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Prometheus Unbound? The National Form Plan, Local Opt-Out Plans and Nonstandard Provisions

Of Square Pegs, "Payments under the Plan," and a Split within the Seventh Circuit

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Prometheus Unbound? The National Form Plan, Local Opt-Out Plans and Nonstandard Provisions

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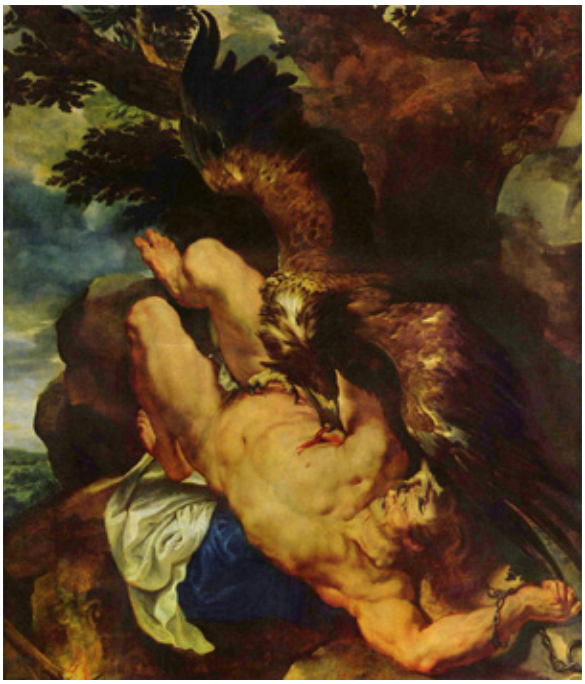
In the ancient Greek myth, Prometheus is a Titan who steals fire from the Olympian Gods, giving it to the poor and destitute humans. In punishment, Zeus has Prometheus chained to a mountain where an eagle (alternatively described as a vulture) daily rips out his liver to feed until he is eventually freed through the efforts of Heracles.

It is not difficult to find this to be an apt retelling of the National Form Plan ("NFP") and its variants in the Local Opt-Out Plans ("LOOPS").[1]

Adopted after a titanic struggle between the National Bankruptcy Rules Committee and a host of dissenting bankruptcy judges,[2] Rule 3015.1 chains districts and debtors into using a standardized format, including the following requirements:

- That paragraphs be numbered and labeled in boldface;
- That there be separate paragraphs enumerating:
  - The curing and maintenance of payments secured by the debtor's principal residence;
  - The payment of domestic support obligations;
  - Payment of claims under the Hanging Paragraph of §1325(a); and
  - The surrender of property with a request that the automatic stay of §362(a) and the co-debtor stay of §1301(a) be terminated;
- That an initial paragraph indicate that the plan does or does not:
  - Limit the amount of a secured claim based on a valuation of the collateral;
  - Avoid a security interest or lien; and
  - Contain any nonstandard provision.
- As to such nonstandard provisions, the LOOP must contain both:
  - A final paragraph for disclosure of nonstandard provisions;
  - A statement that nonstandard provisions located elsewhere in the plan are void; and
  - A certification from a *pro se* debtor or the debtor's attorney that all nonstandard provisions are located in the final paragraph.



Prometheus Bound
Peter Paul Rubens, Flemish (active Italy, Antwerp, and England), 1577 - 1640, and Frans Snyders, Flemish (active Antwerp), 1579 – 1657. (The eagle was painted by Snyders.)

One of the primary goals of the NFP and LOOPs was standardization, which was meant to make review of plans easier, particularly for national creditors or creditor law firms looking down like sharp eyed eagles in their distant eyries.[3] At the same time, another purpose of the NFP and LOOPs was to give debtors and their attorneys the gift of fire[4] so that they could better craft plans that fit their circumstances and needs,[5] filling in the gaps the creators of the NFP and LOOPs failed to anticipate and effectuating the delegation of authority in §1321 that "[t]he debtor shall file a plan." There would be scant need for a separate paragraph, replete with preliminary warnings and concluding threats of

evisceration for rebellious noncompliance, for nonstandard provisions ("NSPs"), if they were not permissible.

This too was a motivating fear the Committee of Concerned Bankruptcy Judges, namely that debtors' attorneys would use the nonstandard provisions section to undermine the NFP and LOOPs.[6] One of the first cases to address the inclusion of NSPs by the debtor's attorney was *In re Parkman*,[7] in which Judge Samson[8] thoroughly rejected the inclusion of a wide range of provisions.[9]

Parkman disposes of nearly all of these NSPs for a multitude of reasons. Firstly and perhaps least problematically, the bankruptcy court rejected a "mere boilerplate" statement that, if there are any unspecified contradictions between the NFP or LOOP and the NSP, then the NSP controls. Allowing a generic override of the NFP or LOOP "would render its use meaningless."[10] Additionally, provisions adversely affecting creditors' rights, but lacking clear and conspicuous notice, failed due to a lack of due process. This is not unreasonable or unfounded, as Rule 3015.1 requires clarity and specificity in proposing any NSP and the parties should not "be required to search through each plan with a fine toothed comb to determine how parties' rights will be affected."[11] And while advisory opinions are not permitted, it is unfortunate that *Parkman* did not provide any direction regarding what notice and disclosures would be sufficiently clear and conspicuous to alert creditors. The holding goes too far, however, to the extent that it prohibits a debtor from **ever** proposing a plan that changes the NFP or LOOP, as neither can claim to have been drafted with such forethought as to encompass all possible circumstances.

Secondly, the *Parkman* opinion rejects as "unnecessary and inappropriate" the NSPs related to application of mortgage payments and restrictions on related fees during a Chapter 13 plan. These NSPs were taken from, among other sources, a 2008 article by John Rao entitled Fresh Look at Curing Mortgage Defaults in Ch. 13,[12] and were also in response to the holding by the First Circuit Court of Appeals in Ameriquest Mortg. Co. v. Nosek (In re Nosek),[13] which held that Chapter 13 plans lacked clear instruction on how payments were to be applied. Subsequently, in 2011, Rule 3001 was amended and Rule 3002.1 was put in place, both of which had the effect of "obviat[ing] whatever need there once might have been not only for application-of-payments provisions but also for provisions related to other home mortgage payment dispute."[14] That the restatement of these protections is problematic might be explained by the simple fact that the Mississippi LOOP (used by both the Northern and Southern Districts) is rather spare compared to other jurisdictions, which often have substantial court-mandated "standard" nonstandard provisions, many of which include comparable or even verbatim mortgage servicing provisions to those rejected in *Parkman*.[15]

Third, *Parkman* found the NSPs that rejected arbitration provisions and the choice of law and venue provisions, among others, to be constitutionally impermissible advisory opinions as there was no showing of any "apparent connection to a creditor, claim, or circumstance specific to the Debtor."[16] It is rather inexplicable to find that a debtor is not subject to any arbitration or choice of law/venue provisions, as they are ubiquitous and are found in what has, with only slight hyperbole, been described as "a gazillion consumer contracts".[17] Additionally, arbitration is increasingly being sought by creditors to supplant bankruptcy court jurisdiction in matters as central as violations of the automatic stay[18] and discharge.[19] While the majority of courts have restricted arbitration of bankruptcy matters, issues related to this are percolating up to the Supreme Court, with arguments touching on rejection of arbitration in executory contracts in the *Mission Product Holdings Inc. v. Tempnology, LLC* case. The *Parkman* decision also finds that these "unilaterally and impermissibly alter creditors' rights."[20] While the prohibition in §1322(b)(2) of modification of claims secured only by the debtor's principal residence would preclude the alteration of mortgage creditors' rights, arbitration provisions are already prohibited in home mortgage agreements.[21] Otherwise, with the possible exception of non-dischargeable student loans, it is unclear why, absent bad faith or some other statutory limitation, the particular right of other creditors to demand arbitration cannot be altered, when their claims can be otherwise modified and rewritten. The severability from the other terms of a contract is also "[f]undamental to the law of arbitration,"[22] and should not be provided greater protections in bankruptcy than elsewhere.[23] And, in fact, it is not uncommon for Chapter 11 plans to be confirmed with the rejection of such provisions and this precise provision has been included in at least one LOOP.[24] Providing for how these arbitration and related provisions will be treated in a Chapter 13 plan avoids the increasingly inevitable fights over jurisdiction, venue, and choice of law, actually retaining control by the bankruptcy courts of contentious issues. An underlying basis for the opposition to the NSPs is that the "ninety-three single-spaced lines of text without bolding, italics, or underlines" would be an "administrative nightmare" for creditors, Chapter 13 trustees, and bankruptcy courts. However, it is rather difficult to believe that a creditor could object in good faith or with a straight

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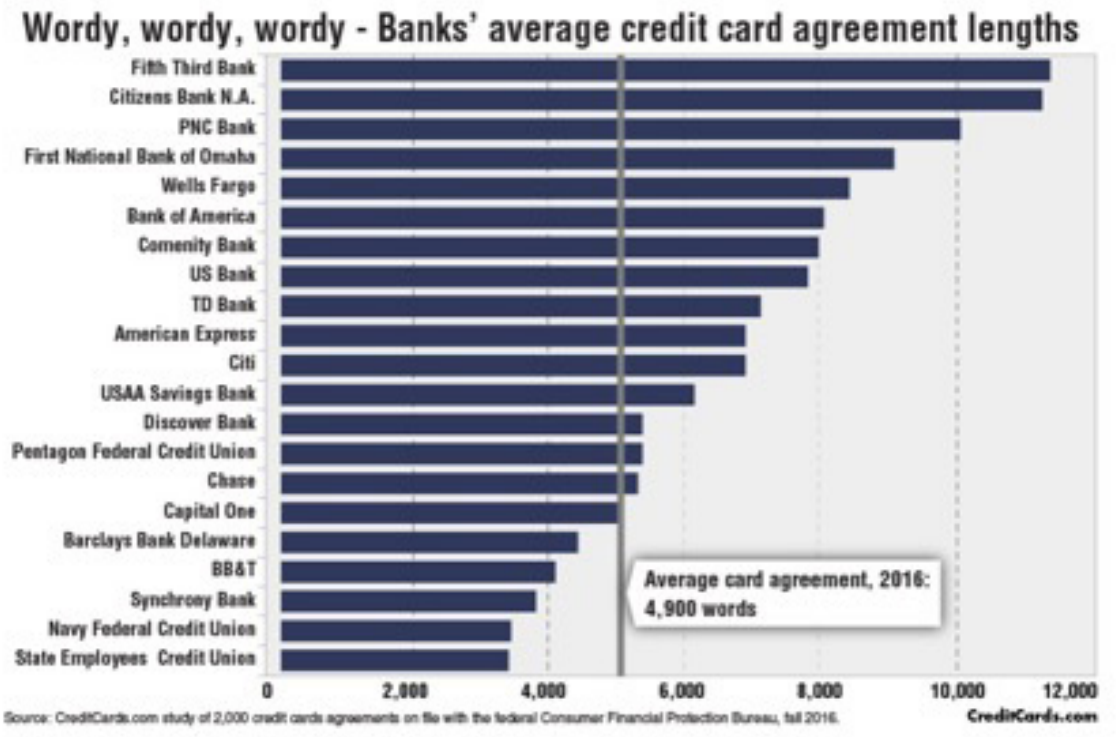
face to the format of these NSPs, given that the average credit card agreement runs to more than 4,900 words, and most mortgage documents received by borrowers are an order of magnitude bigger (see chart):



There is no denying that more prudence by the debtor's attorney would have resulted in a strategy of slowly introducing these NSPs over time, showing both their need and utility, as well as gaining the assent of the Chapter 13 trustee. Furthermore, to the extent that these NSPs present administrative burdens for the trustee, those could be shifted onto the debtor's attorney, with the salubrious effect of forcing the debtor's attorney to evaluate whether the cost of the NSPs justify the need and benefit. Such is the case for Chapter 11 plans, where the Debtors-In-Possession (or often their attorneys) administer, oversee, and enforce provisions related to the debtor/creditor relationship.[25] That would allow Chapter 13 plans to be the laboratories for creative debtors' attorneys that Rule 3015.1(e)(1) intended, without becoming an undue hardship for Chapter 13 Trustees. Just as Rule 3002.1 was ultimately adopted nationwide after similar mortgage servicing provisions were first proposed by debtors, as was done unsuccessfully in *Nosek*, then later moving up the chain to be included in Standing Orders, Form Plans, and Local Rules, so too could other NSPs eventually find wider acceptance.

After the thunderbolt of the *Parkman* opinion struck down with a blast nearly all of the debtor's proposed NSPs, it may take a herculean effort in that jurisdiction to include other NSPs in the future. Elsewhere, however, debtors and their attorneys should use more forethought and seek the liberation that Rule 3015.1(e)(1) and §1321 are intended to grant from the chains of the NFP and LOOPs, one link and provision at a time, by fitting such requests to the specific case and also gaining the support of the Chapter 13 trustee. Perhaps only then will the bankrupt debtors receive the Promethean gift of fire to sufficiently craft Chapter 13 plans to fit their needs.

