

## FILING MORTGAGE PROOFS OF CLAIM IN CHAPTER 13 CASES

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### I) Authority

- A) “A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.” 11 U.S.C. § 501(a).
- B) “The term ‘creditor’ means--(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . . .” 11 U.S.C. § 101(10).
- C) “Claim” is defined by 11 U.S.C. § 101(5) and refers to “right to payment” (contingent or unliquidated) or “right to equitable remedy for breach of performance if such breach gives rise to a right to payment . . . .;” *see also Johnson v. Home State Bank*, 501 U.S. 78 (1991) (stating “a mortgage interest that survives the discharge of a debtor’s personal liability is a ‘claim’ within the terms of 101(5)”).

### II) Who

- A) “A proof of claim shall be executed by the creditor or the creditor’s authorized agent except as provided in Rules 3004 and 3005.” Fed R. Bankr. P. 3001(b).
- B) Usual suspects
  - 1) Creditor/bank
  - 2) Servicing agent
    - (a) “The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose *other than the execution and filing of a proof of claim* or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form.” Fed. R. Bankr. P. 9010(c) (emphasis added).
    - (b) In other words, a servicing agent is not required to attach a power of attorney to a proof of claim.
- 3) Attorneys
  - (a) “An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney’s name, office address and telephone number, unless the attorney’s appearance is otherwise noted in the record.” Fed. R. Bankr. P. 9010(b).
  - (b) *But see* Fed. R. Bankr. P. 2002(g) (Proofs of claim or interest filed by creditor or security holder, respectively, “that designate[] a mailing address constitute a filed request to mail notices to that address.”)

### III) How

#### A) Attachments

- 1) “When a claim, in an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss

or destruction shall be filed with the claim.” Fed. R. Bankr. 3001(c); *see also, e.g., Mitchell Bank v. Schanke*, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (holding that both the existence and amount of an underlying debt may be proven through the introduction of extrinsic evidence other than a copy of the actual note).

- 2) “If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.” Fed. R. Bankr. 3001(d). *But see In re Stoecker*, 143 B.R. 879, 883 (N.D. Ill. 1992), *aff’d in part, vacated in part, sub nom. In re Stoecker*, F.3d 1022 (7th Cir. 1993) (holding that failure to attach documents required by Fed. R. Bankr. P. 3001(c) and 3001(d) does not automatically disallow or permit avoidance of claim with prejudice, but rather only affects the prima facie validity of claim).

3) Assignment of Mortgage Required with Claim?

(a) Initial Claim

- (i) *Expressio unius est exclusio alterius* (mention of one thing implies the exclusion of another) – no mention of assignment of mortgage in Fed. R. Bankr. 3001(c) or (d).

- (ii) *Compare* Fed. R. Bank. P. 3001(e)(3):

*Transfer of Claim Other Than for Security Before Proof Filed.* If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a *statement* setting forth the terms of the transfer. . . . If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. . . .

(second emphasis added), *with* Fed. R. Bankr. P. 3001(e)(4) (requiring that “evidence” of the terms of transfer also be filed).

- (iii) *See also Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000) (citing Fed. R. Bankr. P. 3001(f)) (“A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity *and* amount of the claim.”) (emphasis added) (remaining quotation omitted).

- (b) Assignment of Mortgage, Post-claim Filing – twenty (20)-days’ notice to transferor under Fed. R. Bankr. 3001(e)(4).

B) Itemization

- 1) “*Form and content.* A proof of claim is a written statement setting forth a creditor’s claim. A proof of claim shall conform substantially to the appropriate Official Form.” Fed. R. Bankr. P. 3001(a). *But see, e.g., In re Plunkett*, 191 B.R. 768 (Bankr. E.D. Wis. 1995), *aff’d on other grounds*, 82 F.3d 738 (7th Cir. 1996) (recognizing “informal” proof of claim).

- 2) Form B 10 instructs under Part 1, “Amount of Claim as of Date Case Filed,” to “Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.”
- 3) E.D. Wis. Local Rules
  - (a) L.R. 3001
    - (i) Current – Secured mortgage claims “shall separately state and itemize any claim for arrearages.”
    - (ii) Proposed – Secured mortgage claims “shall contain a detailed itemization of the following: (a) Delinquent periodic contractual payments of principal and interest and, if applicable, escrow; (b) Corporate advances; (c) Escrow advances not already included in (a), above; (d) Costs; (e) Fees; (f) Charges, and (g) Any other items comprising the claim.”
  - (b) Proposed New L.R. 3001.2:

**Cost Itemization in Secured Proofs of Claim.** In addition to the requirements of Bankruptcy Rule 3001, a secured Proof of Claim filed in a Chapter 12 or Chapter 13 case shall contain a detailed itemization of all costs, interest, fees, escrow advances and any other charges comprising the claim. This itemization shall distinguish such charges from the amount of delinquent periodic contract payments.

