Creditors' Rights and Fights: A Walk in the Shoes of Creditors' Counsel

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Update on the Mortgage and Auto Servicing Industry:

Case Filings and What It Means:

Last year was expected by many to be the low-point in bankruptcy filings, but 2016 has seen those numbers drop even lower through the first two quarters of 2016. The official report from the US Courts on case filings through March of 2016 showed only 201,906 cases, versus 213,018 in 2015. The American Bankruptcy Institute, who tracks these numbers, is reporting that the filings through the end of June 2016 are 6% lower than last year.

The statistics for filings for the 1st quarter of the last 5 years are as follows:

Q1 for Year	Total Filings	Ch.7	Ch.11	Ch.12	Ch.13
2016	201,906	126,430	1,878	122	73,430
2015	213,081	138,141	1,743	89	73,076
2014	238,708	160,292	1,925	96	76,375
2013	272,296	189,083	2,345	103	80,737
2012	322,973	227,678	2,885	152	92,173

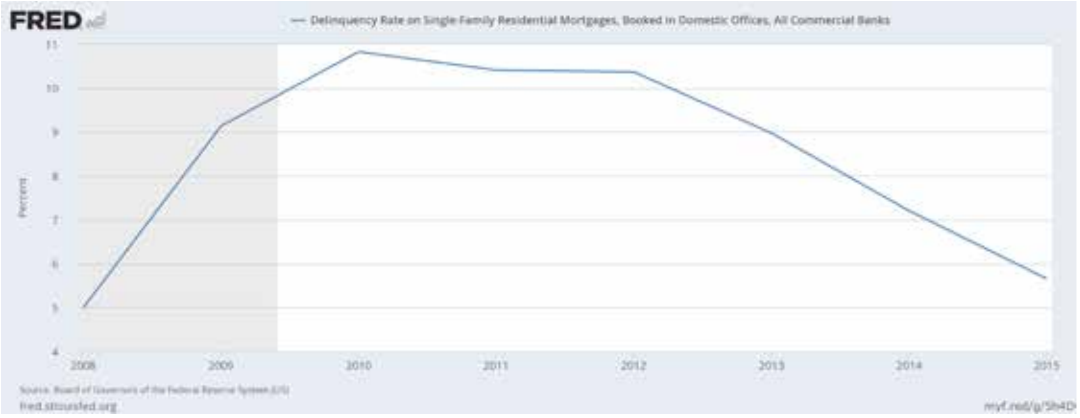
*Statistics pulled from USCourts.gov – Caseload Statistics Data Tables (Table F-2)

The statistics for the 12 month period ending on March 31, 2016 versus the same periods ending in March of previous years shows the same story:

March-March	Total Filings	Ch.7	Ch.11	Ch.12	Ch.13
2015-2016	833,515	523,394	7,380	440	302,193
2014-2015	911,086	596,867	7,053	354	306,729
2013-2014	1,038,280	699,982	8,564	388	329,256
2012-2013	1,170,324	804,885	9,811	463	355,081

*Statistics pulled from USCourts.gov – Caseload Statistics Data Tables (Table F-5A)

These statistics are a positive for the mortgage and automobile servicing industries, as it means less attorney fees associated with bankruptcy, but also indicates that the number of defaults have dropped. This is backed up by the statistics tracked by the Federal Reserve, as indicated in the graph below, showing decreasing default rate for single-family residential mortgages:



Similarly, the rate of default on automobile loans have been consistently low since about 2012, with current default rates of about 0.92%, according to the S&P Dow Jones Indices. However, a recent article by the Wall Street Journal cautioned that the rate of default in the "subprime" auto segment is significantly higher, and could signal economic turmoil ahead. (Ng, Serena, March 13, 2016, *Subprime Flashback: Early Defaults Are a Warning Sign for Auto Sales*, The Wall Street Journal)

One potential reason for the lower rate of filings is the large percentage of mortgage loans that have received loan modifications. Mortgage defaults leading to foreclosures have historically been a large driver of filings, particularly Chapter 13 cases. Without For example, the HAMP program has had a high volume, with over 2.4 million mortgages involved in Trial modifications, and over 1.5 million that started permanent modifications. Additionally, the Treasury Department reported that of the homeowners that did not qualify for a HAMP modification, 24% received an alternative modification or repayment plan, and another 34% came current or paid off the loan. Of note for us in the bankruptcy world, is that only 2% of the loans that did not get a HAMP modification were in bankruptcy.(Treasury Dept., *Making Home Affordable – Program Performance Report Through First Quarter of 2016*).

Based on the continuing low rates of default combined with the large number of mortgages that have been modified, there appears to be no reason to think that the coming 12 months will result in a large increase in filings, if there is any increase at all. As a result, referrals to local counsel will remain at the levels we have seen for the past few years.

Servicing Standards

The National Mortgage Settlement(s):

In February 2012, the Federal government, 49 state attorneys general, and the District of Columbia all entered into a joint settlement known as the National Mortgage Settlement (the Settlement") with the five largest mortgage servicers at the time. The servicers were Ally Financial (GMAC Mortgage/Residential Capital), Bank of America, Citi, JPMorgan Chase, and Wells Fargo. The Settlement had the servicers pay over $5 billion in direct payments to the states, Federal government, and borrowers, as well as agree to provide extensive customer relief ($20 billion), and commit to reforming their systems for loan servicing.

Of particular importance for us is that the Settlement laid out new standards that the servicers agreed to follow during the handling of foreclosure and bankruptcy cases. The subsection on bankruptcy, for example, specified how these servicers were to handle Proofs of Claim and Motions for Relief, and included quality control reviews to ensure that these procedures were followed.

As an additional part of the Settlement, a third-party oversight program was set up, and a Monitor was appointed. That Monitor, Joseph A. Smith, Jr., is assisted in his duties by the Office of Mortgage Settlement Oversight. They recently released a final update in March 2016 on the compliance of the original servicers (or their successors), as the compliance with the Settlement ended at the end of the 3rd Quarter of 2015. Under the Settlement, the Monitor noted that the servicers provided over 640,000 borrowers with $51 billion in mortgage assistance.

While the Settlement compliance requirement has ended for those servicers, they will continue to be held accountable under the CFPB's servicing rules. Additionally, the National Mortgage Settlement has been used as a blueprint for additional settlements that have been done by the CFPB with Ocwen, SunTrust, and most recently, HSBC. All of these settlements have used the same basic servicing standards from the original Settlement as part of their terms.

Some basic information on the terms of the other settlements:

Ocwen	$2 billion in borrower relief $125 million in cash to foreclosed homeowners
SunTrust	$500 million in borrower relief $40 million in cash to foreclosed homeowners
HSBC	$370 million in relief to borrowers $58 million in cash to foreclosed homeowners

An important point to consider about the Settlement, and its long-term effect, is that the terms applied to the loans that were serviced by those entities at the time the settlement was reached. As a result, successor entities, such as Ditech, who purchased a large portion of the Ally portfolio, were also bound by the terms of the settlement.

