AMENDED PLANS,
MODIFIED PLANS
AND
PROOF OF CLAIMS ISSUES

OFFICE OF THE CHAPTER 13 TRUSTEE
NORTHERN AND SOUTHERN DISTRICTS
WEST VIRGINIA

AMENDED PLANS

Prior to confirmation, only the debtor can propose a plan, (11 U.S.C. 1321) and the debtor's plan may be amended—without leave of the Court—as often as necessary (11 U.S.C. 1323)—OR until someone—probably the trustee—objects to the inability of the debtor to promulgate a confirmable plan and files a motion to dismiss.

The required plan for both jurisdictions has a box for **claim** numbers—NOT ACCOUNT NUMBERS. Account numbers frequently change with transfers and even if the lender is the original lender, the debtor doesn't always get the account number right. Obviously, with the initial plan, claims have not been filed, so those are left blank. With amended plans, the trustee expects the claim number boxes to be filled in IF the claim has been filed. If the amended plan is filed after the bar date, the claim number boxes need to be filled in.

There is considerable resistance to this from the debtor bar.

The trustee sets up claims based on the claims as filed with reference to the plan. Without claim numbers, the set up may be complicated, particularly if there are several claims from the same creditor. For example, if a debtor owns several parcels of real estate and has loans against each of them from the same financial institution, the debtor may be current on one or two and in default on the others. How the debtor wants to treat the claims will, in all likelihood, not be

uniform. The description used in the plan will almost always differ from the description of the property in the proof of claim. Sometimes, the debtor and the bank have substantially close numbers as to the amount of the debt, so the trustee's office can deduce which claim goes with which treatment. Sometimes, that is impossible. A formal objection by the trustee may be filed or the trustee will oppose confirmation and state in the recommendation that she is unable to determine which property goes with which claim. This issue is resolved in an amended plan by the use of the claim number.

Another reason for debtor's counsel to include the claim number when preparing an amended proof of claim is to REVIEW the claim. Debtor's counsel may want to file an objection to the claim before confirmation. There is language in the confirmation order that objections to the claim can be filed after confirmation. But if the trustee has made payments pursuant to the confirmation order to a claim to which the debtor later objects, the trustee takes the position that those payments were authorized by the confirmation order and the trustee will **not** seek recovery.

Keep in mind that the plans in both jurisdictions provide that the proof of claim controls over most plan provisions, so if the debtor is attempting to cram down the value and/or the interest rate on a secured claim, the debtor **must** file a motion to determine the value and/or the interest rate. The motion **and** order need to include the interest rate to be paid. Failing to deal with the interest rate will keep the interest rate at the amount in the proof of claim.

The amended plan MUST include the terms of an agreed order which resolved a prior objection. Failure to do so will probably result in another objection and at least a caustic comment in the recommendation by the trustee's office that the amended plan fails to incorporate the terms of the order.

Emails do **not** amend a plan. The only exception that the trustee makes is for the attorney fees being reduced. If an attorney emails either the trustee or staff attorney to advise that he/she is reducing the attorney fee, that email can be used to adjust the fee. The email will be saved to the trustee's case file.

MODIFIED PLANS

Once the plan is confirmed, a plan may be modified—BY ANY PARTY IN INTEREST. 11 U.S.C. 1329.

Debtor modification:

The most frequent modification occurs when the debtor has suffered a change in income or expenses.

A determination of whether modification is appropriate is a three-part inquiry: (1) did "the debtor experience a substantial and unanticipated change in his post-confirmation financial condition"; (2) if so, then is the proposed modification "limited to the circumstances provided by § 1329(a)"; and (3) if so, "then the bankruptcy court can turn to the question of whether the proposed modification complies with §1329(b)(1)." *Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143, 150 (4th Cir. 2007). The party moving for modification, bears the burden of proof.

To have an unanticipated, substantial change in circumstances between the date of confirmation and the date of modification means that the debtor's current circumstances must have been unknown at the time of the confirmation – it is an objective test. *E.g., In re Murphy* at 152.

