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United States Courts

Committee on Rules of Practice & Procedure of the Judicial Conference of the US

In Re: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure

To Whom It May Concern:

The Judicial Conference Advisory Committee on Bankruptcy Rules has proposed amendments to the Federal Rules of Bankruptcy Procedure and Official Forms, and requested that the proposals be circulated to the bench, bar, and public for comment. On behalf of the members of USFN¹, a national not-for-profit organization representing the interests of its members, we are pleased to submit the following comments for consideration.

PROOFS OF CLAIM AND CLAIM SUPPLEMENTS

Comment 1: Rule 3002 - Change in timing for Proofs of Claim by mortgagees

The proposed changes to Rule 3002 attempt to resolve the challenges inherent in an early confirmation hearing followed by a later Proof of Claim bar deadline. The previous amendments, effective in 2011, increased the detail and required documentation to support mortgage Proofs of Claim and provided sanctions for incomplete filings.

The proposed rule shortens the time for filing the Proof of Claim form to 60 days after the petition date (as opposed to approximately 120 days under the current rules). Moreover, Rule 3002(c)(2)(C) requires the filing of a new Mortgage Proof of Claim Attachment (Official Form 410A), which will require a detailed loan transaction history, from the first date of the default on a loan secured by a debtor's principal residence in Chapter 13 proceedings, to be filed with the proof of claim within the shortened 60-day period. The proposed rule then provides an additional 60 days for filing required documentation.

For the creditors and their attorneys, the bifurcated process creates a conflict. The person signing the Proof of Claim must currently verify: "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." Additionally, parties signing the Proof of Claim must satisfy the requirements of Fed. R. Bankr. P. 9011. Executing and filing a claim without a review of supporting documentation, as allowed by the proposed rule, raises the question of whether the signer is committing perjury and/or violating Rule 9011.

¹ USFN is a national not-for-profit association of law firms and trustee companies specializing in mortgage servicing matters. USFN has members in all 50 states who represent the vast majority of the national banks and financial institutions in matters related to mortgage servicing.

For trustees and debtors, the bifurcated claim process creates a requirement to review the claim at two points in time instead of one, thereby increasing the administrative burden and associated costs. It is logical to presume that the claim amounts would be verified for plan feasibility at 60 days post-petition and, again, when the supporting documentation is subsequently filed. Trustee staff will be taxed, as will the debtors' attorneys. The resulting increase in costs will ultimately be borne by debtors in higher attorney fees and trustee fees. Thus, the proposed rule increases the burden on creditors without minimizing the burden on the trustees or the debtors.

■ **Alternative:** USFN recommends decreasing the time for filing a Proof of Claim to 90 days post-petition with no bifurcation. This adjustment would allow plans to be confirmed in a timely manner, decrease administrative burdens, and allow a reasonable time for the creditors to submit fully verified claims.

Comment 2: Rule 3002 - Requirement for filing Proofs of Claim in Chapter 7 cases

The proposed Rule requires creditors who seek allowance of their Proofs of Claim in all Chapter 7 cases to file the same within: (1) 60 days after the filing of the bankruptcy petition or entry of the Order converting the case to a Chapter 7 proceeding or (2) 90 days after the entry of the order for relief in involuntary Chapter 7 cases. However, in the vast majority of Chapter 7 bankruptcy cases, the Chapter 7 trustee does not make any determination as to whether there are assets to administer within this time frame. Furthermore, Rule 3002(c)(2)(C) would require the filing of a Mortgage Proof of Claim Attachment and escrow account statement in individual Chapter 7 cases, if a security interest is claimed in property that is the debtor's principal residence. Finally, the failure for a creditor to timely file a Proof of Claim in a Chapter 7 case would unnecessarily preclude the exercise of its credit bidding rights at a sale of property that is subject to the creditor's lien under Section 363(k) of the Bankruptcy Code.

Accordingly, this rule change would increase administrative burdens and costs without any corresponding benefit. Creditors will be forced to file Proofs of Claim in all Chapter 7 cases to preserve their ability to assert an allowed claim in the case, in order to share in any potential dividends from the bankruptcy estate or credit bid at a Section 363 sale of property secured by their lien.