Since the CFPB has been using the Settlement as a guide for other settlement, servicers would be wise to review their own procedures against those in the settlement, and incorporate the provisions relating to documents used in foreclosure and bankruptcy cases, verification and accuracy of account information, and documentation of the right to enforce the loan.

The Consumer Financial Protection Bureau:

The Dodd-Frank act transferred to the CFPB the ability to create and enforce rules relating to a wide range of consumer loans, including those under the Real Estate Settlement Procedures Act (Reg. X) and the Truth In Lending Act (Reg. Z). The CFPB was specifically tasked with integrating these two Acts, as they overlapped one another, were confusing to borrowers, and burdensome to lenders. In 2013, the CFPB issued their interim final rules on mortgage servicing, and have updated them since. They are currently set to release a new version in July 2016, which has not yet been released as of this being written.

One of the major issues for servicers, and their counsel, has been how the CFPB's rules interact with bankruptcy. The original servicing rules laid out by the CFPB had an exemption inserted for servicers where a borrower was in bankruptcy. However, with subsequent revisions, that exemption has been done away with, with certain exceptions. As a result, servicers are now required to send out monthly statements to borrowers in bankruptcy. In order to assist in the implementation of the notice requirement in bankruptcy situations, the CFPB contracted an outside company to assist in the development and testing of the new notices.

As stated above, there are some exemptions to the monthly statement requirement. The rules created a "menu" that shows the situations where a servicers does NOT need to send out the monthly statement. If one conditions in Column A **AND** one condition in Column B are both met, then notices do not need to be sent:

Column A	Column B
The borrower is the Debtor in bankruptcy	Servicer receives written request to cease statements
Any primary obligor is in a Chapter 12 or 13	Borrowers confirmed plan provides for surrender of the dwelling, provides for lien avoidance, or does NOT provide for pre- or post-petition payments
The borrower is discharged from personal liability on the debt	The bankruptcy court entered an order to avoid the servicers lien; lift the automatic stay; or cease periodic statement
	Borrower files a Statement of Intention that lists the dwelling as being surrendered

After the servicer has stopped sending monthly statements, due to the proper conditions being met, however, they may still have to re-start sending the notices, if any of the following occur:

- case dismissal
- case closing
- reaffirmation of the debt
- discharge is entered
- borrower requests statements resume

Once one of these occurs, the servicer **must** resume sending the monthly statements, within a "reasonably prompt time" following the occurrence of the earliest of these possible events.

CONSUMER SESSION: CREDITORS' RIGHTS AND FIGHTS – A WALK IN THE SHOES OF CREDITORS' COUNSEL

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I. STROLL THROUGH STATUTES OF LIMITATION AND STALE CLAIMS AS VIOLATIONS OF THE FAIR DEBT CONSUMER PRACTICES ACT

Section 1692e of the Fair Debt Collections Practices Act ("FDCPA") prohibits "debt collectors" from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." The FDCPA bars misrepresentation of "the character, amount, or legal status of any debt." *Id.* § 1692e(2)(A).

The laws of the various states have statutes of limitations that prohibit collection of "out-of-statute" stale claims. In 2014 the 11th Circuit Ct. of Appeals became the first circuit court to hold that <u>knowingly</u> filing a proof of claim on an out-of-statute debt in a bankruptcy case can give rise to a violation of the FDCPA. *Crawford v LVNV Funding*, 758 F.3d 1254 (11th Cir 7/10/14) ("*Crawford*"). The decision has fueled great debate and circuit split with respect to the applicability of the FDCPA in bankruptcy proceedings.

The 11th Circuit *Crawford* decision splits with the 2nd Circuit and others that have held that the bankruptcy code impliedly repealed the FDCPA. In *Simmons v Roundup Funding, LLC*, 622 F.3d 93, 95–96 (2d Cir.2010) the 2nd Circuit held that "Federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action." *Id* at 95. In *Walls v Wells Fargo Bank, N.A.*, 276 F.3d 502, 510–11 (9th Cir.2002) the 9th Circuit held that that the filing of an inflated proof of claim could not form the basis for FDCPA violations, but it declined to address whether all claims under FDCPA are precluded by bankruptcy code.

Subsequent to *Crawford* a number of courts had challenged the Crawford holding that filing a proof of claim in a bankruptcy case was an action done "*in connection with the collection* *of any debt*" as required by the FDCPA. One can see the conflict between the bankruptcy code and the FDCPA in this regard. The automatic stay at 11 U.S.C. sec. 362(a)(1) prohibits the "commencement [of actions] … to recover a claim against the debtor that arose before the commencement of the case". Critics of *Crawford* assert that if the filing of a proof of claim is an action to collect a debt within the meaning of the FDCPA, isn't there a stay violation every time a creditor files a proof of claim?

Here in the 6th Circuit, *In re: Broadrick*, 532 B.R. 60 (Bankr. M.D. Tenn 2015) seems to be representative of the developing case law:

> "Thus, this Court rejects the holding in *Crawford* and finds that not every filing of a proof of claim on a stale claim is automatically a violation of the FDCPA. However, going to the other extreme and finding, as *Simmons* did, that the laws are so inconsistent that the FDCPA can never be applied in the bankruptcy claims setting would be just as contrary to the goal of making the two laws work together to the extent possible."

If two statutes are inconsistent with one another, a court can hold that one of the statutes implicitly repeals the other one. There is however a strong federal policy is requiring courts to try to harmonize and give effect to both. This appears to be where things are headed with most court holding that the bankruptcy code can be read in harmony with the FDCPA and that the FDCPA is applicable in bankruptcy cases.

In May, 2016 in *Johnson vs Midland Funding*, 2016 WL 2996372 (11th Cir. May 24, 2016) the 11th Circuit seemed to back off the idea that it is a *per se* violation of the FDCPA to file a proof of claim on a debt that was out-of-statute focusing on the debt collector <u>knowingly</u> doing so. ("We recognize that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations."). The *Johnson* court did however give support to its earlier *Crawford* holding stating that,

> "The Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred. We

recognize that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations. However, when a particular type of creditor—a designated "debt collector" under the FDCPA—files a **knowingly** time-barred proof of claim in a debtor's Chapter 13 bankruptcy, that debt collector will be vulnerable to a claim under the FDCPA. Our examination of these statutes leads us to conclude that the Code and the FDCPA can be read together in a coherent way." [emphasis supplied]

The take away to all of this is that Crawford has stirred up interest in the applicability of the FDCPA in bankruptcy cases. It is important to note:

- The FDCPA is only applicable to "debt collectors", i.e. <u>not to creditors asserting their own claims.</u> The phrase "Debt collectors" does include attorneys and 3rd parties engaged to collect debts. *Heintz v. Jenkins*, 514 U.S. at 299, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995)(FDCPA applies to "attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation.") *Stratton v. Portfolio Recovery Assocs., L.L.C.,* 770 F.3d 443 (6th Cir. 2014) Holding that a lawyer debt-collector violates the FDCPA by asserting a false representation regarding the character or amount of the debt, under § 1692e(2), even when such false statements are made in a legal complaint filed in court" In *Stratton* the court held that after charge-off, the assertion that interest is due after it has been "waived" by charge off can be an FDCPA violation by an attorney filing the complaint to collect it
- There is a 1 year statute of limitations under the FDCPA at 15 U.S.C. sec 1692k(d) which states that "[a]n action to enforce any liability created by this subchapter may be brought ... within one year from the date on which the violation occurs." *In re Simmerman*, 437 B.R. 47 (Bankr. S.D.Ohio. 2011 – Judge Walter) (One-year statute of limitations on Chapter 13 debtors' claim against mortgage loan servicer for alleged violation of Fair Debt Collection Practices Act (FDCPA) began to run upon servicer's

filing of amended proof of claim in debtors' bankruptcy case, and therefore claim, which was filed approximately two years later, was time-barred)

- Statutes of limitations do not extinguish the underlying claim, only the ability to use civil process to collect on it. If everything in the proof of claim is true, including, for instance, the Rule 3001(c)(3) requirement of (iii) the date of an account holder's last transaction; (iv) the date of the last payment on the account; and (v) the date on which the account was charged to profit and loss, then it is probably not deceptive.
- There is a bona fide error defense under 15 U.S.C. sec. 1692k(c) "… if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."
- The bankruptcy court may decline to exercise jurisdiction of an FDCPA claim, *In re Marshall*, 491 B.R. 217 (Bankr.S.D.Ohio. 2012 – Judge Buchanan)

Anyone delving into the "out-of-statute" claims as violations of the FDCPA should be aware of a recent Ohio Supreme Court case, *Taylor v. First Resolution Invest. Corp.,* Slip Opinion No. 2016-Ohio-3444 (June 16, 2016). Ohio's Statute of Limitation is "eight years after the cause of action accrued" under Ohio Rev. Code sec. 2305.06 and "six years after the cause thereof accrued" when no written contract is produced.[1] Ohio Rev. Code sec. 2305.07. Normally the forum state is the one whose limitations statute is used but Ohio Rev. Code 2305.03(B) states that Ohio courts will apply the statute of limitations of the state where the cause of action accrued in instances when that state's statute of limitations is shorter. This is

[1] Ohio Revised Code §1303.16 and Kentucky Revised Statute § 355-3.118 provide a 6 year Statute of Limitations on a Note.

called a "borrowing statute", i.e. a forum court "borrows" the limitation period of another state if the cause of action accrued in that foreign state and that state's limitation period is shorter than the forum state's limitation period. In *Taylor*, the cause of action accrues <u>when</u> the debtor fails to make a payment when due, and the place <u>where</u> it accrues is where the payment was to be made (i.e. not the domicile of the debtor but rather the location of the card issuer to whom the payment is to be made). In *Taylor* Chase Bank was the original bank issuing the credit card. It was domiciled in Delaware which is where the payments were to be made. Using Ohio's borrowing statute, Ohio Rev. Code 2305.03(B), the Ohio Supreme Court held that Delaware's 3 year statute of limitations was applicable.

II. AMBLE THROUGH ADEQUATE PROTECTION

Bankruptcy law requires that auto lenders, as secured creditors, are entitled to receive periodic payments that adequately protect their secured interest, both before and after confirmation.

- Prior to confirmation - 30 days after filing, monthly adequate protection payments until confirmation -11 U.S.C. sec. 1326(a)(1)(C)

- After confirmation – periodic payment in "equal monthly amounts" under sec. 1325(a)(5)(B)(iii) sufficient to adequately protect the secured creditor's interests.

11 U.S.C. sec. 1326(a)(1)(C) of BAPCPA requires that a debtor commence making payments not later than 30 days after the date of the filing of the plan that provides adequate protection directly to a secured creditor. While the statute as written contemplated that adequate protection payments would be made directly to the secured creditor, the logistics of doing so were administratively burdensome. Almost all courts have entered procedures dealing with this subject that require that the Ch. 13 Trustee be the disbursing agent and that the creditor must first file a proof of claim. For example, the S.D. of Ohio (Cincinnati, Dayton and Columbus) entered

General Order # 2 on October 13, 2005, which provided that these adequate protection payments are to be made to the Ch. 13 Trustee who thereafter has certain disbursement obligations under the General Order # 2, i.e. "... the chapter 13 trustee shall pay the secured creditor the required payments." General Order # 2, was later vacated and memorialized in S.D. Local Rule 3070-1. Similarly the E.D. of KY adopted its Local Rule 3015-4.

Although there may occasionally be an instance where there is value so far in excess of the debt that an equity cushion would not require pre-confirmation adequate protection, generally speaking an objection to a plan that fails to provide for pre-confirmation adequate protection will prevail and because of that reality, debtor's counsel will concede the issue in favor of the creditor. Unfortunately there is not uniformity in the procedure for resolving an objection for failure to provide pre-confirmation adequate protection. Some Ch. 13 Trustees will permit the issue to be resolved by an agreed order which is preferable because it is most easily documented and is less burdensome on debtor's counsel, but others require the more time consuming process of filing of an amended plan.

Adequate protection to creditors secured by depreciating personal property is quantified by the diminution in value of the collateral occasioned by the Debtor's use. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd*., 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) (adequate protection compensates for delay and diminution in value resulting from automatic stay). There is no one formula used in determining the amount of the adequate protection payment. Some Ch. 13 Trustees suggest that it should be determined by a multiple, 2% of retail. Others suggest that it be fixed in the same amount as the monthly payment proposed post-confirmation for ease of administration.

When called upon to prove what is adequate, keeping old copies of the NADA books is very helpful as it will have data as of two given points of time for a specific make and model automobile and the difference in values for those two points in time can then be mathematically represented as an average depreciation.

III. PRIORITIZATION OF ATTORNEY'S FEES vis-à-vis MONTHLY PAYMENTS ON SECURED DEBTS

Creditors have long opposed the "front-loaded" payment of attorney's fees in Ch. 13 cases. The automobile lenders perceived that in some instances where debtor's attorney's fees were front-loaded, cases were dismissed for non-payment after the attorney got paid, the case would be re-filed before the collateral was recovered only to have the attorney's fee front-loaded again. Creditors believe that attorneys should share the risk of plan failure. Creditors have similarly objected to "back-loaded" balloon payments on their allowed secured claims. This was described in *In re: Erwin*, 340 B.R. 790 (Bankr.C.D.IL.2007) as follows:

> "Prior to BAPCPA, it was not uncommon for some Chapter 13 plans to provide for backloaded payments, such as balloon payments. Another form of backloading involved graduated or step-up payment plans, where the payments started out smaller and increased over time. Secured creditors, particularly those secured by a vehicle, viewed this as unfair, exposing them to undue risk in light of the constant depreciation of their collateral.
>
> Other plans, filed by debtors whose employment is seasonal, provided for reduced payments or no payments at all during certain months of the year, or called for payments to be made quarterly or semi-annually, rather than monthly, based upon the peculiarities of the debtor's income stream. Secured creditors had similar complaints with those plans.
>
> In response to those creditor concerns, Congress enacted the equal payment provision and a companion provision extending the concept of adequate protection, formerly a preconfirmation requirement, to postconfirmation plan payments. 11 U.S.C. § 1325(a)(5)(B)(iii)(II). The equal payment provision prevents debtors from backloading payments to secured creditors or paying them other than on a monthly basis." *Id* at 901

Although the court in *Erwin* clearly understood the problem, the court ultimately did not require the Trustee to disburse in equal monthly amounts favoring instead not to micro-manage Trustee disbursements. The case has received significant negative treatment as will be discussed in the "equal monthly amounts" section of these materials.

