

Claims, Claims, Claims in Chapter 13 Cases

Kurt A. Steinke, Moderator

Office of the Chapter 13 Trustee; Kalamazoo, Mich.

Danielle M. Klyce

Frego & Associates PLC; Dearborn Heights, Mich.

Hon. Marci B. McIvor

U.S. Bankruptcy Court (E.D. Mich.); Detroit

Noel J. Ravenscroft

Potestivo & Associates, P.C.; Rochester Hills, Mich.



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Claims, claims, claims in Chapter 13 cases

Kurt A. Steinke, Esq., Moderator

Barbara P. Foley, Chapter 13 Trustee

Kalamazoo, Michigan

Claims Issues from Creditors' Perspective

Noel J. Ravenscroft, Esq.

Potestivo & Associates PC

Rochester Hills, Michigan

Claims Issues from Debtors' Perspective

Danielle M. Miller, Esq.

Frego & Associates PLC

Dearborn Heights, Michigan

Tax Claims

Honorable Marci B. McIvor

Bankruptcy Judge

Eastern District of Michigan

Claims Issues from the Creditors' Perspective

I. Form and Content Generally (subject to December 1, 2015 changes)

Proof of Claims - B10 (Official Form 10)

Creditor Information

This is the portion of the claim that simply provides the creditor's name, address, and other contact information.

Section 1 - Amount of Claim

The total amount of the claim as of the petition date is to be inserted in Section 1.

Section 2 - Basis of Claim

This section requires the creditor to type this information in. The instructions on the reverse side of the form provide some examples of information to be inserted in this section (i.e. goods sold, money loaned, services performed, personal injury or wrongful death, car loan, mortgage loan, and credit card).

Section 3 - Last Four Digits For Identifying Creditor

Typically listed here is an account number or the last four digits of the debtor's social security number. However, the instructions to the proof of claim make it clear that a creditor must also redact any private information from documents attached in support of the proof of claim (such as promissory notes, loan applications, account print-offs, etc.) which is may be overlooked.

Section 3a - Debtor May Have Scheduled Account As

Section 3a was implemented in an attempt to rectify differences between the way a debtor lists a claim and the way a creditor files its claim. This space is to be used to report a change in the creditor's name, a transferred claim or other information clarifying a difference between the claim as listed on the proof of claim and the claim as scheduled by the debtor. This additional information should be useful to trustees or claims agents when matching up claims. Since this information is now requested on the form, the creditor should review the petition and schedules prior to filing a proof of claim in order to determine if it is necessary to complete section 3a.

Section 4 - Secured Claim

First, creditors should insert the nature of the collateral and provide a brief description. List the value of the property, if that is determinable at the time, and insert the annual interest rate and check whether it is variable or fixed. The creditor should use the rate in effect as of the bankruptcy filing.

Next the arrearage amount should be listed and supporting documentation attached to the claim. With a claim secured by a mortgage on a debtor's principal residence, there is a specific attachment (Attachment A) that must be included. This attachment itemizes all of the pre-petition arrears listed in the claim.

Creditors should insert the method used to perfect the security interest. Examples might include “deed of trust” for a mortgage, “lien on title” for a car loan or “UCC-1 Financing Statement” for a loan secured by inventory or equipment. The form requests that creditors list both the secured and unsecured portions of its claim, but this is largely not included because this figure may not be determined prior to filing.

Section 5 - Amount of Claim Entitled to Priority

This section makes it clear that a claim must qualify under section 507 of the Bankruptcy Code in order to be given priority status. Under the form, the creditor is guided through a checklist of the pertinent 507 elements before being given a blank to insert the amount of any priority claim.

Section 7 – Documents

Redacted copies of the mortgage, promissory note, or any other supporting documents evidencing the debt must be included. For mortgage creditor’s, a complete chain of title must also be provided.

Mortgage Proof of Claim Attachment

Part 1: Statement of Principal and Interest

This part lists the principal amount due and a breakdown of the interest amount due as of the date of the bankruptcy filing.

Part 2: Statement of Prepetition Fees, Expense, and Charges

Part 2 is an itemized list of the fees, expenses, and charges and the date those amounts were incurred. There are specific descriptions for various fees/costs and a few blank sections for ones that are not already described.

Part 3: Statement of Amount Necessary to Cure Default

If the loan is escrowed for taxes and/or insurance an escrow account statement must be attached to the claim. Section 1 provides information on when the creditor last received a payment and section 2 illustrates the missed mortgage installments, if any. Section 3 provides the total arrearage calculation at the time the bankruptcy was filed.

Also, some creditors will list on this page, at the bottom, and advances made which are included in the total debt, but not in the arrearage calculation. Additionally, the monthly payment may be listed here along with any additional information being disclosed.

II. When to Amend a Proof of Claim

- Loan modification
- Disallowed fees, expenses, or charges
- To resolve an objection to confirmation
- Inaccurate figures

III. Post-Petition Mortgage Fees, Expenses, and Charges

When a mortgage creditor incurs post-petition fees on a debtor’s principal residence, they are required to file a supplemental claim to include and disclose these amounts. A post-petition fee

notice must be filed within 180 days from when the amount listed was incurred. The form essentially mirrors Part 1 of the mortgage proof of claim attachment. Normally these are filed to collect attorney's fees in connection with the bankruptcy filing.

IV. Notice of Payment Change

Notice of mortgage payment changes are filed when the monthly mortgage payment changes on a debtor's principal residence. These must be filed at least 21 days before the new payment amount is due. Routinely this are filed when there are changes in the property tax and insurance portion being escrowed in the mortgage payment or when there is an interest rate change. Documents evidencing the reason for the change must be attached, i.e. an escrow analysis or rate change notice.

