



AMERICAN
BANKRUPTCY
INSTITUTE

Consumer Practice Extravaganza

Understanding Proofs of Claim/Claims Allowance: Constructing Proofs of Claim in Merger-Doctrine States

Hon. Christine M. Gravelle

U.S. Bankruptcy Court (D. N.J.) | Trenton

Matthew J. Murtland

LOGS Legal Network | Norwood, Ohio

Nicole M. Noel

Kass Shuler, P.A. | Tampa, Fla.



Understanding Proofs of Claim/ Claims Allowance



HON. CHRISTINE M. GRAVELLE U.S. BANKRUPTCY COURT (D. N.J.) | TRENTON
MATTHEW J. MURLAND LOGS LEGAL NETWORK | NORWOOD, OHIO
NICOLE M. NOEL KASS SHULER, P.A. | TAMPA, FLA.



What is a Proof of Claim?

- A Proof of Claim (POC) is a written statement filed with the bankruptcy court to register the creditor's claim. (Fed. R. Bankr. P 3001)
- Filed by creditors in Chapter 7, 11, 12 or 13 cases
- Must be executed by the creditor or creditor's authorized agent
- If the creditor fails to timely file a Proof of Claim, a Debtor or Trustee may file a POC within 30 days after the expiration of the bar date (Fed. R. Bankr. P 3004)
- If the creditor fails to timely file a Proof of Claim, any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may file a POC within 30 days after the expiration of the bar date (Fed. R. Bankr. P 3005)



What do you need for a proper POC?

- Rule 3001 requires that the POC "conform substantially to the appropriate Official Form"
 - Official Form 410 and the 410 Instructions
- If the claim is based on a writing, a copy of the writing shall be filed with the proof of claim
 - If the writing has been lost or destroyed, a statement of the circumstance of the loss or destruction shall be filed with the claim.
 - Rule 3001(c)(1)
- Creditor must provide evidence of perfection of security interest if one is claimed- Rule 3001(d)



What do you need for a proper POC?

- Arrears: If a security interest is claimed in the property, a statement of the amount necessary to cure any defaults as of the date of petition must be filed with the POC.
- If a security interest is claimed in property that is the debtor's principal residence the Official Mortgage Proof of Claim Attachment must be filed with the Proof of Claim
 - Official Form 410A
 - Additionally, if an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date of filing and in a form consistent with non- BK law, shall be filed with the attachment to the POC (410A)
 - Rule 3001(c)(2)(C)



What do you need for a proper POC?

- Failure to include any of the required information listed above may preclude the creditor from presenting the omitted information at a future hearing or subject the creditor to sanctions (Rule 3001(c)(2)(D))
 - *In re Simmons*, 643 B.R. 565 (Bankr. D.S.C. 2022)
- A POC executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim
 - Fed. R. Bankr. Proc. 3001(f); *Garner v. Shier (In re Garner)*, 246 B.R. 617, 620-21 (B.A.P. 9th Cir. 2000).



Claims Allowance and Objections

- The burden of persuasion is always on the claimant to establish his entitlement to the claim. *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991). An objection to a proof of claim is a contested matter and a core proceeding. 28 U.S.C. § 157(b)(2)(B); Fed. R. Bankr. Proc. 3007.
- To defeat the prima facie validity, one must provide sufficient evidence and “show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991).
- State Law determines property rights. If your claim is secured under state law then it is secured in bankruptcy court. *Butner v. United States*, 440 U.S. 48, 55 (1979).



Proof of Claim based on Final Judgment

- This is relevant in judicial states around the country
- In various jurisdictions, borrowers have the right to pay off a foreclosure judgment instead of the total debt in full *via* the Chapter 11/13 Plan.
- In these cases, the underlying foreclosure judgment will dictate what the lender is entitled to collect through the POC
- Typically, lender/servicer is restricted to Judgment amount (includes principal, interest, legal, etc.) plus interest through date of filing, and interest over 5 years of the Plan.
- Electing to pay the judgment in full is rare since the debtor only has the 5-year plan term to do so



Proof of Claim based on Final Judgment

- Raises Questions and ongoing case management issues:
 - What about taxes and insurance? Should the loan remain escrowed?
 - What about amounts advanced and interest that has accrued post-Judgment?
 - What if Debtor intends to cure and maintain – does the Debtor get to pick their own adventure?



In re Bernadin, 610 B.R. 787 (Bankr. E.D. Pa. 2019)

- The Debtor filed an adversary against Lender and Counsel alleging that the POC violated the FDCPA. They alleged that the claim “included a false representation of the character, amount, or legal status of the subject debt”
- The debtor took the position that the POC filed was incorrect because it listed Total Debt figures in Part 2 of the 410A after a Judgment was entered.
- The Court determined that it was reasonable to “infer that [Counsel] obtained the mortgage loan history from [Lender] and therefore the charges in the POC giving rise to the FDCPA claim were included in the POC at [Lender]’s request or at minimum based on information provided by [Lender]”
- “The POC drafted failed to recognize the consequence of the merger doctrine on the prepetition foreclosure judgment ... obtained against the debtor and, as a result, demanded payment of charges that were legally uncollectible”



In re Bernadin, 610 B.R. 787 (Bankr. E.D. Pa. 2019)

- Court determine that Lender’s reliance on Midland Funding decision was incorrect. “[the decision] did not hold that there is an irreconcilable conflict between the Bankruptcy Code and the FDCPA or that the FDCPA categorically does not apply to the filing of a proof of claim in a chapter 13 bankruptcy case, as argued.”
- The Court determined that once Judgment is entered, the only amount that the holder can receive is the Judgment plus interest plus any amounts allowed by the mortgage and State law after the entry of Judgement. This doesn’t change just because they filed Bankruptcy.



In re Bernadin, 610 B.R. 787 (Bankr. E.D. Pa. 2019)

- The Court also determined that the drafters of 410A Form did not tailor the terminology of the Form to account for cases in which the mortgage and note merged into the judgment.
- “No Official Bankruptcy Form could require a creditor to itemize and request payment of charges that the creditor has no right to collect – or permit a creditor to submit misinformation to the court”
- 410A has two sections Part 2 (total amount owed to the holder) and Part 3 (pre-petition arrears needed to de- accelerate the loan). Part 2 needs to reflect the Judgment and Part 3 still should list the arrears needed to bring the loan current. He suggested in his opinion that failure to draft the POC in this way would be a violation of FDCPA.



Official Form 410 Instructions Conflict with the Code

- The official instructions to Form 410A provides:
 - “If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the remaining amount of the judgment. Any postjudgment interest due and owing, fees and costs, and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.”
- However, where the Official Forms and the Code conflict – the Code wins



Interest Rate Issues in Chapter 13 Cases

- How do you Determine the Appropriate Interest Rate to Be Used for Pre-Petition and Post-Petition Accrued Interest for an Over-Secured Creditor in a Chapter 13?
- *See In re Narcise*, 2022 WL 3954514 (Bankr. M.D. Fla. 2022, Colton, J.) wherein Judge Colton gives a roadmap to assist parties and the Chapter 13 trustee in calculating secured claims for purposes of treatment under a Chapter 13 plan.
- accruing interest due the oversecured creditor is determined pursuant to the contract or state statute under which the claim arises during the interim period between filing and confirmation; and
- the issue of post-confirmation interest is governed by Section 1325 and the analysis turns to the appropriate *Till* rate (prime rate plus 1 – 3%)



Interest Rate Issues in Chapter 13 Cases

- Interest for General Unsecured Creditors
 - Two main situations:
 1. Debtor is not paying out of disposable income as required under § 1325(b)(1) and trustee or general unsecured creditor objects (i.e. debtor's disposable income is \$2,000 per month but a 100% distribution, without interest, to unsecured creditors would only require \$1,000 per month), or
 2. The liquidation value of the Debtor's assets exceeds the amount of the allowed general unsecured claims.



Interest Rate Issues in Chapter 13 Cases

- Courts are split on whether interest is required. However, most appear to require interest. See *In re Cheatham*, 2017 Bankr. LEXIS 4072 (Bankr. M.D. Fla. 2017, Delano, J.).
- Calculating the interest rate:
 - *Till* Rate vs. Federal Judgment Rate
 - Most courts appear to be using the *Till* Rate, especially for non-solvent debtors. *In re Jozil*, 2010 Bankr. LEXIS 4978 (Bankr. M.D. Fla. 2017, Adams, J.)
- *In re Matthews* provides a solid analysis of the case law on whether interest is required and at what amount. 623 B.R. 818 (Bankr. S.D. Ga. 2020).
- What about the treasury rate?

Faculty

Hon. Christine M. Gravelle is a U.S. Bankruptcy Judge for the District of New Jersey in Trenton, named to the bench in 2013. Previously, she was a partner at the law firm of Markowitz Gravelle, LLP in Lawrenceville, N.J., where she focused on commercial litigation and bankruptcy, representing individual and commercial debtors, creditors, trustees and committees. Judge Gravelle served as president of the Mercer County Bar Association in 2011 after serving nine years as an officer and trustee for the Association. She was a member of the Lawyers Advisory Committee to the Board of Judges of the U.S. Bankruptcy Court for the District of New Jersey from 2008-13, having chaired the committee in her last year of service. She currently serves as the judicial liaison for the committee. She also served as a trustee of the Bankruptcy Section of the New Jersey State Bar Association, and she served on the Board of Trustees of Central Jersey Legal Services as a member and officer. She served on the board of trustees of Central Jersey Legal Services as a member and officer, and she is a member of the National Conference of Bankruptcy Judges. Ms. Gravelle received her undergraduate degree *magna cum laude* from the University of Massachusetts at Amherst and her J.D. *magna cum laude* from Suffolk University Law School in Boston, after which she clerked for Hon. Donald F. Shea on the Supreme Court of Rhode Island.

Matthew J. Murtland is a regional partner with LOGS Legal Network in Norwood, Ohio, where he serves Illinois, Indiana, Kansas, Kentucky, Missouri and Ohio. He joined the firm as an associate in 2012 and was named managing attorney in 2020. Mr. Murtland has over eight years of experience specializing in creditors' rights law in multiple states. He also is an attorney with Shapiro, Van Ess, Phillips & Barragate, LLP in Louisville, Ky. Mr. Murtland received his J.D. in 2011 from Northern Kentucky University Salmon P. Chase College of Law.

Nicole M. Noel is a shareholder at Kass Shuler, P.A. in Tampa, Fla., where she has been practicing in the fields of bankruptcy, creditors' rights and insolvency, real estate, consumer and business litigation since 2009. She heads the Bankruptcy practice group for the firm and handles cases throughout the state of Florida in all districts. Ms. Noel is a member of ABI, the Tampa Bay Bankruptcy Bar Association (TBBBA), The Florida Bar and the American Legal and Financial Network. She formerly chaired the Bankruptcy Practice Group for the American Legal and Financial Network (ALFN) and the Case Law Update Subcommittee for the Real Property Finance and Lending Committee of the Real Property Probate and Trust Law Section of the Florida Bar. Ms. Noel is the vice president for the TBBBA for the 2023-24 Bar year. She recently authored a chapter on bankruptcy in *Florida Foreclosure Law*, published by Fastcase. Ms. Noel is active in the community and is an adjunct professor at Stetson University College of Law, St. Petersburg College and Hillsborough Community College, teaching bankruptcy, real property finance, business law and civil litigation. She participated in the 2016 NextGeneration program, held during the National Conference of Bankruptcy Judges (NCBJ), and she was honored to become a Fellow for the Florida Bar Leadership Academy. In addition, she has been named one of ALFN's Junior Professionals and Executives Group (JPEG)'s standout young professionals to watch in 2016 and most recently received the 2023 Industry Achievement Award for the ALFN. Ms. Noel received her undergraduate degree from Florida State University and her M.B.A. and J.D. from Stetson University School of Business Administration and Stetson University College of Law, respectively.