It is certainly clear that attorney's fees have administrative expense priority under 11 U.S.C. sec. 507 and 503(b) but in the context of a Ch. 13 case that does not mean that the attorney is entitled to his fees before distribution of monthly payments to a secured creditor regardless of whether the distribution to the secured creditor is for pre-confirmation adequate protection payments (11 U.S.C. sec. 1326(a)(1)(C)) or post-confirmation monthly payments (1325(a)(5)(B)(iii)). The statutory directive under Ch. 13 with respect to payment of attorney's fees is 11 U.S.C. sec. 1326(b) that provides:

> "(b) **Before or at the time of each payment to creditors** under the plan, there shall be paid—
> (1) any unpaid claim of the kind specified in section 507(a)(2) of this title;" [emphasis supplied]
>
> Note: 507(a)(2) refers to administrative expenses allowed under 503(b), i.e. attorney's fees

I have often thought about that phrase, "before or at the time of". I believe that the phrase has its clearest meaning when read to say attorney's fees are to be paid …

> "before" payment to creditors when there are no secured creditors entitled to receive adequate protection of their secured interests and the administrative expense priority of the unsecured claim for attorney's fees is clearly prioritized over all other unsecured claims "or"
>
> "at the time of" when there are secured creditors entitled to receive adequate protection of their secured interests.

Although I cannot point to any case law that adopts that reading as a general proposition of law, there are many cases that read the phrase "before or at the time of" to mean that nothing in the Ch. 13 code requires attorney's fees to be paid in full before disbursement to creditors.

In *In re Rogers*, 500 B.R. 537 (Bankr.W.D. Mich.2013), Judge Gregg addressed the priority of attorney's fees vis-à-vis the right of a mortgagee to receive monthly conduit payments and held that the mortgagee right to conduits payment prevailed over the administrative expense priority of attorney fees and they both had to be concurrently disbursed, i.e. "at the time of." *In re Maike*, 2016 WL 1391855, (U.S. District Court, E.D. MI, Northern Division, April 7, 2016) is in accord. Both of these cases however placed great weight on the fact that the payments to the mortgagee were benefitted by the anti-modification provisions of 11 U.S.C. sec. 1322(b)(2) and it was on that basis that the attorney's fees had to be concurrently disbursed with payment to creditors. Judge Gregg criticized an earlier pre-BAPCPA decision, *In re Harris,* 304 B.R. 751 (Bankr.E.D.Mich.2004) in his district that had held that a plan proposing payment in full of the attorney's fees before distribution to 2 motor vehicle secured creditors was permissible. ("This court is not so certain about a lack of merits in an instance when a plan fails to pay an undersecured creditor, for a number of months, while the collateral diminishes in value. The constitutional requirement would seem to be built-in to sec. 1325(a)(5)(B) when a proposed cram down is considered by a court" *Id* at footnote 5). While the opinion discussed that at length in its footnote #5, the decision did not go so far as to specifically consider the priority of attorney's fees vis-à-vis the adequate protection payments to which a motor vehicle secured creditor is entitled.

In the E.D. of Ky the model plan clearly provides for that balance between the administrative expense priority of debtor's attorney's fees vis-à-vis the adequate protection rights of undersecured creditors:

> "1. **Pre-Confirmation Adequate Protection Payments; Post-Confirmation Adequate Protection Payments to be Paid Concurrently with Debtor's Attorney's Fee.** Pre-confirmation adequate protection payments to the following Creditors holding allowed secured claims shall be paid by the Trustee through the plan as provided below. Adequate protection payments shall not accrue or be paid until the Creditor files a proof of claim. The principal amount of the Creditor's claim shall be reduced by the amount of the pre-confirmation adequate protection payments remitted. Payments will continue as provided below after confirmation until the attorney's fee for debtor's counsel is paid in full." E.D. of Ky model plan 12/1/2015.

In the S.D. of Ohio the model plans currently in existence for each of the courts (Cincinnati, Dayton and Columbus) call for a specific monthly payment to be distributed to the Debtor's counsel for attorney's fees and in practice that is distributed concurrently with the specific monthly payments proposed for creditors including motor vehicle secured creditors. It's interesting to note how different Ch. 13 Trustees distribute a specific monthly priority payment (hereafter referred to as a "per mo"). In Dayton if the plan proposes a per mo to a motor vehicle secured creditor, that per mo is all that the Trustee will distribute to the secured creditor or the attorney fee and nothing more even if that means that distributions to unsecured creditors will start before the allowed secured claims are paid. In Cincinnati that is not the case. The Cincinnati Model Plan now in use provides that,

> "Debtor's attorney will be paid a lump sum payment of all funds held by the Trustee at confirmation minus any adequate protection payments, mortgage conduit payments, lease payments or Trustee fees then $ ________ (suggested amount is $100 to $200) every month until the attorney fee is paid. After payment in full of attorney fees due to Debtor's attorney, any resulting additional funds shall be distributed pro rata, or otherwise at the Trustee's discretion, to secured and priority creditors." Cincinnati's Mandatory Form Plan 12/2014.

In Cincinnati therefore there is a built in encouragement for Debtor's counsel not to propose adequate protection payments to motor vehicle secured creditors because the absence of such payments will result in a larger lump sum distribution to the debtor's attorney's fees. While that exists the Cincinnati perspective of the "per mo" is a minimum amount which will increase as more funds become available after satisfaction of the debtor's attorney's fees.

In the new proposed District Wide Plan for the S.D. of Ohio (Cincinnati, Dayton and Columbus) instead of a specific monthly payment the heading has been changed to "Minimum Monthly Payment Including Interest". It is not clear yet if the District Wide Plan when adopted will result in more uniform Ch. 13 Trustee distribution practices.

IV. "EQUAL MONTHLY AMOUNTS" REQUIREMENT

One of the most difficult statutory requirements of confirmation is 11 U.S.C. sec. 1325(a)(5)(B)(iii). The statute provides:

> "(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;" [emphasis supplied]

BAPCPA was very heavily influenced by the motor vehicle lending industry. As an industry automobile lenders borrow the money they loan to customers to purchase their motor vehicles. Prior to BAPCPA Trustee disbursements to motor vehicle secured creditors were very erratic and generally done on a pro-rata basis. The automobile lending industry sought to make the income stream from Ch. 13 cases more dependable and reliable so they could collateralize the money they borrowed with a predictable stream of payments all with an eye to reflecting less risk and better borrowing rates. Another area that troubled the automobile industry pre-

BAPCPA were plans that proposed back-loaded balloon payments. Thus the lobbyists obtained this statutory directive that payments on allowed secured claims be in “equal monthly amounts”.

