WHAT'S GOING ON IN THE SECURED CREDITORS WORLD

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WHAT'S GOING ON IN THE SECURED CREDITORS WORLD

Current Bankruptcy Rules

Federal rules of procedure are adopted by the Supreme Court. The Supreme Court exercises this rule-making authority through the Judicial Conference of the Unites States. The Judicial Conference entrusts the responsibility for what? to its Committee on Rules of Practice and Procedure, commonly referred to as the Standing Committee. The most recent changes to the Bankruptcy Rules were implemented with an effective date of December 1, 2011. Among other things, those rules sought to press creditors with somewhat aggressive timelines and potential penalties. For instance, Fed. R. Bankr. P. 3002.1 requires mortgage creditors to file notices of payment changes, file notices of post-petition fees, expenses and charges, and to affirmatively respond to notices of final cure within 21 days, under the threat of being precluded from presenting any omitted information as evidence in any contested matter or adversary proceeding for failure to comply. Further, Fed. R. Bankr. P. 3001 requires a mortgage servicer to attach to a filed proof of claim additional documentation such as an itemized statement of interest, fees, and expenses as well as an escrow account statement prepared as of the date the petition for relied was filed. Again, if any information required by theRrule is not attached to the proof of claim, the holder of the claim may be precluded from presenting the omitted information as evidence in any later contested matter or adversary proceeding. These added burdens have caused many mortgage servicers to change their internal rules from never miss a bar date to file a proof of claim ONLY when all documents have been collected and attached to the claim. The result is that many proofs of claim of mortgage servicers are being filed untimely if at all.

Proposed Bankruptcy Rules – Effective December 2014

Moreover, on August 15, 2013, the Advisory Committee on Bankruptcy Rules, chaired by U. S.

Bankruptcy Judge Wedoff (N.D. Ill.), unveiled the newest version of bankruptcy rules and a national form of Chapter 13 Plan. These latest proposed amendments appear to be continuing the trend toward increasing the duties of mortgage servicers. The present Fed. R. Bankr. P. 3002(a) provides that an unsecured creditor "must file" a proof of claim for the claim to be allowed while a secured creditor "may file" a proof of claim. The language has sparked debate as to whether and when a secured creditor has to file a proof of claim. Fed. R. Bankr. P. 3002(d) provides, in part: "Time for Filing. In a … Chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code … ."

The proposed amended Rule 3002(a) would "require" a secured creditor to file a proof of claim in order to have an allowed claim. In addition, the Advisory Committee seems determined to require proofs of claim to be filed before confirmation. The proposed rule change would accelerate the bar date in Chapter 13 cases. Rather than allowing 90 days from the § 341 meeting, the proposed rule would require that the claim be filed within 60 days from the date the petition for relief was filed by the debtor. A creditor could file a motion to extend the bar date by 60 days if the debtor fails to timely file his/her list of creditors' name and addresses. Mortgage servicers have loudly voiced their concerns about this proposed amendment, alleging that while 60 days might be sufficient time to obtain some of the information required to be attached to a proof of claim, it certainly would not be sufficient time to produce all necessary documents.

In response to the outcry from the mortgage industry, the Advisory Committee has proposed that the claims process be bifurcated. The proposed Rule 3002(c)(2) would require a creditor to file the proof of claim with the full amount owed within 60 days of the petition for relief but the creditor would have 120 days to file the supporting loan documentation. It appears, however, that the escrow analysis would

still need to be attached to the proof of claim and filed within 60 days of the petition date.

Consumer Financial Protection Bureau

Additionally, the Consumer Financial Protection Bureau (CFPB) has implemented rules that will impact mortgage servicers in the bankruptcy world as well. Monthly statements (or the rarer coupon books) will now be required to be sent to borrowers and must contain: (1) the amount due for the billing period; (2) an explanation of the amount due, including fees imposed; (3) a past-payment breakdown; (4) transaction activity; (5) partial payment information; (6) contact and account information; and (7) delinquency information. Important to bankruptcy, the regulations require disclosure of monies held in suspense. While the mortgage servicers attempted to convince CFPB that loans in bankruptcy should be excluded from the rule, the CFPB stated that complexity alone does not justify exemption – merely adjustments – and further stated that such complexity truly necessitates the need for bankruptcy loans to be included. Mortgage servicers are not in agreement on how to interpret these new rules in the bankruptcy context so we can expect a wide variation early on.

The timing of payment change notices is another challenge under the CFPB rules on loans in Chapter 13. Under the rule, a borrower with anARM loan must be provided notice between 210 and 240 days before the first payment is due after the first rate change. Notice must also be sent between 60 and 120 days before such a change is effective. While mortgage servicers attempted again to get an exception for Chapter 13 cases due to requirements under Federal Rule 3002.1, the CFPB declined to make any exception.

In short, COMPLIANCE is the mantra of the day. Mortgage servicers continue to face the challenges thrust upon them. They continue to try to ensure that they comply with RESPA, FDCPA, the national mortgage servicing settlement, and the Federal Rules of Bankruptcy Procedure.

LATE FILED MORTGAGE CLAIMS IN CHAPTER 13*

May a Secured Creditor File and Have Allowed a Tardily Filed Claim in A Chapter 13 Proceeding?

Assuming notice to the creditor is adequate, claims against the debtor or his estate must be timely filed in a Chapter 13 proceeding. Only timely filed proofs of claim are entitled to treatment under Chapter 13 plans.[1] Bankruptcy Rules 3002(c) and 9006(b) establish the deadline for filing the proof of claim in Chapter 13 cases. Currently a proof of claim is timely if filed within ninety days after the first date set for the meeting of creditors. See Fed. R. Bankr. P. 3002(c). This rule regarding the proof of claim applies to a secured or unsecured claim.

