UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MICHAEL F. POWE Case No. 98-10935

Debtor

MICHAEL F. POWE

Plaintiff

v. Adv. No. 99-01121

CHRYSLER FINANCIAL CORPORATION

Defendant

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT DECLARING DEFENDANT'S PRACTICES NONPERVASIVE AND NONINTENTIONAL

Steve Olen and Steven L. Nicholas, Attorneys for the Plaintiffs, Mobile, AL
Donald J. Stewart, Attorney for the Plaintiffs, Mobile, AL
C. Lee Reeves, Attorney for the Defendant, Birmingham, AL
Rhonda L. Nelson, Attorney for the Defendant, San Francisco, CA

This case is before the court on the motion of the defendant, Chrysler Financial Corporation, for summary judgment in its favor on the issues of pervasiveness and intent relating to Chrysler's failure to itemize attorneys fees in proofs of claim. This court has jurisdiction to hear this motion pursuant to 28 U.S.C.§ § 157 and 1334 and the Order of Reference of the District Court. This matter 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

Chrysler's motion for summary judgment declaring Chrysler's practices to be nonpervasive and unintentional and the Court is awarding judgment to Chrysler.

FACTS

A.

The court explained the facts of this case in its order dated May 10, 2002. *Powe v. Chrysler Financial Corporation (In re Powe)*, 278 B.R. 539 (Bankr. S.D. Ala. 2002). Those facts are incorporated by reference. That order granted a judgment to Chrysler Financial Corporation. In a subsequent order dated July 3, 2002, this court granted the motion of the plaintiff class to alter and amend the May 10, 2002 judgment. The court had erroneously held that the plaintiff class had not proven that any proofs of claim were filed that did not disclose that an attorneys fee was included. In fact, based upon the agreement of the plaintiff and defendant, Chrysler had only produced proofs of claim that contained an attorneys fee. Therefore, all of the claims in evidence contained an attorneys fee, and, in certain of the claims, the fee was not disclosed on the claim or in any attachments to the claim. The court incorporates the facts from the July 3, 2002 order by reference.

On August 23, 2002, the court entered a further order in this case upon Chrysler's motion seeking to have the court determine that the named plaintiffs had no standing to be class representatives and to dismiss all further proceedings. The court held that regardless of the fact that the named plaintiffs had no further claims, other class members did have standing. There were class members who had proofs of claim filed in their cases by Chrysler. Those claims contained, but did not disclose, an attorneys fee. On October 3, 2002 (as amended October 11, 2002), Chrysler asked the court to clarify its August 23, 2002 order. In an order dated November

14, 2002, the court ruled that Chrysler might be subject to injunctive and monetary judgments against it pursuant to 11 U.S.C.§ 105 if it failed to disclose the inclusion of postpetition attorneys fees in proofs of claim filed in chapter 13 bankruptcy cases. Section 105(a) authorizes a court to:

> "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

The court clarified in the November 14, 2002, order that the issue is whether there exists "a pervasive practice of nondisclosure of proof of claim preparation fees in proofs of claim."

Thereafter, the court ordered the parties to do discovery on this limited issue so that a summary judgment motion could be brought on the discrete point. At the conclusion of the discovery, Chrysler brought this motion for summary judgment for a determination as to whether its practices showed a "pervasive practice or pattern of nondisclosure of proof of claim preparation attorneys fees in proofs of claim." Order of November 14.

B.

Two law firms that worked for Chrysler from 1994-2001 filed proofs of claim in which postpetition attorneys fees were not disclosed. Chrysler had at least 134 firms that did claim preparation for it during that period. Of approximately 96,000 proofs of claim filed, only approximately 12,000 contained attorneys fees. Of the 12,000 that contained fees, 7,876 of the claims disclosed the fees. In 3,820 claims, the fees were included, but not separately disclosed on the claim form. The 3,820 claims constitute 4% of all claims filed and 32% of claims filed with fees.

The Cooksey, Howard firm represented Chrysler in the Central and Southern Districts of California. It only added attorneys fees to claims when Chrysler was an oversecured creditor. Therefore, only 70 of 1,450 claims contained fees. As of 2000, Cooksey, Howard discontinued including an attorneys fee in any proof of claim. The Cooksey firm believed that disclosure of the fee was not required in the districts it handled.

The Hale, Headrick firm represented Chrysler in all districts of Tennessee, Arkansas, Mississippi, North Carolina, South Carolina, and Virginia .[1] Postpetition fees were disclosed in the proofs of claim filed in seven districts and were not disclosed in three others. The firm believed that it was following local procedures and practices in handling each district in the manner it did. Hale, Headrick filed approximately 7,600 proofs of claim with fees disclosed and at least 3,751 claims without fees disclosed. The undisclosed fee claims are 49% of the total claims with fees filed. Of the 3,751 claims, 2891 claims lacked disclosure because they were in the three districts in which Hale, Headrick believed no disclosure was required by the districts' practices and procedures. The remaining 860 claims were filed in the districts where Hale, Headrick believed disclosure was a necessary part of the procedure. One of the Hale, Headrick partners attributed the lack of disclosure to "human error."

