

# More Claims Issues in Consumer Cases

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# DISCOVER



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**Mortgage Claims in 2012**  
 **Holders, Servicers, and Documents, Oh My!**  
 **A Discussion About Change**

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In today's bankruptcy case, mortgages and the associated claims have more issues associated with them than in years past. While we still see traditional mortgage claims, with arrearages, escrow shortages, foreclosure fees and the like; we are also seeing loan modifications, both in the trial period as well as fully executed; loans ripe for modification; refinances without proper subordination agreements; and of course, a lack of record as to who the current owner or servicer of the mortgage might be. We've also seen a spike in the number of lien strips that are being achieved through the bankruptcy process. All of these "different" factors impact how we're able to treat mortgage claims in a Chapter 13 Plan and how the Trustee administers those treatments. And once we have determined the best course of treatment, it is up to the Court to determine if such treatment is permissible under the Code.

"The social and economic fabric of our nation, and our state, is deeply rooted in the fundamental right of all people to own, use, and transfer real property. Real property ownership has been and continues to be one of the highest personal priorities of most Americans." *Maine Association of Realtors Public Policy Statement, 2011-2012*. It therefore makes sense that "getting it right" or "making it right" in the bankruptcy setting should be at the top of the list of priorities.

In this trying time, when mortgage companies have gone out of business, been purchased and absorbed by others, have been found to be "robo-signing" foreclosure documents and the like, how is a practitioner to know which creditor to look to for accurate information and documentation regarding a client's mortgage? Who do you look to to negotiate a loan modification? How do you confirm that a loan modification has been fully executed? How do you determine if payments have been properly recorded on the account? These are only a few of the questions facing bankruptcy practitioners today regarding mortgage claims. And unfortunately, there are no hard and fast rules that are fool proof.

These materials are presented with an eye toward what could be done to alleviate some of the confusion and inefficiency caused by the current state of affairs. They are not intended to politicize the issue or criticize any particular party in the process, but to point out possible solutions to current problems in accurately addressing and administering mortgage claims – which ultimately impact a Debtor's fresh start.

As Judge Pepper discusses in her materials, recent revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms have changed the way mortgage claims are "outlined" on the Proof of Claim. The changes seem to have been designed with an eye toward consistency, which may or may not be the end result. One immediate result, however, does appear to be a conscientious effort on the creditor's<sup>1</sup> part to accurately complete the Proof of

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<sup>1</sup> In the context of this discussion, creditor refers to both the mortgage company as well as their servicing agent.

Claim. It is this writer's experience that, historically, when local counsel filed claims on their client's behalf, they were more accurate and detailed than when a creditor filed on its own behalf. It is hopeful that the changes effective in December 2011 create a consistency not previously seen in recent years.

**Problem: Mortgage Creditors Hire Local Counsel with Limited Representation Authority: Does that really support the efficiency of the bankruptcy system today?**

With little exception known to this writer, Debtors' counsel is hired, and thus "appears", for the duration of a Chapter 7 or Chapter 13 case, absent an order to the contrary. This appears to be rooted in the tradition that attorneys do not typically appear on a limited, or project, basis during ongoing litigation or proceedings.

Conversely, mortgage creditors typically hire counsel to perform just one or more specific tasks within the bankruptcy proceeding, such as filing a Proof of Claim, objecting to confirmation, seeking relief from stay, etc. There seems to be little in the way of "cradle to grave"<sup>2</sup> service expected when it comes to attorney representation and mortgage claims. And while this practice is specifically provided for under Federal Rule of Bankruptcy Procedure 9010, which states:

Rule 9010. Representation and Appearances; Powers of Attorney

(a) Authority To Act Personally or by Attorney. A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) Notice of Appearance. 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.

(c) Power of Attorney. The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and

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<sup>2</sup> While perhaps having a more general origin, 'cradle to grave' is a term this writer learned from Detroit-area attorney Darryl Chimko, describing the representation of a creditor from the beginning of the bankruptcy case until the end, or until lift of stay, whichever came first.

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. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U.S.C. §459, §953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered, this practice seems counterintuitive to the efficient and accurate administration of a mortgage claim in a bankruptcy case *today*.

Perhaps in years gone by, i.e. before the mortgage industry came under such close scrutiny due to multiple issues, it was sufficient to allow a creditor to represent itself<sup>3</sup> in certain phases of the proceedings. But in today's climate, with improper or inaccurate record keeping, unknown note holders, incomplete or inaccurate records of debtor accounts, does this make sense?

Proposal for Consideration: This writer submits that under the current set of circumstances, where a mortgage creditor may be too large to timely and accurately manage all of the accounts it holds, requiring local counsel for the duration of the case would provide the individualized attention the vast majority of mortgages seem to demand. Mortgage creditors would benefit primarily from an attorney who is familiar with the local case law, practices, and administration of bankruptcy matters and who can be relied on to provide guidance and advice in this capacity.

### **Problem: Incomplete or Outdated Recordings with the Register of Deeds**

As we know, the Register of Deeds is where records related to land are recorded. And without taking us all back to through the pains of first year Property I or II, it is commonly accepted that the fundamental purpose of recording documents regarding land is to put “the public” on notice regarding ownership and encumbrances against the real property.

According to the Wayne County Register of Deeds website<sup>4</sup>,

The Register of Deeds is the official recording officer for all legal papers and instruments pertaining to the transfer and encumbrance of lands and properties within the County....

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<sup>3</sup> Note the following regarding FRBP 9010: Notes of Advisory Committee on Rules—1983; This rule is substantially the same as former Bankruptcy Rule 910 and does not purport to change prior holdings prohibiting a corporation from appearing pro se. See *In re Las Colinas Development Corp.*, 585 F.2d 7 (1st Cir. 1978).

<sup>4</sup> <http://www.co.wayne.mi.us/deeds.htm>; Detroit, MI is located in Wayne County.

The Register of Deeds Office is the place where people record documents relating to land transactions. Different types of deeds as well as land contracts, mortgages, liens and lease agreements are recorded at the Register of Deeds Office.

So how can it be so difficult to track down who has the mortgage today? Well for starters, transfers of mortgages and sales of notes are not necessarily recorded with the Register of Deeds. Does that make sense? If the purpose of the Register of Deeds is to put the public on notice, and the transfer of a mortgage is an encumbrance on real property, wouldn't it be proper to record it with the Register of Deeds? And what is the consequence of failing to do so?

So, accepting that this does not happen, how does a bankruptcy practitioner best address this deficiency in the system? Notice everyone.

Considering best practices, a practitioner is likely reviewing mortgage documents, bills, correspondence, and a credit report in the preparation of a bankruptcy petition where real property is involved. Setting aside logic and assumptions, if the practitioner lists all mortgage creditors and/or servicers identified through this review, it will decrease the likelihood of missing the current creditor and/or servicer.

Proposal for Consideration: Legislative revisions of applicable state laws, and enforcement thereof, requiring lenders to promptly record receipt of transferred interest in real property. In the context of bankruptcy, perhaps a requirement for affirmative action on the part of the mortgage creditor and/or servicer, separate from a Proof of Claim, to acknowledge ownership and/or servicing of the mortgage account in a timely fashion. As with any requirement, consequences for failing to do so should be set forth and enforced.

### **Problem: Decision Makers Do Not Participate Directly in the Process**

In the Eastern District of Wisconsin, a program has been developed to mediate mortgage modifications<sup>5</sup>. The Mortgage Modification Mediation Program (MMM)<sup>6</sup> is a voluntary program is designed to facilitate face to face discussions between lenders and borrowers to determine whether the borrower qualified for a loan modification. What observers have found though is that the creditor often does not send an individual with decision making ability to participate in the process. This seems akin to a law firm sending a first year associate into state

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<sup>5</sup> Request to participate is made by way of motion. The form of which is attached at the conclusion of these materials as Exhibit 1.

<sup>6</sup> You may also visit the Court's website for more information on the program at: <http://www.wieb.uscourts.gov/index.php/component/content/article/98>

court mediation, with no authority to accept or reject the panel's recommendation. This wastes the time and resources of everyone involved the process. One has to wonder why the creditor would agree to participate in the program, which is entirely voluntary, if the creditor is not serious about its participation.