C) Amount

- 1) Can be difficult for debtor to overcome the Federal Rules’ presumption(s) – *See, e.g., In re Nejedlo*, 324 B.R. 697 (Bankr. E.D. Wis. 2005) (Kelley, B.J.) (holding that even when creditor fails to appear to defend its proof of claim, the objecting party must still present sufficient evidence to overcome the presumption of Federal Rule of Bankruptcy Procedure 3001(f)); *In re Habiballa*, No. 04-27609 (Bankr. E.D. Wis. 2006) (Kelley, B.J.) (holding that an evidentiary tie goes to the creditor).
- 2) Previously reaffirmed debts – *See, e.g., In re Eiler*, 390 B.R. 920 (Bankr. E.D. Wis. 2008) (McGarity, C.B.J.).
- 3) Post-petition Interest on Pre-petition Claim for Oversecured Creditor
  - (a)

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. § 506(b); *see also Rake v. Wade*, 508 U.S. 464 (1993).

- (b) Limited and/or overruled by:

- (i) Title 11 U.S.C. § 1322(e) (effective Oct. 22, 1994) – “Notwithstanding subsection (b)(2) of this section and section 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.”
  - (ii) *E.g.*, *In re Young*, 310 B.R. 127 (Bankr. E.D. Wis. 2003) (Kelley, B.J.) (holding additional interest is not allowed unless agreed to in the loan documents).
  - (c) Rate – *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). *But see In re Terry Ltd. P’ship*, 27 F.3d 241 (1994) (noting there is a “presumption in favor of the contract [default] rate subject to rebuttal based on equitable considerations”), *cert. denied sub nom. Invex Holdings, N.V. v. Equitable Life Ins. Co. of Iowa*, 513 U.S. 948, (1994); *General Electric Capital Corporation v. Future Media Prods., Inc.*, 530 F.3d 1178 (9th Cir. 2008), *amended by* 536 F.3d 969 (9th Cir. 2008) (reversing post-*Till* bankruptcy court decision and instructing bankruptcy court to apply “majority rule” presumptively allowing default interest rate).
- D) Redaction – Fed. R. Bankr. P. 9037
- 1) Must redact from all “filings:” date and month of individual’s birth; all but last four (4) digits of social security, tax identification, or account number; and a minor’s name, except initials.
  - 2) Remedial Motion Procedure
- E) Total Debt Claims
- 1) Problem: Title 11 U.S.C. § 1325(a)(5)(B)(iii)(I) requires payment of secured claim to be made “in equal monthly amounts;” *see also, e.g., In re Schultz*, 363 B.R. 902 (Bankr. E.D. Wis. 2007) (McGarity, C.B.J.) (holding debtor may pay a secured claim in full during the term of the plan in unequal amounts only when the creditor does not object to same).
  - 2) Result: Post-BAPCPA, total debt mortgage claims generally do not occur unless loan is matured. *See, e.g.,* 11 U.S.C. § 1322(c)(2).
- F) Under or Unsecured Mortgages and Surrendered Property
- 1) *In re Bolton*, No. 05-26436 (Bankr. E.D. Wis. 2005) (McGarity, C.B.J.) (allowing secured mortgage proof of claim following creditor’s previous election only to sue borrower for money judgment in state court).
  - 2) “In Wisconsin, the cause of action on a note evidencing an indebtedness and the cause of action to foreclose the mortgage on real estate that secures the indebtedness are distinct.” *Bank of Sun Prairie v. Marshall Dev. Co.*, 2001 WI App 64 ¶ 12, 242 Wis. 2d 355, 626 N.W.2d 319. “The debt secured by a mortgage is regarded as the *primary obligation* between the parties, and the mortgage as incidental to the indebtedness or obligation secured thereby.” *Glover v. Marine Bank of Beaver Dam*, 117 Wis. 2d 684, 345 N.W.2d 449 (1984) (emphasis in original) (quotations omitted). As a result, extinguishing the mortgage of course does not also extinguish the debt. *Bank of SunPrairie*, 2001

- WI App ¶ 20. In other words, even if the mortgagee's collateral has been previously surrendered or foreclosed, if the lender has not waived deficiency against the debtor, creditor still possesses an unsecured claim
- IV) Debtor or Co-obligor Filing Claims – Fed. R. Bankr. P. 3004 & 3005 (allowing 30 days after deadline for same)
  - V) Withdrawal of Claim – Fed. R. Bankr. P. 3006
  - VI) Reconsideration for Dis/Allowance of Claim – Fed. R. Bankr. 3008
  - VII) Conversion – “All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 case.” Fed. R. Bankr. P. 1019(3).
  - VIII) Waiver of rights – Creditor waived right to jury trial in trustee avoidance action by filing proof of claim. *Langenkamp v. Culp*, 498 U.S. 42 (1990).