Accomplishing that is a very difficult task because there are many factors that will cause periodic payments on allowed secured claims to be unequal. So-called “step” plans where the plan payment starts at a lower amount for a certain period of time and then steps up to a higher amount will usually result in payments to secured creditors that are not equal in amount. Debtor’s attorney’s fees will usually be set up with a per mo that will satisfy the fee in about a year, but after that has been satisfied there will necessarily be more dollars available for payment to creditors.

In re Desardi, 340 B.R. 790 (Bankr.S.D.Tex.2006) is oft cited in its detailed review of the subject. It attempted to work around the “equal monthly amounts” requirement by extending the minimum pre-confirmation adequate protection payments post-confirmation deferring the equal monthly amounts. It held that once the periodic post-petition payments begin they had to be equal, but until they begin, attorney’s fees could be paid concurrently with a minimum adequate protection payment on the allowed secured claim. Similarly, *In re: Hill*, 2007 WL 499622 (Bankr.M.D.N.C.2007) and *In re Blevins*, 2006 WL 2724153 (Bankr.E.D.Cal.2006). Other cases tried to reconcile accommodating debtor’s attorney’s fees with the equal monthly amounts requirements by approaching it as a timing event, i.e. when the equal monthly payments must begin. *In re Chavez*, 2008 WL 624566 (Bankr.S.D.Tex.2008)

Desardi and the others was criticized in *In re Denton*, 370 B.R. 441 (Bankr.S.D.Georgia.2007) determining that the periodic payments that had to be in equal monthly amounts began with the first disbursement post-confirmation. What has emerged are two lines of cases, a group that try to reconcile what is the almost irreconcilable tension between attorneys desirous of being paid fees sooner than during the entire applicable commitment period and others that that take a more strict construction of the statutory requirement for equal monthly amounts.

> *In re Sanchez*, 384 B.R. 574 (Bankr.D.Oregon.2008) ("Proposed Chapter 13 plan under which "910 creditor" with purchase-money security interest in debtors' motor vehicle would receive postconfirmation adequate protection payments, in amount of $50 per month, until fees of debtors' attorney were paid in full, whereupon payments to "910 creditor" would increase and creditor would receive $250 of the $288 that debtors were paying into plan until creditor's claim was paid, did not comply with Chapter 13's "equal monthly payment" requirement and could not be confirmed")("In Chapter 13 case, administrative expense claimants may insist only on concurrent payments with, rather than full payment before, non-administrative claims")
>
> *In re Williams*, 385 B.R. 468 (Bankr.S.D.Georgia.2008) (Plan "must provide periodic payments on allowed secured claims in equal monthly amounts, refers without distinction to all regularly-recurring postconfirmation payments on allowed secured claims, and does not permit Chapter 13 debtors, in order to create source of funding for their counsel fees, to provide two sets of postconfirmation payments to secured creditors in different amounts.")
>
> *In re Willis*, 460 B.R. 784 (Bankr.D.Kansas.2011) ("Chapter 13 plans proposing that secured creditors be paid monthly in pro-rated amounts based upon creditors' ratable shares of each monthly disbursement, following deduction of trustee and attorney fees and other payments, did not satisfy requirement under plan confirmation statute that periodic plan payments on qualifying secured claims be made in equal monthly amounts, and thus could not be confirmed over affected creditors' objections; under proposed plans, creditors' payments would change as amounts deducted prior to proration changed.") ("… do not propose an equal monthly amount be paid to the car creditors because both plans provide that debtors' attorney's fees be paid a fixed amount over a number of months that is less than the plan term. When those fees are paid, the payments to secured creditors will necessarily increase")
>
> *In re Kirk,* 465 B.R. 300, 307 (Bankr.N.D.Ala.2012) (if a plan proposes to pay debtor's attorney fees pursuant to § 1326(b)(1), "those payments may be paid contemporaneously with payments to secured creditors, but the plan should be structured so that payments to the attorney neither reduce nor delay the required equal monthly payments to secured claimholders.") *Id* at 308
>
> *In re Romero*, 539 B.R. 557 (Bankr.E.D.Wisconsin.2015) (Secured creditor objected to confirmation of modified Chapter 13 plan which proposed to pay post-confirmation adequate protection payments of $75 per month to it until debtors' attorney fees were paid in full and then to begin monthly payments of $122 until secured creditor's claim was

paid in full. Held: that the proposed plan did not comply with the Bankruptcy Code's equal monthly payments requirement.)

In re Bollinger, 2011 WL 3882275 (Bankr.D.Oregon.2011) (requirement that periodic payments to secured creditor in equal monthly amounts prohibited balloon payment)

In practice the car creditor's approach has been to demand the minimum to which the code entitles it, i.e. determine what monthly payment when amortized at the *Till* rate will pay the claim in full over the applicable commitment period. As previously mentioned different Trustees have different distribution practices. In Dayton, Ohio a specific per mo sets exactly what the Trustee will disburse monthly on an allowed secured claim even if it means that unsecured creditors will receive distributions simultaneously. In Cincinnati, Ohio however the Trustee sets up a per mo that will increase after attorneys fees have been paid in full believing it is desirable from the debtor's perspective to satisfy the interest bearing secured claims before any distribution to unsecured creditors.

As previously mentioned, the new proposed District Wide Plan for the S.D. of Ohio (Cincinnati, Dayton and Columbus) instead of a specific monthly payment the heading has been changed to "Minimum Monthly Payment Including Interest". It is not clear yet if the District Wide Plan, when adopted, will result in more uniform Ch. 13 Trustee distribution practices.

V. TRUSTEE DISBURSEMENT PRIORITIZATION OF CONDUIT MORTGAGE PAYMENTS TO THE DETRIMENT OF AUTO LENDERS

Confirmation of a Ch. 13 plan that provides for a conduit mortgage payment and an allowed claim secured by a motor vehicle contemplates that at the onset of the case, the debtor's plan payment will be sufficient to accommodate both the conduit mortgage payment and the monthly payment on the secured claim of the automobile lender. What happens when, by virtue of a missed plan payment, there is insufficient money to pay both the conduit mortgagee and the car creditor their respective monthly payments under the confirmed plan. There is almost no case law on this subject but approximately half of the Ch. 13 Trustees in the nation will distribute all available funds to the conduit mortgagee until it is brought current with nothing to the secured motor vehicle lender.

A car creditor will never get relief from stay if the debtor misses just one plan payment but if the conduit mortgage payment is large in relation to the monthly plan payment (e.g. $1,500 plan payment with a conduit mortgage payment of $1,200), a single payment default will cause a several month disruption of monthly payments to the car creditor if all available funds are distributed to the conduit mortgagee until it is brought current. The problem also surfaces when the debtor's original plan called for a debtor disbursement to the mortgagee outside the plan but then, following a default and relief from stay motion by the mortgagee, a plan modification is filed setting up a conduit mortgage payment.

In *In re Coffman*, 393 B.R. 829 (Bankr.S.D.Ohio.2008) Judge Preston was called upon to determine the relative disbursement priority between a car lessor and a conduit mortgagee. GMAC had taken the position that if there was insufficient money to pay both the car lease per mo and the conduit mortgage payment, GMAC should be entitled to a pro rata share of the available funds. Judge Preston held that the mortgagee disbursements were entitled to priority but held so in the context of a motor vehicle lease being an unsecured claim. The court held there was no unfair discrimination because the mortgages were secured and the lease was unsecured. Would this have been different if the GMAC claim was a claim by a motor vehicle as opposed to a lease?

The Ch. 13 Trustees who prioritize the conduit mortgage to the detriment of the car creditor rely on the anti-modification provisions of 1322(b)(2). The car creditor's perspective is that while 1322(b)(2) says which secured claims can be modified and which can't, once the plan is confirmed and the conduit mortgagee and the car lender both have the right to receive a specific monthly payment, their rights are equal. There would clearly be fewer relief from stay motions filed by car creditors if there were no prioritization of the conduit mortgage payment and the car creditors received something every month instead of nothing.

CONSUMER SESSION: CREDITORS' RIGHTS AND FIGHTS – A WALK IN THE SHOES OF CREDITORS' COUNSEL

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A. Walk through the 410/410A Proof of Claim Form.

1. **Skate over Parts 1 through 3.**

    a. Part 1 – Identify the Claimant – self-explanatory.

    b. Part 2 – Identify the Claim itself – no real deviation from prior B10 Proof of Claim Form.

    c. Part 3 – Signature of filer/Declaration

        i. Now includes a check box for "creditor's attorney".

        ii. Declaration alleviates pressure for creditor's attorney as long as creditor confirms the information provided to creditor's attorney is accurate and creditor's attorney has made good faith effort to verify its accuracy.

2. **Form 410A – Treading Water.**

    a. Form 410A must be completed by a creditor whose security interest is the debtor's principal residence. Although at first glance, the Form appears innocuous, it can be very difficult to understand. It was supposed to make the claim information more transparent.

    b. Includes Parts 1 through 4:

        i. Part 1 -- Mortgage and Case information

        ii. Part 2 -- Total Debt Calculation – basically a payoff of the loan as of the date the bankruptcy case is filed. But --

(a) Escrow deficiency for funds advanced -- This is the amount of any prepetition payments for taxes and insurance creditor made out of its own funds for which it has not been reimbursed.

(b) Less total funds on hand – This is NOT ONLY the funds being held in suspense or unapplied, if any, but also any positive escrow balance, if any.

iii. Part 3 -- Arrearage as of the date the case is filed – prior to Form 410A, this amount was an easy calculation of past due payments, escrow shortage and any costs assessable to the loan.

(a) Part 3 now requires the inclusion of "projected escrow shortage", which has caused great angst among many creditors and their attorneys.

(b) The National Association of Chapter 13 Trustees, Mortgage Committee is drafting guidelines for mortgage creditors to follow relating to the Form 410A (due to the outcry over the difficulty of this Form). A copy of the **DRAFT** form (as of July 1, 2016) United States Bankruptcy Official Form 410A – Guidelines for Mortgage Creditors, is attached.

(c) Escrow deficiency for funds advanced – This is the same number as set out in Part 2 -- any prepetition payments for taxes and insurance creditor made out of its own funds for which it has not been reimbursed.

(d) Projected escrow shortage. This is the difference between what should exist in the escrow account at filing, less the amount actually held. The amount of the projected escrow shortage should be consistent with the escrow account statement attached to the proof of claim per Federal Rule of Bankruptcy Procedure 3001(c) (2) (c).

(e) Less funds on hand is ONLY the funds being held in suspense or unapplied funds, if any.

iv. Part 4 – Monthly mortgage payment. The difficult portion of this Part is the monthly escrow. It should take into account the receipt of any amounts claimed in Part 3 as escrow deficiency and projected escrow shortage. Therefore, a creditor should assume that the escrow deficiency and shortage will be paid through the

Chapter 13 plan and provide for a credit of a like amount when calculating the escrow portion of the ongoing mortgage payment.

v. Part 5 – Loan payment history from the first date of default. The difficulty here is "from the first date of default".

(a) The Committee Notes for Form 410A define "First Date of Default" as: The first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, escrow payments or other charges immediately payable.

(b) If a debtor was late making a payment in June 2011, paid the payment but never paid the late charge that was assessed to the loan in June 2011, then the first date of default is June 2011. Think of the extent of the payment history if the creditor wants to collect that late charge!

(c) Form 410A provides two pages for the payment history: Page 1 of __ (the Mortgage Proof of Claim Attachment) and Page 2 of __ (the Mortgage Proof of Claim Attachment: Additional Page), but the instructions for Form 410A kindly (or cruelly) add: "If more space is needed, fill out ant attach as many copies of *Mortgage Proof of Claim Attachment: Additional Page* as necessary"!

3. Slipping and sliding through Common Complaints about Form 410 and Form 410A.

a. How to calculate "Projected Escrow Shortage" (Part 3 of Form 410A) – some creditors' "systems" cannot "understand" how to calculate this figure because it cannot create the illusion that the projected escrow shortage has been paid (will be paid as part of the arrearage but must be taking into consideration as having been "paid" when calculating the ongoing post-petition monthly mortgage payment). Further, when the next payment change occurs that projected escrow shortage included in the arrearage cannot be brought back into the escrow account for consideration when the escrow analysis is run.

c. Does the new method of calculating the arrearage help or hurt the Debtor? The key to a Chapter 13 bankruptcy is to give the Debtor a "fresh start". Inclusion of a projected escrow shortage often creates an arrearage for an otherwise current loan. Will this then force the mortgage payment to be made conduit through the Trustee?

d. Form 410A is provided for use as a landscape document – that translates to sideways when printed after being downloaded from the National Forms (http://www.uscourts.gov/forms/bankruptcy-forms). For those creditors who use that form and type in the required information, the filed Proof of Claim's Form 410A will appear sideways, making it difficult to review without printing or rotating the view.

e. Because the spreadsheet provides little room for large numbers, any creditor who scans the completed Form 410A runs the risk of an illegible payment history.

B. March through Proof of Claim Objections.

1. **General Rule.**

a. Federal Rule of Bankruptcy Procedure 3001 as amended effective December 1, 2011 requires creditors to meet a high standard for claims preparation, the failure to comply with which could bar the claim in total. (See Section C below.)

b. 11 U.S.C. § 502(a) says a claim is deemed allowed unless a party in interest objects.

c. A claim is *prima facie* evidence of a valid claim if it is executed and filed in accordance with the bankruptcy rules. *Fullmer v. United States (In re Fullmer)*, 962 F.2d 1463, 1466 (10th Cir. 1992). Federal Rule of Bankruptcy Procedure 3001(f).

d. Debtor bears the burden of rebutting the *prima facie* evidence. *In re Leatherland*, 302 B.R. 240, 258-59 (Bankr. N.D. Ohio Dec. 28 2007).

e. Federal Rule of Bankruptcy Procedure 3007 governs claim objections and provides the objection shall be in writing, filed and provide notice.

f. 11 U.S.C. § 502(b) says even if a claim is objected to, the court shall still allow it except to the extent the claim implicates any of the nine exceptions in that section. *Travelers Cas. & Sur. Co. of Am. v. Pac Gas & Elec. Co.*, 549 U.S. 443, 449 (2007).

2. **Common Claim Objections**.

   a. No itemization of amount owed and no documentation to support the claim shifts the burden of proof to the creditor upon objection by the Debtor. *In re Quevedo*, 2008 WL 1767730 (Bankr. N.D. Tex.).

   b. Amending a deficient proof of claim to attach required documentation/itemization constituted *prima facie* evidence of the debt owed and the claim would be allowed as amended. *In re Cox*, 2007 WL 4219407 (Bankr. W.D. Tex.).

   c. Stale claims – filing of a claim for a time-barred debt is a violation of the Fair Debt Collection Practices Act. *Crawford v. LVNV Funding, LLC*, 758 F.2d 1254 (11th Cir. 2014).

   d. Expenses included in claim not authorized by contract and/or applicable non-bankruptcy law. 11 U.S.C. §1322(e).

C. Schlepp through Creditor Compliance with Rules 3001(c) and 3002.1.

1. **Rule 3001(c)**.

   a. Federal Rule of Bankruptcy Procedure 3001(c) as amended effective December 1, 2011 requires creditors to meet a high standard for claims preparation, the failure to comply with which could bar the claim in total.

   b. Requires a copy of the "writing" to be attached to the claim. Writing is contract, note, written agreement and the like. Rule 3001(c) (1).

   c. Requires a breakdown of any expenses included in the claim if in addition to its principal a claim includes interest, fees, costs and expenses. Rule 3001(c) (2) (A).

   d. Requires documentation to support claim if security interest is the principal residence of the debtor. Rule 3001(c) (2) (B).

   f. Requires a copy of an escrow account statement if the loan is escrowed for taxes and/or insurance prepared as of the date the petition is filed. Rule 3001(c) (2) (C).

   g. "Penalty" for a creditor failing to comply with Rule 3001 is either precluded from presenting the omitted information as evidence to contest the objection or award of expenses and attorney's fees and nothing more. *In re Reynolds*, 470 B.R. 138 (Bankr. D. Colorado, April 9, 2012); see, also, *In re Cluff*, 313 B.R. 323 (Bankr. D. Utah August 23, 2004) (Rule 3001(c) does not create an independent ground to disallow claims.)

h. Rule 3001(c) (3) (A) requires when a claim is based on an open-end or revolving line of credit (except one that is secured by the principal residence of the debtor) requires only a statement with name of entity to whom the debt is owed, date of last transaction, date of last payment on the account and date the account was charged to profit and loss. Only upon written request is the writing evidencing such an agreement required to be produced (see Rule 3001(c) ((3) (B)).

2. **Rule 3002.1**.

a. Federal Rule of Bankruptcy Procedure 3002.1 is applicable in Chapter 13 cases as to claims secured by the debtor's principal residence and provided for under §1322(b)(5) of the Code. Rule 3002.1(a).

b. Rule 3002.1(b) requires such a creditor to file a notice of any mortgage payment change (escrow, interest rate adjustment, etc.) with the court no later than 21 days before the payment in the new amount is due.

i. Court could not excuse a creditor from providing such a notice even if it is virtually impossible to comply with the Rule (HELOC loans) because any creditor whose claim is subject to the Rule "**shall** file and serve" the notice (emphasis added). *In re Adkins*, 477 B. R. 71 (Bankr. N.D. Ohio 2012); see, also, *In re Pillow*, 2013 WL 10252924 (Bankr. W.D. Michigan), which finds, although the court could not excuse compliance with the Rule, Rule 9006 gave the court authority to adjust the time-period of 21 days on a case by case basis.

ii. If there is no arrearage to cure under §1322(b) (5), the claim is not "provided for" under §1322(b) (5) and therefore Rule 3002.1 does not apply and a lender is not required to file a response to the trustee's notice. *In re Weigel*, 485 B.R. 327 (Bankr. E.D. Va. 2012).

iii. The court in *In re Tollios* disagreed with the *Weige*l court and found regardless of whether there is an arrears to cure, the notice must be filed. *In re Tollios*, 491 B.R. 886 (Bankr. N.D. Ill 2013).

c. Rule 3002.1(c), (d) and (e) set out the requirement for a creditor to file a notice of fees, expenses and charges incurred in connection with the claim after the bankruptcy case was filed that the holder asserts are recoverable against the debtor within 180 days after the date on which the fees, expenses or charges were incurred. The debtor or trustee have one year from the filing to challenge the fee, expense or charge.

d. Rule 3002.1(f) requires a trustee to file a notice stating the debtor has paid the full amount required to cure any default on the claim within 30 days after the debtor completes all payments under the plan

e. Rule 3002.1(g) requires the holder to file a statement as to whether it agrees with the trustee's statement and whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code within 21 days after the trustee's notice is filed. The statement is to be filed as a supplement to the proof of claim.

f. Consequences for failure to file response:

   i. Court may bar the holder of the claim from presenting any evidence showing the default was not in fact cured; and,

   iv. Award appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

   iii. Response filed to trustee's notice does not enjoy same prima facie presumption as a proof of claim. *In re Kreidler*, 494 B.R. 201 (Bankr. M.D. Pa. 2013).

   iv. If there is no arrearage to cure under §1322(b) (5), the claim is not "provided for" under §1322(b) (5) and therefore Rule 3002.1 does not apply and a lender is not required to file a response to the trustee's notice. *In re Weigel*, 485 B.R. 327 (Bankr. E.D. Va. 2012).

g. Rule 3002.1(h) provides within 21 days after service of the response required under subdivision (g) of the rule, the debtor or trustee may file a motion to determine if the debtor has cured the default and paid the required post-petition amounts. The failure of the debtor or trustee to file such a motion does not constitute a waiver of the right to later challenge the post-petition amounts. *In re Bodrick*, 498 B.R. 793 (Bankr. N.D. Ohio, October 8, 2013).

United States Bankruptcy Official Forms 410 & 410A – Guidelines for Mortgage Creditors

Published by: National Association of Chapter 13 Trustees, Mortgage Committee[1]

Purpose: This document was developed by the Mortgage Committee of the National Association of Chapter 13 Trustees in an attempt to provide practical guidance around certain portions of the Official Bankruptcy Forms 410 & 410A. While the Committee acknowledges that these "Guidelines" are not necessarily requirements under applicable US Bankruptcy Law, it is the Committee's position that these Guidelines will provide greater clarity and consistency as to the manner in which the Mortgage Servicing Industry completes Official Bankruptcy Forms 410 & 410A.

Guidelines:

1. If the Escrow Account balance is negative at the time of the bankruptcy filing:
   a. the fields in Part II and Part III entitled "Escrow Deficiency" should be populated with the amount of such deficiency; and
   b. the final balance in Column O (Escrow Balance), in Part V, should match the figures in the fields in Part II and Part III entitled "Escrow Deficiency."

2. If the Escrow Account is positive at the time of the bankruptcy filing:
   a. the field in Part II entitled "Less Total Funds on Hand" should be populated with the amount of this positive balance, plus any amounts in suspense; and
   b. this positive balance should not be included in the "Less Funds on Hand" field in Part III.
   c. "$0.00" or "NA" should be inserted in the fields entitled "Escrow Deficiency" within Parts II and III.

3. If the Escrow Account is $0.00 at the time of bankruptcy filing:
   a. "$0.00" or "NA" should be inserted in the fields entitled "Escrow Deficiency" within Parts II and III.
   b. the final balance in Column O (Escrow Balance), in Part V, should reflect "$0.00"

4. The field in Part III entitled "Less Funds on Hand" should be populated with the amount of funds in suspense at the time of the bankruptcy filing. This field should not include a positive balance in the Escrow Account.

5. While not required, there is nothing within the Official Form which would prohibit the history set forth in Part V to start on the month prior to the current default which is the basis of the arrearage claim.

6. Loans that are in the pendency of a Trial Modification Plan are not considered current for purposes of determining "the first date of default" within Part V.

7. Number 2 of Part 1 of the 410 Form should only be checked "Yes" if the claim was acquired by the entity filing the POC after the filing of the bankruptcy case.

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[1] The Committee agrees that these Guidelines will not be distributed in their final form until the Official Bankruptcy Form 410A is posted on the Administrative Office of the US Court's website.

8. A loan that has been modified in a manner which capitalizes any and all the delinquency as of the effective date of the loan modification, including, but not limited to, principal, interest, fees, and escrow, is considered current as of the effective date of the loan modification for purposes of determining "the first date of default" within Part V.

9. Where an amended claim ("APOC") is required following a post confirmation loan modification and the district requires strict use of the 410A with the 410, only sections 1-4 of the 410A should be completed as follows:
   a. Part 1 – Reflect any updates to the note interest type as a result of the modification
   b. Part 2- Principal balance should reflect the PB post loan modification. Only the Principal Balance and Total Debt fields should be completed.
   c. Part 3 – Only complete the "Total Prepetition Arrearage" line and the amount disclosed should match the amount received from the chapter 13 trustee on the arrearage claim prior to the modification.
   d. Part 4 – Should be completed to reflect the amount and breakdown of the first post loan modification payment. Indicate the 1st date that payment amount is due.
   e. The Loan Modification Agreement should be attached to the amended claim. Loan documents may be attached if required by local rule or practice.
   f. A disclaimer such as the following may be added to the APOC:

   "NOTICE: This Proof of Claim is being amended in connection with a loan modification, which has impacted the arrearage included in the initial Proof of Claim. Please disregard the figures set forth in the original Proof of Claim."

   g. Part 5 should not be completed.

10. Disclosure of Optional Products on 410A - Optional products may include accident and health insurance and/or credit life insurance purchased by the borrower at any time during the life of the mortgage account. The premiums due on those products may be reflected in or added to the monthly mortgage payment amount. Those amounts may not necessarily be classified as a fee on the claimant\servicers system of record, as they are passed through to a third party. Amounts for these premiums may be reflected on additional lines added to 3 and 4 of the 410A, if the claimant\servicer so chooses. Where the claimant\servicer does not classify the premium amounts as a fee within its system of record and such amounts need to be reflected in Part 5 of the 410A, a footnote or disclosure reflecting that treatment is appropriate.

11. Daily Simple Interest - On the 410A Form, Column N "Accrued Interest Balance" only needs to be completed if the loan is a Daily Simple Interest Loan. If the loan is not a Daily Simple Interest Loan, then the Column should be left blank.

12. Reverse Mortgages

- Part 1 of the 410A
  - Identify that the mortgage is a reverse mortgage on the "Fixed accrual / daily simple interest / other" line as well as on the 410 form in box 9.
- Part 2 (Total Debt) of the 410A form
  - Servicers / mortgagees may add a line(s) to allow the incorporation of line items that impact the amount of the total debt

- Part 3 (Arrearage) of the 410A form should only reflect a balance where there is an advance balance that the servicer / mortgagee requires cured.
  - Only those fees and costs associated with the default, and not part of regular monthly servicing, should be listed.
  - Servicers / mortgagees may add a line(s) to allow the incorporation of line items that impact the amount of the pre-petition arrearage, i.e., balance of "Non-escrow advance balance" and / or a line for "Line of Credit"
- Part 4 (Monthly Mortgage Payment) of the 410A form should not list a monthly payment. Servicers / mortgagees should fill the lines with "N/A" or "not applicable"
- Part 5 (Loan Payment History) of the 410A form
  - Column C labeled "Funds Received" should only be used to reflect money received from the borrower.
  - Column J labeled "Amount to Escrow" and Column O labeled "Escrow Balance" are inaccurate as the loan is and remains a non-escrowed account. Servicers / mortgagees may change the names of those columns. E.g. Column J: "Amount to non-escrow balance" and Column O: "Non-escrow advance balance."
  - Column D labeled "Amount Incurred" combined with Column E labeled "Description" should be used to reflect only that tax, insurance, fee, or charges paid out on the borrowers behalf and has been assessed to the account. A second disclosure under "Column J" on the same line for the same amount is not required.
  - Servicers / mortgagees should list out separately individual advances for pre-petition default related taxes, insurance, fee, or charges even if they would show as part of the balance due.
  - Column J as re-labeled as "Amount to non-escrow balance" should only reflect those monies applied to the non-escrow balance from the borrower.
- Include an addendum (or footnote) information, as needed, about: Terms specific to a reverse mortgage, including expectations regarding payment in full, ability to draw on lines of credit, calculation of principal balance, if the reason for the default is due to non-monetary reasons such as failure to repair, and non-escrow status requiring the Debtor to make all future tax and insurance payments when due.
- Servicer / Mortgagee may attach other explanatory ledgers or information to support the principal balance.

Mortgage Proof of Claim Attachment

(12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information

Case number: ____________________

Debtor 1: ____________________

Debtor 2: ____________________

Last 4 digits to identify: ___ ___ ___ ___

Creditor: ____________________

Servicer: ____________________

Fixed accrual/daily simple interest/other: ____________________

Part 2: Total Debt Calculation

Principal balance: __________

Interest due: __________

Fees, costs due: __________

Escrow deficiency for funds advanced: __________

Less total funds on hand: – __________

Total debt: __________

Part 3: Arrearage as of Date of the Petition

Principal & interest due: ____________

Prepetition fees due: ____________

Escrow deficiency for funds advanced: ____________

Projected escrow shortage: ____________

Less funds on hand: – ____________

Total prepetition arrearage: ____________

Part 4: Monthly Mortgage Payment

Principal & interest: _____________

Monthly escrow: _____________

Private mortgage insurance: _____________

Total monthly payment: _____________

Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance

Mortgage Proof of Claim Attachment: Additional Page

(12/15)

Case number: ______________

Debtor 1: ______________

Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A.	**B.**	**C.**	**D.**	**E.**	**F.**	**G.**	**H.**	**I.**	**J.**	**K.**	**L.**	**M.**	**N.**	**O.**	**P.**	**Q.**
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance