UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

TRACY D. SLAUGHTER Case No. 02-14399-MAM

Debtor

TRACY D. SLAUGHTER and
MARK D. FLEMING and all others
similarly situated

Plaintiffs

v. Adv. No. 03-01035

MBNA AMERICA BANK, N.A.

Defendant

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL WITH LIMITATIONS

Steve Olen and Royce Ray, Attorneys for Plaintiffs, Mobile, AL
Donald J. Stewart, Attorney for Plaintiffs, Mobile, AL
Philip D. Anker, Attorney for Defendant, New York, New York
Matthew C. McDonald, Attorney for Defendant, Mobile, AL

This case is before the court on the motion of the Plaintiffs to compel the defendant, MBNA America Bank, N.A., to respond to Plaintiffs' first request for production of documents and Plaintiffs' first set of interrogatories. The court has jurisdiction to hear this matter pursuant to 28 U.S.C.§ § 157 and 1334 and the Order of Reference of the District Court. This motion is a core proceeding pursuant to 28 U.S.C.§ 157(b)(2) and the court has the authority to enter a final order. For the reasons indicated below, the court is granting the motion to compel with limitations.

FACTS

The plaintiffs filed a complaint that alleges that MBNA included in proofs of claim filed in their cases, "postpetition finance charges or interest, which are improper, unlawful, illegal and uncollectible charges, and none of which were properly disclosed." The plaintiffs assert that the charges "violate the Bankruptcy Code and constitute an abuse of the bankruptcy process" and seek an injunction, return of improperly collected sums, and sanctions as well. The plaintiffs ask that a class of debtors be certified in the case.

The defendant denies that it filed any improper claims, or that it filed claims at all (at least in some cases it transferred the claims to another party) and denies that plaintiffs suffered any damages. MBNA also asserts, inter alia, the defenses of unclean hands, laches, the impropriety of punitive damages, and that MBNA acted in good faith .

Ms. Slaughter and Mr. Fleming served document production requests and interrogatories seeking some information that MBNA does not believe it should be required to produce. Some of the matters raised in the motion to compel were settled at the hearing between the parties. [1]

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[1] The defendant had alleged that the plaintiffs' motion to compel should be denied before reaching the substantive issues because plaintiffs had not attempted to confer in good faith with the defendant prior to filing the motion. Plaintiffs argued they had done so at their Rule 26(a)(1) meeting, had exchanged three letters on discovery issues and had a second meeting at which dates for a motion to compel hearing were discussed. MBNA agrees that those exchanges took place but MBNA believed a further conference was necessary after the supplemental discovery responses of MBNA were filed.

The court discussed the issue with counsel and opined that the Rule 37 conference requirement may have been met, but, even if it had not, and the court denied plaintiffs' motion to compel, the plaintiffs could file it again unless the court dismissed the motion with prejudice. In light of the confusion and the conferences that had occurred, the court indicated a "with prejudice" dismissal was unlikely.

The court then gave the parties a chance to confer and, when the hearing recommenced, the attorneys indicated only two issues remained--the ones addressed in this order. If the parties still believed that the Rule 37 issue was viable, it should have been presented. The court

Only two areas of disagreement remain. (1) What is the scope of the discovery that must be provided by the defendant to the plaintiffs? (2) What is the scope of the privilege log that must be provided to plaintiffs by defendant?

A.

Slaughter and Fleming have asked MBNA to produce all proofs of claim filed by MBNA or on its behalf that contain postpetition interest, charges or fees.[2] They request all documents that reflect MBNA's policies and procedures regarding proofs of claim and postpetition interest, charges, and fees. They also seek amended proofs of claim that reflect credits, adjustments and waivers of postpetition interest, fees, and charges. They seek documents that support the MBNA defenses.

MBNA has produced proofs of claim for the calendar year 2000 for Alabama only. It asserts that it should not be required to produce any more for several reasons: (1) MBNA does not prepare its own proofs of claim and must go to the buyer of its claims for the information. (2) The time and expense of production of the information is large since there is no readily available means to cull the data. A person must search for the necessary information and make calculations. (3) The Alabama claims produced to date yielded less than 5% of proofs of claim in the year 2000 with overcharges. Many of the proofs of claim understated the debt owed. (4)

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concludes it was settled or waived. If it had been raised, the court would have held that the Rule 37(a)(2)(B) requirements were met by the plaintiffs.

[2] MBNA filed some proofs of claim itself. Others were filed on its behalf by buyers of the accounts. Both of these types of proofs of claim are the ones about which MBNA must provide information.

MBNA acted in good faith and according to its policy of filing claims for the amount owed as of the petition date.

The debtor/plaintiffs assert that the information is necessary to allow them to prepare their case and the information requested is crucial to their case. The debtors argue that if MBNA cannot produce the information easily, the debtors should not suffer due to MBNA's inadequate record keeping. Also, allowing MBNA to choose a year and/or a state to use as a "sample" of the data that would be produced is inappropriate since MBNA should not be able to determine what might be relevant to plaintiffs' case.

Slaughter and Fleming, in order to certify a class, and to prove their case at trial, will need to prove that a number of debtors had proofs of claim filed in their cases with improper postpetition charges added to the proofs of claim without disclosure. The debtors will also need to prove that this practice was knowing and pervasive. For class certification purposes, the debtors must prove commonality, typicality, numerosity and adequacy of representation . To prove these grounds, it is reasonable to assume that the debtors must know how many debtors were overcharged, if any; where these debtors are located; what is the dollar amount of the overcharges; who prepared the proofs of claim; and what are the policies and procedures of the claims preparers for claims filing, if any.

