FEES AND E'S

This session will discuss when and how servicers can pursue recovery of fees and costs in bankruptcy court as well as how the evolution and growth of e-notes, e-signings and e-recordings continues to change bankruptcy practice across the country.

I. FEE RECOVERABILITY IN BANKRUPTCY COURT

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A. Federal Bankruptcy Code and Rules

- Title 11 U.S.C. § 101(5) provides that a "claim" consists of a right to payment or equitable remedy, "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."
- Title 11 U.S.C. § 502(b) applies to claims generally and excepts those claims where the claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law or were brought to the court's attention through an untimely proof of claim.
- Title 11 U.S.C. § 506(b) permits an allowed secured claim holder to recover any reasonable attorney's fees, costs, or charges provided for under the agreement or state statute under which the creditor's claim arose. Generally, the creditor must establish: (1) that it is over-secured, to the extent that the value of the creditor's interest in the estate's property exceeds the amount of the creditor's allowed pre-petition claim; (2) that the fees and costs are reasonable, detailed through supporting evidence; and (3) that the agreement giving rise to the claim provides for the fees and costs.
- Federal Rule of Bankruptcy Procedure 3002.1 " . . . applies in a Chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim."
- Federal Rule of Bankruptcy Procedure 3002.1(c) provides that "[t]he holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee 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 against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred."

- Federal Rule of Bankruptcy Procedure 3002.1(d) provides that "[a] notice filed and served under subdivision (b) or (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)."
- Federal Rule of Bankruptcy Procedure 3002.1(d) provides that "[o]n motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.
- Federal Rule of Bankruptcy Procedure 2016(a) provides that "[A]n entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application."
- General Order 2021-01 in the United States Bankruptcy Court for the Northern District of Texas applies to Chapter 13 cases "filed on, filed after, or pending" as of January 1, 2021, and applies to all divisions of the Northern District of Texas Bankruptcy Court. Section 22(b) of the Standing Order revises the presumptive amounts a Mortgage Lender may recover via a Notice of Post-petition Mortgage Fees, Expenses or Charges ("PPFN"). The $700.00 limit for recovery of post-petition attorney's fees set forth in Northern District of Texas General Order 2017-1 is eliminated and, instead, the "[c]ourt deems the lesser of (1) the maximum attorney's fees that Fannie Mae allows for legal work related to bankruptcy services provided on Fannie Mae whole mortgage loans reflected in the Fannie Mae Servicing Guide and (2) the actual amount paid or to be paid by the creditor to its attorney as reasonable compensation, without prejudice to the Trustee, the Debtor, or any other party contesting entitlement to the fees, or the reasonableness of the amount or mode of payment of the fees and expenses." Section 22(b) of the Standing Order further provides that "[a]llowance of fees and/or expenses in amounts greater than those allowed by Fannie Mae shall be by separate order of the

Court pursuant to paragraph 22(a) or if Bankruptcy Rule 3002.1 does not apply, then by the filing of a separate motion requesting approval of such additional fees and/or expenses." Finally, Section 22(b) of the Standing Order provides that [t]he submission of an agreed order containing a provision for the creditor's recovery of attorney's fees in a pending bankruptcy Case shall constitute an affirmative representation to the judges of this Court by all signatories to the agreed order that there is objective evidence supporting a finding that the creditor has a properly perfected lien and is over secured or if otherwise legally entitled to recover such fees."

B. General Case Law

The bankruptcy courts will generally require the party seeking allowance of fees and costs to carry the burden of demonstrating reasonableness by providing a detailed description of the services rendered, supporting documents, or other evidence prior to making a determination on an application for payment. In re Huhn, 145 B.R. 872, 875-76 (W.D. Mich.1992); In re Foertsch, 167 B.R. 555, 562 (Bankr.D. N.D. 1994). The bankruptcy court has the inherent power to determine the reasonableness of the amount of fees and costs to be allowed under § 506(b) in accordance with federal standards. In re 268 Ltd., 789 F.2d 674 (9th Cir. 1986); In re Imperial Coronado Partners, Ltd., 96 B.R. 997, 1001 (BAP 9th Cir. 1989); In re Daleissio, 74 B.R. 721 (BAP 9th Cir. 1987); In re 433 South Beverly Drive, 117 B.R. 563, 568 (Bankr. C.D. Cal 1990). In Daleissio, the court established a test for determining reasonableness under §506(b) when it stated "[r]easonableness embodies a range of human conduct. The key determinant is whether the creditor incurred expenses and fees that fall within the scope of the fees provision in the agreement, and took the kinds of actions that similarly situated creditors might reasonably conclude should be taken, or whether such actions and fees were so clearly outside the range as to be deemed unreasonable." Id. at 723. "Reviewing the [Chapter 13] plan and filing a proof of claim are unquestionably appropriate actions to protect a lender's interest in estate property." In re Okafor, 595 B.R. 903, 907 (Bankr. D. Kan. 2018); a*lso see* In re Snow, 603 B.R. 114 (Bankr. W.D. Okla. 2019) addressing the risks and penalties associated with a flawed proof of claim in a Chapter 13 case and concluding that " . . . preparing, signing, and filing a proof of claim for a residential mortgage lender is not an inconsequential ministerial task"; and In re Mandeville, 596 B.R. 750, 765 (Bankr. N.D. Ala. 2019) stating that the " . . . court is not willing to say that because a plan *should* not violate the Code, it is unnecessary, and thus unreasonable, for a creditor to employ an attorney to review a proposed plan and determine whether it nonetheless violates the intended protection afforded by the Code."

