



Chapter 13 Best Practices

Wednesday, April 7, 2021

12:00 – 1:15 PM Central Time

Attendee Questions

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*Select the ? to type your question
to our presenters*

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This panel will highlight these and other noteworthy issues:

- What are some pitfalls to avoid when filing a Proof of Claim?
- How does the CARES Act and forbearance agreements change best practice considerations?
- When should a servicer file a Supplemental Proof of Claim for a CARES Forbearance Claim?
- What are the steps a servicer should take before filing a Post-Petition Fee Notice? How does this vary by jurisdiction?
- How should a servicer approach filing a Response to a Notice of Final Cure?
- What other impacts does recent legislation have on bankruptcy?
- After a year of seemingly constant changes, what might be changing next?

PROOF OF CLAIM

Proof of Claim

- Don't be late for a very important date.
 - Understand the consequences of untimely filed claims.
- Verify compliance with any local rules/procedures.
- Know whether the POC or Plan Controls.
- Late Claims – to file or not to file?
- Forbearance Issues and Considerations.

SUPPLEMENTAL PROOF OF CLAIM FOR CARES ACT FORBEARANCE CLAIM

Supplemental POCs (SPOCs)

Practice Pointer: In bankruptcy, we like to use acronyms. Do not confuse SPOCs with NMPCs/NPCs/PCNs (Notices of Mortgage Payment Change) or PPFNs (Post-Petition Fees Notices). THESE ARE DIFFERENT!

- The CAA amends 11 U.S.C. § 502(b)(9) to add 11 U.S.C. § 501(f), which permits a mortgage servicer to file a SPOC.
- Can be referred to as a “CARES Forbearance Claim.”
- Timely filed if filed before the date that is 120-days after expiration of a/the forbearance period granted under the CARES Act.
 - An SPOC is not untimely even if filed after a bar date.

Supplemental POCs (SPOCs) (Continued)

A SPOC must include specific information:

- The relevant terms of the modification or deferral;
- A copy of the modification or deferral if it is in writing; and
- A description of the payments to be deferred until the date on which the mortgage loan matures.

A servicer/client (as a party in interest) may then itself move to modify a plan to deal with a SPOC if a/the debtor (or his/her/their attorney) does not do so within 30-days of the SPOC being filed.

Exception: If a debtor is curing a default with a loan deferral or modification and not through payments disbursed under a plan, there is generally no need for the servicer/client to file a SPOC.

Fill in this information to identify the case:

Debtor 1 _____
Debtor 2 _____
(Spouse, if filing)
United States Bankruptcy Court for the _____ District of _____
(State)
Case number _____

Form 4100S

Supplemental Proof of Claim for CARES Forbearance Claim 02/21

This Supplemental Proof of Claim is filed in compliance with the requirements of 11 U.S.C. § 501(f)(1) as the Debtor was granted a forbearance under the CARES Act (15 U.S.C. § 9056 or 9057). "Creditor" in this form means "eligible creditor" under 11 U.S.C. § 501(f). File this form as a supplement to your proof of claim.

Name of creditor: _____ Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: _____

Property address: _____
Number Street

City State ZIP Code

Part 1: Amount of Loan That Was Not Received During Forbearance Period

List of payments not received during forbearance period:

Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____

Total of payments due under the forbearance: _____

Part 2: Information About Agreement to Modify or Defer Loan Obligation

Have the Debtor and Creditor entered into an agreement to modify or defer the loan obligation in connection with the forbearance?

☐ Yes. Include the information required by 11 USC § 501(f)(2)(B)(i)-(iii) and attach copies of the writing outlining the modification or deferral:

☐ The loan was modified as follows:

☐ The amount of forbore payments and the deferral date:

☐ No. Debtor or their counsel should contact the Creditor about any resolutions that may be available to the Debtor.

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FORM 4100S –
SUPPLEMENTAL PROOF
OF CLAIM FOR CARES
FORBEARANCE CLAIM

Part 3: Sign Here

The person completing this form must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box::

- ☐ I am the creditor.
☐ I am the creditor's authorized agent.

