

## Tennessee Bankruptcy Practice: Uniform Bankruptcy Code Not So Uniform in Chapter 13 Practice

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It is said that experience is the best teacher. In the context of the bankruptcy law, this is especially true. Tennessee has three bankruptcy districts (Western, Middle and Eastern) and practice under a “uniform” bankruptcy code is anything but uniform. As demonstrated below, having local bankruptcy counsel is especially important in this area of the law.

All three districts in Tennessee provide for “conduit” trustee payments of mortgage payments and arrears, but have different practices in how they do it. In the Western and Eastern Districts, mortgages are generally provided conduit treatment (i.e., “inside the plan”) only if loans are delinquent at the time of filing. While this is the general rule in practice, there are case by case exceptions making individual plan review critical. By contrast, debtors in the Middle District (which is one of the few jurisdictions that has adopted the proposed Uniform Model Plan) are required to pay their ongoing mortgage payments through the trustee’s office regardless of the status of the mortgage account.

There is also a difference in practice regarding the first payment to be made through the plan. In the Middle and Eastern Districts, the first payment made by the chapter 13 trustee will be the first month after the filing date. In the Western District, the first payment will generally be the second or third month after the filing date (the exact month is determined by the debtor’s plan). Those payments are “gap” payments – post-petition installment payments that will not be paid through the plan as post-petition maintenance payments. In the Western District, mortgage servicers must include the gap payments in the arrearage claim even though they are post-petition payments. This has caused some difficulty because the Proof of Claim Form, Form 410, and the Mortgage Proof of Claim Attachment, Form 410A, were designed to include only amounts due as of the petition date. The best practice to deal with “gap” payments is to modify the form by adding a line to Part 3 (Arrearage as of Date of the Petition) on the Mortgage Proof of Claim Attachment (Form 410A) to list the full post-petition payment(s) (i.e., principal, interest and escrow) in the claim.

Other areas of difference between the districts in Tennessee is the commencement date for payments to mortgage servicers and the enforcement of the proof of claim bar date by the chapter 13 trustees. Pursuant to Fed. R. Bank. Pro. 3002, a proof of claim is filed timely if it is filed within 90 days after the first date set for the § 341 Meeting of Creditors, approximately 120 – 140 days after the bankruptcy is filed. Plan confirmation often occurs before the proof of claim bar date resulting in confirmation of the plan before the mortgage servicer’s proof of claims is filed. In both the Middle and Eastern Districts, the chapter 13 trustee will not commence making any payments to mortgage servicers until a proof of claim is filed, meaning that even though a plan is confirmed, payments will be held by the trustee. The Western District, by contrast, is a pay upon confirmation jurisdiction and the chapter 13 trustee will commence making the post-petition maintenance payment (but not payments on the pre-petition arrearage) pursuant to the terms of the confirmed plan. This sometimes leads to payments to the

incorrect mortgage servicer if, e.g., there has been a loan service transfer at or after the filing of the bankruptcy case, and to accounting issues for both the trustee and servicer.

Practices in regard to objections to untimely mortgage servicer proof of claims are different even within districts in Tennessee. In the Western District and the Southern (Chattanooga) and Winchester Divisions of the Eastern District, the chapter 13 trustees do not typically object to late-filed mortgage servicer proof of claims. This “soft bar date” philosophy appears to be due to the belief that it is more beneficial for debtors to pay the servicer filed claims, even though late, so that their mortgage will be current upon completion of the plan. In the Middle District and the Northern (Knoxville) and Northeastern (Greeneville) Divisions of the Eastern District, the chapter 13 trustees object to, and seek the disallowance of, any late filed mortgage servicer proof of claim. To date, no bankruptcy judge in the Middle or Eastern District of Tennessee have ruled that mortgage proof of claims are excepted from the proof of claim bar date. Even though there is a risk that no payments will be made on a mortgage through the plan and that the loan will fall even further behind, the chapter 13 trustees in these jurisdictions believe that the bankruptcy code/rules and the confirmed plan do not authorize payment of a late filed claim. In many (but not all) instances, debtors’ attorneys will file a proof of claim on behalf of mortgage servicers so that payments are made on the claim and the funds not disbursed to other creditors.

Much more could be written about chapter 13 practice differences within Tennessee bankruptcy courts. Even the few examples provided above show that having experienced local bankruptcy counsel is important to servicers to avoid pitfalls and to successfully participate in the bankruptcy process.

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