

Representing Creditors in Consumer Bankruptcy Cases

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Forms

- 4.1 Proof of Claim (Official Form B10)
- 4.2 Mortgage Proof of Claim Attachment (Official Form B10A Attachment A)
- 4.3 Notice of Mortgage Payment Change (Official Form 10S1 Supplement 1)
- 4.4 Notice of Postpetition Mortgage Fees, Expenses, and Charges (Official Form B10S2 Supplement 2)
- 4.5 Reaffirmation Agreement: Rule 4008 Statement Regarding Net Monthly Income and Current Monthly Expenses
- 4.6 Reaffirmation Agreement Cover Sheet (Official Form B27)
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I. Overview

§4.1 This chapter is intended to provide creditors and their counsel with a basic understanding of the fundamentals of representing creditors in Chapter 7 and Chapter 13 consumer bankruptcy cases. Accordingly, the most common issues facing creditors, such as filing proofs of claim and dealing with the automatic stay, are addressed in this chapter. The chapter begins with a discussion of matters common to all creditors in consumer bankruptcy cases and continues with the most important concerns of creditors in Chapter 7 and Chapter 13 consumer bankruptcies.

II. General Considerations

A. Filing Proofs of Claim

§4.2 To receive payment from the bankruptcy estate, a creditor must file a proof of claim in the bankruptcy case of the debtor. Creditors paid directly in Chapter 13 cases also should file proofs of claims. 11 USC 101(5) defines a *claim* as a

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

“A proof of claim is a written statement setting forth a creditor’s claim.” Bankruptcy Rule 3001(a). A proof of claim is deemed allowed for purposes of payment unless a party in interest objects to the allowance of the proof of claim. 11 USC 502(a). Bankruptcy Rule 3002(c) provides that a creditor must file a proof of claim within 90 days of the first date set for the meeting of creditors in Chapter 7 and Chapter 13 cases. *See also* LBR 3002 (WD Mich) (which supplements Bankruptcy Rule 3002). A governmental unit is allowed 180 days and may file a motion to extend the time period. An untimely claim is subject to disallowance upon objection of a party of interest. 11 USC 502(b)(9). In Chapter 7 cases, an allowed unsecured claim, proof of which is tardily filed, is enti-

tled to a distribution from property of the estate, but only after payment in full of allowed, timely filed, general unsecured claims. 11 USC 726(a)(3). The court no longer provides a copy of the proof of claim form with the notice of filing. Most courts have a link to the proof of claim form on their Web sites. The proof of claim, Official Form B10 (form 4.1), as amended effective December 1, 2011, is available online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010.pdf, along with Attachment A (Mortgage Proof of Claim) (form 4.2, discussed in §4.5), Supplement 1 (Notice of Mortgage Payment Change) (form 4.3, discussed in §§4.48, 4.55), and Supplement 2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges) (form 4.4, discussed in §4.55).

The top of the form requests general information such as the case name and number and the name and mailing address of the creditor. If the creditor has separate addresses for the receipt of court notices and payments, both addresses should be included where indicated. The top right of the form includes a box the creditor should complete if the claim is intended to amend a previous claim or if another person or entity has filed a claim for the same debt.

The remainder of the proof of claim is composed of numbered sections and a signature block at the bottom of the form. Section 1 asks for the amount of the claim as of the filing date. This is the balance of the debt that the debtor would have had to pay on the filing date to satisfy the claim. This amount, however, should not include unmatured (postpetition) interest. 11 USC 502(b)(2). If the amount of the claim incorporates any prepetition interest accrued, fees accrued, or any other amount in addition to the principal owed, the box in section 1 should be checked.

Section 2 asks for the basis for the claim. A short description of the origins of the debt should be included in this section. If the claim is based on a debt with a specific monthly payment, that payment amount also should be included in section 2.

Section 3 requests the account number related to the debt. If the related account number is not public information, the proof of claim (and any attachments) must have the account number redacted to the last four digits. Likewise, any other personal information of the debtor, such as the debtor's social security number, should be similarly redacted because the proof of claim becomes public information once filed. Bankruptcy Rule 9037. The amended Official Form B10 also provides for an optional "Uniform Claim Identifier," which is a bankruptcy-specific identification number that a creditor may use to facilitate payment and track accounts without the use of personal information.

Section 4 should be filled out only by secured creditors. The creditor must note the nature of the collateral and estimate its value. The amount specified as the value of the property is especially important in Chapter 13 cases for personal property and is discussed in §4.30. The creditor should also fill in the applicable contractual interest rate (and indicate, in the updated Form B10, whether the rate is fixed or variable) and any arrearage on the debt at the time of filing as well as state the basis of a validly perfected security interest. Finally, the amount of the secured motor vehicle claim should be the value of the property and the unsecured portion of the secured claim subtracted from the total claim amount, if the claim is not subject to 11 USC 1325(a)(5). See §4.37.

Section 5 should be completed only if the creditor holds a claim entitled to priority under the Bankruptcy Code. Section 6 contains a certification that all payments on the claim have been credited and accounted for in the claim amount.

Section 7 of the proof of claim requests the attachment of documents evidencing the amount and validity of the debt. To avoid an objection to the proof of claim, documents evidencing the debt and any relevant security interest should be attached to the proof of claim. Bankruptcy Rule 3001(c)(1) states when a claim is based on a written document, a copy of that document must be attached to the proof of claim. *See* LBR 3002(a) (WD Mich). For the most common types of secured claims, a copy of the contract and security agreement underlying the debt and evidence of

perfection of the security interest should be attached. *See* Bankruptcy Rule 3001(d). For unsecured claims, a copy of a judgment, billing statements, a contract, or, at the very least, an account summary should be attached to the proof of claim. A claim that complies with the Bankruptcy Rules on claims is prima facie evidence of the validity and amount of the claim. Bankruptcy Rule 3001(f). Effective December 1, 2011, Bankruptcy Rule 3001(c)(2) is added and specifies additional requirements for the proof of claim in an individual debtor case. If a claim in addition to its principal amount includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of these charges must be filed with the proof of claim. Bankruptcy Rule 3001(c)(2)(A). If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition must also be filed with the proof of claim. Bankruptcy Rule 3001(c)(2)(B). If a creditor fails to provide the required information, the court may prevent the creditor from presenting the omitted information, in any form, as evidence (unless it determines that the failure was substantially justified or is harmless) and/or award other appropriate relief, including reasonable expenses and attorney fees. Bankruptcy Rule 3001(c)(2)(D). *See* §4.5 for discussion of additional requirements regarding a secured interest in a debtor's principal residence.

Section 8, effective December 1, 2011, requests that nonattorney signers of the claim identify their signing status and contains space for the person filing the proof of claim to sign and date the claim. A person signing a proof of claim should ensure that the information in the claim is accurate and has been filed for a proper purpose. As noted in the disclaimer below the signature line, significant penalties can arise from filing a fraudulent proof of claim. Moreover, an attorney who improperly signs a proof of claim is subject to sanctions under Bankruptcy Rule 9011.

Differences in filing proofs of claim in Chapter 7 and Chapter 13 cases are detailed in §4.30.

B. The Automatic Stay

§4.3 After the debtor files the bankruptcy case, all actions by creditors must cease due to the existence of the automatic stay. 11 USC 362(a). Immediately upon the filing of the petition, the automatic stay is imposed (thus the name automatic stay). The stay prevents creditors from taking any action against the debtor or against property of the estate. The automatic stay is in effect when the debtor files the bankruptcy petition with the court, with certain exceptions. For example, if the debtor has had two previous cases dismissed in the preceding one year and the debtor files another case, there is no automatic stay unless the debtor seeks an order from the bankruptcy court to have the automatic stay imposed. 11 USC 362(c)(4). A second common exception is when an in rem order is entered pursuant to 11 USC 362(d)(4). Additionally, the automatic stay terminates after 30 days if the debtor has had one case pending in the last year that has been dismissed. 11 USC 362(c)(3). These exceptions are discussed in more detail in §4.58.

11 USC 362 contains a list of actions that must cease as a result of the automatic stay. Any action taken in violation of the automatic stay is void or voidable and the debtor may seek damages and sanctions against the violating creditor. *See* 11 USC 362(k). Creditors need to be aware that actual knowledge of the filing of the bankruptcy case is not needed. It can be enough that the action was taken after the petition was filed.

Another interesting twist to the automatic stay is that it can apply to a nonbankrupt party. If the debtor had a cosignor on a consumer debt, the codebtor stay protects the nonfiling cosignor in a Chapter 13, but not in a Chapter 7, case. 11 USC 1301 imposes what is known as the codebtor stay. For example, if the debtor's father cosigned on an automobile loan and the debtor files a Chapter 13 case, the creditor would be prevented from pursuing the collection of the debt from the father until such time as the codebtor stay is vacated. Using the same example, if the debtor files a Chapter 7 petition, the father receives no such protection, as a codebtor stay does not exist in a

Chapter 7 case. It is important to note that the nonfiling codebtor stay may exist even where the debtor stay has terminated pursuant to 11 USC 362(c)(3).

III. Chapter 7 Cases

A. Secured Creditors

1. Proofs of Claim

a. In General

§4.4 The overwhelming majority of Chapter 7 cases are “no-asset” cases, meaning there are no nonexempt assets for the trustee to administer for the benefit of creditors. In the Bankruptcy Courts for the Eastern and Western District of Michigan, the clerk of the court sends a notice to parties in interest at the beginning of a Chapter 7 case. This notice will either provide a deadline by which proofs of claim need to be filed, or it will instruct parties in interest not to file proofs of claim until further notice is provided. Traditionally, creditors in Chapter 7 cases did not file a proof of claim until the court provided a notice advising creditors to file a claim. The notice would indicate that the trustee has recovered assets, and the creditors were directed to file a proof of claim by the deadline contained in the notice. Based on the 2005 amendments, personal property secured creditors may wish to reconsider when, not if, a proof of claim should be filed.

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) includes 11 USC 521(a)(6), which provides an incentive for a secured auto creditor to file a proof of claim at the outset of the case. The essence of 11 USC 521(a)(6) is that if the debtor does not reaffirm or redeem within 45 days after the first meeting of creditors, the automatic stay will be vacated on the 46th day and the personal property will no longer be property of the estate. However, the automatic stay will be vacated only if the creditor has an “allowed claim.”

How do you obtain an allowed claim? You have to file a proof of claim. 11 USC 502 provides that a claim is deemed allowed unless a party in interest files an objection. Once the proof of claim is filed, you have an allowed claim. By filing the proof of claim, the secured creditor provides an incentive for the debtor to perform the stated intention, i.e., reaffirm, redeem, or surrender, or face the possibility that the creditor may repossess the collateral. Without a properly filed proof of claim, the personal property secured creditor may not be eligible for the protections under 11 USC 521(a)(6). There is no filing fee involved and, in light of this provision, it makes sense for this type of creditor to file the proof of claim at the outset of the case. The failure to file the proof of claim only limits the options available. A secured creditor must include evidence of perfection of its security interest with the proof of claim. Bankruptcy Rule 3001(d) (discussed in more detail in §4.30).

b. Mortgage Creditors

§4.5 Secured mortgage creditors should generally not file proofs of claim in Chapter 7 cases unless directed to do so by the trustee, who determines that this is an asset case and then informs creditors to file a proof of claim through a notice generated by the court clerk and served on all interested parties. Since the majority of Chapter 7 cases filed are no-asset cases, typically there is not sufficient equity in any assets of the debtor that will allow the Chapter 7 trustee to liquidate those assets for the benefit of the bankruptcy estate. As a result, the case is deemed no-asset, as no assets are available for administration. Some practitioners may choose to file a proof of claim as a precaution in no-asset cases, even if a notice states that they should not. No penalty is incurred by doing so, and the extra work early on may help avoid the risk that he or she may overlook a later notice. If the Chapter 7 trustee determines, however, that there are assets that can and should be administered, the trustee will notify the clerk’s office and the administrative office will issue a notice of assets and the need to file claims.