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.

x _____ Date ____/____/____
Signature

Print _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

City State ZIP Code

Contact phone (____) ____-____ Email _____

FORM 4100S –
SUPPLEMENTAL PROOF
OF CLAIM FOR CARES
FORBEARANCE CLAIM

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Polling Question

What is the most common method in your jurisdiction for dealing with payments included in a COVID-related forbearance agreement?

- Deferral/Capitalization (*state-mandated or client-authorized)
- Modified/Amended Chapter 13 Plan
- Post-Petition/Catch-up Stipulation or Agreed Order
- Loan Modification (*via client application)
- Other

Supplemental POCs (SPOCs) (Continued)

Form 4100S is effective as of February 5, 2021. Some jurisdictions have yet to begin using SPOC procedures. Local practice is generally determining whether SPOCs are filed.

Practice Pointer: Know your local rules (and contact the Court or Clerk if you have any sort of question or hesitation in making a specific filing).

Additional Issues:

- Sunset on Certain CARES Act/CAA Provisions
 - COVID-19 Bankruptcy Relief Extension Act introduced in Congress on February 25, 2021, was amended before it passed the Senate and signed by President Biden on March 27, 2021.
 - Where does it stand and what does it mean?
 - Legislation would result in an extension of *some* of the provisions to 3/27/2022
- Fannie Mae Announcement

NOTICES OF POST-PETITION FEES

ARE POST-PETITION FEES COLLECTABLE?

- **Does the Mortgage contain a fee shifting provision?**
- **Does your Jurisdiction have rules regarding recoverability of attorney fees?**
- **Is Equity necessary to collect fees?**
 - Historically, firms have relied on 11 U.S.C. § 506(b) that indicated that if there was no equity in the property then you could not collect fees post-petition.
 - However, in recent decisions in ED of PA BK, NJ BK Court, 6th Cir Court of Appeals and ND of AL: Courts have all agreed that so long as the mortgage contains a fee shifting provision and the Chapter 13 Plan cures the arrears then the fees are automatically recoverable.

ARE POST-PETITION FEES COLLECTABLE AROUND THE COUNTRY?

New Jersey: Yes, mortgage must contain a fee shifting provision and the Plan must cure the arrears.

Rhode Island, Maine, Massachusetts, Connecticut & New Hampshire : Yes, mortgage must contain a fee shifting provision.

Maryland and D.C: Yes, Judges look to FNMA Guidelines.

South Carolina: Fees must be reasonable. SC does not allow for the collection of POC fees where the arrearage is zero or only consists of a projected escrow shortage.

North Carolina: PPFNs are capped. WD of NC - \$450 total for POC and Plan Review with individual breakdown of \$325 for POC and \$125 for Plan Review. MD and ED are \$450 total for POC and Plan Review without any breakdown requirements.

Vermont: Yes, well, maybe. In a recent case the court upheld a debtor's challenge to a PPFN for fees related to a plan review and POC filing. Because the plan was vanilla and the POC was straightforward, the court struck the fees and even granted the debtor's attorney's fees for challenging.

ARE POST-PETITION FEES COLLECTABLE AROUND THE COUNTRY?

Virginia: Yes, allowed in each of the two Districts of Virginia.

Florida:

- Costs for PCNs and fees for prior PPFNs are ministerial and therefore, non-recoverable.
- Fees and costs contained in the PPFN are not paid by the Trustees unless included in the Plan.
- The Eastern District will not grant a discharge if the loan is in arrears, this includes fees and costs in a timely filed PPFN (In re: Evans 564 B.R. 513 (E.D. Va. 2017),
- Northern, Middle, and Southern – attorney’s fees and costs are allowed and should be included in the PPFN.
 - In Middle- Tampa/Ft Myers some judges are limiting fee amounts for plan reviews and objections to confirmation, but nothing formal or written.
- Southern
 - New Local Rule 3002.1-1 expands Fed BK Rule 3002.1 requirements to any real property that is paid in the plan. However, if the stay is lifted you may not file 3002.1 notices or you could be sanctioned. The rule specifically states PCNs, but local practice is to stop all 3002.1 notices once the stay is lifted.

ARE POST-PETITION FEES COLLECTABLE?

Tennessee:

WD: There are two divisions within the Western District – Memphis and Jackson.

- The Memphis Trustees (there are 2) limit fees for pre-confirmation work to \$500.00.
 - These fees must be included on the proof of claim via an appendix in order for them to be paid.
 - The Trustees will not pay fees included in an actual filed PPFN, their position is that the PPFN is simply a notice and does not make the fees a part of the claim.
 - There is not any actual written rule, but rather local custom and the court follows the Trustees' position in this matter.
- The Jackson Trustee does not have a fee cap, but does follow the same local custom to include fees on the proof of claim via an appendix.
 - If seeking additional fees, i.e. objection to plan, those will typically be included in any order/agreed order rather than via PPFN.

ED: There are four divisions – Chattanooga, Winchester, Greenville and Knoxville. All divisions accept PPFNs for attorney's fees. Occasionally, the Trustee for Greenville/Knoxville will file an objection for fees over \$650.00, but will agree to resolve if client reduces to \$500.00. This is on a case-by-case basis.

MD: allows PPFNs for fees, no specific prohibitions or requirements.

ACT 6 APPLICATION TO BANKRUPTCY

- Is the mortgage a Residential Mortgage?
 - Definition of Act 6 is set forth in Section 101. It states:
 - “RESIDENTIAL MORTGAGE” means an obligation to pay a sum of money in an **original bona fide principal amount of the base figure** or less, evidenced by a security document and secured by a lien upon real property located within this Commonwealth containing two or fewer residential units or on which two or fewer residential units are to be constructed and shall include such an obligation on a residential condominium unit.

Act 6 Base Figure History

- Prior to 9/6/2008 the Base figure was \$50,000. After 9/6/2008 “base figure” for Act 6 eligibility increased from \$50,000.00 to \$217,893.00.
- From 2020 to 2021 the Base figure increased from \$260,404.00 to \$263,975.00.

41 P.S. Section 406. Attorney's Fees Payable states:

With regard to residential mortgages, no residential mortgage lender shall contract for or receive attorney's fees from a residential mortgage debtor except as follows:

(1) Reasonable fees for services included in actual settlement costs.

(2) Upon commencement of foreclosure or other legal action with respect to a residential mortgage, attorney's fees which are reasonable and actually incurred by the residential mortgage lender may be charged to the residential mortgage debtor.

(3) Prior to commencement of foreclosure or other legal action attorneys' fees which are reasonable and actually incurred not in excess of fifty dollars (\$50) provided that no attorneys' fees may be charged for legal expenses incurred prior to or during the thirty-day notice period provided in section 403 of this act.

§ 2311(a)(2)(i) Limitation on creditor's attorney fees.

- After commencement of proceedings attorney fees are presumed to be reasonable under paragraph (1) if they conform with the attorney fees promulgated and as may be amended from time to time by the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, the Department of Housing and Urban Development, the Department of Veterans Affairs or their respective successor organizations;

THE WESTERN DISTRICT OF PENNSYLVANIA

- Many Mortgage Companies and Servicers were not filing PPFNs in the WD of PA
 - In April 2018, Judge Agresti issued his own Order requiring that all PPFNs include: the invoices, hourly time records and a certification.
 - In addition, for years the Chapter 13 Trustee has been opposing all PPFNs in the Western District
- In 2019 we defended two Motions to Preclude Post-Petition fees before Judge Deller, one matter before Judge Böhm and another before Judge Agresti
 - Among several arguments we relied on the recent Pennsylvania Statute 68 Pa.C.S§2311 “Limitation on Creditor’s attorney fees” that became effective on 12/17/2018, as well as, our lodestar attached that verified the time spent on the POC, Objection to Plan, and Plan Review
 - We also argued that Act 6 did not apply as alleged by the Trustee
- The Judges in the WD of PA determined:
 - They “[were] not aware of any legal authority to preclude the creditor from collecting a flat fee”
 - Based on the hourly time records provided in our response the fees incurred for the drafting of the POC and 410A (\$550), Plan Review (\$350) and Objection to Confirmation (\$500) were all reasonable
 - If the PPFN contains all of the necessary information required (invoices, lodestar & certification) fees are allowed

PATHWAY TO COLLECTION OF FEES IN PA

- It is now evident that there is a pathway to collect post-petition fees and costs in the Western District of PA and the rest of the State:
- The law firm you employ MUST BE keeping contemporaneous hourly time records to justify the time spent on the file;
- The time records must be attached to the PPFN;
- The lawyer who performed the work MUST BE a licensed attorney in that State.
- The Law firm must check to make sure that the mortgage contains a fee shifting provision, Act 6 does not apply, there is equity in the property (11 U.S.C. §506(b)) or §1322(e) applies

COLLECTION OF FEES INCURRED UNDER CARES ACT

- Can the Creditor Recovery Bankruptcy Attorneys' Fees When a Loan is in Forbearance?
 - CARES Act- 4022 (b)(3) ACCRUAL OF INTEREST OR FEES.—
During a period of forbearance described in this subsection, no fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract, shall accrue on the borrower's account.
- If the action pertains to the Forbearance – then no fees can be recovered.
- If it pertains to another action in the BK case (POC, MFR, Objection to Plan) then you can recover .

Polling Question

Does your jurisdiction require Lodestars to be attached to post-petition fee notices?

- Yes
- No
- I have no idea.

RESPONSE TO NOTICE OF FINAL CURE

Final Cure Notices

Practice Pointers and Potential Issues:

- Always file a response.
- Always include fees and costs incurred (and unpaid) in any docketed PPFN.
- Make sure your payment history is consistent with all timely-filed NMPCs/NOPCs/PCNs.
- Do you file a “disagree” response if only the current month is due?
 - What does the servicer/client require?
 - When does the applicable grace period expire?
- How do you address forbearance payments?

The Discharge Problem

A statement (or response) saying, e.g. that a debtor is not current on payments, is ***not*** an objection to discharge; generally, creditors do not have standing to object to a debtor's discharge in a Chapter 13 context. So, if a response filed under Fed.B.R. 3002.1(g) is not an objection to discharge, what does it really mean and what kind of weight does it carry as a debtor seeks a discharge?

Practice Pointer: Many debtor attorneys treat responses filed per Fed.B.R. 3002.1(g) as objections to discharge when he/she files a motion to determine per Fed.B.R. 3002.1(h). A motion to determine is, however, intended to be a vehicle for a debtor to contest an alleged delinquency. (Some attorneys also file these motions to buy a debtor with additional time to cure, as there is a response/objection period, as well as generally a hearing date set.)

Final Cure Notices (Continued)

The Discharge Problem (Continued)

- Pre-COVID Scenario 1
 - A Fed.B.R. 3002.1(g) response is nothing more than a notice of an arrearage. A debtor can proceed with seeking a discharge, but will emerge from bankruptcy with the arrearage still owing (unless and until cured). [In other words, a delinquent post-discharge debtor may find him/herself subject to the (re)commencement of foreclosure proceedings immediately following a five-year Chapter 13 case.]
- Pre-COVID Scenario 2
 - A Fed.B.R. 3002.1(g) response puts the Court on notice of a material default under the confirmed Plan (specifically, failure to ***maintain***). Because of the default, a debtor cannot be found to have per se ***completed*** the Plan under § 1328 and would therefore be ineligible for discharge (or worse).

The Discharge Problem (Continued)

- Post-COVID Scenario
 - The Consolidated Appropriations Act of 2020 mandates that a forbearance/non-payment post-petition does not prevent the entry of a Chapter 13 discharge provided:
 - A debtor's plan provides for the curing of a default and maintenance of payments on a residential mortgage under 11 U.S.C. § 1322(b)(5), and;
 - A debtor has missed three or fewer mortgage payments or entered into a forbearance agreement or loan modification agreement with the mortgage holder or servicer because of a COVID-19-related hardship.
 - *See* 11 U.S.C. § 1328(i)(2).

Webinar Wrap-Up

Questions

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