The significant and unanticipated change in the debtor's situation must be explained—not simply asserting that the debtor has decreased income and/or higher costs of living. Amended Schedules I and J must be filed with the modification.

Failure to pay taxes that come due during the pendency of the plan does not constitute a significant and unanticipated change in the debtor's situation. While the debtor may have a significant pre-petition tax debt to be paid through the Chapter 13 plan, the debtor knows that taxes will be a continuing debt. Schedules I and J should account for the payment of taxes. In addition, if the taxing authority does not file a claim pursuant to 11 U.S.C. 1305(a), the debtor cannot make provision for the payment of those unpaid taxes through a modification of the plan. The election by the taxing service not to file a claim pursuant to 11 U.S.C. 1305(a) means that the claim is not allowed and cannot be provided for in the plan, AND the tax is also not discharged and will continue to accrue interest and penalty.

Post-petition taxes, even if paid through the trustee, are paid as priority taxes with no interest. Prior to BAPCPA, the payment of the claim as a priority claim could discharge the debt. HOWEVER, changes in the Code with BAPCPA now allow the taxing authority to continue to accrue interest on the post-petition taxes (as well as any non-dischargeable tax debt), so at the conclusion of the plan, the taxing authority can bill the debtor for unpaid interest and penalties. 11 U.S.C. 1322(b)(10) and 11 U.S.C. 1328(a). As a rule of thumb, any tax which is non-dischargeable, can be paid through the trustee but the post-petition interest will not be paid and will accrue to be paid at the conclusion of the case. *See, i.e. In re Thaxton*, No. 2:09-bk-20649, 2017 WL 2371121, at *2 (Bankr. S.D. W. Va. May 30, 2017) (Volk)

The debtor is also responsible for modification of the plan when income increases significantly. These are not often filed by the debtor. However, if the trustee's office sees that adjusted gross income on the annual tax returns increasing above 15-20%, the trustee's office will file a motion to modify based on the tax returns.

In both jurisdictions, we have an informal modification to extend the plan and/or to increase plan payments when there has been a default in plan payments. This may be done by motion and order or by joint stipulation and order.

Creditor modification

A similar process is in play in resolution of a motion for stay relief. If a claim was being paid directly by the debtor, who subsequently defaults, the claim may be paid by the trustee, which is a modification of the plan. The order changing the disbursing agent will provide for the amount of the arrearage on the claim as a separate claim as well as the on-going monthly payment. Note that the arrearage will be paid without interest, but the on-going monthly payment includes interest and the order **must** provide for the interest rate. If no interest rate is included, the claim will be set up and paid at the interest rate set out in the proof of claim. Ideally, the order will include the amount of the new plan payments, but frequently the order will merely state that the trustee will notify the debtor of the increased plan payment. The trustee will do so by the filing of a Notice of Increased Plan Payment and Gross Base. The debtor is responsible for increasing the plan payment. **If this is a wage-withholding case, the debtor is responsible for filing the appropriate pleadings for the amended wage order and for making the difference between what is withheld and the new plan payment until the amended wage order is honored.**

Trustee modification:

The most frequent modification filed by the trustee is for mortgage payment changes or mortgage fees, expenses and charges. These are generally filed by the mortgage creditors on an annual basis and a trustee staffer reviews these, does a feasibility workup to see if the case will

still cash flow. If not, a motion to modify is filed. Generally, it will include any other issues which have arisen since the last review of the case, such as missed payments.

Specific figures for what the debtor needs to pay are in the motion to modify. If the debtor does not make the payments, the amount needed for the modification will increase. This is particularly true when continuances of the hearing on the motion to modify are granted and the debtor decides not to make the specified payments. The trustee is required to begin making the increased mortgage payments as of the effective date of the notice, so counsel who think they are doing their clients a favor by stalling on these is doing just the opposite. Sometimes the delay makes it impossible for the debtor to make the increased payments.