Under Fed. R.Bankr. P. 26(b)(1), the information a party seeks must be information that will lead to admissible evidence. Clearly, the information sought is relevant to the case and would lead to admissible evidence. Therefore, defendant MBNA must rely upon some "exception" to Rule 26 to preclude production. Fed. R. Bankr. P. 7026(c).

Rule 7026(c) requires a court to issue a protective order when "justice requires [it] to protect a party . . . from . . . undue burden or expense." MBNA argues that the cost and delay occasioned by requiring it to produce records of all debtors who had proofs of claim filed in their cases that contained undisclosed postpetition charges would be great. Producing the information about 737 Alabama debtors took several months, a lot of manpower, and voluminous photocopies. MBNA argues that the sampling of data it provided is enough.

Debtor argues that a sampling is not sufficient, particularly when the defendant chooses the sample. Also, the reason producing all of the relevant records is difficult is that MBNA has chosen a type of record keeping that makes production difficult. MBNA cannot hide behind the record procedure it devised to shield it from discovery requests.

The parties, in their arguments, suggested four alternative ways to deal with this issue:

(1) Require defendant to produce all requested discovery at defendant's cost;
(2) Require defendant to produce all requested discovery at plaintiffs' cost;
(3) Require the plaintiffs to select another state comparable to Alabama and require MBNA to produce the requested discovery for that state at plaintiffs' cost; or
(4) Require the plaintiffs to select another state comparable to Alabama and require MBNA to produce the requested discovery for that state at defendant's cost.

The court concludes that it is appropriate to require MBNA to produce the relevant documents for a limited time period with no assessment of costs at this time. This is appropriate for at least the following reasons. First, it is clear that at least in some instances (36 in the year 2000 in Alabama alone) undisclosed postpetition charges were added to proofs of claim. This number, standing alone, is not large, but it is evidence that is sufficient to warrant further discovery. Second, as the rules make clear, a party is entitled to discover facts that lead to admissible evidence. The requested production is not just calculated to lead to admissible evidence--it, for the most part, would be admissible evidence. Third, MBNA cannot readily produce the evidence

because it did not keep the evidence in a manner that is easy to extract. This is not the plaintiffs' fault. MBNA may not have anticipated this type of suit against it, but it should have anticipated objections to claims for which precisely this evidence would be necessary. As stated in *Baine v. General Motors Corporation,* 141 F.R.D. 328, 331 (M.D. Ala. 1991),

> The mere fact that producing documents would be burdensome and expensive and would interfere with a party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request . . . As one treatise has expressed it, 'The fact that defendant's size requires it to keep a great amount of records cannot give it immunity which a small organization would not possess.' 4A *Moore's Federal Practice § 34.19 n.10.*

To file a proof of claim alleging a particular amount is due means that the creditor should have a record of how it arrived at the claim amount. Therefore, although this is like thousands of claim reconsideration hearings or claim objection hearings being held at once, the creditor ought to be able to provide the information to prove its case. This is true even if the proof may cost defendant a significant amount of money. MBNA cannot deny discovery of routine factual data by making it difficult to produce. *Baine,* Id. at 331 (stating that "lack of an adequate filing system [cannot] insulate a party from discovery.") In fact *Kozlowski v. Sears Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) stated:

> The defendant may not excuse itself from compliance [with discovery requests] by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of documents an excessively burdensome and costly expedition.

This case is similar to the *Kozlowski* case. Sears was asked to produce evidence of accidents similar to the one in the complaint in which a child was burned when his pajamas caught fire. Sears asserted it indexed claims only by name and could not find "pajama" claims other than by searching the entire Sears Index which would be impossible. The court required the search.

The court will limit the years for which MBNA must produce nationwide records to 2000 and 2001 at this time. If this sampling proves to be inadequate for class certification hearing purposes, the court will consider a motion by plaintiffs to expand the discovery at a later date. If a class is certified and more evidence is needed for trial purposes, further discovery will be allowed.

B.

Plaintiff seeks a privilege log from MBNA containing all pre- and postcomplaint communications in this case except for communications with trial counsel. The parties disagree specifically as to whether a privilege log of all nonproduced communications between employees and inhouse counsel is necessary.

Plaintiff asserts that it is important to know what MBNA employees did and thought postfiling that is not privileged. This information could be discerned, in part, from employee communications. MBNA asserts that such a log would be costly to produce. Neither party, of course, can point to any specific evidence discovery might or might not produce or how many documents might need to be logged. They simply do not know.

Again, the court must weigh the burden and the benefit of the production. The court concludes that the privilege log should be produced that includes communications between inhouse counsel and employees of the company as it relates to proofs of claim. The case has only been pending for eight months. This short period that must be searched limits the number of logged documents. The court concludes that for plaintiff to be able to see what documents exist outweighs the burden to defendant. The court concludes this because of what discovery has revealed already--that at least some claims have been overstated.

IT IS ORDERED that Plaintiffs' motion to compel is GRANTED as follows:

1. Defendant shall produce all records relating to 2000 and 2001 sought in the interrogatories and requests for production of documents; and

2. Defendant shall produce a privilege log as to all allegedly privileged relevant communications between employees and inhouse counsel for precomplaint and postcomplaint time periods.

Dated: October 24, 2003

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE