

# **Concurrent Session**

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## Creditor Representation Breakout

### **Ronald A. Levine**

Levine, Block & Strickland LLP, Atlanta

### **Whitney Warnke Groff**

McCalla Raymer, LLC; Roswell, Ga.

### **Eric W. Roach**

Office of Nancy J. Whaley, Standing Chapter 13 Trustee; Atlanta

Creditor Breakout Session

Speakers:

Auto creditor: Ron Levine  
Mortgage creditor: Whitney Goff  
Trustee: Eric Roach

Topics:

341 MOC –

To attend or not?  
When it is beneficial and what can you expect to learn.  
Prioritizing questions based on limited time.

POCs –

Issues in preparation and Filing:  
Supporting documentation  
Fees and costs  
Signatures  
Redaction  
Should you ever withdraw a POC (unless clearly filed in error)

Transfer and Assignments –

What are they?  
How do they work?  
Who files them and when?

How to obtain information from the trustee?

National Data Center – what is it and what can it do for you?  
Individual trustee website  
Available information

Post Petition Fees and Costs -



# Section 1

## I. New Trustee Procedures concerning Section 341 Meetings

### A. Individuals with Limited English Proficiency

As required by Executive Order 13166, signed August 11, 2000, the United States Trustee Program updated the Language Assistance Plan in 2008. After successful pilot programs, a new procedure is now in effect for the Northern District. The Trustee conducting the Section 341 hearing now has immediate access to interpreters for over 150 languages. For additional information concerning this policy or the procedure access [http://www.usdoj.gov/ust/eo/public\\_affairs/lep/index.htm](http://www.usdoj.gov/ust/eo/public_affairs/lep/index.htm).

### B. Personally Identifiable Information (PII)

No party attending a 341 Hearing is permitted to put a debtor's PII on the record. No longer will the Trustee ask debtors to state their address, and creditors are asked to inquire about contact information either before or after the hearing.

## II. Proofs of Claim

An essential part of any bankruptcy filing is the Proof of Claim being filed accurately, being filed on time and providing the proper information for the Trustee to be capable of administering the claim.

### A. When proofs of claim are filed with the United States Bankruptcy Court, it is important that all claim reflect the following information:

1. Valid address to which payments and/or notices are to be forwarded
2. Valid contact information: telephone number and a legible signature

### B. Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements, contracts, judgments, mortgages, security agreements, and evidence of perfection of lien. Do not send original documents to the court. If documents are not available, provide an explanation as to why.

### C. When claims are amended, the proof of claim and the claims register should be clear as to the amended status of the claim:

1. The amended box should be checked and the date of the original claim should be provided in the previously filed claim section
2. The courts claims register should also reflect amended

**D. When assignments/transfers are filed, this document should reflect:**

1. The old and new account numbers, unless doing so would violate Fed.R.Bankr. P. 9037
2. The old and new address
3. The date the claim was filed, the claims register number and the dollar amount of the claim

**E. When proofs of claim are withdrawn:**

1. The withdrawal should be on the creditors letterhead/stationary
2. The withdrawal of proof of claim should reflect the courts claim register number and the amount of the claim
3. When a creditor has multiple claims on a case, be clear of which claim is to be withdrawn

**F. When a proof of claim is filed late, but is provided for in the Chapter 13 Plan:**

The Trustee files a Notice of Intent to fund a late filed proof of claim. The Trustee then places the creditor's claim on a one disbursement hold, providing the debtor and the debtor's attorney an opportunity to object to the proof of claim.

**G. Notice of intent not to fund –**

When a secured claim is filed and the confirmed plan does not treat or provide for the claim in the plan, the Trustee will file a Notice of Intent not to fund claim, this is to put the debtor and creditor on notice that the Trustee will not fund the claim until it is provided for in the plan.

**H. Why is my claim not being funded?**

This is a frequent question received by the Trustee staff. Prior to contacting the Trustee, it may helpful to review the following items below to determine the reason why disbursements are delayed.

- Is a proof of claim filed?
- Is the proof of claim administrable by the Trustee? (see- Trustee Objections to proofs of claim)
- Is there a delayed creditor step? When does the confirmed plan state that payments on the proof of claim are to begin?

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- Is the plan confirmed? Only adequate protection payments are disbursed prior to confirmation.
- What is the status of the case? (i.e. dismissed, converted, transferred)
- When and how were plan payments received?
  - Plan payments received by personal check are placed on a 30 day hold.
  - Money orders, Certified funds and official checks have no hold and will be disbursed at next disbursement.
  - Payments received from an employer are placed on hold, until following disbursement, if received after the 15<sup>th</sup> of the month.
  - Income tax checks are placed on a 45 day hold, and then released unless a motion to retain is filed

Any payment that is 3 times a debtor's plan payment, from insurance funds or from a settlement, are reviewed by the Trustee to determine how they are to disburse.

### I. Trustee Objection to Proof of Claim –

When a claim is filed that the Trustee cannot administer, an objection will be filed. Following are the most common objections that the Trustee may have, to a filed proof of claim. The Trustee's objection to proofs of claim are sought to disallow claims without prejudice, thereby allowing Creditors to amend faulty claims:

- Defective- occurs most often when the face of the claim has conflicting amounts listed, but also includes incorrect names and case numbers – see Exhibit A
- Duplicate- typical situation involves assigned claims in which the assignee and assignor file identical claims
- No Proof of Perfection- all secured claims are required to attach supporting documents. The Trustee objects to NPMSI, Judgment, and FIFA claims, if no perfection is provided.
- Improper classification- typical scenario involves classifying a claim as priority that does not qualify as priority under 11 U.S.C. Section 507, the Trustee seeks relief to pay the claim as a general unsecured debt – see Exhibit B
- Late – when claims are filed after the Bar Date and are not provided for in the Chapter 13 Plan

**III. New Guidelines for Mortgage claims:**

The Bankruptcy code requires standing Trustees to examine proofs of claim and object to the allowance of any claim that is improper, if a purpose would be served. This duty pertains to all judicial districts, even districts in which local rules or practices expressly provide that debtor’s counsel are required to review proofs of claim as part of the representation of their client. If a specific provision of these guidelines conflicts with a local rule, administrative order, or case law, the local rule, administrative order, or case law will control. For claims secured by a lien on the debtor’s residence that are to be paid by the Trustee under the plan the trustee must review the following:

1. Verify that copies of documents supporting a perfected security interest are attached to the proof of claim. If the secured creditor/mortgagee fails to attach copies of documents supporting a perfected security interest and the Trustee is unable to confirm that the creditor/mortgagee has perfected its security interest, the trustee must take appropriate action.
2. Verify that there is an itemization of the pre-petition fees, costs or other charges are attached to the proof of claim. If the proof of claim does not include an itemization of the fees, costs, and other charges and the Trustee is unable to obtain the itemization, the Trustee must take appropriate action.
3. Verify whether the proof of claim includes a flat fee for review of the Chapter 13 plan prior to confirmation and for the preparation of the proof of claim, and if so, whether the fee is reasonable and fairly reflects the attorney fees incurred. If the Trustee determines that the fee is not reasonable, the Trustee must object to the claim or take such other action as may be appropriate.
4. Verify that the secured creditor has filed a proof of claim. If no claim has been filed, the Trustee must ensure that the mortgagee’s claim is not paid or take other action as may be appropriate.
5. If a Trustee determines, based on the Trustee’s facial review of the mortgage proof of claim, that the fees, costs, or charges are material and improper, the Trustee must take appropriate action.

**IV. 13 Network Website –**

Allows the user to access the Trustee’s information. The site displays information regarding claim set-up, debtor plan payments and disbursements on claims that are being funded. See Exhibit C. In order to gain access to this secured website contact the IT department for the specific Standing Chapter 13 Trustee, each of the Northern District’s Standing Chapter 13 Trustees has an individual 13 Network Site. The Information Access Agreement can be obtained from the following:

Nancy J Whaley - [http://www.njwtrustee.com/Forms/atw\\_WAA.pdf](http://www.njwtrustee.com/Forms/atw_WAA.pdf)

Mary Ida Townson - <http://www.atlch13tt.com/pdf/AccessAgreement.pdf>

Adam Goodman - [http://www.13network.com/trustees/atg/atgdocs/ATG\\_WAA.pdf](http://www.13network.com/trustees/atg/atgdocs/ATG_WAA.pdf)

## V. **Orders**

The following are the email addresses the Standing Chapter 13 Trustees have established to accept Orders for review:

Chief Judge Bihary	-	orders@atlch13tt.com
Judge Bonapfel	-	orders@atlch13tt.com
Judge Diehl	-	orders@atlch13tt.com
Judge Drake	-	orders@13trusteeatlanta.com
Judge Murphy	-	orders@13trusteeatlanta.com
Judge Brizendine (Atlanta)	-	orders@13trusteeatlanta.com
(Gainesville)	-	reb-orders@njwtrustee.com
Judge Massey	-	jem-orders@njwtrustee.com
Judge Mullins	-	crm-orders@njwtrustee.com



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EXHIBIT B

B10 (Official Form 10) (12/07)

UNITED STATES BANKRUPTCY COURT Northern District of Georgia		PROOF OF CLAIM
Name of Debtor: <u>[REDACTED]</u>		Case Number: <u>[REDACTED]</u>
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): <u>Nansor [REDACTED]</u>		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.
Name and address where notices should be sent: <u>[REDACTED]</u> <u>[REDACTED]</u> <u>[REDACTED]</u>		Court Claim Number: (if known) _____
Telephone number: <u>[REDACTED]</u>		Filed on: _____
Name and address where payment should be sent (if different from above):   Telephone number: _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.  <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
1. Amount of Claim as of Date Case Filed: \$ <u>123,40</u>  If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.  If all or part of your claim is entitled to priority, complete item 5.  <input type="checkbox"/> 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.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(u). If any portion of your claim falls in one of the following categories, check the box and state the amount.  Specify the priority of the claim.  <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).  <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507(a)(4).  <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507(a)(5).  <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507(a)(7).  <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507(a)(8).  <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(____).
2. Basis for Claim: <u>service</u> (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: <u>030699</u>  3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.  Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: _____  Value of Property: \$ _____ Annual Interest Rate: _____ %  Amount of arrearage and other charges as of time case filed included in secured claim. If any: \$ _____ Basis for perfection: _____  Amount of Secured Claim: \$ _____ Amount Unsecured: \$ <u>12340</u>		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		Amount entitled to priority: <u>\$ 12340</u>
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.)  DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.  If the documents are not available, please explain: _____		*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
Date: <u>11/10/08</u>	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.  <u>[REDACTED]</u> Assistant Manager Collection	FOR COURT USE ONLY DO NOT STAPLE OR FOLD CLAIM See www.ganb.uscourts.gov for information on filing claims electronically.

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

EXHIBIT C

Internet Explorer powered by Dell

http://66.194.155.139/13netv3/CaseFrameLoaded.aspx?cid=10060478

Case Number: Name, Social Security Number, or @14 Address Line

**BSS** 13Network

Lonnie Funk Case Query

PROFILES | PARTIES | PAY SCHEDS | PAYERS | FINANCIALS | PLAN/ALL | MATTERS |

Recently Accessed Cases: 1027-70224 JEM LONNIE LEROY FUNK

007 70224 JEM LONNIE LEROY FUNK (xxx xy 8810) 2711 MISTY ROCK COVE + DACULA + GA + 30012 \$1,181.00 MO/ Dar Date(s): 10/26/2007 (has passed) 12/28/2007 (has passed)

Trustee: Nancy Whaley Attorney: CLARK & WASHINGTON

Confirmed: 9/13/2007 Case Status: ABOUT TO COMPLETE

FINANCIAL SUMMARY - CASE 07-70224

LONNIE LEROY FUNK paying \$1,383.00 MONTHLY

Receipts Disbursements Balance

Check Status: Cleared | Rejected | Pending Payment | Warned | Voided | Outstanding

Date	Payee	Payee Name	Source / Check	Description	Receipts	Disbursements	Balance
4/12/2009			9093	EMPLOYER PAYROLL DEDUCTION CHECK	\$617.50		
3/18/2009			8485	FMP PAYROLL DEDUCTION CHECK/ONE DISBURSEMENT	\$617.50		
3/5/2009			7811	EMPLOYER PAYROLL DEDUCTION CHECK	\$617.50		
3/2/2009	12	JEFFERSON CAPITAL SYSTEMS, LLC	7225215	AMOUNT DISBURSED TO CREDITOR - MONTHLY DISBURSEMENTS			\$1,935.48
3/2/2009		NANCY WHALEY, TRUSTEE	7273531	TRUSTEE FEE - MONTHLY DISBURSEMENTS			\$119.17
2/20/2009			7125	EMP PAYROLL DEDUCTION CHECK/ONE DISBURSEMENT	\$617.50		
2/12/2009	0	LONNIE LEROY FUNK	7225208	DEBTOR REFUND/GRANTED BY TRUSTEE OR COURT - COMPUTER CHECKS			\$3,000.00
2/4/2009			6474	EMPLOYER PAYROLL DEDUCTION CHECK	\$617.50		
2/4/2009			43762	INSURANCE PREMIUMS	\$5,445.45		
2/2/2009	12	JEFFERSON CAPITAL SYSTEMS, LLC	7270864	AMOUNT DISBURSED TO CREDITOR - MONTHLY DISBURSEMENTS			\$2,933.13
2/2/2009		NANCY WHALEY, TRUSTEE	7268925	TRUSTEE FEE - MONTHLY DISBURSEMENTS			\$154.37
1/22/2009			5766	EMP PAYROLL DEDUCTION CHECK/ONE DISBURSEMENT	\$617.50		
1/9/2009			5149	EMPLOYER PAYROLL DEDUCTION CHECK	\$617.50		
12/24/2008			4485	FMP PAYROLL DEDUCTION CHECK/ONE DISBURSEMENT	\$617.50		
12/11/2008			3780	EMPLOYER PAYROLL DEDUCTION CHECK	\$617.50		
11/26/2008			3093	EMP PAYROLL DEDUCTION CHECK/ONE DISBURSEMENT	\$617.50		
11/17/2008			2404	FMP PAYROLL DEDUCTION CHECK/ONE DISBURSEMENT	\$617.50		
11/3/2008	1	GEORGIA TELCO CREDIT UNION	7257592	INTEREST - MONTHLY DISBURSEMENTS			\$44.55
11/3/2008	1	GEORGIA TELCO CREDIT UNION	7257592	AMOUNT DISBURSED TO CREDITOR - MONTHLY DISBURSEMENTS			\$3,795.03
11/3/2008	2	GEORGIA TELCO CREDIT UNION	7257592	AMOUNT DISBURSED TO CREDITOR - MONTHLY DISBURSEMENTS			\$65.11
11/3/2008	2	GEORGIA TELCO CREDIT UNION	7257592	INTEREST - MONTHLY DISBURSEMENTS			\$0.71
11/3/2008		NANCY WHALEY, TRUSTEE	7256205	TRUSTEE FEE - MONTHLY DISBURSEMENTS			\$206.60
10/14/2008			915022	M.O. CASHIER'S CK FROM DEBTOR	\$618.00		
10/1/2008	1	GEORGIA TELCO CREDIT UNION	7253494	INTEREST - MONTHLY DISBURSEMENTS			\$94.16
10/1/2008	1	GEORGIA TELCO CREDIT UNION	7253494	AMOUNT DISBURSED TO CREDITOR - MONTHLY DISBURSEMENTS			\$303.36
10/1/2008	2	GEORGIA TELCO CREDIT UNION	7253492	AMOUNT DISBURSED TO CREDITOR - MONTHLY DISBURSEMENTS			\$185.08
10/1/2008	2	GEORGIA TELCO CREDIT UNION	7253492	INTEREST - MONTHLY DISBURSEMENTS			\$4.50
10/1/2008		NANCY WHALEY, TRUSTEE	7252054	TRUSTEE FEE - MONTHLY DISBURSEMENTS			\$30.90
9/25/2008			1078037	FMP PAYROLL DEDUCTION CHECK/ONE DISBURSEMENT	\$618.00		
9/15/2008			912873	M.O. CASHIER'S LY FROM DEBTOR	\$618.00		
8/1/2008	1	GEORGIA TELCO CREDIT UNION	7244438	INTEREST - MONTHLY DISBURSEMENTS			\$80.98
8/1/2008		GEORGIA TELCO CREDIT UNION	7244438	AMOUNT DISBURSED TO CREDITOR - MONTHLY DISBURSEMENTS			\$1,651.25

View Chapter 13 Information Management System

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http://66.194.155.139/13netv3/CaseFrameLoaded.aspx?ref=10060478 - Internet Explorer provided by Dell

http://66.194.155.139/13netv3/CaseFrameLoaded.aspx?ref=10060478

http://66.194.155.139/13netv3/CaseFrameLoaded.aspx?ref=10060478

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Case Query

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PROFILE | PARTIES | PAYEE | FINANCIALS | PLAN CASE | MATTERS

AD7-70224-JEM LONNIE TERUY FUNK (xxx-xxx-5810) 2713 MUSTY ROCK COVE + Dacula + GA + 30019

Recently Accessed Cases: AD7-70224 JEM LONNIE TERUY FUNK  
\$1,883.00 (M3) Due Date(s): 10/28/2007 (has passed) 12/24/2007 (has passed)  
Confirmed: 9/13/2007  
Case Status: ABOUT TO COMPLETE

Trustee: Nancy Whaley Attorney: CLARK & WASHINGTON

**PAYEE FOR THIS CASE - 07-70224**

Claims Summary

Number of Claims	14
Total Amount Claimed	\$12,054.87
Total Amount Scheduled	\$29,190.24
Total Principal Paid	\$12,054.87
Total Principal Owed	\$0.00
Total Principal Due	\$0.00
Total Interest Paid	\$212.94
Total Interest Due	\$0.00

Claims Breakdown

	Priority	Secured	Unsecured	Other
Claimed	\$3,300.00	\$3,686.26	\$4,868.61	
Scheduled	\$3,300.00	\$16,669.00	\$9,781.21	\$0.00
Principal Paid	\$3,300.00	\$3,686.26	\$4,868.61	
Principal Owed	\$0.00	\$0.00	\$0.00	
Principal Due	\$0.00	\$0.00	\$0.00	
Interest Paid	\$0.00	\$212.94	\$0.00	
Interest Due	\$0.00	\$0.00	\$0.00	
Collateral	\$0.00	\$0.00	\$0.00	
Monthly Payment	\$1,168.00	\$204.00	\$0.00	

Payee Disbursements (last 6 Months)

Amount Claimed by Type

Claims Listing

Name	Classified	Description	Type	Code	Monthly Payment	Principal Paid	Principal Owed	Claimed Amount	Sched Amount	Account No.	% Paid Rev	Int Rate
GEORGIA TELCO CREDIT UNION	1	Secured BY Vehicle	V	42	\$287.00	\$4,667.87	\$0.00	\$10,216.92	\$5,278.00	XXXXXXXXXX 401	84.82%	10.00%
GEORGIA TELCO CREDIT UNION	2	Secured BY Vehicle	V	42	\$189.00	\$3,477.75	\$0.00	\$3,477.75	\$3,471.00	XXXXXXXXXX 003	100.00%	10.00%
COUNTRYWIDE HOME LOANS, INC.	3	MORTGAGE	M	42	\$780.00	\$0.00	\$0.00	\$38,549.29	\$7,920.00			
CHASE HOME EQUITY	5	MORTGAGE	M	42	\$15.00	\$208.81	\$0.00	\$108.81	\$0.00	XXXXXXXXXX 667	100.00%	
INTERNAL REVENUE SERVICE	13	PRIORITY TAXES	T	30	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			
SCHEDULED CREDITORS	6	UNSECURED	U	62	\$0.00	\$0.00	\$0.00	\$0.00	\$1,000.00			
SCHEDULED CREDITORS	7	UNSECURED	U	62	\$0.00	\$0.00	\$0.00	\$0.00	\$112.00			
SCHEDULED CREDITORS	8	UNSECURED	U	62	\$0.00	\$0.00	\$0.00	\$0.00	\$5,079.00			
SCHEDULED CREDITORS	9	UNSECURED	U	62	\$0.00	\$0.00	\$0.00	\$0.00	\$2,100.00			
SCHEDULED CREDITORS	10	UNSECURED	U	62	\$0.00	\$0.00	\$0.00	\$0.00	\$642.00			
SCHEDULED CREDITORS	11	UNSECURED	U	62	\$0.00	\$0.00	\$0.00	\$0.00	\$48.00			
INTERNATIONAL CAPITAL SYSTEMS, LLC	12	UNSECURED	U	62	\$0.00	\$4,868.61	\$0.00	\$4,868.61	\$0.00		100.00%	

13netv3 Privacy Alerts

Your Chapter 12 Information Management System

Internet | Protected Mode: On

# Section 2

## SELECT CREDITOR ISSUES INVOLVING PROOF OF CLAIMS

A proof of claim is the bankruptcy law equivalent to a RSVP that the creditor has elected to participate in a bankruptcy case. Filing a proof of claim subjects the claimant to the jurisdiction of the bankruptcy court. *Granfin Ancera, SA v Nordberg*, 492 US 33.41 (1989). Filing a proof of claim subjects the filer to bankruptcy court jurisdiction and may waive claimant's non-bankruptcy law jury trial even when claimant attempts to reserve such right.

## SUPPORTING DOCUMENTATION

As new markets have emerged in selling blocks of consumer credit card accounts by the originators to other entities, issues relating to the efficacy of proofs of claims have risen involving putting the claimant to its proof, including proof assignment, proof of the debt and proof of terms of the credit card contract itself.

While lack of documentation does not result in disallowance, it may strip the claim of the prima facie validity of the claim afforded by Bankruptcy Rule 3001(f); 11 U.S.C. 502(a). See, e.g., *In re Gilbreath*, 395 BR 356 (Bky SD Tex 2008)(Where the court disallowed purported credit card assignee's proof of claim on ground that creditor did not carry burden of proof as to (i) validity/assignment ; (ii) debt; (iii) underlying obligation. Those attorneys who skip reading the opinion and go to the decision line might be better served by reading the court's Introduction at p. 358, to wit:

"In its opinion in *Parsley*, this Court cautioned that it would continue to monitor the shoddy practices of creditors and their attorneys resulting from the corrosive "assembly line" culture fostered by flat fee engagements that have become common the consumer bankruptcy field. *In re Parsley*, 384 BR 138, 183-185 (Bankr.S.D.Tex 2008). In *In re Prevo*, 394 BR 847 (Bankr.S.D.Tex 2008), this Court, following up from its *Parsley* opinion, took to task a creditor who failed to abide by the rules for filing proofs of claim and for obtaining post petition fees and expenses. Now, once again, this Court finds itself in the unfortunate position of having to police attorneys and their clients to ensure that they comply with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure." Id at 358-359

See also *In re Plourde*, 397 BR 207 at 226 (Bky DNH 2008)("The need to provide details on

the terms and conditions of the contract, and the actual charges and interest imposed, from time to time may be onerous from the credit card issuer's point of view. However, such difficulties flow from the business model that the credit card industry has voluntarily adopted. So long as credit card issuers wish to maintain sole discretion to vary the terms of their agreement with a consumer at any time, and from time to time, they must accept the legal consequences of that business model. One of those consequences is that they may need to provide details of the charges and interest imposed by them in response to a proper objection to a proof of claim in a bankruptcy proceeding".) *Id* at 226.

*In re Moreno*, 341 BR 813, 819 (Bky SD Flor 2006)(If the original proof of claim contains only summary information and lacks the documentation necessary under Bankruptcy Rule 3001 to establish prima facie validity, the claimant will have the burden of establishing its claim, including, for example, providing a break down of how it calculated charges, such as interest, late fees or attorney fees, if it is these types of charges which represent the challenged amount). Other courts are not as quick to disallow based upon a debtor's insistence that the credit card claimant prove its debt. See *In re Shank*, 315 BR 799 (Bky ND Ga 2004)(Purely formal objection to proof of claim based on lack of documentation would not support disallowance where Debtor had no factual basis for disputing liability or amount of debt).

### **FILING OF PROOF OF CLAIM FOR AN IMPROPER AMOUNT**

The importance of filing accurate proof of claims has been demonstrated by court decisions imposing damages and sanctions for not doing so. *In re Stewart*, slip opinion 2008 WL 5096011 (Bky ED La 2008). The bankruptcy court in the exercise of its authority under 11 U.S.C. 105(a) ordered audits of all proofs of claim in the district when the court determined that payments had been misapplied by the mortgage creditor); *In re Campbell v. Countrywide Home Loan Inc.*, 545 F3d 348 (5<sup>th</sup> Cir 2008)(A mortgage lender filed a proof of claim that asserted the lender had a right to increase the debtor's post petition mortgage payments to recoup certain escrow shortfalls allegedly attributable to unpaid prepetition payments. The court declined to impose sanctions for violation of stay, but sustained the debtor's objection stating at fn1 at p. 356:

"FN1. Our discussion is limited to whether Countrywide's conduct in this case constitutes a violation of the automatic stay under Section 362. Of course, the bankruptcy court has other

mechanisms to impose sanctions on parties who may attempt to abuse the procedural mechanisms within the bankruptcy court. See 11 U.S.C. 105; Fed. R. Bankr. P. 9011"

### **FILING A PROOF OF CLAIM AS A PREREQUISITE FOR "ANTI-RIDE THROUGH" PROVISIONS OF BAPCPA**

Prior and after BAPCPA the circuits remain in disagreement as to whether a Debtor may retain secured property without reaffirmation, discharge the debt and convert the obligation to a non-recourse "pay as you go" transaction (the so called "Ride-Through" option). See, e.g., *Dumont v. Ford Motor Credit Company*, 282 BR 481 (9<sup>th</sup> Cir BAP 2008)(Ride through option eliminated by BAPCPA); *Compare Costal Federal Credit Union v. Hardiman Jr.*, 398 BR 161 (ED NC 2008)(Where reaffirmation agreement is not approved by court but debtor has done all code requires Ride Through is an option). Although by the express terms of 521(a)(6) a secured creditor holding a purchase money security interest in the property described by these code section is entitled to the statutory benefit of the same if and only if the creditor holds an "allowed" secured claim (i.e., a secured claim proper in form which is filed in the bankruptcy case), the issue of whether a formal proof of claim must be filed is not settled. *Compare In re Steinhaus*, 349 BR 694 (Bky D Idaho 2006) at division 2(a)(i)(no formal proof of claim need be filed) with *Coastal Federal Credit Union v. Hardiman*, 398 BR 161 (Ed NC 2008) at VI A (filing a proof of claim is a prerequisite to having an allowed claim).

### **WHO MAY FILE A PROOF OF CLAIM**

A servicer has standing to defend a proof of claim filed on behalf of its principal. *In re O'Dell*, 268 BR 607, 618 (ND Ala 201) affd 305 F3d 1297, 1302 (11<sup>th</sup> Cir 2002). A servicer is a party in interest in proceedings involving loans which it services).

# Section 3

Tagged Opinion

ORDERED in the Southern District of Florida on Oct 28, 2008



John K. Olson, Judge  
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

In re:

Case No. 08-14257-BKC-JKO

FAZLUL HAQUE,

Chapter 7

Debtor.  
\_\_\_\_\_ /

**ORDER GRANTING WELLS FARGO BANK , N.A.'S  
MOTION FOR RELIEF FROM STAY AND IMPOSING SANCTIONS  
FOR NEGLIGENT PRACTICE AND FALSE REPRESENTATIONS**

THIS MATTER came on for continued hearing on September 18, 2008, pursuant to the Motion For Relief From Stay (the "Motion") [DE 14] filed by Wells Fargo Bank, N.A. (the "Creditor"). Since the Creditor has provided sufficient evidence to support the relief requested the Motion will be granted. However, given the nature of the circumstances surrounding the fictitious claim for money owed, sanctions are warranted.

The Motion was filed on April 21, 2008, under the Court's negative notice procedures pursuant to Local Rule 4001-1(C), to which there was no response. *See* Certificate of No Response [DE 15]. After reviewing the Motion, I was concerned about certain charges listed in the affidavit

signed by a representative of the Creditor, and accordingly set an evidentiary hearing for June 24, 2008. Of specific worry was a charge for \$2,114.10 in “penalty interest.”<sup>1</sup> At the June 24<sup>th</sup> hearing it became abundantly clear that neither the Creditor’s representative nor its counsel, the Florida Default Law Group, P.L. (“FDLG”), could explain this charge. *See* Transcript of 6/24/2008 Hearing [DE 39]. At the request of Creditor’s counsel I continued the evidentiary hearing on the Motion so as to provide the Creditor and its counsel ample time to explain the basis for the “penalty interest” charge. *Id.*

For reasons relating in part to the Chapter 7 Trustee’s independent investigation into this issue, the second hearing did not take place until September 18, 2008, or approximately three months after the original hearing. At that September 18<sup>th</sup> hearing the Creditor was represented by Niall T. McLachlan, a very able lawyer who works for Carlton Fields, P.A., a well respected firm of a high reputation. FDLG represented itself at the hearing.<sup>2</sup> As to the “penalty interest,” both the Creditor and FDLB conceded at the hearing that this was an erroneous charge and that the Creditor was never entitled to payment on this sum. Penalty interest under the terms of the loan in question is a fee chargeable for prepayment of the loan during the first three years of the loan term. Since the Debtor is in bankruptcy and the Motion was filed based on the Debtor’s default, the notion that the Debtor paid off his loan in full to the Creditor is absurd. It is utterly perplexing to me how the Creditor or its law firm could or did assert such a claim.

Christine L. Herendeen, a lawyer at FDLG, testified as to the circumstances encompassing

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<sup>1</sup>There were other charges claimed by the Creditor which initially concerned the court, however, those concerns have been resolved through further disclosures by the Creditor. Thus, no further action is needed as to those matters.

<sup>2</sup>This brings to mind the classic aphorism that “A lawyer who represents himself has a fool for a client.” It would have been prudent for FDLG to have hired counsel. Its decision not to do so is a reflection of the firm’s casual attitude toward this matter.