PROOFS OF CLAIM

Every creditor in a Chapter 13 case is required to file a proof of claim prior to the bar date in order to be paid—whether by the debtor or the trustee as disbursing agent. Rule 3002. There is no provision in the Rule for a late-filed claim in a Chapter 13 case. If a creditor doesn't file a proof of claim, the debtor has a 30-day window in which to file the claim on behalf of the creditor. There is no provision in the rules for the creditor to correct that claim. Although in a recent case in ND, creditor's counsel had some case law from outside our jurisdictions that allowed an amendment by the creditor. We don't have a decision in ND because debtor's counsel was willing to amend the proof of claim he filed on behalf of the creditor to accept certain aspects of the amended claim, so we did a joint stipulation that basically ran roughshod over the proofs of claims. If a claim is not allowed and is not paid during the pendency of the case, upon completion of the plan, the personal liability of a claim not filed is discharged. The secured creditor may retain its lien on the collateral. The car or other personal property may not have much value to the creditor at the end of five years, so there's not a lot of incentive on behalf

of the debtor's counsel to file a proof of claim on behalf of a car creditor or the sofa creditor. The mortgage creditor is in a better situation, and failure to file a proof of claim may result in the debtor's counsel filing that claim on behalf of the mortgage creditor. Which may or may not be good news for the mortgage creditor. If the debtor is severely behind on the mortgage, how correct is the monthly mortgage payment amount or the arrearage? The creditor can do a Notice of Monthly Mortgage Payment Change afterwards, but the arrearage is set in stone in the proof of claim and confirmation order. When we do the notice of final cure, I don't think the creditor can complain that the arrearage hasn't been cured. I would argue that the failure of the creditor to protect its claim results in the difference between the actual arrears and the amount in the proof of claim and confirmation order is uncollectable.

There is an official form for the proof of claim. And for loans secured by the debtor's principal residence, there are required attachments. Failure to include the attachments will result in an objection from the trustee. The filing of an amended claim is NOT a response to an objection. Creditor's counsel needs to file a response or contact the trustee or staff attorney to provide for the allowance of the claim. We file a proposed order with the objection, so if the creditor merely files an amended claim, the order could be entered which disallows the claim.

Proofs of claim may trump a plan; they don't trump an order.

Many creditors fill out the payee section of the claim with the name of the person completing the form as the payee. That's who we make the check payable to. So, if the check should be XYZ BANK, put XYZ Bank as the payee and **c**/o in the next line for the person to whom the check should be directed.

On the topic of amended proofs of claim, creditors should **not** file a proof of claim with a zero balance to indicate that the claim has been paid. A notice filed with the Court that the claim

has been satisfied prior to the completion of the case works. If a proof of claim is filed with a zero balance, the trustee's office will seek reimbursement of funds that came from the trustee's office. If the claim is satisfied and the creditor doesn't file anything with the Court but sends a check with a note—often a Post-It—that the claim is satisfied, we will do a motion to determine that the claim has been satisfied, which requires a notice and a proposed order and a deadline for a response.

An amended proof of claim is required when there is a change of address for the payments. The trustee's office does not accept letters or emails to change addresses for any party. To make a change of an address in our system, the address change must be of record with the Court—and that includes attorneys.

The failure to amend the claim to provide the change of address results in the claim being put on reserve. The trustee's office sends out a Notice of Claim on Reserve and we serve any address we have for the creditor—such as the yellow sticky from the post office or a letter which tells us that the creditor has moved. The claim will remain on reserve until the address is amended or the plan completes, and we send the money to the Clerk's office as unclaimed funds.

The trustee office will file an objection to a proof of claim if the claim is late filed—and we use the bar date to determine "late"—anything filed after that date is late; filed as secured without supporting documentation required by the Rules; is filed in the wrong category—for example, doctors who file as priority claims; or any other factor that is clear on the face of the proof of claim and its attachments. For example, in one case, the proof of claim filed for a mortgage claim showed a different address for the real estate than the debtor's address on the schedules and the middle initial of the borrower was different than the debtor's middle initial.

The trustee objected and it turned out that the bank had made an error—the debt was not the debtor's.

If there are other elements of the proof of claim which should be objected to and the information supporting that objection are in the debtor's hand, the debtor must object. Do not send an email to the trustee's office that the particular debt was discharged in a Chapter 7 case or that it is was given to the debtor's ex-spouse in a divorce action. The trustee will NOT file those objections. Those are objections which the debtor must file because the debtor has the information that supports the objection.

With respect to the latter scenario, if the debtor is still on the loan, it behooves debtor's counsel to put in the plan that the debt owed to CREDITOR X was ordered to be paid by the ex-spouse and the ex-spouse is to hold the debtor harmless and further that the debtor surrenders all right, title and interest in the said collateral and will not pay the claim.

A proof of claim is prima facie evidence of the claim. Failure to object to a claim means that it is allowed. The trustee's office sets up each claim that is filed to be paid through the trustee unless the plan contains specific instructions otherwise.

COMMON PROBLEMS:

1. Failure to attach evidence of perfection.

a. Frequently, there is no copy of the deed of trust attached, or if there is one, it is a copy of an unrecorded deed of trust. (My requests for a recorded copy have yielded on too many occasions, a new copy of the unrecorded deed of trust with the handwritten words: "This is a true copy of the file copy."

b. Not as common-- the deed of trust is not recorded in the proper county. Several cities fall into two counties, and we will find that the attorney who filed the deed of trust may have filed in it the wrong county.

. Irregular notary block and signatures.

2. Failure to itemize the arrearage

Frequently, there is simply a figure on the proof of claim form and no itemization. Sometimes, there is a sheet which simply states "missed payments" and "other charges." If this is a mortgage claim on the debtor's principal residence, there is a REQUIRED attachment for the itemization.

We check the late fee. West Virginia is, I think, unique in having a limitation in its state consumer protection law–late fees cannot exceed $25.00 per late payment. So, if the late fee isn't divisible by 25, it's probably an impermissible late fee.

The trustee will also object to math errors or incorrectly filled out forms. Just as some debtor's counsel have trouble multiplying by 60, some creditors have trouble putting in the correct number.

3. Failure to provide the paper trail between the filer of the claim and the beneficiary under the deed of trust

The deed of trust will name as a beneficiary some lender who isn't around anymore. The claim will be filed either by the servicer or the successor in interest–but with no documentation. The recent WV Supreme Court case may have determined that the trustee wouldn't have standing to litigate the assignment, but the trustee needs to know that the party being paid is entitled to the funds.

In *In re Harford Sands, Inc.*, 372 F3d 637 (4th Cir. 2004), the Chapter 11 debtor objected to the proof of claim of Stancills alleging, and apparently proving, that:

1. The amount of the claim was arrived at arbitrarily and without documentation;

2. That the claimant was not the rightful owner of the obligation;

3. That the claim was time-barred under Maryland state law.

The Fourth Circuit noted that when a claim is filed, it is presumptively allowed as to amount and validity. The burden then shifts to the debtor (Since *Harford Sands* is a Chapter 11 case, no trustee is not involved in the claims process.) to object to the claim and then "must introduce evidence to rebut the claim's presumptive validity." If the debtor carries its burden, the creditor has the ultimate burden of providing the amount and validity of the claim by a preponderance of the evidence.

In *Harford Sands*, the creditor failed to carry the ultimate burden, the Fourth Circuit found. First, as to the amount and validity of the claim, the testimony at hearing on the objection was that the Stancills' accountant had arrived at the figure of $174,688 for the claim but "have not included any such tonnage slips or hauling receipts in the record on appeal" nor did they explain how those figures proved the actual debt. Secondly, the creditor failed to produce any documentation of the assignment of the claim from "the rightful owner of the putative account receivable." (The court did not address the state law issue.)