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THE ISSUES WITH POST-PETITION FEE NOTICES

As most bankruptcy attorneys know, the rules vary depending on the jurisdiction and the judge. Even judges in the same district follow different procedures. This is especially true when it comes to recovery of creditor's attorney fees in Chapter 13 cases.

Rule 3002.1 sets forth the requirements for providing notices related to claims secured by the debtor's primary residence. Pursuant to 3002.1 holders of secured claims must file a notice itemizing fees and charges incurred after the petition date within 180 days of the date the fees are incurred. Sounds simple enough, but as evidenced by the significant increase in objections to creditor's fee notice, it has become anything but simple. More and more creditors are faced with the dilemma of whether or not to file a post-petition fee notice.

When faced with an objection to a post-petition fee notice, a creditor must prove they are entitled to the fee. Courts will look to the underlying agreements and non-bankruptcy law to determine entitlement to attorney fees.¹ Most residential mortgages include provisions providing for recovery of fees incurred in connection with the enforcement of the mortgage and incurred to protect the secured creditor's interest. However, one court disallowed the requested fees where the mortgage did not unambiguously provide for the collection of attorney fees for bankruptcy plan review or for filing fees or court costs related to proof of claim preparation.² In *Clark*, the debtor's plan proposed to pay the mortgage direct.³ The creditor filed a post-petition fee notice in the amount of \$300.00 for filing fees and court costs related to its proof of claim and \$350.00 for the plan review.⁴ The debtor objected and argued that the underlying agreement does not allow for recovery of attorney's fees from the debtor.⁵ A lender is only permitted to collect mortgage fees, expenses, and charges in bankruptcy if the underlying agreement or applicable non-bankruptcy law so permit.⁶ The court held that within the four corners of the underlying loan documents, the mortgage did not contain unambiguous language establishing a mortgagor obligation for mortgagee attorney fees for bankruptcy plan review or for filing fees or court costs related to proof of claim preparation.⁷ As such the court ruled the the fees are disallowed.⁸ Accordingly, the loan documents must always be reviewed prior to filing a post-petition fee notice to ensure recovery of said fees is allowed under the terms of the loan documents.

Objections related to reasonableness of the creditor's requested fees filed by debtors and trustees have become routine. Unfortunately, many judges are agreeing with the debtors and trustees and are significantly reducing the amount of fees owed to creditors. One of the most common arguments alleges that preparation of proof of claims and Chapter 13 plan reviews are inconsequential ministerial tasks. In Florida, these reasonableness objections are usually sustained in part and creditor attorney's fees are drastically reduced.⁹ A creditor in the Southern District of Florida filed a post-petition fee notice seeking fees in the amount of \$950.00 for the proof of claim and plan review.¹⁰ The court, without providing any reasoning, reduced the fees to a total of \$225.00.¹¹ In another Southern District of Florida case, a creditor filed its post-petition fee notice seeking \$510.00 for the proof of claim and \$390.00 for a plan review.¹² The debtor, whose plan proposed to the pay the claim directly, objected and argued the fee was not reasonable.¹³ The court agreed with the debtor and found the fees were excessive and unreasonable as the debtor's case is simple and the plan proposes to pay the claim directly.¹⁴ In *In re Cousins*, another Southern District of Florida case, the debtor objected to creditor's fees in the amount of \$500.00 for a proof of claim and \$450.00 for a plan review.¹⁵ The plan in *Cousins* proposed to cure the arrears and maintain the ongoing monthly payment.¹⁶ Despite the proposed plan treatment, the Court found the fees excessive and unreasonable.¹⁷ The court reduced creditor's fees to \$500.00.¹⁸

