UPCOMING AMENDMENTS TO BANKRUPTCY RULE 3002 TO IMPACT BANKRUPTCY FILING PRACTICES FOR MORTGAGEES

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Effective December 1, 2017, certain amendments to the Federal Rules of Bankruptcy Procedure ("the *Bankruptcy Rules*") recently adopted by the Supreme Court[1] will impact the allowance of secured claims in bankruptcy. Below, we focus on the amendments to Bankruptcy Rule 3002, which will serve to:

- Clarify that Rule 3002 applies to secured claims in cases pending under chapters 7, 12, or 13 of the Bankruptcy Code.[2]
- Shorten the deadline for filing proofs of claim to seventy (70) days after the bankruptcy filing.

The potential impact of these Rule 3002 amendments is significant, and is discussed in more detail as follows:

A. AS AMENDED, RULE 3002 WILL REQUIRE A SECURED CREDITOR TO FILE A PROOF OF CLAIM TO HAVE AN ALLOWED CLAIM

It has long been understood that for a secured claim to be "allowed" in bankruptcy and eligible to receive distributions from the estate, a proof of claim is necessary.[3] In its current form, however, Bankruptcy Rule 3002(a) provides that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed . . . ."[4] The conspicuous absence of secured claims from the text of Rule 3002(a) has led to differing opinions regarding whether a secured proof of claim must be filed by the Rule 3002(c) deadline or some other date.[5] Lack of clarity on this issue can have a negative impact on the reorganization, as one bankruptcy court explains:

> Without a deadline for filing proofs of claim in secured cases, the trustee would be bound to pay “not less than the allowed amount of such claim” under section 1325(a)(5)(B)(ii). This result would run afoul of the requirement of section 1326(a)(2) that the trustee make distributions as soon as practicable after confirmation. The trustee would be unable to comply with section 1326(a)(2) with any certainty if a secured creditor could file a proof of claim years after confirmation. Potentially, the secured creditor would be able to claw back funds that had already been distributed. Moreover, debtors would be forced to modify plans each time a secured proof of claim was filed.[6]

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Noting the potential for secured creditors to "wreak havoc" on a carefully constructed payment schedule by filing a proof of claim at the last minute, the Seventh Circuit recently held a secured creditor to the deadline in Rule 3002(c).[7]

The new text in Rule 3002(a) clarifies what case law has previously established: namely, that a secured creditor must file a proof of claim in order for the claim to be allowed, and thereby is subject to treatment under the bankruptcy plan. Rule 3002(a) also clarifies, in accordance with section 506(d) of the Bankruptcy Code, that the failure to file a proof of claim does not affect the lien securing the debt.[8] Accordingly, the creditor's lien rights are left undisturbed.

B. AS AMENDED, BANKRUPTCY RULE 3002 WILL REQUIRE PROOF OF CLAIM TO BE FILED NO LATER THAN 70 DAYS AFTER THE PETITION DATE

By applying Rule 3002 to secured claims, the amendments make clear that secured claims are subject to the filing deadline set forth in Rule 3002(c)—an issue that was open to debate under the current version of the Rule.

In its current form, Rule 3002(c) requires proofs of claim to be filed within ninety (90) days after the first date set for the section 341 meeting of creditors. In a chapter 13 case, the section 341 meeting must be scheduled between twenty-one (21) and fifty (50) days from the petition date.[9] This means that, under the current Bankruptcy Rules, a chapter 13 proof of claim bar date typically falls four months after the bankruptcy is filed.

Chapter 13 plan confirmation, however, generally proceeds on a faster schedule than the bar date. Section 1324 of the Bankruptcy Code provides that a confirmation hearing must be held between twenty (20) and forty-five (45) days after the section 341 meeting, "unless the court determines that it would be in the best interests of the creditors and the estate to hold such hearing at an earlier date and there is no objection to such earlier date."[10] As a result, chapter 13 plans are often confirmed *before* all proofs of claim have been filed, and this, in turn, can create problems for a debtor who is using chapter 13 to save his/her home, especially when it is unclear *when* the mortgage claim has to be filed.

The amendments to Rule 3002(c) seek to solve this issue. Because secured claims will now fall within the scope of Rule 3002(a), secured creditors will be bound to abide by Rule 3002(c)'s claim bar date. As amended, Rule 3002(c) provides:

> (c) TIME FOR FILING. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13.[11]

By pegging the claim bar date to seventy (70) days from the petition date (rather than the current deadline of ninety (90) days from the section 341 meeting), the amendments significantly shorten the time to get a claim on file from approximately four months to just over two months. A creditor can move for an additional sixty (60) days, but only upon a showing that (1) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the creditor matrix required by Rule

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1007(a); or (2) notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and the notice was mailed to the creditor at a foreign address.[12] In other words, on the face of the rule as amended, a bankruptcy court cannot grant more time simply because the creditor needs it.

C. AS AMENDED, BANKRUPTCY RULE 3002 WILL PROVIDE AN ADDITIONAL 50 DAYS TO FILE SUPPORTING DOCUMENTS

Perhaps recognizing the time-crunch that these amendments will place on mortgage servicers, a corresponding amendment to Rule 3002(c)(7) provides the secured creditor with up to one-hundred twenty (120) days from the petition date to file "any attachments required by Rule 3001(c)(1) and (d)."[13] This will give mortgage servicers additional time to track down loan documents, including assignments and copies of recorded mortgages. For many loans, if the foreclosure proceedings preceded the filing of the bankruptcy petition, the creditor may have these documents readily accessible. As such, the one-hundred twenty (120)-day extension is likely intended for situations where an account is missing one or more of the standard chain-of-title documents.