V. Claims Bar Deadline Issues

- Does the bar deadline apply to secured creditors?
- What happens when an unsecured creditor misses the bar deadline?

VI. Proposed/New Local Rules

- LR 3001-2: Notice of Inability to Comply with Time Requirements

VII. Proposed Changes to Proof of Claim Forms

- Form 410
- Form 410A
- Form 410S2

TAX CLAIMS IN CHAPTER 13 CASES

I. Treatment of Tax Claims

A. Secured

Secured tax claims must be treated like any other secured claim. Treatment is controlled by 11 U.S.C. § 1325(a)(5) which states:

(5) with respect to each allowed secured claim provided for by the plan-

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that -

(i) the holder of such claim retain the lien securing such claim until the earlier of -

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if -

(i) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

Secured tax claims may be bifurcated into a secured and unsecured portion if taxing authority is undersecured. *See* 11 U.S.C. § 506(a). If the taxing authority claim is over secured, debtor must pay post-petition interest on the claim. Interest must be paid at the statutory rate. *See* 11 U.S.C. § 506(c).

B. Priority Unsecured Claims

Priority tax claims are defined at 11 U.S.C. § 507(a)(8). Priority taxes under this section include several different taxes: income taxes for pre-bankruptcy tax years for which the tax return was last due (including extensions) after three years before the bankruptcy petition filing date or for which the tax was assessed within 240 days before the petition date (§ 507(a)(8)(A)(i) and (ii)), trust fund taxes the debtor was required to collect or withhold and pay over to the government (such as income taxes an employer is required to withhold), property taxes incurred before the bankruptcy and last payable without penalty after one year before the bankruptcy filing date, certain employment taxes paid on priority wage and salary claims for which a return was last due after three years before the bankruptcy filing, penalties related to priority taxes (if such penalties are to compensate for actual pecuniary losses), and certain other taxes. Broadly speaking, the policy behind these priorities favors payment of taxes that are new enough that the taxing authorities may not yet have had an opportunity to collect them, and taxes that a debtor collects and holds in trust for another taxpayer. The treatment of tax claims is controlled by 11 U.S.C. § 1322(a)(2) which provides in a Chapter 13 case:

(a) the plan -

(2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim.

Priority tax claims include tax and interest accrued to the date of filing. 11 U.S.C. § 1322(a)(2) does not require the payment of interest which accrues post-petition on the claim. However, interest which accrues on an 11 U.S.C. § 507(a)(8)(c) claim will be non-dischargeable pursuant to 11 U.S.C. § 1328(a)(2).

C. Unsecured Claims

The treatment of unsecured claims is governed by 11 U.S.C. § 1322(b)(1). 11 U.S.C. § 1322(b)(1) does not require a specific amount to be paid, but rather requires that a debtor may not discriminate in the treatment of claims arising

out of consumer debt. If there is an objection by any unsecured creditor, the plan must comply with 11 U.S.C. § 1325(b) which states:

(b)(1) if the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

D. Necessity of Filing Returns

11 U.S.C. § 1308 REQUIRES that all delinquent tax returns be filed at least one day prior to the date set for the first meeting of creditors. This requirement is actually beneficial to debtors because it insures the filing of accurate tax claims. Claims based on estimated returns are ALWAYS higher than claims based on actual returns; if a taxing authority filed a claim based on estimated returns, make sure an amended claim is filed once the actual returns have been filed with the appropriate taxing authority.

E. Post Petition Claims

Taxing authorities may file claims for taxes which become due while the case is pending. 11 U.S.C. § 1305(a) provides:

(a) A proof of claim may be filed by any entity that holds a claim against the debtor-

(1) for taxes that become payable to a governmental unit while the case is pending;

Taxes which become due while the case is pending are NONDISCHARGEABLE. Most courts will allow a debtor to modify his/her plan to provide for payment of a post petition tax claim. Any proposed modification must comply with 11 U.S.C. § 1329.

II. Dischargeability and Tax Claims

Generally, priority and unsecured claims which have been provided for by the plan will be discharged. There are two notable exceptions. First, a discharge granted under 11 U.S.C. § 1328(b), essentially operates like a Chapter 7 discharge. In other words, if a debtor obtains a discharge without completing plan payments pursuant to 11 U.S.C. § 1328(b)(1) - (b)(3), tax debts which would be nondischargeable if this case had been a Chapter 7, are not discharged. The taxes which are excepted from discharge are set forth in 11 U.S.C. § 523(a)(1). Generally they are taxes for which no return or a fraudulent return was filed, and taxes for which returns were due less than two years prior to filing the bankruptcy.

The second type of tax debt which is nondischargeable in a Chapter 13 case is interest which accrues on a § 507(a)(8)(C) claim. An 11 U.S.C. § 507(a)(8)(C) claim is a claim for a tax that is required to be collected or withheld. Pursuant to 11 U.S.C. § 1328(a)(2), these taxes are nondischargeable. Even if a debtor's plan provides (as it must) for full payment of a § 507(a)(8)(C) claim, case law holds that interest which accrues during the life of a Chapter 13 plan is NOT dischargeable. See *United States v. Monahan (In re Monahan)*, 497 B.R. 642 (B.A.P. 9th Cir. 2013); *Bruning v. United States*, 376 U.S. 358 (1964). This is an exception to the general rule that tax creditors are not entitled to post-petition interest on priority tax claims.

For a good discussion of the treatment of tax claims generally, see Wm. E. Brewer, Jr., *Treatment of Pre-Petition Tax Debt in Bankruptcy*, <http://www.southeasternbankruptcylawinstitute.org/archive/2010/documents/W.pdf>