AMERICAN BANKRUPTCY INSTITUTE

2023 Alexander L. Paskay Memorial Bankruptcy Seminar

Consumer Breakout

Understanding Proofs of Claim and Claims Allowances

Hon. Peter D. Russin, Moderator
U.S. Bankruptcy Court (S.D. Fla.) | Fort Lauderdale

Stephenie B. Anthony
Anthony & Partners, LLC | Tampa

Nicole M. Noel
Kass Shuler, PA. | Tampa

Jonathan A. Semach
Law Offices of Buddy D. Ford, P.A. | Tampa

CONCURRENT SESSION

2023

Understanding Proofs of Claim & Claims Allowance

Panelists

Hon. Peter D. Russin, Moderator
U.S. Bankruptcy Court (S.D. Fla.) | Fort Lauderdale

Stephenie B. Anthony
Anthony & Partners, LLC | Tampa

Nicole M. Noel
Kass Shuler, PA. | Tampa

Jonathan A. Semach
Law Offices of Buddy D. Ford, P.A. | Tampa

Creditor Concerns in Filing Claims

- A secured creditor wants to be able to collect post-petition interest and attorney's fees under Section 506 but must be oversecured. But that same creditor does not want to risk waiving an unsecured deficiency claim. What should the proof of claim provide to preserve both?
- What happens if a secured creditor does not include a claim for interest or attorneys' fees. Is it waived?
- What happens if during the Chapter 13, the Debtor changes their mind and surrenders the collateral or totals the car, can the secured creditor file an unsecured deficiency claim?
- Can the creditor amend the claim at any point and if not why not?

Amended/Late Filed Claims

- What should a secured creditor concerned about a deficiency claim in a 13 (or 11) include in the proof of claim?

- According to the Eleventh Circuit Court of Appeals, an amended claim should be "freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim." An untimely claim should not be allowed, however, if it represents only an "attempt to file a new claim under the guise of amendment." *In re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir.1985)(quoted in *In re Gilley*, 288 B.R. 901, 903 (Bankr.M.D.Fla.2002))

Considerations for Allowance

- Timely notice that it would seek a deficiency claim in the debtor's chapter 13 case in the event of a default
- Creditor's intent, expressed in the original claim, to hold the estate liable for the claim later set forth in the amendment
- Timeliness of the filing and whether it occurred pre or post confirmation
- Action or inaction taken in the Plan confirmation process
- Prejudice to other parties if the Claim were to be allowed

Courts that have allowed amendments

- *In re Winters*, 380 B.R. 855 (Bankr.M.D.Fla. 2007) (untimely amended deficiency claim allowed where the original timely filed claim provided notice to the Debtor that Creditor intended to pursue a deficiency claim if the vehicle was subsequently surrendered and sold)
- *In re Aguero*, 597 B.R. 190 (Bankr.S.D.Fla 2018)(a court's inquiry should be focused on fair and timely notice to other interested parties, like the debtor, the chapter 13 trustee, and other creditors whose plan treatment will be impacted by allowance of an amendment)
- *In re Shiver*, 484 B.R. 468 (Bankr.N.D.Fla 2013)(an express provision in a confirmed chapter 13 plan which extends the time period to file an unsecured deficiency claim will render the claim timely filed even outside the statutory bar deadline)

Courts that have disallowed amendments

- *In re Jackson*, 482 B.R. 659 (Bankr.S.D.Fla. 2012)(a creditor must file a timely unsecured deficiency claim in a chapter 13 case and Confirmation of a Plan which provides for surrender of the collateral with no allowance of an unsecured claim is *res judicata*).
- *In re Porco*, No. 9:10-BK-14251-FMD, 2013 WL 1283378 (Bankr.M.D. Fla. Mar. 28, 2013)(allowing the amended claim would be prejudicial to the trustee who commenced payments two years prior).
- *In re George*, 426 B.R. 895 (Bankr.M.D.Fla. 2010)(citing finality, amendment allowed less frequently after claims bar date and confirmation)

Practice Pointer for Secured Creditors:

Include Reservation of Rights Language in Your Attachment to Your Proofs of Claim.

Example Language: The Creditor reserves its rights to amend or supplement this Proof of Claim as circumstances require. Nothing in this Proof of Claim shall be taken to waive, release, or otherwise compromise any additional component of the Claim (or collateral securing any portion of the Claim) in the event that this becomes necessary to preserve or enforce any such claim or interest. Other than as expressly agreed in writing executed by the Creditor, the Creditor's actions in this bankruptcy case shall in no event be considered to modify its rights against any third party, including if applicable, any co-maker, endorser, guarantor, principal obligor, or other party liable or contingently liable for the Claim described in this Proof of Claim. Until such time as the collateral securing this Claim is valued pursuant to Bankruptcy Code § 506, or this case is closed, the Creditor reserves the right to alter or amend the allocation of this Claim between secured and unsecured status, including, but not limited to, the assertion of a deficiency claim upon disposition of the collateral

Practice Pointer for Secured Creditors:

Make Sure You Properly Itemize and Otherwise Comply with FRBP 3001(c) Or You Could Open Your Client Up to Potential Sanctions Under FRBP 3001(c)(2)(D).

See *Thomas v Midland Funding, LLC.*, 578 B.R. 355 (Bankr. W.D. Va. 2017) (in this adversary proceeding the Court gives a lengthy opinion on whether the breakdown of interest, fees and costs satisfies the itemization requirement in FRBP 3001(c)(2)(a) and what action the Court is permitted to take if said requirement is not met by the creditor).

Interest Rate Issues in Chapter 13 Cases

- How do you Determine the Appropriate Interest Rate(s) 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 nice 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.

Interest for General Unsecured Creditors

- Two main situations:
  - 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
  - The liquidation value of the Debtor's assets exceeds the amount of the allowed general unsecured claims.
- 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).

Estimation of Claims

What is estimation?

- *Allows a bankruptcy court to estimate the value of an unliquidated or contingent claim for various purposes*
- *Exception: 28 U.S.C. 157(b)(1)(B) prohibits bankruptcy courts from estimating personal injury torts or wrongful death claims for the purpose of distribution.*

When is it useful?

Types of Estimation

- *11 U.S.C. § 502(c)(1)*
- *Rule 3018(a) of the Federal Rules of Bankruptcy Procedure*

Estimation under 11 U.S.C. § 502(c)(1)

- Allows estimation for "any contingent or unliquidated claim, the fixing of or liquidation of which … would unduly delay the administration of the case."
- Judge Russin recently dealt with the issue of undue delay in a Chapter 13 case. *In re Aaron Abella*, Case No.: 20-20184-PDR
- Estimation becomes binding for all purposes of the case (voting, distribution, etc.)
- Method for Estimation
  - No set procedures. *See In re Trigeant Holdings, LTD*, 2015 Bankr. LEXIS 957 (Bankr. S.D. Fla. 2015, Kimball, J.).
  - Court can rely on oral argument, briefs, affidavits, documents, or even hold a trial.
  - Courts have wide leeway to determine amount. Can award the full value of the claim, zero value, or any number in between. *See In re Wall*, 2020 Bankr. LEXIS 2918 (Bankr. S.D. Ala. 2020); *In re A&B Assocs., L.P.,* 2019 Bankr. LEXIS 988 (Bankr. S.D. Ga. 2019).

Estimation under Rule 3018(a)

- Only applies in Chapter 9 and Chapter 11
- Allows a bankruptcy court to temporarily allow a claim or interest in an amount the court deems proper for the purposes of accepting or rejecting a plan.
- Only relevant in Subchapter V cases for determining whether a case is being confirmed under § 1191(a) or (b).

Notices of Mortgage Payment Change, A Case Study
Sierra and James, Judge Scott M. Grossman

- FRBP 3002.1 "To collect post-petition fees, expenses, or other charges incurred in connection with a claim secured by a debtor's principal residence, a creditor must follow the noticing requirements of Federal Rule of Bankruptcy Procedure 3002.1(c)." *In re Navarro*, 2020 WL 2843033, at *3 (Bankr. S.D. Fla. 2020).
- "Rule 3002.1 only applies in chapter 13 cases, and only applies to claims 'secured by a security interest in the debtor's principal residence ... for which the plan provides that either the trustee or the debtor will make contractual installment payments.'" *Id.* "The rule mandates 'both the form and content for a mortgage creditor in such cases to provide notice of any payment changes, including interest rate and escrow accounts adjustments, and any fees, expenses or other charges.'" *Id.*
- Such a notice is not prima facie valid under Rule 3001(f) so the creditor bears the burden of proof with respect to the additional postpetition fees and charges. *In re LeGare-Doctor*, 634 B.R. 453, 458 (Bankr. D.S.C. 2021) (citing *In re Brumley*, 570 B.R. 287, 290 (Bankr. W.D. Mich. 2017)); *see also In re White*, 641 B.R. 717, 723 (Bankr. S.D. Ga. 2022).

Notices of Mortgage Payment Change, A Case Study
Sierra and James, Judge Scott M. Grossman

- In Sierra and James, the secured creditor on the Debtor's principal residence voluntarily paid off the primary lien of the HOA but mislabeled the payoff in the Notice as "Taxes" and failed to provide any detail as to the asserted attorney's fees. Judge Grossman found that the Bank failed to sustain its burden under Rule 3002.1 and disallowed the Notice of Payment Change. The Court also granted Debtor's fees and costs as permitted under Rule 3002.1. For equitable reasons, the Court subrogated the secured creditor to the rights of the HOA's claim against the Debtors but there may be circumstances in which equity would not apply.

- **Secured creditors must be accurate and descriptive in any Notice of Payment Change or will risk disallowance and having to pay the opposing parties fees and costs.**

Claims: Cross-Collateralization

- Common with Credit Union accounts. There will be a provision stating "Collateral securing other loans with the Credit Union also secures this loan."

- One example - Cross-collateralization provisions operate to secure the debt arising from the credit card or line of credit as well as the vehicles. Thus, the credit card/line of credit debts also are secured by the vehicles.

- Review early in the case and make a determination whether or not to assert the cross-collateralization

- Be consistent—make sure if you are asserting cross-collateralization of one account across multiple claims that the numbers add up

- Object if Chapter 13 Plan is not consistent with your cross-collateralization

Cross Collateralization - Cases

- To obtain confirmation of his proposed Chapter 13 plan, debtor could not elect different options, "surrender" and "cram down," for the two different motor vehicles that cross-collateralized a creditor's two claims. *Barragan-Flores v. Evolve Federal Credit Union* (*In re Barragan-Flores*), 984 F.3d 471 (5th Cir. 2021)

- Partial reaffirmations are not permitted where multiple loans are secured by the same collateral by virtue of a pre-petition security interest or a security agreement containing a cross-collateralization clause. *In re Casenove*, 306 B.R. 367 (Bankr.M.D.Fla. 2004)

Thank You!

Faculty

Stephenie B. Anthony is a founding member and the current managing member of Anthony & Partners, LLC, with offices located in Tampa and Bartow, Fla., and she is a trial lawyer focusing on creditors' rights, bankruptcy law and commercial litigation. She has represented lenders, fiduciaries and other parties-in-interest in chapter 11, 13 and 7 bankruptcy cases. In addition to general civil litigation, Ms. Anthony focuses on creditor/debtor litigation in breach-of-contract, foreclosure, replevin, lender-liability, and other loan-enforcement contexts. Her litigation experience includes representation in state and federal trial and appellate courts statewide. Ms. Anthony is a past president, chairman and secretary of the Tampa Bay Bankruptcy Bar Association, having served on the Association's board for eight consecutive years. For two years following admission to the Florida Bar, she clerked for Hon. Alexander L. Paskay, Chief Bankruptcy Judge for the Middle District of Florida. Ms. Anthony is admitted to practice before the U.S. Court of Appeals for the Eleventh Circuit, and the U.S. District and Bankruptcy Courts for the Middle, Northern and Southern Districts of Florida. She is a member of the Federal and Hillsborough County Bar Associations, the Hillsborough Association for Women Lawyers, ABI, the Central Florida Bankruptcy Bar Association and the Southwest Florida Bankruptcy Professional Association. Ms. Anthony received her B.S. in finance/multinational business operations in 1994 from Florida State University and her J.D. in 1997 from Stetson University 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 secretary for the TBBBA for the 2022-23 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 St. Petersburg College and Hillsborough Community College, teaching bankruptcy, 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. 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.

Hon. Peter D. Russin is a U.S. Bankruptcy Judge for the Southern District of Florida in Fort Lauderdale, appointed on Aug. 14, 2020. Prior to his appointment, he was co-founder of Meland Russin Budwick in 1993, a boutique commercial litigation and bankruptcy firm in Miami, where he routinely represented corporate debtors, secured lenders, creditors' committees and trustees in insolvency proceedings, as well as asset-purchasers in bankruptcy. He also counseled clients through out-of-court workouts and private debt restructuring. Judge Russin successfully prosecuted and defended avoid-

ance actions, including preference and fraudulent conveyance actions, in state and federal courts, and he has written and lectured extensively on insolvency and commercial litigation topics. AV-rated Preeminent by Martindale-Hubbell, Judge Russin was listed in *Chambers USA* (2005-16), *Chambers & Partners* for creditors' rights, *The Best Lawyers in America*, as a Top Lawyer in the *South Florida Legal Guide*, *and in Florida Trend*'s Legal Elite and *South Florida Super Lawyers*. he also was a Florida Supreme Court Certified Circuit Civil Mediator. Throughout his career, Judge Russin has written and lectured extensively on insolvency and commercial litigation topics. He also is a past president of the Bankruptcy Bar Association of the Southern District of Florida. Judge Russin received his B.A. with departmental honors in 1985 from Tulane University of Louisiana and his J.D. in 1988 from George Washington University Law School.

Jonathan A. Semach is an associate with the Law Offices of Buddy D. Ford, P.A. in Tampa, Fla., where he focuses on debtor representation. He has represented more than 100 chapter 11 debtors as either first or second chair. His clients have ranged from small mom-and-pop businesses to large multistate corporations with annual gross revenues in excess of $20 million. Mr. Semach was admitted to the Florida Bar in 2008 and was selected as a *Super Lawyers* Rising Star in 2017 and 2018. Mr. Semach specializes in business and consumer bankruptcy, debtor/creditor rights, debt negotiation and commercial litigation. He is a member of ABI, the Tampa Bay Bankruptcy Bar, the Hillsborough County Bar Association and the Florida Bar. Mr. Semach received his B.A. in 2005 *cum laude* in classical studies from the University of Florida, Gainesville and his J.D. *cum laude* in 2008 from the University of Florida Levin College of Law.