In sum, the amendments to Rule 3002 provide a staggered deadline for filing proofs of claim for secured debt. The creditor can file the proof of claim and any supporting documents (e.g., note, mortgage, escrow analysis) within seventy (70) days of the order for relief. If the mortgage is on the debtor's principal residence, then the creditor will need to include the completed Form 410A with the initial filing. The creditor will then have another fifty (50) days (if needed) to file supporting documents, including evidence that the security interest has been perfected as a supplement to the previously docketed proof of claim.[14] Of course, nothing in the amended rule prohibits the creditor from filing everything by the initial seventy (70)-day deadline, but if the creditor does not have all of its standing documents in hand, and decides to take advantage of the one-hundred twenty (120)-day extension, the proof of claim will essentially be incomplete until the supplement is filed.

D. FAILURE TO FILE A PROOF OF CLAIM WITHIN THE DESIGNATED TIME PERIOD

Given the clarity amended Rule 3002 will bring to secured claims, creditors should take special care to consider the consequences of the failure to file a proof of claim. No creditor is required to file a proof of claim. If a creditor does not file a proof of claim, however, the claim will be ineligible to receive a distribution under the chapter 13 plan.[15] This can be problematic for debtors desiring to cure a prepetition default on long term secured debt, like a home mortgage. Without a proof of claim on file, and without payments being made on the loan, the creditor may seek relief from stay and/or adequate protection of its interest.[16] Section 501(c) of the Bankruptcy Code and Bankruptcy Rule 3004 address this issue by allowing a debtor or trustee to file a "surrogate" proof of claim for the secured debt, thereby rendering the secured claim eligible for treatment under the chapter 13 plan.[17]

Several jurisdictions have enacted a surrogate filing protocol as part of their local bankruptcy rules. In the District of Massachusetts, for example, once a surrogate proof of claim is filed, the Clerk of Court will provide notice to the secured creditor and a deadline by which that creditor may file an amended claim.[18] If the secured creditor fails to amend, then the surrogate proof of claim will become the allowed claim.[19] Accordingly, if the secured creditor does nothing in response to the bankruptcy, it risks potentially waiving amounts over and above what the debtor might claim and provide for in a chapter 13 plan via a surrogate proof of claim.

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E. CONCLUSION

The amendments to Rule 3002 could have a significant impact on secured creditors. First, Rule 3002(a) clarifies that a proof of claim *must* be filed in order for a secured claim to be allowed and receive distributions in a chapter 7, 12, or 13 bankruptcy proceeding. Second—and perhaps more significantly—the changes to Rule 3002(c) will require creditors to modify their proof of claim filing practices in order to meet shorter deadlines.

Notes:

[1] *See* https://www.supremecourt.gov/orders/courtorders/frbk17_d18e.pdf.
[2] 11 U.S.C. §§ 101 *et seq.*
[3] Plan distributions are made to creditors holding "allowed claims." *See* Fed. R. Bankr. P. 3021. A claim is "deemed allowed" under section 502(a) of the Bankruptcy Code if a proof of claim has been filed to which no party objects. *See* 11 U.S.C. §§ 501 and 502.
[4] Fed. R. Bankr. P. 3002(a).
[5] *Compare In re Mehl*, No. 04-85570, 2005 WL 2806676, at *2 (Bankr. C.D. Ill. Oct. 25, 2005) (Rule 3002(c) proof of claim bar date does not apply to secured claims); *with In re Dumain*, 492 B.R. 140, 148 (Bankr. S.D.N.Y. 2013) (Rule 3002(c) does apply to secured claims); *see also In re Pajian*, 785 F.3d 1161, 1163-64 (7th Cir. 2015) (discussing cases).
[6] *See Dennis*, 492 B.R. at 146. (internal citations omitted).
[7] *See Pajian*, 785 F.3d at 1164 (in its decision, the circuit noted the forthcoming amendments to Rule 3002).
[8] *See* Committee Note: "Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void."
[9] *See* Fed. R. Bankr. P. 2003(a).
[10] 11 U.S.C. § 1324(a).
[11] *See* https://www.supremecourt.gov/orders/courtorders/frbk17_d18e.pdf.
[12] *See* Fed. R. Bankr. P. 3002(c)(6) (effective December 1, 2017).
[13] *See* Fed. R. Bankr. P. 3002(c)(7) (effective December 1, 2017).
[14] *See id*.
[15] *See* 11 U.S.C. § 1326(b)(2) (requiring chapter 13 trustee to make distributions "in accordance with the plan"); § 1321 (plan distributions are made to creditors with "allowed claims"); § 502(a) (a claim is "deemed allowed" if a proof of claim has been filed to which no party objects); *In re Hogan*, 346 B.R. 715, 720 (Bankr. N.D. Tex. 2006).
[16] *See Hogan*, 346 B.R. at 723.
[17] *See* 11 U.S.C. § 501(c) ("If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim"); Fed. R. Bankr. P. 3004.
[18] *See* MLBR 13-13(b).
[19] *See id*.

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