A claim is barred, that is not even considered, if it fails to comply with the procedural requirements of Fed R. Bankr. P. 3001 governing filing of proofs of claim, including requirements that a claim must be timely filed as set forth in the Bankruptcy Code.[2]

There is nothing in Bankruptcy Rule 3002 to indicate that the bankruptcy courts have any discretion to enlarge the statutory time periods. The "excusable neglect" standard does not apply in this Chapter 13 context.[3] This does not mean, however, that the secured party must file a proof of claim. The secured creditor can elect not to participate in a bankruptcy case and rely on its lien rights.[4] But there are consequences if a secured creditor elects not to protect its rights to distributions under the Chapter 13 plan by failing to file its claim. It will not be entitled to receive distributions to the extent provided in the plan.[5] It may be precluded from later challenging plan provisions, even if inconsistent with the Bankruptcy Code.[6] If the Chapter 13 plan does propose to modify creditor's secured claim by paying creditor less than what creditor believes is owing, then the creditor who objects to such treatment must file a timely proof of claim and objection to confirmation, or it will be bound by the confirmed plan.[7]

Occasionally overlooked by secured creditors is that their prepetition claim is subject to the automatic stay even if protected from modifications.[8] And under the Bankruptcy Code automatic stay provisions postpetition communications geared toward collection of the prepetition debt are prohibited. The automatic stay continues until discharge.[9]

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*Prepared by Robert Wilson for the 2014 Advanced Consumer Bankruptcy Course

[2] *In re Tucker* 174 B.R. 732 (Bankr. N.D. Ill. 2003)

[3] *Jones v. Arross* 9 F 3d 79 (10th Cir.1993)

[4] *In re: Macias*,195 B.R. 659 (Bankr. W.D. Tex. 1996)

[5] *In re: Dumain*, 492 B.R. 140 (Bankr. S.D. N.Y. 2013)

[6] *In re: Summerville*, 361 B.R. 133 (B.A.P. 9th Cir. 2007)

[7] *In re: Dennis*, 230 B.R. 244 (Bankr. D. N.J. 1999), *In re: Stewart*, 247 B.R. 515 (Bankr. M.D. Fla. 2000)

[8] *In re: Geiger*, 2001 W.L. 34633702 (C.C. E.D. PA) Aff. 55 Appx. 82 (3rd Cir. 2003)

[9] *In re: Singh*, 457 B.R. 790 (Bankr. E.D. Cal 2011)

The binding effect of a confirmed Chapter 13 pan prohibits creditors from asserting any additional interest after confirmation other than as provided for in the plan.[10]

There is a split of authority on whether the creditor is entitled to a distribution absent a timely filed claim.[11] This is subject to plan provisions which may require proof of claim prior to distribution. It is also subject to court cases determining that one cannot be a creditor for bankruptcy purposes without holding a claim and the ninety day deadline for filing proof of claim must be strictly observed by all parties.[12] Those cases, as well as the majority of those deciding the issue, hold that in a Chapter 13 case the court has no discretion to enlarge the time under Fed. R. Bank. P. 3002(c) for a creditor filing a proof of claim other than in the case of a claim by a governmental entity, an infant or an incompetent person.[13] See generally Chapter 14 Practice and Procedure, 8:2 Thomson Reuters 2013 2d Ed.

An issue exists as to whether a late filed claim must be objected to for it to be disallowed. Many courts hold that the secured claim filed after the bar date in a Chapter 13 case is subject to disallowance on that basis. That is, an objection must be filed, or its allowed by default.[14]

As with any other limitation statute, untimeliness is an affirmative defense with the responsibility for seeing the issue resting on the party who objects to the claim.[15] A number of orders have been signed by courts around the State because no one objected to them being entered.

CONCLUSION: ALTHOUGH OCCASIONALLY IGNORED, BANKRUPTCY COURTS HAVE NO DISCRETION TO ALLOW A LATE FILED SECURED CLAIM IN A CHAPTER 13 PLAN.

See *In re: Hogan*, 346 B.R. 715 (Bankr. N.D. Tex. 2006). Judge Stacey Jernigan provides an excellent discussion of late filed claims.

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[10] *In re: Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007)

[11] Compare *In re: Moehring*, 485 B.R. 571, Bankr. S.D. Oio 2013), *In re: Jurado*, 318 B.R. 251 (Bankr. D.P.R. 2004); *In re: Mehl*, 2005 W.L. 2806676 (Bankr. C. D. Ill. 2005); *In re: Dumain*, 492 B.R. 140 (S.D. NY 2013)

[12] *In re: Kelley*, 259 B.R. 580 (Bankr. E.D. Tex 2001); *In re: Hogan*, 346 B.R. 715 (Bankr. N.D. Tex. 2006)

[13] *In re: Mickens*, 2005 W.L. 375661 Bankr. D.C.)

[14] *In re: NWONWU*, 362 B.R. 705 (Bankr. E.D. Va. 2007), *In re: Nealey*, 2011 W.L. 1485541 (Bankr. E.D. Va.)

[15] *In re: Jensen*, 232 B.R. 118 (Bankr. N.D. Ind. 1999)

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Mr. Carter is licensed to practice law in Texas. He is a member of the Dallas Bar Association, Houston Bar Association and Tarrant County Bar Association He was also named a Texas Rising Star in the Super Lawyers edition of Texas Monthly in 2007 and 2009.

Mr. Carter is licensed to practice before the United States District Courts for the Eastern, Northern, Southern and Western Districts of Texas, and the 5th Circuit Court of Appeals.