While this program has been developed and implemented by the Court, the frustration is no less in dealing with voluntary offers of loan modification options made to borrowers by the lenders directly.

**Problem: How Can the Debtor Get a Loan Modification if the Creditor Claims to Never Receive the Documents?**

This is likely the most frustrating problem facing homeowners today. Who is responsible for the failures of the mortgage creditors who are no longer? A case brought on other grounds illustrates the complexity, and ensuing frustration, of the failure of the loan modification process of some of the country's largest mortgage creditors is *Wylor v Bank of America*<sup>7</sup>, an unpublished Western District of Michigan case decided by Judge Quist of the United States District Court.

A sample, without citation, of the facts are as follows:

She immediately applied for and supplied all required documentation for a loan modification with Countrywide. Jessica Jasso, a Countrywide representative, told Plaintiff that the foreclosure process on their home would not be initiated. However, the home was advertised for sale and scheduled for a sheriff's sale in mid-March.

Ms. Jasso then completed the loan modification, and told Plaintiff that the modification had a "three month trial period." Ms. Jasso told him that the modification would become permanent if Plaintiff made each payment on time during the trial period. Plaintiff made all of the payments on time, but he did not receive a permanent modification.

Sometime thereafter, BOA began servicing the loan. In April 2010, Plaintiff again applied for a loan modification under the Home Affordable Mortgage Program ("HAMP"). Plaintiff's wife submitted all documentation for Plaintiff's modification in accordance with HAMP's guidelines. Plaintiff's wife confirmed, via telephone, that BOA received all of the required documents.

In June 2010, BOA told Plaintiff's wife to submit a new HAMP application because it could not find the first application, despite Plaintiff

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<sup>7</sup> United States District Court, Western District of Michigan, Southern Division, Case 1:11-CV-132; <http://docs.justia.com/cases/federal/district-courts/michigan/miwdcce/1:2011cv00132/65492/18/0.pdf?1320752746>

having received a FedEx confirmation of receipt. Once again, Plaintiff submitted all required documents per HAMP's guidelines.

In the Fall of 2010, Plaintiff and/or his wife sent several letters to BOA requesting the status of their modification. BOA did not respond to any of the letters. According to Plaintiff, many of the letters "were considered Qualified Written Request[s] under [the Real Estate Settlement Procedures Act ("RESPA")] and were totally ignored" by BOA.

Eventually, three representatives from BOA's "President's Office" confirmed that three of Plaintiff's modification applications sent to BOA were complete and in review.

*(Id.)*

This is the story many debtors' counsel hear, and experience, regularly. It has been this writer's experience that mortgage creditors will not offer or process loan modifications through the office of debtor's counsel, requiring instead that counsel authorize direct communication with the debtor by creditor, which serves only to foster further frustration with an already unreliable and inefficient system. As one consumer attorney recently blogged:

The stories of frustrated homeowners who attempt to obtain loan modifications are retold every day. After faxing and refaxing voluminous documentation supporting their loan modification, home owners are told that their documents cannot be found or are otherwise misplaced. Follow up calls to check on the status of a loan modification reveal that that homeowners file has been transferred to another agent. Then, the homeowner calls the other agent only to learn that the new agent can't find the documents. So – the homeowner jumps through hoop after hoop after hoop and then finally gives up.

*Attorney Mike Shovan, <http://bankruptcy-in-michigan.com/2012/01/can-the-loan-modification-program-be-saved/>; January 28, 2012.*

Chapter 13 Trustee Thomas W. McDonald Jr.<sup>8</sup> appears to have created a logical, viable solution to this issue in the form of a Motion for Mortgage Modification Request. Seemingly similar to the mediation program offered in the Eastern District of Wisconsin as well as other programs being used throughout the country, the language of the motion and order appear to assert more directive to the lender as there doesn't appear to be a consent option "built in".

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<sup>8</sup> Eastern District of Michigan, Northern Division at Bay City.

If the debtor's motion is granted, the order requires a creditor to "register to use the DMM Loss Mitigation Web Portal<sup>9</sup> and shall post creditor's loan modification package and requirements ("Creditor's Required Loan Modification Package") thereon." A complete copy of the motion and order appears at the end of these materials as Exhibit 2<sup>10</sup>.

Upon review, the DMM Loss Mitigation Web Portal appears to provide a concrete method through which loan modification documents can be provided to servicers in a reliable manner. The website recognizes that:

Borrowers who attempt to [submit loan modification documents] on their own, however, face many difficulties. First, the documentation required is as unique as the borrower. Knowing what forms and documents are needed depends on the servicer, investor and the borrower's financial situation. Second, ensuring delivery and review of the borrower's package has proven to be challenging as the channels of communication between borrower and servicer have not been well established.

Use of the DMM Loss Mitigation Web Portal assures accountability of all parties to the loan modification process.

As of April 13, 2012, the DMM Loss Mitigation Web Portal is used by the following servicers:

- 21st Mortgage Corporation
- America's Servicing Company
- Bank of America (but only if you are in an active bankruptcy)
- JP Morgan Chase / EMC
- Ocwen Loan Servicing, LLC / Litton Loan Servicing
- Resurgent Capital Services
- Saxon
- Select Portfolio Servicing
- Washington Mutual
- Wells Fargo Home Mortgage

Further, outside the realm of bankruptcy, it is not uncommon for homeowners, in good faith, to believe that an active loan modification application will prevent the creditor from proceeding with foreclosure on the property and therefore, will not exercise their options under Title 11. Unfortunately, this often ends with the homeowner holding only

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<sup>9</sup> <https://www.dclmwp.com/>

<sup>10</sup> The document may be obtained online at: <http://mcdonald13.com/pdfs/OrderMortgageModificationRequest.pdf>

a right to redemption, not a modified loan, and certainly not an ownership interest in the property.

Proposal for Consideration: Require creditors who offer loan modification options to register and utilize the DMM Loss Mitigation Web Portal or another reliable 3<sup>rd</sup> party provider of similar services. Additionally, creditors should be forbidden from falsely stating that foreclosure proceedings will not commence or continue while an application is pending if, in fact, they will. Further, legislation preventing foreclosure on a primary residence while a loan modification application is pending may be appropriate. It is this writer's belief that while recognizing that mortgages are a contractual obligation between lender and borrower, for which lender is entitled to full payment under the original terms of the loan, if loan modifications are offered by a lender, they must be offered in good faith and not as a means to provide a false sense of security from foreclosure or other means designed to entice the homeowner to ignore other options available to him or her under any applicable law.

**Conclusion:**

As stated at the onset of these materials, there are no hard and fast answers to these issues. It is incumbent on all the parties involved to actively work on devising honest, reliable solutions that make sense; not only for those loans subject to bankruptcy proceedings, but also those that are not.

**Additional Reading:**

Prof. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, Department of Justice, Executive Office of the U.S. Trustee (July 24, 2007), 87 Tex. L. Rev. 121 (2008); see also <http://www.msfraud.org/law/lawarticles/Misbehavior%20and%20Mistake%20in%20Bankruptcy%20Mortgage%20Claims%20.pdf>.

**Exhibit 1**

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re Chapter 13  
Case No.:  
Debtor.

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**NOTICE OF MOTION AND MOTION TO PARTICIPATE IN  
MORTGAGE MODIFICATION MEDIATION PROGRAM**

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To: \_\_\_\_\_ and its successors, assigns and servicing agents (“mortgage creditor”),  
please take notice:

The undersigned debtor[and joint debtor if applicable] (the “Debtor”) files this Motion seeking to enter into a mortgage modification agreement through the Court’s sanctioned Mortgage Modification Mediation Program (“MMM Program”). **The mortgage creditor has 30 days from the filing of this Motion to accept or object to entry into the MMM Program.** If the mortgage creditor does not timely consent to participate in MMM, the Court will schedule a hearing, and the mortgage creditor is expected to participate in the hearing.