About The Author

Edward Boltz is a partner at the Law Offices of John T. Orcutt, P.C., where he has represented clients in not only Chapter 7 and 13, but also in related consumer rights litigation, including fighting abusive mortgage practices and developing solutions for student loans. Mr. Boltz received his B.A. from Washington University in St. Louis in 1993 and his J.D. from George Washington University in 1996. Mr. Boltz served as the President of the National Association of Consumer Bankruptcy Attorneys (NACBA) from 2013 through 2016 and remains on its Board of Directors. He sits on the Bankruptcy Council for the North Carolina Bar Association and the American Bankruptcy Institute Consumer Commission. Additionally, Mr. Boltz is the President of the Monti, a North Carolina organization that produces live storytelling shows and recordings of his and others tales can be heard at **www.themonti.org**. ◉

Endnotes

[1] Of the 94 federal judicial districts, all but 7 adopted LOOPs rather than the NFP.

[2] The Committee of Concerned Bankruptcy Judges submitted comments signed by 144 bankruptcy judges arguing that "there will be no significant benefits – but there will be some very significant harms – from the use of a national mandatory plan." The resulting compromise was to allow the adoption of LOOPs that substantially conformed to the NFP in both style and substance, but allowing local variations.

[3] While the fear of national consumer debtor law firms was one of the primary motivations in the letter from the Committee of Concerned Bankruptcy Judges, there seemed to be little foresight regarding the dangers of national creditor law firms, which often have little connection to or concern for the local legal practice, let alone the local community. Similarly, there is scant judicial hand-wringing about national corporate debtor law firms in Chapter 11 cases.

[4] An excellent source of NSPs can be found in the NCLC Digital Library at Form 22 Chapter 13 Plan Provisions. These have been drafted and/or collected by John Rao, one of the members of the National Bankruptcy Rules Committee and a main proponent of the NFP and LOOPs.

[5] *See* Comment Part 8. This part gives the debtor the opportunity to propose provisions that are not otherwise in, or that deviate from, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. *See* Rule 3015(c).

[6] And although I am perhaps pushing the Prometheus metaphor too hard, it is worth noting that the letter from the Committee of Concerned Bankruptcy Judges does worry that debtors' attorneys will "eviscerate" (or, more literally, disembowel and tear the liver out of) the NFP or LOOPs.

[7] 589 B.R. 567 (Bankr. S.D. Miss. 2018).

[8] Ironically for my theme, Samson is often seen as a Hebrew analogue of the Greek Heracles, the liberator of Prometheus.

[9] These included: The interaction of §1306 and Vesting; Rejection of Arbitration; Application of Mortgage Payments under §524(i); Disposition of Surrendered Personal Property; Credit Reporting; Revocation of Consent to Communication under the TCPA; Choice of Law and Venue; Consent to Non-Core Jurisdiction; and Notice of Mortgage Payment Changes.

[10] *In re Vega-Lara*, No. 17-52553-CAG, 2018 Bankr. LEXIS 1332, at *15 (Bankr. W.D. Tex. May 4, 2018).

[11] *See In re McIntosh*, No. 12-46715-399, 2012 Bankr. LEXIS 5584, at *8 (Bankr. E.D. Mo. Nov. 30, 2012) *aff'd*, 491 B.R. 905 (B.A.P. 8th Cir. 2013) (note that this was decided prior to the enactment of RULE 3015.1).

[12] XXVII ABI Journal 1 14, 62-63 Feb. 2008.

[13] 544 F.3d 34 (1st Cir. 2008).

[14] *Parkman* at *11.

[15] *See, e.g.,* the LOOPs from the Middle District of North Carolina and the Southern District of Illinois.

[16] *Parkman* at *15.

[17] Hagy, Tom, The Future of Mandatory Arbitration Shock: Sides Square Off in Consumer Contracts and Employment Arenas.

[18] *See In re Jorge*, 568 B.R. 25 (Bankr. N.D. Ohio 2017) (Arbitration not appropriate for determination of stay violation in a Chapter 7).

[19] *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382 (2d Cir. 2018) (Requiring arbitration of an alleged discharge violation would impermissibly "[strike] at the heart of the bankruptcy court's unique powers to enforce its own orders.")

[20] *Parkman* at *19.

[21] *See* 15 U.S. Code § 1639c (e).

[22] *See* Brookner, Jason S. & Blacker, Monica S., The Rejectability of Arbitration Clauses, ABI Journal, Vol. XXVI, No. 3 (April 2007), at 77.

[23] *See Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 404 n. 12 (1967) ("[E]xcept where the parties otherwise intend, arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded").

[24] *See* WDNC LOOP: Section 8.1.10: All contractual provisions regarding arbitration or alternative dispute resolution are rejected in connection with the administration of this Chapter 13 case.

[25] That such is permitted in for Chapter 11 debtors, including individuals, is, of course, tied to the much smaller volume of such cases, but one does not have to sniff very hard to catch a whiff of an implicit class bias in the differing treatment.