■ **Alternative:** USFN requests that the rule clearly indicate that the timeline for Chapter 7 Proofs of Claim is solely for those cases in which a Notice of Possible Distribution is filed by the trustee and governed by the Notice of Claims Bar Deadline issued by the Chapter 7 trustee and/or the court.

Comment 3: Rule 3002.1 - Lacks an exemption for de minimis payment changes

Rule 3002.1 currently requires creditors with claims secured by a debtor's principal residence in Chapter 13 proceedings to file and serve a Notice of Payment Change at least 21 days prior to the effective date of the payment change. While the official form for the Notice of Payment Change is being reformatted into Official Form 410S1, there has been no change to Rule 3002.1 and/or the Official Form to address the administrative burden posed by the dilemma of negligible periodic payment changes.

As certain daily simple interest loans and/or home equity line of credit agreements often have nominal fluctuations in the amount of the monthly payments, **it is advisable to create an exemption for the required Notices of Payment Change:** (1) in non-conduit Chapter 13 cases (i.e., where the debtor tenders the post-petition mortgage payments); and/or (2) based upon a threshold amount of the change in the payment. To the extent that the exemption applies, the Notices should either not be required at all or only be required on a bi-annual basis.

Comment 4: Clarification on the acquisition of the claim if needed for the Proof of Claim – Official Form 410

Part 1, Section 2 of the proposed, revised Proof of Claim form requires information as to whether the "claim" has been "acquired from someone else." The Instructions for Proof of Claim refer to the Bankruptcy Code definition of a "claim" under section 101(5). However, it remains unclear whether Part 1, Section 2 requires information regarding the transfer of the debt and/or the transfer of loan servicing rights, as well as whether it only requires

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information regarding the last transfer of the “claim,” and not any prior transfers. Furthermore, this section requires clarification as to whether it applies to both pre-petition and post-petition transfers of the “claim.” To the extent that there is a post-petition transfer of the “claim” and a Proof of Claim was previously filed by the transferor, then a Transfer of Claim should be filed and the transferee would not be filing an amended Proof of Claim, unless there was an error within the original Proof of Claim.

■ **Alternative:** USFN recommends the addition of the following bullet point to the Instructions regarding the acquisition of a claim from someone else: “If the claim has been acquired from someone else, then state the identity of the last party who owned and/or was the holder of the claim and who transferred the claim to you prior to the filing of the debtor’s bankruptcy petition.”

Comment 5: Revisions to Part 2 and Part 4 of the Instructions to Proposed Official Form 410A

The third bullet point on Part 2 regarding fees and costs currently states: “Any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing.”

■ **Alternative:** USFN recommends that the current language be revised to state the following: “Any fees, expenses or other charges incurred before the petition was filed.”

There are two reasons for this recommendation. First, the recommended language mirrors the language in FRBP 3001(c)(2)(A). Second, the recommended language eliminates the use of the words “note” and “mortgage.” This is important because home equity lines of credit are not evidenced by a note, and not all loans or lines of credit are secured by a mortgage.

The first sentence of Part 4 also currently states: “Insert the principal and interest payment amount of the monthly payment as of the petition date.”

■ **Alternative:** USFN recommends that the current language be revised to state the following: “Insert the principal and interest amount of the first post-petition payment.”

The reason for this recommendation is that Part 4 of Form 410A is intended to reflect the amount of the debtor’s first post-petition payment, not the amount of the debtor’s payment as of the petition date.

Comment 6: Addition of Footnote to Part 2 of the instructions to proposed Official Form 410A

The instruction section on the Proof of Claim form 410 titled “Secured claim under 11 U.S.C. Section 506(a)” discusses the issues regarding the amount of a secured/unsecured claim based upon value and specifically states there are exceptions under 11 U.S.C. Sections 1322(b) and 1325(a).

As a suggestion: To the extent that creditors believe the valuation within the Proof of Claim may be binding on them, it would be advisable to place a footnote in the value section, directing the parties to a disclaimer wherein the creditor reserves its right to contest the value of the collateral in the event that it becomes a contested issue in the bankruptcy case.