The Debtor hereby moves the Court for authority to enter into the MMM Program. By this Motion, the Debtor agrees and certifies as follows:

**Eligibility**

1. The Debtor is the owner-occupant of a one- to four-unit residential property used as the Debtor’s primary residence.
2. The Debtor has regular income.
3. The Debtor has an unpaid principal mortgage balance that is equal to or less than \$729,750 (for a one-unit property).
4. The Debtor has a mortgage payment that is not affordable due to a financial hardship that can be documented.

### **Participation Requirements**

5. The Debtor agrees to make post-petition mortgage payments to the mortgage creditor of 31% of the Debtor's gross monthly income or 75% of the Debtor's current mortgage payment, whichever is less (the "Modified Mortgage Payment").
6. The first Modified Mortgage Payment will be due and must be received by the mortgage creditor no later than the next monthly scheduled due date (plus any grace period) after the filing of this Motion. The only exception to this requirement is if the Debtor does not know the identity of the mortgage creditor at the time the payment is due; in that event the Debtor will make the Modified Mortgage Payment to the Debtor's attorney to be held in trust until the mortgage creditor is identified.
7. The Debtor will continue to make the Modified Mortgage Payments to the mortgage creditor each month until the Mediation Program is concluded or an Order of the Court expressly states otherwise.
8. The Debtor has filed the Schedules and Statement of Financial Affairs which may be relied upon by the mortgage creditor in evaluating the Debtor's loan for modification. The Debtor will provide the mortgage creditor with the following documents:
  - (A) Signed copies of the state and federal tax returns filed in the past two years; and
  - (B) All pay advices received within the last 60 days of the date of this Motion.
9. The Debtor will provide the mortgage creditor with all other reasonably requested financial records no later than 21 days after the date the mortgage creditor files its Consent. The Debtor has reviewed the list of the typical required documents on the Court's website, and understands and agrees that updated, current documents will be required as time passes.
10. The Debtor will pay \$125 (the "Mediation Fee") to the Mediator, no later than fourteen days after appointment of the Mediator. Mediators do not accept personal checks for the Mediation Fee.
11. The Debtor agrees to appear and participate in good faith in the Mediation sessions. The Mediation Fee is nonrefundable even if the Debtor does not appear or does not agree with the outcome of the Mediation session.

### **Agreed Modification of the Automatic Stay**

The Debtor understands, agrees and consents to a Court order modifying the automatic stay as follows:

12. The automatic stay is immediately modified as of the date of this Motion to permit the mortgage creditor to request information, evaluate and analyze the Debtor's

financial situation, participate in the mortgage modification process and negotiate loan modification terms.

- 13. If the mortgage creditor does not receive any Modified Mortgage Payment by the due date, including any applicable grace period, the Debtor understands and agrees that the mortgage creditor may file a Motion for Relief from Stay. If the mortgage creditor’s Motion is granted by the Court, the mortgage creditor will be able to pursue any remedy against the mortgaged property available under the mortgage and applicable nonbankruptcy law, including foreclosure.

**Mediation Conclusion**

- 14. The Debtor understands and agrees that the mediation sessions will conclude no later than 60 days after a mediator is selected. Unless the Debtor and the mortgage creditor agree in writing to extend the deadline, the mediator will issue a report to the Court within 7 days after the conclusion of the 60-day period. If neither a written extension nor the final report is filed within 75 days after a mediator is selected, the mediator’s appointment will be terminated, and the MMM Program will be deemed concluded in this case.
- 15. If no report is filed or the report advises that no agreement was reached, the Debtor understands and agrees to file a modified feasible Chapter 13 plan to address the claim of the mortgage creditor and the Debtor’s other creditors. Failure to file such a modified plan within a reasonable period of time is cause for granting the mortgage creditor relief from the automatic stay.

**Successful Mortgage Modification**

- 16. If a modification is agreed upon, the Debtor will cooperate in promptly formalizing any needed legal documents including the filing of a modified Chapter 13 plan, if appropriate.
- 17. The Debtor agrees that upon successful completion of the MMM Program and entry into a mortgage modification agreement, the Debtor will not voluntarily dismiss this Chapter 13 case for at least nine months. The Debtor may seek relief from this provision for good cause shown.

WHEREFORE, the Debtor requests that the Court enter an Order authorizing the Debtor and the mortgage creditor to enter into the MMM Program.

Dated:

\_\_\_\_\_  
Debtor’s Signature

Dated:

\_\_\_\_\_  
Joint Debtor’s Signature

**Exhibit 2**

*Caption*

**MOTION FOR MORTGAGE MODIFICATION REQUEST**

The debtor[s] request entry of an order setting deadlines and other parameters for [list creditors with mortgages encumbering the debtor[s]’ primary residence] to respond to debtor(s) request for a mortgage modification, and in support state:

1. The debtor[s] filed this Chapter 13 case in an attempt to retain their primary residence.
2. The debtor[s] would like to modify the terms of the mortgage[s] encumbering their primary residence. The debtor[s]’ income will allow them to contribute as much as 31 percent of their current gross income to payment of their modified mortgage debt.
3. An order setting forth certain deadlines and other parameters will assist the parties in negotiation of a modification of the relevant mortgage[s].
4. Debtor[s] will pay the DMM Web Portal cost in the amount of \$25.00 to the Chapter 13 Trustee.

Wherefore, debtor[s] request the entry of an order setting deadlines and other parameters for a mortgage modification, and such other relief as this Court deems just and proper.

Dated:

/s/ \_\_\_\_\_  
 [Attorney Name]  
 [Name and Address of Firm]

*Caption*

**MORTGAGE MODIFICATION REQUEST ORDER**

This case was considered by the Court on the debtor[s]’ Motion for Mortgage Modification Request (Doc. No. \_\_). Finding that the debtor[s] desire to retain their primary residence and have stated that they have sufficient income to justify modification with the goal of modifying the current mortgage[s] encumbering their primary residence, it is:

**ORDERED:**

1. Creditor Registration on the DMM Loss Mitigation Web Portal. Within 14 days of the entry of this Order, the creditor, if not already registered to use the DMM Loss

Mitigation Web Portal([www.dclmwp.com](http://www.dclmwp.com)), shall register to use the DMM loss Mitigation Web Portal and shall post creditor's loan modification package and requirements ("Creditor's Required Loan Modification Package") thereon. Questions about registration or posting of the Creditors Required Loan Modification Package can be directed to the Chapter 13 Trustee or DMM Support at 1-800-481-1013.

2. Mortgage Modification Report within 60 Days. Within 60 days from the date of this Order, the mortgage creditor shall file a report with the court, stating whether the mortgage modification request was granted or denied and list, in detail, the programs for which debtor(s) were reviewed. If denied, the report shall state the reasons for the denial. Said report shall include a printout of the transactional history from the DMM Loss Mitigation Web Portal.

3. DMM Loss Mitigation Web Portal Requirement to file Documents. All filing of documents between debtor and creditor for purposes of this Mortgage Modification Request shall be accomplished by using the DMM Loss Mitigation Web Portal. The Chapter 13 Trustee is authorized to pay the \$25.00 Web Portal fee from the debtor's funds on hand. Questions by any party on the use of the DMM Loss Mitigation Web Portal can be directed to the Chapter 13 Trustee.

4. Debtor[s]' Financial Documents. Counsel for debtor[s] or, if unrepresented, the debtor[s] shall, within 28 days after entry of this order, provide to creditor Creditor's Required Loan Modification Package by filing it via the DMM Loss Mitigation Web Portal. Creditor's Required Loan Modification Package may be downloaded from the DMM Loss Mitigation Web Portal. Questions about downloading the Creditor's Required Loan Modification Package or filing it via the DMM Loss Mitigation Web Portal can be directed to the Chapter 13 Trustee or DMM Support at 1-800-481-1013.

5. Creditor Request for Additional or Updated Documents. At least 14 days prior to the scheduled mortgage modification report due date, creditor[s] and its counsel shall review the debtor[s]' filed Creditor's Required Loan Modification Package and notify the debtor[s] of any additional or updated financial records they must supply to the creditor[s]. Debtor[s] shall provide creditor[s]' and its counsel all reasonably requested additional financial records within 72 hours of such notification. If there is a non-filing co-borrower, creditor[s] may request financial information from the nonfiling co-borrower if the filing debtor intends to use the non-filing co-borrower's income to qualify for a modification. Upon receipt of all documents, creditor[s]' counsel shall timely submit the documents to underwriting at least 10 days in advance of the mortgage modification report due date. The filing of documents per this provision shall be accomplished via the DMM Loss Mitigation Web Portal.

6. Identification of Mortgage Modification Participants with Settlement Authority. At least 21 days prior to the scheduled mortgage modification report due date, counsel for the creditor[s] must provide a completed Certification of Settlement Authority identifying the creditor[s]' representative[s] who will be acting upon the mortgage modification request, and to debtor[s]' counsel along with the case number of the

action and contact information for all of the parties. The contact information must include the last known mailing address, phone number, and email address for each party. **At least one of the creditor[s]’ representatives designated in the Certificate of Settlement Authority must sign the mortgage modification report pursuant to this Order.** Creditor[s] may amend the Certificate of Settlement Authority to change the designated creditor[s]’ representative provided they supply the amended Certificate of Settlement Authority to the debtor’s counsel no later than 5 days prior to the mortgage modification report due date. Creditor shall also identify the designated creditor representative on the DMM Loss Mitigation Web Portal.

7. Parties Must Participate in the Mortgage Modification Process. The trustee of a securitized loan or its fully authorized designee with complete and master servicer settlement authority (to settle within the guidelines of any third party, or subject to any third party investor approval) or a specialist from the creditor[s]’ mortgage modification department with complete and master servicer authority to settle must continuously participate in the entire mortgage modification request process.

8. Court Approval of Mortgage Modification. Parties are directed to promptly seek any necessary court approval for the mortgage modification and to formalize the modification in any needed legal documents.

9. Creditor Fee. Counsel for the creditor[s] is entitled to receive a reasonable fee for all work involved in connection with the mortgage modification, including requesting and reviewing documents, and will clearly delineate such fee in the completed agreement or by amended proof of claim.

10. Debtor(s) counsel’s fee. Counsel for the debtor(s) is entitled to receive reasonable compensation for all work involved in connection with the mortgage modification and shall file an application for allowance of attorney fees and costs for allowance by the Court, or alternatively accept a “no look” fee in the amount of \$750.00 to be paid as an administrative expense.

11. Remedies. If a mortgage modification does not occur because the mortgage creditor(s) fails to designate a representative with settlement authority; fails to file the Certificate of Settlement Authority when due; fails to register on the DMM Loss Mitigation Web Portal; failed to provide Creditor’s Required Loan Modification Package; fails to file the Mortgage Modification Report when due; or otherwise does not engage in the mortgage modification in good faith, then the Court may order a representative from the mortgage creditor(s) to physically appear before the court for a show cause hearing; order the mortgage creditor(s) and debtor(s) to engage in mediation to modify the mortgage; and impose such other sanctions as the court deems appropriate including, but not limited to, an award of actual costs and attorney fees to the aggrieved party.

12. Privileged Communications. All statements made by the parties, attorneys, and other participants associated with the mortgage modification request are privileged and not

reported, recorded, or placed into evidence, made known to the Court, or construed for any purposes as an admission.

13. Stay Lifted to Allow Loan Modification. The automatic stay is modified, to the extent necessary, to facilitate the mortgage creditor[s]' loan modification terms pursuant to this Order. The parties shall timely submit any agreed loan modifications to the Court for approval.

14. All parties are directed to comply with this Order and to engage in the mortgage modification in good faith. Failure to do so may result in the imposition of damages and sanctions.

IT IS SO ORDERED.

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DANIEL S. OPPERMAN  
United States Bankruptcy Judge

**More Claims Issues in Consumer Cases:  
Procedural Rules/Statutes that Impact Claims**

**Hon. Pamela Pepper  
United States Bankruptcy Court, E. D. Wisconsin  
Milwaukee, Wisconsin**

A. **Rule 3002.1 and the Accompanying Forms**

1. *The Rule Generally*

On December 1, 2011, new Federal Rules of Bankruptcy Procedure 3002.1 went into effect. The rule applies in Chapter 13 cases where a creditor has a claim secured by a security interest in the debtor's principal residence, and where the debtor's Chapter 13 plan provides for cure of default as provided for in § 1322(b).

The rule requires the holder of such a claim to file two new "notices" which had not been required under the rules previously. First, Rule 3002.1(b) requires the creditor to file "a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment." This portion of the rule, then, requires a creditor to file a document that puts the debtor and the trustee on notice of any post-petition changes in the monthly post-petition mortgage payment amount, in most instances probably as a result of interest rate changes under an adjustable rate mortgage. Second, Rule 3002.1(c) requires the creditor to file "a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or the debtor's principal residence."

The rule also imposes a new obligation on the Chapter 13 trustee. Rule 3002.1(f) requires that within 30 days of the debtor completing making all of the payments due under the plan, the trustee shall file a "notice stating that the debtor has paid in full the amount required to cure any default on the claim."

2. *The Forms Generally*

To assist creditors in complying with Rules 3002.1(b) and (c), the Rules Committee (chaired

by Judge Wedoff of the Northern District of Illinois) promulgated new, required forms. These forms are part of the Official Forms, Instructions and Committee Notes package.

Form B10S1 is entitled “Notice of Mortgage Payment Change.” This is, as the name implies, the form creditors must file in order to comply with Rule 3002.1(b). Form B10S2 is entitled, “Notice of Postpetition Mortgage Fees, Expenses, and Charges.” Creditors must file this form in order to comply with Rule 3002.1(c).

3. *Issues that Have Arisen*

a. Is Form B10S2 a “Notice,” or an “Amended” or “Supplemental” Claim?

Form B10S2, which creditors must use when post-petition fees, expenses or charges are incurred, is called a “Notice.” Rule 3002.1(d) requires the mortgage creditor to use this form, stating “**Form and Content.** A notice filed and served under subdivision . . . (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder’s proof of claim. The notice is not subject to Rule 3001(f).”

An ambiguity has arisen in some districts, apparently as a result of the fact that Rule 3002.1(d) uses both the word “notice” and the word “supplement.” Over the years, a body of case law has developed which indicates that creditors can “amend” their original proofs of claim. *See, e.g., Unioil v. H.E. Elledge, et al. (In re Unioil, Inc.)*, 962 F.2d 988 (10<sup>th</sup> Cir. 1992). Many districts also allow creditors to “supplement” their proofs of claim, by filing what is, in effect, an amended proof of claim adding in post-petition arrearages, costs and/or fees. This procedure allows debtors to pay post-petition arrearages, costs and fees through their plans. Some districts call such an amended claim a “supplemental” claim.

The question has arisen in some of these districts—should trustees treat the B10S2 form as a “notice,” and take no action upon it unless the creditor amends/supplements its proof of claim, or

the debtor asks the court/trustee to pay the amounts listed in the notice? Or should trustees treat the B10S2 form as a “supplemental” claim, and pay it—or require the debtor to amend the plan, if the plan can’t accommodate it—unless the debtor objects?

Those in favor of treating the B10S2 as a notice argue the following: First, Rule 3002.1(c), Rule 3002.1(d) *and* the Form B10S itself call this creature a “notice.” So that must be what the drafters meant it to be. Second, Rule 3002.1(e) provides a procedure for challenging the amounts in such a notice, and it is *not* the same procedure that applies to objecting to a proof of claim. Rule 3002.1(e) states that “[o]n motion of the debtor or trustee filed within one year after service of [the B10S], the court shall, after notice and a hearing, determine whether payment of any claimed fee, expense or charge is required by the underlying agreement and applicable bankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.” Thus, Rule 3002.1(e) requires the debtor or the trustee to file a motion (not an objection, as required in Rule 3007), and sets a time period of one year from the date the B10S2 is filed for that motion to be filed.

Third, the Rules Committee specifically stated that the Form B10S2 should *not* be accorded the same *prima facie* validity as we accord a proof of claim. Rule 3002.1(d) states that the Form B10S “is not subject to Rule 3001(f).” Rule 3001(f) states, “**EVIDENTIARY EFFECT.** 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.” So, the argument goes, if the Rules Committee meant for a Form B10S2 to be treated as an amended, or supplemental, proof of claim, the Committee would not have specified that Rule 3001(f) does not apply.

Finally, because the creditor files the B10S2 as a “supplement” to the original proof of claim, it does not appear on the public docket report. It is docketed as a “claims event,” and while it does appear in the claims register history, it does not receive a document number (the way an amended

or supplemental claim would).

Those in favor of treating the Form B10S2 as an “amended” or “supplemental” claim argue as follows: First, they argue that it is burdensome to require a mortgage creditor to both file Form B10S2 *and* file an amended or supplemental claim in order to get the amount in the Form B10S2 paid. Second, a debtor who does not believe that she owes the amount listed on the B10S2 has two procedures available to her—she can file a traditional objection to claim under Rule 3007(a), or she can file a motion for determination of fees, expenses or charges as provided for in Rule 3002.1(e). Third, treating the Form B10S2 as an amended or supplemental claim would further the goal of making sure that debtors didn’t complete their Chapter 13 plans, only to be hit with the surprise foreclosure complaint a week after discharge because they did not realize that they still owed a deficiency due to late fees, increases in interest rates, or escrow adjustments.

Which of these positions is the “right” one? So far, there is no case law on this issue. Judge Wedoff indicates that the Rules Committee did not intend Form B10S2 to function as an amended claim or a supplemental claim. First, Rule 3002.1(c) specifically refers to post-petition fees, charges and expenses incurred “after the bankruptcy case was filed.” Judge Wedoff indicates that for the fees or charges to constitute a “claim,” they’d have had to be incurred pre-petition. Second, he indicates that the Committee’s purpose in promulgating this rule was simply to put the debtor on notice of the possibility that a deficiency claim might exist after the debtor completes all of the plan payments and receives a discharge. Some debtors, Judge Wedoff notes, might intentionally decline to pay those post-petition costs and fees—that’s their prerogative. He says that the Committee did not wish to require a debtor to pay, or not pay, those fees—only to avoid the situation where a debtor struggled through five years of a plan, completed all the payments, received a discharge, and then got hit with a foreclosure complaint or other such action because the debtor hadn’t realized that he’d

been accruing post-petition late fees or escrow shortages which he hadn't paid during the Chapter 13 case.

The Administrative Office of U.S. Courts' Office of Information Technology issued an informational document explaining the new rule to court personnel. That document specifically states that the Form B10S2 is "not an amended claim." While not legally binding in any way, the fact that the Administrative Office is instructing court personnel not to treat the form as an amended claim seems to be in line with Judge Wedoff's explanation of the Rules Committee's intentions.

If a court were to treat the Form B10S2 as an amended or supplemental claim, such a decision would give rise to a number of procedural questions. How would the court resolve the apparent conflict between Rule 3007, which does not impose a deadline by which a debtor must object to a proof of claim, and Rule 3002.1(e), which requires a debtor or trustee to file a motion for determination of fees within one year of the date the B10S2 is filed? What if fees require an increase in plan payments—must the debtor file an amended plan to increase the payments?

One can imagine a similar issue arising with regard to the Form B10S1, involving changes in the amount of the monthly post-petition mortgage payment, in those districts where the trustee makes the post-petition payments (so-called "conduit" districts). Is the trustee to change the post-petition mortgage payment the instant the Form B10S1 is filed? What if the debtor objects, arguing (for example) that the mortgage contract called for a rate adjustment every 12 months, and the Form B10S1 reflects an adjustment after only three months—a violation of the terms of the mortgage?

b. How far should courts go in enforcing the requirements of Rule 3002.1?

Rule 3002.1(i) states that if the creditor "fails to provide any information" as required by subsections (b) [notice of payment changes], (c) [notices of fees, expenses and charges] or (g) [response to trustee's notice of final cure payment], the court may, after notice and a hearing, . . .

(a) preclude the holder from presenting the omitted information . . . unless the court determines that the failure was substantially justified or is harmless; or (2) award other appropriate relief, including reasonable expenses and attorney’s fees caused by the failure.” So there are teeth to these notice requirements—there are sanctions a court may impose if the creditor does not comply with the requirements of any of the three new requirements imposed by Rule 3002.1.

Judges have seen compliance problems already. Rule 3002.1(b), for example, requires the creditor to file the notice of changes in post-petition payment amounts at least 21 days before the payment change goes into effect. Some creditors have filed the Form B10S1 only days before, or even days or weeks after, the payment change went into effect. Rule 3002.1(c) requires the creditor to file the B10S2 notice of post-petition fees, charges or expenses “within 180 days after the date on which the fees, expenses, or charges are incurred.” Because only six months have passed since Rule 3002.1 became effective, we have not yet reached a point where many creditors could have filed late B10S2 notices late, but doubtless that time will come. Some creditors have, instead of filing the notices required by Rule 3002.1, filed (after the deadline for filing the required notice) a motion asking for additional time to file the notice. In particular, one judge in Pennsylvania had a creditor who, *after* the deadline for filing the response to the trustee’s 3002.1(f) notice of final cure, file, not a response, but a motion asking the court for additional time to determine whether or not it agreed with the trustee’s notice of final cure.

The rule gives courts the authority to refuse to allow the creditor to present the information (which, in some cases, might actually harm, rather than help, the debtor), or to award expenses, costs or fees. Courts are starting to confront the question of whether they should avail themselves of such sanctions in every case of a failure to comply, or only the “egregious” ones.

c. Can a debtor “waive” the requirements of Rule 3002.1?

In at least one instance, a creditor has attempted to have a debtor “waive” application of Rule 3002.1. The situation arose in a district that allows creditors to obtain relief from the stay via “negative notice”—in other words, a district in which the court’s procedures allow a moving creditor to give all interested parties a deadline by which to object to the motion for relief, and if no one objects, the court grants the relief requested in the motion upon certification that there was no objection. In this instance, the moving creditor’s motion for relief from stay asked that, as part of the relief, the Court order that the notice provisions of Rule 3002.1 were “waived.” The creditor gave the usual period of time for objections. Neither the debtor (apparently asleep at the wheel) nor any other party objected, and the creditor filed an affidavit of no objection. The court, however, caught the provision in reviewing the motion before signing the order, and refused to sign the order as long as it contained the waiver provision.

It does not appear that a debtor can waive application of Rule 3002.1 The rule imposes affirmative obligations on the *creditors*, and the *debtor* cannot waive those obligations. It is arguable whether a debtor can waive her right to request Rule 3002.1(i) sanctions for failure to comply with the notice requirements. Time will tell whether creditors seek such waivers.

B. **Section 362(d)(4)**

While not implemented as recently as Rule 3002.1, there is a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) which appears to have escaped the attention of many creditors, and which directly impacts the finality of mortgage claims.

As many consumer practitioners know, BAPCPA added “serial filer” provisions that limited the availability of the automatic stay. Section 362(c)(3) provides that if a debtor had a case dismissed within the year prior to the date he filed his current petition, the stay remains in effect

only for 30 days, unless the debtor moves to extend it. Section 362(c)(4) provides that if a debtor had two or more cases dismissed within the year prior to the date he filed the current petition, there is no stay in effect, and the debtor must file a motion (within 30 days of the date the current petition is filed) to have the stay imposed; otherwise, his creditors are not subject to a stay unless he files an adversary proceeding seeking imposition of the injunction.

Another of these “serial filer” provisions is §362(d). In particular, §362(d)(4) provides that a court “shall” grant relief from the stay “with respect to a stay of an act against real property . . . by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved . . . (B) multiple bankruptcy filings affecting such real property.” In the case of one of these “serial filer” debtors who has filed multiple bankruptcies involving the same real property, §362(d)(4) provides that, “[i]f recorded in compliance with applicable State laws governing interests or liens in real property,” the order granting relief “shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court.” Simply put, a mortgage creditor who proves that the debtor filed the petition to hinder, delay or defraud creditors, and who has filed multiple bankruptcies involving this same property, can obtain an order of relief that applies in any case that this debtor, or any successor in interest to this debtor, might file for a period of two years following the order granting relief.

Many creditors are familiar with this “nuclear option” provision, and debtors have found themselves unable, for two years after a creditor exercises the option, to obtain the protection of the stay. But it does not appear that many creditors or debtors read on in §362(d)(4) to the rest of the sentence quoted above. After stating that the stay is binding for 2 years after the order granting relief, the sentence goes on to say, “*except that a debtor in a subsequent case under this title may*

*move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing.”*

So—while a mortgage creditor may obtain the two-year, *in rem* relief against a serial filer who files to hinder, delay or defraud, that same debtor can, in a subsequent case, ask the court in the subsequent case to relieve the debtor of the 2-year *in rem* bar “based upon changed circumstances for good cause shown.”

Imagine the following scenario: The debtors file five Chapter 13 cases over the course of seven years. In each of those cases, they are trying to save their home. Each case makes it to a certain point, and then collapses. In each case the mortgage creditor files a motion for relief from the stay. But in the fifth case, the creditor files that motion pursuant to §362(d)(4), asking for the 2-year *in rem* relief. The debtors don’t object to that motion, and the court in the fourth case grants it. The mortgage creditor immediately goes out and records the order in accordance with state lien law, and then withdraws its claim from the case. Several months later, the debtors file their *sixth* bankruptcy case, on the eve of foreclosure. The mortgage creditor, secure in the possession of its §362(d)(4) *in rem* order, does not file a proof of claim, and does not terminate the foreclosure proceedings. The debtors, when they realize that the creditor plans to proceed with foreclosure, file a motion in the *sixth* case, asking the bankruptcy court to set aside the *in rem* order granted in the *fifth* case—which has been duly recorded by the creditor.

The creditor shoots back a brief, smug objection, saying, “Judge, this is ridiculous—if they want you to set aside an order in the *fifth* case, they need to file a motion to reopen the fifth case and challenge that order there. And we have a final order, binding for two years from the date it was issued, recorded in compliance with state lien laws. You should deny this motion without a hearing, as procedurally incorrect.” The debtors respond that §362(d)(4) allows them to challenge, in this

sixth case, the order entered in the fifth case, if they can show changed circumstances and good cause.

It is difficult to read the statute in any other way than to indicate that the debtors are correct—which means that all of the certainty and finality that the creditor believed it gained through the *in rem* order now appears illusory. And a questions arise—what constitutes “changed circumstances?” What constitutes “good cause” for a debtor to obtain relief from a §362(d)(4) order? It is up to the court in the sixth case to answer these questions, but it appears clear that mortgage creditors would do well to understand that obtaining an *in rem* order pursuant to §362(d)(4) does not ensure finality with regard to the status of their claim in bankruptcy.

POST CONFIRMATION SURRENDER OF REAL PROPERTY

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Topic: If a debtor surrenders real property post-confirmation in a Chapter 13, can the creditor file a deficiency claim and be paid under the Chapter 13 plan?

The Scenario: Debtor files for Chapter 13 bankruptcy with the intention of keeping real property secured by one or more liens. Presumably the plan properly treats the secured debt against the property, the secured creditor(s) files an appropriate secured proof of claim and the plan is confirmed. The debtor changes their position post confirmation and elects to surrender the property.

The Applicable Code Sections:

502 Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

.....

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

1327 Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

1329 Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to-

- (1) Increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) Extend or reduce the time for such payments;
- (3) Alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or
- (4) Reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that-
  - (A) Such expenses are reasonable and necessary;
  - (B) (i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or  
(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and
  - (C) The amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title;

and upon request of any party in interest, files proof that a health insurance policy was purchased.

The Cases:

In *Re Nolan, Chrysler Fin. Corp. v Nolan*, 232 F.3d 528 (6<sup>th</sup> Cir. 2000), “a debtor cannot modify a plan under section 1329(a) by: 1) surrendering the collateral to a creditor; 2) having the creditor sell the collateral and apply the proceeds [\*5] toward the claim; and 3) having any deficiency classified as an unsecured claim.” See also *Ruskin v. DaimlerChrysler Servs. N. Am., L.L.C. (In re Adkins)*, 425 F.3d 296 (6<sup>th</sup> Cir. 2005) (remaining portion of allowed secured claim must be paid on a secured basis).

Five propositions of Nolan:

1. Section 1329(a) “does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim.” Instead, Section 1329(a)(1) “only affords the debtor a right to request alteration of the amount or timing of specific payments.”
2. Such a “proposed modification would violate section 1325(a)(5)(B), which mandates that a secured claim is fixed in amount and status and must be paid in full once it has been allowed.”
3. Allowing this kind of modification post-confirmation “would contravene section 1327(a), because a contrary interpretation postulates an unlikely congressional intent to give debtors the option to shift the burden of depreciation to a secured creditor by reclassifying [\*6] the claim and surrendering the collateral when the debtor no longer has any use for the devalued asset.”
4. It would be inequitable to allow a debtor to revalue or reclassify a claim because the collateral depreciated when a secured creditor cannot seek to reclassify its claim if the collateral appreciates in value.
5. “Section 1329 clearly indicates that modifications after plan confirmation cannot alter a claim (a right to a remedy or payment of a certain total amount), but can extend or compress payments and reduce or increase the amount of the delivery of value planned as an eventual satisfaction for the creditor’s claim.”

Differentiation:

1. This is the surrender of real property, normally an appreciating asset subject to a state court foreclosure, whereas Nolan involved the surrender of a vehicle, normally a depreciating asset subject to repossession under state law.
2. The property in Nolan was “crammed down” at confirmation. Real property is generally (though not always these days) paid as a “long-term” debt.

In RE: Julie Ann Enders, Case No. 308-04229, Chapter 13, 2010 Bankr. LEXIS 113 (U.S. Bankruptcy Court for the Middle District of Tennessee): The debtor in this case had a plan confirmed on 7/15/08 treating her mortgage company, Countrywide Home Loans, Inc. (later BAC Home Loans Servicing, L.P.) as a long-term secured creditor under Section 1322. Countrywide filed an appropriate secured claim prior to confirmation. On 7/28/09, the debtor filed an expedited motion to modify the plan to surrender real estate and disallow claim. The debtor sought to modify the confirmed plan to surrender the real estate, disallow the secured claim of Countrywide and reduce the plan payments. Countrywide sought and obtained stay relief on 10/1/09. The creditor neither objected to the motion to modify plan, nor did they file a deficiency claim as permitted by the stay relief order on 10/1/09. The court ruled that Countrywide’s failure to object and/or file a deficiency claim implied that Countrywide had “accepted its foreclosure or the debtor’s surrender as an accelerated full payment on its debt” and granted the motion to modify the confirmed plan.

In RE: Michael W. Disney, Case No. 06-16712 HRT, Chapter 13, 386 B.R. 292, (Bankr. D. Colo. 2008), 2008 Bankr. LEXIS 1013 (U.S. Bankruptcy Court for the District of Colorado): Allows for recharacterization of a secured claim following the foreclosure or surrender of collateral and treatment of the resulting deficiency claim in a modified plan under Sections 502(j) and 1329(a).

In RE: Dudley J. Sellers, Jr. & Glenda M. Sellers, Case No. 08-50511, 409 B.R. 820 (Bankr. W.D. Louis. 2009), 2009 Bankr. LEXIS 2285: Debtors’ plan was confirmed with two secured creditors being paid pro-rata on their allowed secured claims on 9/17/08. Debtors’ had a change in financial circumstances and filed a motion to modify the confirmed plan to surrender the

collateral and eliminating the pro rata payments to the secured creditors on 12/2/2009. One creditor filed a timely objection to the proposed modification. After review, the court determined that it was feasible to modify a plan to surrender the collateral and reclassify the secured claims to unsecured claims, but reset the matter for further hearings on the identification of the collateral and its condition.

In RE: Margerite Write, Case No. 03-20787, 2005 Bankr. LEXIS 1168; 54 Collier Bankr. Cas. 2d (MB) 638 (Bankr. D. Kans. 2005): Debtor filed for Chapter 13 protection on 5/6/03 and her plan was confirmed on 5/21/03. Creditor had a mechanic's lien in second position on the debtor's residence. The confirmed plan treated the mechanic's lien as fully secured and to be paid in full through the plan. Debtor's mortgage company obtained stay relief post-confirmation and properly foreclosed on the debtor's residence. Debtor then objected to the claim of the creditor and filed a motion to modify the confirmed plan to recharacterize the creditor's claim to that of an allowed unsecured claim. The court held that while the modification must still comply with the requirements for confirmation under sections 1322(b) and 1325(a), that the modification requested in this case was appropriate.

Conclusions:

1. Plan modification to recharacterize an allowed secured claim against real property to an allowed unsecured claim for a deficiency balance may be permitted under sections 1329(a) and 502(j) so long as the plan still complies with sections 1322(b) and 1325(a).
2. Proper notice of the proposed plan modification is essential.
3. A separate motion to reclassify the claim or objection to the claim sought to be recharacterized is recommended.
4. Be prepared to support any alleged change in circumstances of the debtor(s).
5. Be prepared to differentiate *In Re Nolan* from your case.

**Treatment of HOA Dues Which Accrue Post-petition in a Chapter  
13 When the Debtor Proposes to Surrender the Collateral**

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**A discussion of the treatment of claims for post-petition HOA or condo dues in a chapter 13 where the debtor proposes to or has surrendered the real estate. Are such post-petition dues a claim – are they dischargeable – are they an administrative claim?**

**DISCUSSION POINTS:**

- 1. Are post-petition HOA dues a claim (secured or unsecured or both) pursuant to §101(5)?**
- 2. Are post-petition HOA dues dischargeable pursuant to §§523(a)(16) and 1328(a)?**
- 3. Do post-petition HOA dues arise from the pre-petition HOA Agreement or do they arise as a matter of property rights that “run with the land”?**
- 4. May a HOA file a proof of claim for estimated post-petition HOA dues?**
- 5. May a HOA file an administrative claim for post-petition HOA dues?**

**Relevant Statutes:**

**§101(5)** The term "claim" means -

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

**§101(12)** The term "debt" means liability on a claim.

**§523(a)** A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

**§1305(a)** A proof of claim may be filed by any entity that holds a claim against the debtor -

(1) for taxes that become payable to a governmental unit while the case is pending; or

(2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

**§1325(a)** Except as provided in subsection (b), the court shall confirm a plan if-

(5) with respect to each allowed secured claim provided for by the plan-

- (A) the holder of such claim has accepted the plan;
- (B) (i) the plan provides that –
  - (I) the holder of such claim retain the lien securing such claim until the earlier of –
    - (aa) the payment of the underlying debt determined under nonbankruptcy law; or
    - (bb) discharge under section 1328; and
  - (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
- (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
- (iii) if –
  - (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
  - (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or
- (C) the debtor surrenders the property securing such claim to such holder;

**§1328(a)** Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt -

- (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

**§1328(b)** Subject to subsection (d), at any time after confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if -

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
- (3) modification of the plan under section 1329 of this title is not practicable.

**§1328(c)** A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt -

- (1) provided for under section 1322(b)(5) of this title; or
- (2) of a kind specified in section 523(a) of this title.

**Relevant Case Law: (NOTE: Much of the language below is taken directly from the listed cases without citation or attribution.)**

*In re Heflin*, 2010 Bankr. LEXIS 1253 (Bankr. E.D. VA. 2010)

HOA objected to the confirmation of a chapter 13 debtor's plan because it did not provide for payment of on-going property owner assessments on property that the debtor was surrendering.

The HOA claimed a lien of the debtor's real estate. The HOA filed a secured and unsecured proof of claim to HOA dues. First, the Court held that post-petition HOA dues were dischargeable in a chapter 13 if provided for in the plan and a discharge was granted. The Court further ruled that the secured claim was satisfied by the surrender of the real estate and the HOA could exercise its rights pursuant to its lien. With respect to the unsecured claim, the pre-petition HOA dues were treated like other unsecured claims and their objection was overruled. The Court did not have to rule on the issue of the post-petition dues since the only question before the court was whether the plan satisfied the requirements for confirmation. But assuming the post-petition dues were an allowed post-petition claim, they would be treated the same as other unsecured claims under § 1305(b).

*In re Kelly*, 2010 Bankr. LEXIS 1409 (Bankr. N.D. CA 2010)

HOA filed a Motion for Relief from Stay (MFR) claiming that the debtors owed both pre and post-petition HOA dues. Under the "Homeowner Association Covenant, Conditions and Restrictions", the debtor was personally liable for assessments. The debtor did not contest the

lifting of the stay to allow the HOA to record a lien for the post-petition HOA dues, but objected to the request for relief to obtain a judgment for the post-petition dues. The Court held that both pre and post-petition HOA dues were discharged pursuant to §1328(a). Since the plan provided for payment on a pro rata basis for general unsecured creditors, the HOA did not have grounds for relief from stay to obtain a personal judgment against the debtors. There is no discussion in the case of whether a proof of claim to post-petition HOA dues would be allowed.

***Foster v. Double R Ranch Association***, 435 B.R. 650 (9<sup>th</sup> Cir. BAP 2010)

Debtor filed a complaint to determine that the post-petition HOA dues were dischargeable in his chapter 13 case. The Bankruptcy Court for the Western District of Washington ruled that post-petition HOA dues were not discharged pursuant to §1328(a). The BAP agreed and held that the duty to pay post-petition HOA dues was not a contractual obligation, dischargeable in chapter 13, but was rather an affirmative covenant to pay that was an incident of ownership of the property that was not affect by the filing of the bankruptcy. The debtor listed the HOA as an unsecured creditor for pre-petition dues. The HOA, pre-petition filed its lien for past due HOA dues. The debtor intended to retain the property and his amended plan provided for the cure of the pre-petition arrearages in the event the BAP ruled that the HOA held a secured claim. The plan provided for a 0% payout to unsecured creditors. The BAP ruled that post-petition HOA dues are neither claims nor debts and that §523(a)(16) is therefore inapplicable to post-petition HOA dues. The BAP held that state law governs the substance of post-petition HOA dues. The Court found that under Washington law, the HOA Declaration is NOT a contract, but a document that creates a type of real property which is therefore a running covenant that us

binding on subsequent grantees. The Court therefore held that as a matter of law, debtor's personal liability for HOA dues continued post-petition as long as he maintained his legal, equitable or possessory interest in the property and was unaffected by his discharge. In essence, the "running" covenant rule in this case boiled down to one of "you stay, you pay" since debtor's confirmed plan indicated he will stay in his home by curing his prepetition default on his mortgage and maintaining on-going payments through his confirmed Chapter 13.

*In re Hall*, 454 B.R. 230 (Bankr. N.D. GA. 2011)

Condo Association (CA) contacted the debtor for payment of CA dues after received her chapter 13 discharge. The Bankruptcy Court found the CA in contempt and the CA filed a motion to reconsider. On reconsideration, the Court first looked at whether post-petition CA are claims under §101(5). The Court reasoned that if they were claims, they arose pre-petition and are subject to the stay. If they were not claims, the Court had to examine whether the post-petition assessments arose before or after commencement of the case for purposes of the stay. Since they debtor was not obligated to pay any post-petition CA dues on the date of filing, they are not claims under §101(5) because there is no enforceable obligation at the time of filing the case. A condominium association does not have a right to payment for future, post-petition assessments at the time of a debtor's bankruptcy filing. The Debtor confirmed a plan which included her pre-petition assessment arrears, and the Debtor continued to own and reside in the Property. The Court found that the individual was liable for assessments based on ownership of the unit, which was subject to the covenant to pay assessments. The Declaration's provision that the assessment was also a personal obligation was qualified by the words "of the Person who is the Owner of

such Unit at the time the assessment fell due." The Court looked at the purposes of §523(a)(16) and held that the change to §523(a)(16) was to resolve a conflict in the courts as to whether association fees accruing after commencement of a chapter 7 case were discharged. Additionally, Congress stated that the provision was intended to broaden the protections accorded to community associations with respect to fees or assessments arising from the debtor's interest in a condominium, cooperative, or homeowners association. Congress expressly intended to prevent such fees from being discharged to the detriment of associations. Of course, the case before the Court was a chapter 13 case and NOT a chapter 7 case. The Court found that post-petition assessments are not claims and subject to the automatic stay and that this holding comported with the sound reasoning that the creditor's right to payment simply does not exist at the time of a debtor's bankruptcy filing. Additionally, the nature of the claim for assessments was a covenant that runs with the land and bound property owners to pay obligations in the state of Georgia and under the subject Declaration. Therefore, the Court found that the CA did not violate the automatic stay in its attempt to collect the post-petition assessments.

*Maple Forest Condominium Association v. Spencer et al.*, 457 B.R. 601 (Dist. Ct. E.D. MI 2011)

The sole issue in this case was whether Debtor's personal liability for condominium fees assessed after the filing of a petition for relief could be discharged in a Chapter 13 bankruptcy proceeding, pursuant to *11 U.S.C. § 1328(a)*. The Court held that with certain exceptions, §1328(a) discharges pre-petition debts upon confirmation and completion of a bankruptcy plan. Debts arising after the petition date, however, are not generally dischargeable in bankruptcy. The Court

therefore had to determine whether the post-petition assessments of condominium fees constituted dischargeable pre-petition debts or nondischargeable post-petition debts.

The Court first looked at the three approaches Courts had taken to determine whether a claim arose pre or post-petition. The first is referred to as the "right to payment" test, under which a claim does not arise for bankruptcy purposes until each element of the claim is established. This is the minority view and has been widely criticized as inconsistent with the broad definition of "claim" intended by Congress. Under the second approach, termed "the debtor's conduct" approach, a claim arises when the conduct by the debtor occurs, even if the actual injury is not suffered until much later. Finally, the third approach looks at whether there was a prepetition relationship between the debtor and the creditor such that a possible claim is within the fair contemplation of the creditor at the time the petition is filed. This has been alternately termed the "fair contemplation," "foreseeability," "pre-petition relationship," or "narrow conduct" test. The Court concluded that the three general approaches fail to elucidate the matter, courts have applied a different set of approaches to resolve the question of whether post-petition condominium assessments are pre-petition claims. The first line of cases treats post-petition assessments as incidents of ownership deriving from a covenant running with the land and thus as nondischargeable post-petition debt. These cases hold that a condominium association has a property interest in extracting reimbursement of maintenance costs from the burdened estate, which creates a new personal liability at the time of each assessment. (Long string of cited cases is omitted). Courts following this approach express particular concern for the notion that discharging a debtor's personal liability for post-petition assessments would work an impermissible deprivation of property interests through bankruptcy law. The second line of cases takes precisely the opposite approach, treating the post-petition assessments as contractual

obligations arising from the pre-petition acquisition of the condominium property (another long string of cited cases omitted). The courts following this approach emphasize the broad definition of "claim" under the Bankruptcy Code and view future assessments as "contingent, unmatured, unliquidated, unfixed right to payment. The third line of cases has been described as comprising "results-oriented decisions driven by equity." These cases hold that post-petition assessments are dischargeable as pre-petition debts only to the extent that a debtor has actually surrendered the property and, therefore, obtains no benefit from the property. Although the results of these cases may seem equitable, they lacked a firm foundation in the Bankruptcy Code until the enactment of §523(a)(16). The Bankruptcy Code now adopts the approach of this line of cases for some types of bankruptcy proceedings inasmuch as a debtor cannot obtain a discharge of post-petition condominium association assessments as long as "the debtor or the trustee has a legal, equitable, or possessory ownership interest" in the subject property. This court held that §523(a)(16) and §1328(a) are mutually inapplicable based upon the plain language of the Bankruptcy Code. When evaluating the dischargeability of debts under §1328(a), the conditions of discharge set forth in §523(a)(16) simply do not apply. The Court then looked at Michigan law. Under Michigan law, Debtor was obligated to pay the monthly assessments so long as he was a unit owner. Therefore, the obligation to pay condominium fee assessments arises from a covenant running with the land. The analysis is not concluded with this determination that the debt arises out of property law rather than contract. As an incident of ownership, the obligation to pay the assessed fees depends upon whether Debtor remained the owner of the property at all relevant times. It is undisputed that Debtor listed an intent to surrender the property in his Chapter 13 plan, but it is equally undisputed that the mortgagee has not taken title to the collateral. In ordinary circumstances, a creditor with a senior security interest in real property will act to

foreclose upon the property or accept a deed in lieu of foreclosure soon after the lifting of the bankruptcy stay. In determining whether the claim arose pre or post-petition, the Court found that regardless of whether the obligation to pay assessments is viewed as a contractual or property right, it arises post-petition where it lies wholly within the power of the debtor to avoid the obligation *after* the petition date. Viewed *ex ante*, Debtor's obligation to pay post-petition assessments would not arise until and unless Debtor retained title after the commencement of bankruptcy proceedings. While the existence of a claim is determined by state law, federal law determines when a claim arises. In this case, Debtor became liable for Association assessments on an ongoing basis, both before and after the petition date. Each month's new assessment arose not out of some pre-existing obligation to continue paying for some period of time, but as a result of continued ownership of the property. As a result, there was no pre-petition "right to payment," which is the *sine qua non* of a "claim" under the Bankruptcy Code. All that would have been necessary for Debtor to stop incurring such debts was for him to transfer title. Divesting ownership cuts off all future liability. In this way, the liability on condominium assessments stands in contrast to the liability on a mortgage or other secured loan. The former gives rise to an obligation only while the debtor retains ownership of the property, whereas the latter constitutes an ongoing personal obligation for repayment even where the collateral is divested or destroyed. The Court ruled that the pre-petition assessment liabilities were unquestionably dischargeable as "claims" arising prior to the petition date, however, the post-petition assessments arose solely because Debtor retained ownership after that time. Each month of continued ownership brought with it a separate assessment, which Debtor could have avoided after the petition date. Finally and relatedly, the court need not consider whether bankruptcy courts have the power to compel the secured creditor to accept surrender of the property, as Debtor failed to make any attempt to

effect a surrender of the property to creditors. In the absence of any attempt by Debtor to effect transfer ownership of the property by tendering a deed in lieu of foreclosure or otherwise, there is no reason to assume such efforts would be wholly fruitless. The Court held that the assessments must be viewed as post-petition debts not discharged under §1328(a) regardless of whether the Association's rights derive from a contract or a covenant running with the land.

*In re Colon*, 2011 Bankr. LEXIS 3909 (Bankr. UT 2011)

HOA filed MFR or for a determination that post-petition HOA dues were NOT subject to the automatic stay. The Court found debtors could provide for the post-petition HOA dues in their plan because post-petition HOA assessments met the definition of "claim" under §101(5). The court also held that the HOA assessments were not excepted from discharge under §1328(a) by §523(a)(16). Where the Debtors are not enjoying the benefits of the HOA and to hold Debtors liable for post-petition HOA dues when they no longer live at the Property and indeed have surrendered the Property to the secured lienholder is not only inequitable, but in contrast to the plain language of §1328(a). The Court did not address the issue of whether the HOA Regulations ran with the land under Utah state law. Despite the fact that the Debtors were listed on the title to the Property, the Court found that the Debtors had no consequential interest in the Property that measured up to rights to exercise ownership interests and control. Because the court found that post-petition HOA assessments were dischargeable under §1328(a), the creditor could not pursue the debtors for collection of those assessments and the stay should not be modified to allow collection.