The Fifth Circuit and Ninth Circuits previously held that § 506(b) is inapplicable to post-confirmation fees and costs. In re T-H New Orleans Ltd. Partnership, 116 F.3d 790, 797 (5th Cir. 1997); In re Hoopai, 581 F.3d 1090 (9th Cir 2009). However, former bankruptcy judge, Jeff Bohm, and current bankruptcy judge, Marvin Isgur, from the Houston Division for the Southern District of Texas also previously ruled in two separate decisions that the bankruptcy courts retain post-confirmation jurisdiction to determine the reasonableness of

these fees and costs in accordance with standards of reasonableness under applicable state law. In re Sanchez, 372 B.R. 289 (Bkrtcy. S.D. Tex. 2007); In re Padilla, Memorandum Decision (Bkrtcy. S.D. Tex. 2007). This technical application of whether federal and/or state law is applicable to the reasonableness of the fees and costs does not generally cause disparate results as the federal and most state law standards of the reasonableness of fees and costs are very similar. However, if § 506(b) is inapplicable to post-confirmation fees and costs, creditors may have a right to recover their reasonable fees and costs under their loan agreement and/or applicable non-bankruptcy law, even if their claims are undersecured as set forth more fully in In re Welzel, 275 F.3d 1308 (11th Cir. 2001), In re Hoopai, 581 F.3d 1090 (9th Cir 2009), and In re SNTL Corp., 571 F.3d 826 (9th Cir. 2009).

C. Timing

- Creditors generally utilize the date the service was performed as the operative date to utilize for all Notices of Post-petition Fees, Expenses, and Charges ("PPFN") under Rule 3002.1.
- If the service date or the invoice date is more than 180 days from the current date and Fed. R. Bankr. P. 3002.1 is applicable to the claim, the fee should be notated as non-recoverable.

D. Dollar Amount Threshold

- Creditors may internally established a dollar threshold to file a PPFN (e.g. $150 of fees/costs).

E. Non-Recoverable Fees

- Assignment -considered a cost of doing business and not recoverable from a borrower, as borrower did not cause the loan to be transferred.
- Notice of Change of Address - considered a cost of doing business and not recoverable from a borrower.
- Document Retrieval/Skip Trace/Title Search in bankruptcy – generally considered a cost of doing business and not recoverable from a borrower.
- Motion to Approve Loan Modification - considered a cost of doing business and not recoverable from a borrower. Generally, any fees surrounding loss mitigation/loan modifications are considered non-recoverable unless specifically negotiated in a loan modification agreement.
- Notice of Final Cure (agree only) - considered an administrative task that does not require the assistance of counsel.
- Payment Change Notice -considered an administrative task that does not require the assistance of counsel.
- Post-petition Fee Notice -considered an administrative task that does not require the assistance of counsel.

- Transfer of Claim - considered a cost of doing business and not recoverable from a borrower, as borrower did not cause the loan to be transferred.
- Conditional Non-Opposition to Motion to Sell -many courts view fees as unreasonable when lender is being paid in full
- Limit of one property inspection fee per month for a post-petition delinquent loan, absent unusual circumstances

Otherwise, fees and costs incurred in connection with a bankruptcy proceeding are generally recoverable from a borrower if: (1) recoverable under the terms of the applicable loan documents; (2) reasonable (which may depend on the status of the loan delinquency and automatic stay); and (3) in compliance with any confirmed plan of reorganization and properly noticed in accordance with the Federal Rules of Bankruptcy Procedure (e.g. Fed. R. Bankr. P. 3002.1) to the extent applicable. Accordingly, it is necessary to engage in a case-by-case analysis with these factors in mind prior to seeking recovery of fees and costs.

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I. ENOTES AND EMORTGAGES

A. eCommerce Laws

Uniform Electronic Transactions Act (UETA)

Introduced in 1999, UETA was proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The Uniform Electronic Transactions Act (UETA) was a national effort to establish rules for electronic transactions

Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §15 U.S.C. §§7001-31

Just a year later, in 2000 ESIGN was enacted. ESIGN expressly pre-empts state law. The pre-emption provisions provide that state law can only supersede the provisions of ESIGN if the state law is an enactment of UETA as adopted by NCCUSL.

Uniform Real Property Electronic Recording Act (URPERA)

Introduced in 2004 the Uniform Real Property Electronic Recording Act (URPERA)

aims to provide assistance to land record officials by addressing electronic real estate document transactions and authorizes officials to accept, store, and protect documents in electronic form.

B. eNotes are created and stored electronically

C. Terminology of eNotes

Authoritative Copy
Control or Controller
Location
Electronic Signature

D. Enforceability and Legal Challenges

Fannie Mae and Freddie Mac have a series of requirements that loan originators must adhere to be through to be able to sell eNotes to the government sponsored entities**.**

Safe harbor provisions of eCommerce laws

Rooker-Feldman Doctrine - Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

II. REMOTE ONLINE NOTARIZATION (RON)

A. Remote online notarization is an electronic notarization where the person whose signature is being notarized and the notary are in different physical locations and are communicating via two-way audio-visual conferencing, the signatures are provided electronically, and the notarial seal is applied electronically.

B. Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac offer guidance in their Selling Guide and Seller/Servicer Guide, with respect to Remote Notarization. Updates issued with respect to remote notarization requirements

C. RON Legislation and Executive order

State Governors have issued Executive Orders to establish notary procedures for using audio-video communications to perform notarial acts for remotely located signers

D. Executive Order issued in New York:

New York Governor Cuomo issued an executive order allowing notarizations using audio-video technology in place of physical appearance under certain conditions.

On March 19, 2020 Governor Cuomo signed Executive Order 202.7, which authorizes notary publics to officiate documents remotely.

Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:

The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;

The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing);

The person must affirmatively represent that he or she is physically situated in the State of New York;

The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;

The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and

The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

Subsequent guidance and extensions of have been issued with respect to New York's initial Executive Order.