However, some courts do recognize the risks posed to lenders when a borrower files for bankruptcy and recognize that the risks can be mitigated by having an attorney review the plan, petition, loan documents and by having an attorney prepare the proof of claim.¹⁹ The court in *Mandeville* details the consequences of filing an inaccurate proof of claim.²⁰ Filing a proper proof of claim constitutes prima facie evidence of the validity and amount of the claim.²¹ Moreover, filing a defective claim could deprive a creditor of the prima facie evidentiary presumption of validity and amount, or, it could preclude the creditor from presenting the omitted information, as evidence in any contested matter or

1 11 U.S.C 1322(e)

2 *In re Clark*, 593 B.R. 661 (Bankr. S.D. Ala. 2018).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 See *In re England*, 586 B.R. 795 (Bankr. M.D. Ala. 2018)

10 *In re Zabchuck*, 21-10815-EPK (May 17, 2021)

11 *Id.*

12 *In re Chiarenza*, 21-10492-MAM (September 29, 2021)

13 *Id.*

14 *Id.*

15 *In re Cousins*, 20-23868- MAM (September 29, 2021)

16 *Id.*

17 *Id.*

18 *Id.*

19 See *In re Mandeville*, 596 B.R. 750 (Bankr. N.D. Ala. 2019).

20 *Id.*

21 *Id.*

adversary proceeding and entitle the objecting party to reasonable attorney's fees caused by the failure.²² Another risk to creditors is that creditors are bound by the provisions of the confirmed plan, even if that plan improperly modifies their claim.²³ These risks demonstrate the importance of having an attorney file the proof of claim and review the plan on behalf of the creditor and justify reimbursement of the attorney's fees as contemplated by the terms of the underlying loan documents.²⁴

To combat the uncertainty, some jurisdictions have instituted a "no look" threshold, which means the trustee will not object if the fee is below those threshold amounts. For example, the Northern District of Texas has a "no look" fee amount of \$700 whereby any fees requested below \$700 are presumptively reasonable and anything above \$700 requires supporting documentation with an attached itemization of services provided.²⁵ The Southern District of Florida also has recently enacted a "safe harbor" amount of \$525.00 for preparation and filing of the proof of claim, plan review and filing of any objections to the plan.²⁶ Other courts have an unwritten or informal no look threshold. For example, one trustee's office in Florida has a "no look" threshold of \$865.00 for creditor attorney's fees incurred during the proceedings.

The "no-look" threshold will not prevent a creditor from seeking fees in excess of the "no-look" threshold. The Northern District of Texas allowed a creditor to recover fees in the amount of \$900.00, which is \$200.00

over the "no-look" threshold.²⁷ The Trustee in *Garcia* objected after the creditor filed two post-petition fee notices which totaled \$900.00 in fees and expenses.²⁸ The Trustee argued that the creditor was stacking its attorney fees in an attempt to avoid the the "no-look" threshold.²⁹ The creditor filed a response to the Trustee's objection and included an exhibit detailing the Fannie Mae maximum allowable fee schedule.³⁰ The court stated that the "no-look" threshold does not prejudice the creditor from seeking an amount greater than \$700.00 by application or motion.³¹ The Court held that the servicer satisfactorily explained the basis for the fees and expenses³² and approved the requested fees and expenses. However, the court noted that this should not be construed as an endorsement of secured creditors seeking fees in excess of the "no-look" fee without filing a proper application or motion as required by the General Order.³³

As a result of these objections and differing treatment throughout the country, creditors are faced with the dilemma of whether to file a notice that includes the actual fees incurred and risk incurring additional fees defending their notice or file a notice with a significantly decreased amount to avoid objections. Creditors will continue to face this dilemma until such a time as there is uniformity or all districts publish guidelines related to standard allowable fees. ■

22 *Id.*

23 11 U.S.C. 1327.

24 See *Mandeville*, 596 B.R. 750.

25 See *General Order* 2017-01.

26 See *Guidelines For Chapter 13 Attorney Fees For Secured Creditors*.

27 *In re Garcia*, 17-60124-RLJ-13, 2018 WL 3203385 (Bankr. N.D. Tex. June 28, 2018)

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*



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