NATIONAL FORM PLAN

Comment 1: The National Form Plan should be a prerequisite to the rule amendments

The stated purpose of the Chapter 13 plan form project is “intended to eliminate the current anomaly of a major aspect of consumer bankruptcy practice not having a national form for presenting essential information to parties in interest.” The Advisory Committee drafted the form and rule amendments as complementary parts of a project

to improve the Chapter 13 process. This complementary relationship should be maintained, and the rule amendments should be considered only in conjunction with adoption of the uniform Chapter 13 plan. It has been the understanding of many creditors and their counsel that the proposed amended rules, which weaken certain existing protections and due process, are in exchange for one consistent national Chapter 13 plan. Thus, the adoption of proposed amended Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009 should be contingent on the uniform Chapter 13 plan being adopted at the same time.

Comment 2: Treatment of secured claims that are subject to surrender

Section 3.5 of the proposed uniform Chapter 13 plan provides:

“The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor’s claim. The debtor(s) consent to termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to the collateral upon confirmation of the plan. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.”

“Consent to termination of the stay” is different than actual termination of the stay pursuant to a court order. In several jurisdictions, the existing practice is for creditors to obtain relief from the automatic and/or co-debtor stays upon entry of the order confirming the plan.

■ **Alternative:** USFN recommends revising Section 3.5 to provide as follows: “Termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to a creditor’s exercise of its rights against the collateral shall be effective upon entry of an order confirming the plan without the necessity of a separate order granting relief from the automatic stay and/or co-debtor stay.”

Comment 3: Treatment of secured claims under section 3.1 of the uniform Chapter 13 plan.

Section 3.1 identifies the name of creditor and the collateral, but **it should also include a section for reference to the last four digits of the account number.** Often times, the same creditor may have more than one claim on the same collateral and debtor, and the plan should identify, with more specificity, the account that is being referenced.

This section also provides:

“If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease and all secured claims based on that collateral will no longer be treated by the plan.”

This section will prevent a creditor from receiving payment on a claim secured by collateral upon which another creditor obtained relief from stay. For example, if a junior priority secured creditor obtained relief from stay, the first priority secured creditor would no longer receive payments on its claim through the plan, even if the junior secured creditor subsequently reached an agreement to avoid foreclosure on the collateral with the debtor. This would appear to be an unintended consequence.

■ **Alternative:** USFN recommends eliminating this sentence from the form plan so that the debtor is required to modify the plan to cease payments to creditors who have not obtained relief from the automatic stay.

This section also provides:

“Unless otherwise ordered by the court, the amounts listed on a Proof of Claim or modification of a Proof of Claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage.”

The plan is unclear as to what happens to a late-filed, secured claim for arrears.

USFN recommends the addition of:

“Unless otherwise ordered by the court, the amounts listed on a Proof of Claim or modification of a Proof of Claim filed after the filing deadline under Bankruptcy Rule 3002(c) supersede any contrary amounts listed below as to the current installment payment and arrearage.”

Comment 4: Treatment of trustee’s fees and priority claims

The form plan fails to identify priority creditors. USFN recommends revising the form allowing the debtor to disclose not just the estimated total amount of other priority claims, but also disclosure of the identity of the priority creditors and the amount of debts attributable to the priority creditor.

Comment 5: Signatures

Section 10 of the uniform Chapter 13 plan indicates that debtors need not sign the plan if they are represented by an attorney. **In order to strengthen the evidentiary weight of the plan, USFN recommends requiring the debtors’ signatures on the plan, even when they are represented by counsel.**

Comment 6: Plan amendments

The check box on the first page of the uniform Chapter 13 plan prompting the debtor to disclose whether the plan is amended does not allow designation as “1st” amended plan, “2nd” amended plan, etc. **Provision for such a designation should be added. It would also be useful to require debtors to highlight any changes from the prior version of the proposed plan in order to direct interested parties’ attention to relevant changes.**

The form plan has no provisions for pre-confirmation adequate protection payments (pre-confirmation ongoing mortgage payments.) **USFN recommends inclusion of such a provision.**

Conclusion

On behalf of the members of USFN, thank you for the opportunity to submit these comments. Please do not hesitate to contact us with any questions or for further discussion.

Respectfully,



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