

USTP's Efforts to Protect Against Creditors' Disclosure of Individuals' Personally Identifiable Information

by

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Introduction

The U.S. Trustee Program is the component of the Justice Department that promotes integrity and efficiency in the nation's bankruptcy system by enforcing bankruptcy laws, providing oversight of private trustees, and maintaining operational excellence. The core of the Program's mission is combating bankruptcy fraud and abuse, and protecting the integrity of the bankruptcy process.

One of the Program's top priorities has been to identify and act against mortgage fraud and abuse, both civilly and criminally. In addition to bringing actions focusing on wrong-doing committed by debtors, the Program protects innocent debtors against foreclosure rescue operators and abusive practices by mortgage lenders and servicers, primarily in cases involving systemic or multi-jurisdictional violations. As part of these ongoing efforts, last year, the U.S. Trustee for the districts of Massachusetts, New Hampshire, Maine and Rhode Island entered into a nationwide settlement with First Tennessee Bank National Association ("First Tennessee") to resolve claims that the creditor improperly disclosed individuals' complete Social Security numbers and, in some instances, financial account numbers in more than 2,680 proofs of claim filed since December, 2007, in dozens of bankruptcy courts. This article examines the Program's recent efforts to ensure creditors' compliance with Federal Rule of Bankruptcy Procedure 9037 as part of its continuing efforts to combat mortgage fraud and abuse in the bankruptcy system.

Bankruptcy Rule 9037

Protecting the personally identifiable information ("PII") of debtors and other individuals in bankruptcy cases has gained importance with the advent of electronic case filing. Section 205(c)(3) of the E-Government Act of 2002 (the "EGA")¹ required the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability ... of documents filed electronically." To satisfy this requirement, the Court adopted Rule 9037, which restricts the filing of documents in bankruptcy cases containing certain types of PII, to address privacy concerns resulting from public access to electronic case files. Rule 9037 became effective on December 1, 2007.

Rule 9037 concerns the following types of PII:

¹Pub. L. No. 107-347, 44 U.S.C. § 3501 *et seq.*

- an individual's Social Security number or Taxpayer Identification number;
- an individual's birth date;
- the name of an individual, other than the debtor, known to be and identified as a minor; and
- a financial account number.

Pursuant to Rule 9037(a), in the absence of a court order, any document filed in a bankruptcy case must limit the disclosure of that PII to:

- the last four digits of the Social Security number and Taxpayer Identification number;
- the year of the individual's birth;
- the minor's initials; and
- the last four digits of the financial account number.

Rule 9037 applies to both paper and electronic filings. Although court personnel often scan paper filings for access on the electronic docket, the relevant concern under the EGA is electronic availability, not the form of the initial filing. In certain limited instances, the entire PII described above may be disclosed.² The bankruptcy court also may require the filing under seal, and without redaction, of any documents that disclose the PII described above.³ The court also possesses the inherent authority to issue a protective order to prevent remote access to private or sensitive information, either on the court's own motion or on motion of a party in interest.⁴

Rule 9037 does not explicitly describe the court's authority to compel redaction of the PII described in subsection (a), or to fashion relief beyond requiring filing under seal or restricting electronic access to court documents in the event of a prohibited disclosure.⁵ The Bankruptcy Code, however, specifically addresses the court's broad

²Rule 9037(b) provides limited exceptions for: (1) a financial account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; (2) the record of an administrative or agency proceeding unless filed with a proof of claim; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; (5) a filing covered by subdivision (c) of the rule (authorizing the court to order that a filing be made under seal without redaction); and (6) a filing that is subject to § 110 of the Code (imposing penalties for bankruptcy petition preparers who negligently or fraudulently prepare bankruptcy petitions).

³Rule 9037(c).

⁴See Advisory Committee Note (2007) to Rule 9037. In addition, the court may, for cause, enter a protective order requiring redaction of additional information not listed in Rule 9037(a). Rule 9037(d). Such information may include "means of identification" referenced in Bankruptcy Code section 107(d), and defined in 18 U.S.C. § 1028(d).

⁵Rule 9037(d).

authority to provide redress for such disclosures. 11 U.S.C. § 107 provides, in relevant part:

(c)(1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification ... contained in a paper filed, or to be filed, in a case under this title.

(B) Other information contained in a paper described in subparagraph (A).

A Case Study: *In re Sequeira*

As part of the Program's efforts to combat mortgage fraud and abuse in the bankruptcy system, the U.S. Trustee's office in Manchester, New Hampshire, identified and successfully resolved an issue involving the filing of proofs of claim by First Tennessee in multiple jurisdictions nationwide that contained PII in violation of § 107 and Rule 9037. In *In re Sequeira*, No. 08-13386 (Bankr. D.N.H., filed November 14, 2008), First Tennessee filed a proof of claim via the court's CM/ECF system asserting a secured claim in the amount of \$24,370.02, and included as appendices a copy of the court's Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (the "341 Notice"), and a copy of some documents evidencing the debt. Although First Tennessee redacted all but the last four numbers of the debtor's Social Security number found on the 341 Notice, it also filed an appendix to the proof of claim, which included the debtor's full Social Security number, described as a "customer number," on at least one of the pages.

The U.S. Trustee filed a motion to strike First Tennessee's proof of claim and attachments, without prejudice to its right to file a claim that complied with Rule 9037. Citing Rules 7012⁶ and 9037 and Bankruptcy Code § 107, the U.S. Trustee moved to strike and to remove the documents permanently from the docket on the ground that they contained personal information about the debtor that would subject her to an undue risk of identity theft or other unlawful injury by anyone with a PACER account or with access to the publicly available court docket maintained by the clerk's office.

During the pendency of the motion to strike in the *Sequeira* case, the U.S. Trustee discovered that a debtor in a case pending in the Bankruptcy Court for the Northern District of Mississippi sought similar relief against First Tennessee pursuant to Rule 9037. In addition, the U.S. Trustee and First Tennessee identified other bankruptcy cases in which First Tennessee, through a third party vendor, filed proofs of claim in the

⁶Rule 7012 incorporates Federal Rule of Civil Procedure 12, and permits the court to strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter," on its own motion or on the motion of any party.

District of New Hampshire containing the debtors' or other third parties' full Social Security numbers and/or financial account numbers.

Because of the U.S. Trustee's concerns that First Tennessee, through a third party vendor, had filed proofs of claim in other jurisdictions that did not comply with Rule 9037, in June 2009 the U.S. Trustee and First Tennessee entered into a nationwide settlement, which the bankruptcy court in the *Sequeira* case approved. The settlement resolved the motion to strike in exchange for First Tennessee's agreement to review all of its proofs of claim filed through a particular vendor in all bankruptcy courts throughout the United States on and after December 1, 2007, to identify those that improperly disclosed PII. As to those claims filed in violation of Rule 9037, First Tennessee agreed to:

- move to restrict access to the improperly filed proofs of claim, in the District of New Hampshire and all other judicial districts, and to file redacted proofs of claim where appropriate;
- provide notice to individuals whose full Social Security number or full account number had been disclosed in any of those proofs of claim;
- adopt and maintain appropriate processes, internal controls, and written policies and procedures to ensure the identification of information in its possession that would violate Rule 9037 if included in a filing without redaction;
- adopt and maintain appropriate processes, internal controls and written policies and procedures to ensure that future proofs of claim comply with the bankruptcy rules; and
- provide periodic updates to the Office of the Comptroller of the Currency ("OCC") of its actions to restrict access to improperly filed proofs of claim, and notify OCC of any disclosure of sensitive customer information.

The bankruptcy court approved the stipulation in July 2009. First Tennessee provided to the U.S. Trustee a list of cases in which it filed noncompliant claims. To protect debtors and other individuals from inadvertent disclosure while First Tennessee completed a list of corrective actions, the list remained confidential until October 20, 2009. During this period, First Tennessee filed motions to limit or prohibit access to all of those noncompliant claims, filed redacted versions of the claims, and notified all affected bankruptcy filers and their attorneys, as well as affected third parties, regarding these corrective actions.

On October 20, 2009, First Tennessee certified to the bankruptcy court that it had removed PII from thousands of bankruptcy court documents nationwide, and included a list identifying the affected cases. Ultimately, First Tennessee identified more than 2,680 proofs of claim, filed since December 2007 in dozens of bankruptcy courts nationwide, that included the debtors' full Social Security numbers and/or financial account numbers.

Going Forward: Avoiding PII Violations

Although Rule 9037 imposes a uniform, nationwide obligation among court filers to comply with PII redaction requirements, bankruptcy courts have not established uniform procedures for alerting filers to the requirements of Rule 9037. Most bankruptcy court CM/ECF pages, however, remind ECF users of their Rule 9037 obligations by posting a notice stating: “**IMPORTANT NOTICE OF REDACTION RESPONSIBILITY:** All filers must redact: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; and financial account numbers, in compliance with Fed. R. Bankr. P. 9037. This requirement applies to all documents, including attachments.”⁷ Some CM/ECF pages also require the filer to check a box averring that the filer has read the notice and understands the obligation to comply with the redaction rules when filing.⁸ Because Rule 9037 does not prescribe a uniform procedure for addressing violations of the rule, procedures for obtaining relief vary among jurisdictions.

To reduce the risk of Rule 9037 violations in any jurisdiction, filers should review thoroughly all documents to be filed, whether paper or electronic, for compliance with the redaction requirements. Table 1 contains a non-exhaustive list of common documents filed in bankruptcy cases that may give rise to PII concerns. In addition, attachments filed in support of these documents may contain PII subject to redaction, such as bank and financial account statements, credit card and loan records, pay stubs, tax returns and other business and financial records. Finally, because the 341 Notice sent to creditors and other parties in interest lists the debtor’s full name and Social Security number,⁹ PII concerns exist if the creditor attaches the 341 Notice to a filing.

⁷Emphasis in original. This language appears on the CM/ECF login page for the Bankruptcy Court for the District of Maryland. The precise language varies slightly among jurisdictions.

⁸For example, the CM/ECF login page for the Bankruptcy Court for the District of New Hampshire includes this language next to a check box: “I understand that, if I file, I must comply with the redaction rules. I have read this notice.”

⁹Rules 1007(f); 2002(a)(1).

Table 1: Common Documents Giving Rise to Rule 9037 Concerns

Chapter 7	Chapter 11	Chapter 12	Chapter 13
Proof of Claim	Proof of Claim	Proof of Claim	Proof of Claim
Motion for Relief from Stay	Motion for Relief from Stay	Motion for Relief from Stay	Motion for Relief from Stay
	Motion to Compel Assumption or Rejection of Executory Contract; Responses to Motion to Assume or Reject	Motion to Compel Assumption or Rejection of Executory Contract; Responses to Motion to Assume or Reject	Motion to Compel Assumption or Rejection of Executory Contract; Responses to Motion to Assume or Reject
Motion to Dismiss Case	Motion to Dismiss Case	Motion to Dismiss Case	Motion to Dismiss Case
	Motion to Convert Case	Motion to Convert Case	Motion to Convert Case
	Motion to Appoint Trustee		
	Motion to Appoint Examiner		
	Objection to Disclosure Statement		
	Objection to Plan Confirmation	Objection to Plan Confirmation	Objection to Plan Confirmation