Chrysler had no policy or procedures in place that governed the behavior of counsel it hired to represent it in bankruptcy cases. In particular, Chrysler never instructed its outside

[1] Some of the districts were not handled by Hale, Headrick for the entire period at issue. Hale, Headrick is one of the names of the firms that have handled Chrysler's work in the named districts. The firm has had other names. In fact, Stephen Hale, the partner principally in charge of Chrysler's work was a partner in another firm prior to starting Hale, Headrick with others. He was doing Chrysler work at the pre Hale, Headrick firm as well. For ease of reference, the court will merely refer to the firms as a group as "Hale, Headrick".

counsel to include or not include attorneys fees in proofs of claim. Chrysler's trial representative indicated he did not know that outside attorneys were including fees in some cases until the trial. However, there was evidence at trial that attorneys had indicated, in their bids to Chrysler to be outside counsel, that they intended to file proofs of claim that included fees, when appropriate. Chrysler did not receive copies of the claims from counsel. Chrysler did not add attorneys fees, when claimed, to the debtors' account balances.

LAW

Motions for summary judgment are controlled by Rule 56 of the Federal Rules of Civil Procedure, which has been made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056. A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson, supra.* at 2510, 2511. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Anderson, supra.* at 2510, 2511.; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The movant, Chrysler, asserts that there is no genuine issue of material fact left for trial because it is clear from the evidence that the practice of nondisclosure of fees is not pervasive. Chrysler also asserts that any nondisclosure of fees is not a knowing or intentional act on Chrysler's part. Chrysler also asks that the class be decertified. The plaintiff class asserts that

the practice of nondisclosure is pervasive and that the fact of Chrysler's knowledge or intent is not to be determined at this time nor is any issue of class decertification. The court will first address the issue of the pervasiveness of the practice of Chrysler's outside counsel and then address the other issues.

A.

The parties disagree about how the court should look at the claims in evidence. Are they a glass half empty or half full? Chrysler views the claims from the perspective of the totality of all claims filed by Chrysler. In that light, only 4% of the claims involved nondisclosure of any kind. Only 2 of 134 law firms had any undisclosed fees. The plaintiffs view the claims from the perspective of the subset of claims with nondisclosed fees. In that light, 100% of the claims involve nondisclosure. As to the two firms that added undisclosed fees, there was 32% and 49% nondisclosure respectively, as related to total claims filed by each firm.

The issue of pervasiveness is not one about which the court has directly written. In several other class action decisions in similar cases, the court held that parties were due to have judgments entered against them when the policy of the company was not to disclose in any bankruptcy proofs of claim the fact that postpetition attorneys fees were being added to the claim amount. E.g. *Slick v. Norwest Mortgage, Inc. (In re Slick)*, Case No. 98-14378, Adv. No. 99-01136, Order Awarding Judgment to Plaintiffs (Bankr. S. D. Ala. May 10, 2002); *Harris v. First Union Mortgage Corp.(In re Harris)*, Case No. 96-14029, Adv. No. 99-01144, Order Awarding Judgment to the Plaintiffs (Bankr. S.D. Ala. May 10, 2002). There was no real question of the level of pervasiveness because it was 100%. This is the first case in which only a

subset of proofs of claim, from two limited areas of the country, had undisclosed attorneys fees in them.

The reason the court concluded that an abuse of the bankruptcy process actionable under 11 U.S.C.§ 105(a) as a class action required a pervasive practice was to preclude any right to recovery by a plaintiff or plaintiffs for isolated or de minimis actions of a party. Sanctionable conduct must be serious and substantial for class relief since a judgment for sanctions is akin to a judgment for contempt. Otherwise, individual actions for isolated wrongs are the appropriate relief vehicles. There is no set formula or level of action that this court can devise to make it easy to determine pervasiveness. Since awarding a judgment against a party for abuse of process is akin to a sanction for contempt, as stated above, the best the court can say for guidance is that the activity must be one that is repeated and serious against the class. *Slick v. Norwest Mortgage, Inc., supra* (sanctions for 100% nondisclosure of fees); *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439 (1st. Cir. 2000) (sanctions possible for failure to file reaffirmation agreements as required by the Bankruptcy Code); *State of California Development Dept. v. Taxel (In re Del Mission Limited)*, 98 F.3d 1147 (9th Cir. 1996) (sanctions for one time failure of taxing authority to obey court order of repayment); *Jove Engineering, Inc. v. Internal Revenue Service (In re Jove Engineering, Inc.*), 92 F.3d 1539, 1553 (11th Cir. 1996) ("section 105 creates a statutory contempt power in bankruptcy proceedings"); *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.)* 40 F.3d 1084 (10th Cir. 1994) (sanction of president of corporation that filed a chapter 11 petition in bad faith); *Rucker v. Conseco Finance Servicing Corp. (In re Rucker)*, 278 B.R. 262 (Bankr. M.D. Ga. 2001) (sanction for improper affidavit).

In this case, the defendant is Chrysler itself, not its attorneys. Chrysler's representatives have filed the vast majority of the claims with disclosure. Filing proofs of claim with disclosure is the pervasive practice of Chrysler. The pervasive practice of one or more of Chrysler's outside counsel might be to file proofs of claim without disclosure, but Chrysler's pervasive practice is the overall performance of all of its outside counsel, taken as a whole, in filing proofs of claim. Whatever the amount or percentage of claims that would make for pervasiveness, the threshold is not reached in this case.

B.

Since the Court is holding that the practice of Chrysler and/or its counsel is not pervasive, there is no need to discuss the other issues raised by the parties. Without pervasiveness, the action is not viable. Therefore the defendant's motion for summary judgment is due to be granted and judgment awarded to defendant on the merits.

IT IS ORDERED AND ADJUDGED that the defendant, Chrysler Financial Corporation, is awarded a judgment against the plaintiff class with no costs awarded to either party.

Dated: December 1, 2003

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE