

[New Bankruptcy Proof of Claim Rules Take Effect](#)

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Subject: New Bankruptcy Proof of Claim Rules Take Effect

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Michael Proctor

As seen in the Spring 2012 issue of West Virginia Banker.

In the wake of the national attention directed towards residential mortgages in the last few years, certain revisions were made to the Federal Rules of Bankruptcy Procedure to address perceived deficiencies in bankruptcy proofs of claim. The rule changes were first proposed in 2009 by the Judicial Conference of the United States and became effective December 1, 2011.

The most noticeable change is the requirement that a new Proof of Claim form (Official Form 10) be used for all bankruptcy claims.¹ Of additional importance to creditors of individual debtors, new requirements have been added for claims in individual cases, especially with regard to mortgage claims involving the debtor's principal residence. These changes are contained in Federal Rule of Bankruptcy Procedure 3001(c).

Official Form 10:

Upon reviewing the revised Form 10 for the first time, apart from minor stylistic changes,² a creditor will note two substantial revisions to Boxes 7 and 8.

Box 7 previously allowed the option to "attach a summary" of the documents supporting the claim. This option has been removed and the Form now requires a creditor to attach "redacted copies of the documents that support the claim." In practice, it is doubtful that many creditors attached a summary rather than the actual documents. But that option has been removed, emphasizing the goals of the Judicial Conference to ensure that claims are supported with complete documentation.

Box 8 previously required a claimant to sign the box and list her title. A proof of claim could be filed by "the creditor or other person authorized" to file the proof of claim. The new form requires that the signatory specifically identify her basis for filing the claim by listing her name, title, company, address, telephone number and email address, and by affirming that she falls into one of the following categories:

"I am the creditor."

"I am the creditor's authorized agent." (Attach copy of power of attorney, if any.)"

“I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.)”

“I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)”

The revisions to box 8 also include a statement above the line for the signatory stating: “I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.” Signing a proof of claim has always been subject to the penalty of perjury, but the inclusion of this statement in the form appears to be yet another example of the intent of the drafters to ensure the accuracy of the claims by reminding the signatory of the gravity of filing a claim. The penalty for filing of a fraudulent claim continues to be prominently displayed on the face of the form: “Fine of up to \$500,000 or imprisonment for up to 5 years, or both.”

Of particular importance here is the case where a servicing agent files a proof of claim. According to the official Advisory Committee Note, “when a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.” Given that the rules were amended largely in response to residential mortgage servicing concerns, mortgage servicers must pay special attention and should review their internal policies to ensure they are in conformity with the new rules.

The best practice is for the signatory to have personally reviewed the account records and be authorized in the scope of her employment by the creditor to make the statements that are included in the claim.

Rule 3001(c)

The former Rule 3001(c) is now re-designated as Rule 3001(c)(1). Rule 3001(c)(1) imposes no changes to prior practice. As previously, when a proof of claim is based on a writing, the writing must be filed with the proof of claim. However, creditors should be aware of brand new requirements contained in Rule 3001(c)(2) which apply to bankruptcies filed by individuals.

Rule 3001(c)(2) mandates that if a claim in an individual’s bankruptcy contains more than the principal balance, an itemized statement must be filed. A creditor must categorize components of the claim as “interest, fees, expenses, or other charges.” As a practical matter it will be important to further itemize the “other” category to avoid scrutiny by debtors’ counsel, trustees and the courts.

Additionally, if the creditor claims a security interest in the individual debtor’s property, “a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.” Also, if the contractual payment includes an escrow component, an escrow account statement must be attached. Given that escrow payments may change upon the filing of bankruptcy, the best practice would be to include a statement explaining the last pre-petition payment amount as well as the first post-petition payment amount. It would also be good practice to include a running escrow account ledger.

Finally, Rule 3001(c)(2) allows a court to impose sanctions if a creditor fails to provide any required information. Specifically, a court may preclude the creditor “from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case” and/or award to the debtor appropriate attorney fees

and expenses caused by the failure to provide the information.

This provision is important because normally a proof of claim is prima facie evidence of the creditor's claim – meaning that the debtor has the burden to contradict the claim. But, if Rule 3001 sanctions were imposed, a creditor may not be able to rely on the proof of claim as evidence and could be precluded from arguing that it was entitled to collect the particular item in a motion to terminate the automatic stay, objection to the proof of claim, adversary proceeding or other contested matter.

Specific Changes for the Debtor's Principal Residence

While Rule 3001(c)(2) applies to all claims in which the debtor is an individual, the biggest change to prior practice applies to proofs of claim that are based on a security interest in the debtor's principal residence.³ For such claims, a creditor must attach a new form Mortgage Proof of Claim Attachment (Attachment A).⁴

Attachment A requires an itemization of the principal and interest as of the petition date, a statement of all items that are not principal and interest, and a statement of the amount necessary to cure the default as of the petition date. The form provides categories for the mortgage creditor to facilitate complete disclosure of all payments, suspense accounts and related fees and costs. Each collectible pre-petition item must be disclosed in the relevant category.

Proper completion of Attachment A would appear to satisfy all of Rule 3001(c)(2)'s new requirements, whether the claim is for the debtor's principal residence or otherwise. Therefore, even though Attachment A is required only for residential mortgage claims, creditors may consider implementing a form attachment for use in all individual claims to ensure compliance.

Conclusion

In summary, creditors should become familiar with the new proof of claim rules and forms. Particular attention should be given to filing claims which are secured by residential mortgages due to the requirements of additional information and the use of a new supporting attachment. It is also extremely important that claims include all required information and that signatories have first-hand knowledge of the account and are properly authorized to sign the proof of claim.

(1)http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010.pdf

(2) The most notable is new Box 3B, the Uniform Claim Identifier. This item is optional and was included as a benefit to creditors who use an Identifier to facilitate electronic payment in Chapter 13 cases.

(3) The scope of this Article is the initial Proof of Claim. Mortgage creditors should also be aware of Bankruptcy Rule 3002.1. This Rule requires disclosure of post-petition payment changes, notice of fees and expenses as well as other provisions for Chapter 13 claims secured by the debtor's principal residence. Official forms:http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010S1.pdf and

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010S2.pdf

(4)http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010A.pdf

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