

The Mortgage Lender's D-I-Y Guide to Bankruptcy Proofs of Claim

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Introduction:

On 12/1/11, the Bankruptcy Rules began requiring a series of new Official Forms for Proofs of Claim (“POCs”) from all filing claimants. The requirements apply not only to new bankruptcies, but also to *already existing* bankruptcies too. That means all of them. Many lenders want to file their own POCs, without paying lawyers to do it. This outline teaches you when, why and how to do it. It also teaches you what happens to your claim when you fail to do it right.

Two related features of bankruptcy “best practices” are worth exploring first: the NCRS and the EBN system. Sign up for at least NCRS. Sign-up for both is free, and it’s revocable.

I. The National Creditor Registration Service (NCRS”) (<https://ncrs.uscourts.gov>)

A. 11 USC §342(f)(1) allows lenders to file a “notice of address to be used by all the bankruptcy courts [...] to provide notice [...] in all cases under chapters 7 and 13 in which [the lender] is a creditor.”

1. Lenders merge, change mailing addresses, open and close branches, use multiple addresses, employ 3rd-party account services and use payment lockbox addresses.
2. Debtors are notorious for furnishing their bk lawyers with nothing more than a payment lockbox address for bk notices to lenders.
3. USPS does not deal with transposed ZIP Codes, PO Box ZIP Codes mis-used for street address ZIP Codes, etc. Numeric ZIP Codes govern mail delivery.

B. NCRS sign-up begins with the website (<https://ncrs.uscourts.gov>), but does not end there. The website simply inserts supplied info onto a 3-page “Creditor Registration of Preferred Address and Request for NCRS Participation”.

1. Lender supplies all other, NON-preferred alternative addresses, like PO Boxes, branch addresses, obsolete addresses, lockbox addresses, etc., so they can be matched electronically with the lender’s preferred receiving address.

2. Print out the agreement, get it signed by your management (*e.g., CEO*) and then paper-mail it to BAE Systems - Bankruptcy Noticing Center in Herndon, VA. (Address is spelled out on the contract).

C. Why bother? Because of 11 USC §342(g)(1) & (2) and your lien rights.

1. If a lender is registered with the NCRS, no notice to the lender from the Bankruptcy Court is effective unless it is sent to the NCRS-registered preferred address.

a. Without NCRS registration and unless a lender has filed a POC with a preferred address, the Clerk sends all notices to the lender at the address furnished on the creditor matrix by the debtor. What good is a Notice at your payment lockbox address?

b. Often a Clerk's Notice of Hearing on an Objection or Motion from the Trustee or debtor's counsel is the "last clear chance" for a lender to realize that something (usually bad) is about to happen.

2. If a lender is registered with the NCRS, all Notices of Bankruptcy Case and Order for Relief MUST be sent to the registered address. No matrix address alone is sufficient.

a. Unless the NCRS-registered address is used to send the Bankruptcy Notice, no monetary sanctions can be awarded against a lender can be awarded for a stay-violation.

b. Debtors' counsel are becoming increasingly trigger-happy about seeking sanctions awards for stay-violation, because it is seen as easy money. NCRS registration means a better chance of accurate receipt of a notice, to say out of trouble, and an excuse for an unknowing violation, to get out of trouble.

3. NCRS registered addresses can be changed, updated, revised, or withdrawn as required. Just be sure to keep it current and correct - like a credit bureau report.

4. The sooner you know about a bankruptcy, the sooner you can recall the repo man, or freeze deposits as additional collateral to be detailed on your POC, or both.

a. NCRS does not guarantee no mis-delivery of Notices from anyone except the Bankruptcy Clerk. The Clerk alone has access to the Registry, not debtors' lawyers or Trustees.

b. Notices sent by debtors' lawyers or Trustees will not be controlled by the NCRS. They will still be sent (and perhaps arrive) on paper, addressed to who-knows-where.

II. Electronic Bankruptcy Noticing ("EBN") <http://ebn.uscourts.gov>. This is the next step after NCRS, for the truly "paperless" devotee. If you have a 4G iPhone, you will like EBN. If you remember rotary dial phones, you will be skeptical. BR 9036 authorizes it.

A. EBN supersedes NCRS registration. It means all bankruptcy notices will arrive *solely by e-mail*. No USPS-delivered paper will arrive as a back-up.

1. EBN was ideally designed for high-volume recipients, but "occasional" recipients can benefit just as well.
2. If you are unwilling to rely on e-mail-only notice, stick with NCRS registration, but realize you are a fossil-in-training. Mailed paper is a purely 19th century method of communication.
3. A 'middle path' - sign up first for NCRS. See if it works. If it does, then investigate EBN. Acclimate by degrees rather than all-in at once.
4. Ironically, the EBN website simply populates a 4-page paper contract agreement with the address & e-mail information a lender provides. The lender must print it, sign it and paper-mail it or fax it to BAE Systems in Herndon, VA.

B. Once EBN is triggered, a 30-day redundant-notice period follows. During that time, the lender receives *both* paper notices and e-notices from BAE.

1. System failures can be detected, provided the lender compares all paper notices received with all EBN notice received, to detect any discrepancies.
2. Once the 30 days have passed, paper notices *from the Bankruptcy Clerk* stop. No weaning period. The lender receives only e-notices, to the designated e-mail address(es).
3. Be certain you have protocols in place to receive and open all e-Notices, just as you do now (right?) with all paper notices.
4. "Notice by electronic means is complete upon transmission". BR 9036.

C. Why bother with EBN? To get the best information by the fastest possible means. Knowledge is power, always.

1. EBN sends notices nightly, for all filings occurring that prior day.
2. Bankruptcies are now e-filed 24/7/365. Why not learn about a filing in a day, instead of in a week, or whenever the USPS finds you?
3. How many deposit accounts have you seen drained *after* a bankruptcy filing date, but *before* the lender could exert its rights to freeze the account(s)?
 - a. Freezing pre-petition funds on deposit after a petition is filed does not violate the §362 stay, per *Citizens Bank of Maryland v. Strumpf*, 516 US 16 (1995), but a lender has to know about the filing to accomplish a worthwhile freeze.
 - b. Statutory liens on deposits are useless unless a lender knows it should exercise them.
4. Ever had to return collateral repossessed 2 days after a bankruptcy filing date but 2 days before the paper notice arrived? Who pays for that mess?

D. Realize that EBN controls notices from Bankruptcy Courts and Clerks, not from debtors' lawyers or Trustees. Those will still arrive willy-nilly, on paper, addressed as they please.

III. The new POC form - "Official Form B-10 (12/11)".

A. Unlike the rest of the Forms addressed in this material, specific use of POC Form B-10 is not expressly mandatory. A POC must only "conform substantially to the appropriate Official Form". BR 3001(a).

B. Form B-10 is required for ALL proofs of claim, both secured and unsecured, not just claims secured solely by residential real estate.

1. All other forms discussed in this material apply only to loans secured by residential real estate.
2. Never file a single "totaled" claim for multiple debts or accounts. File a separate claim, separately documented for each separate debt.
3. POC forms were previously included with Clerk's Bankruptcy Notices, but no longer. Form B-10 is available everywhere, including each USBC website.
 - a. Discard prior editions and adopt B-10 universally, unless some local rule or method directs otherwise.

- b. Arrange for word-processing completion as a pdf document, to facilitate e-filing.
 - c. Beware that some districts (*e.g.*, WDNC), have pre-formatted methods to create a POC for e-filing, without the use of a Form B-10 as a pdf. Conform to local custom and practice.
4. Older release-dates are still acceptable, but they lack certain redaction aspects (*i.e.*, confining disclosure of acct. nos. to just the last 4 characters. (*See*, POC Form B-10, box #3.)

a. **Careful redaction of ALL of an consumer’s “non-public personal information” (“NPI”) on all POC’s and on all POC attachments is absolutely critical. Nothing else will more certainly cost a lender money than failure to redact. See BR 9037(a).**

b. Examples of NPI go well beyond the last 4 characters of a borrower’s SSN & Acct. No., including

(1) Driver’s license number

(2) Acct nos. on any other loan, any deposit acct. anywhere

(3) Dates of birth (except the birth year, if you simply MUST disclose something).

(4) Minor dependants’s names

(5) Mother’s maiden name (so often used as a password)

(6) any other identifying numbers or characters which, when combined with a consumer’s name, allows access to identity or account information or content.

c. penalties are often defined by state statutory law (which also still applies) and usually include borrower’s attorney fees.

d. Read & understand the attached separate outline “The Redaction Trap”. Some of the citations are to NC state statutory law, but other states often have equivalents, the Bankruptcy Rules apply nationally, and so should the object-lessons.

B. New POC form changes are relatively few:

1. Box 1. If your claim includes ANYTHING other than principal, interest and late charges, check the box and attach a separate itemization of those charges. Form B-10A (Attachment A) is for just that purpose, when the collateral is residential real estate.

2. Box 3a - Use this to detail any name-change of the lender, or a transferred claim, or anything else that explains any difference in info on the POC itself and the documents attached to it.

3. Box 3b - the “Uniform Claim Identifier” is for the convenience of national lenders who may assign a specific 24-character claim identifier to make electronic payments in Ch. 13s easier. Ignore it unless you are enormous.

4. Box 4 - critical to secured lenders.

a. Insert the annual interest rate when bankruptcy was filed (NOT when you received it.) Check the box to designate a fixed or variable rate.

b. Claiming collateral other than land or a car - like frozen deposits? Check “Other” and after “Describe” add something like “frozen deposits \$[amt]” and

(1) for federally chartered CUs, cite “12 USC §1757(11)”,

(2) for state-chartered CUs, cite your equivalent state statute (*e.g.*, “NCGS §54-109.59”).

(3) for any other deposit institution insert “right of setoff”.

c. “Amount of arrearages” is where to insert the total of all late payments + late fees + other charges you seek to recover. The total here must match the total on p.2, Form B-10A (Attachment A), discussed below.

5. Box 7 reminds claimants to attach redacted copies of all exhibits to all POCs. Fail to redact and you will risk a cascade of Motions to Seal, Motions for Sanctions, Adversary Proceedings, and legal costs. You will deserve them all.

6. Box 8 now requires the signer to disclose his name, a full contact address, telephone no. and an e-mail address. Be accurate and complete.

C. E-file POCs whenever possible, even if Clerks will still accept paper claims (for the present). Soon enough, what is permissible will become required, and paper claims will be the rare exception from *pro se* creditors.

1. Some Clerks (*e.g.*, WDNC) are placing a formal or informal annual limit of the number of paper POCs they will accept from any institutional lender. Above the limit and the claims are returned unfiled.
2. Why risk a bar date with a paper claim returned unfiled?
3. E-filed claims still require documentation per Box 7, just like paper claims. Learn how to use the company scanner, and hope for legibly copied documents.

III. For residence-secured claims only - new Form B-10A (Attachment A). “Mortgage Proof of Claim Attachment” (a/k/a “What it takes to return the loan to current status”).

A. BR 3001(c)(2)(C) requires this specific Attachment to any POC secured by a “principal residence”. Only this particular form will do.

B. Nothing distinguishes a mobile home from residential real estate, so use this even if your collateral is a singlewide, doublewide, etc., even withOUT land included.

1. Required in all Ch. 13s and in all Ch. 11s filed by individuals - not just Ch. 13s. Its purpose is to spell out exactly what is required to return a residence-secured account to contractual currency within the life of a bankruptcy plan.
2. Attachment A is NOT required where the lender simply claims “a security interest in the debtor’s *property*” per BR 3001(c)(2)(B), only if “a security interest is claimed in property that is the debtor’s *principal residence*” per BR 3001(c)(2)(C).
 - a. If the collateral is not the debtor’s residence, the lender must still specify the amount necessary to “cure any default as of the date of the petition” in the POC, per BR 3001(c)(2)(B). Do NOT use Attachment A.
 - b. If the collateral IS the debtor’s principal residence, DO use Attachment A.
3. If an escrow acct. has been established, an escrow acct statement prepped as of the petition date is also a required attachment. The same BR expressly requires it.
4. Obviously a copy of the note and Deed of Trust (“DoT”) or mortgage *with any Exhibit containing the legal description of land* are also required. BR 3001(c)(1).
 - a. Any pre-petition modification agreements are part of the contractual agreement, so include them too.

b. If the collateral includes a mobile home (with or without land) for which the title has not been cancelled and if your lien is recorded on it (it better be!), include a copy of the title or equivalent DMV lien filing receipt from e-title states.

C. B-10A, Part- by- Part. The drafters have tried to make it “foolproof”.

1. The preamble again requires redaction on the lender’s acct. no. to the last 4 characters. Be certain you use the same ones listed on Box 3 of the POC form.

2. Part 1, Lines 1 & 2: Specify the P & I *as of petition date*, not as of the date of prep or the date you received the notice. Get the petition date from PACER or the Notice.

3. Part 1 Line 3 should equate to an account payoff as of petition date, with all interest accrued through that date.

4. Part 2 - if it was due on petition date, if you want it back and if it’s not principal or interest, itemize it here.

a. This Part 2 satisfies the “statement that itemizes interest or charges” in the POC’s Box 1 & the requirements of BR 3001(c)(2)(B) & (C).

b. Did the bankruptcy stop your pending foreclosure? Part 2, Lines 3 - 10 are where to itemize the lender’s foreclosure costs, Use Lines 15- 17 too, if needed.

c. Part 2 Line 18 is repeated on Part 3, Line 3.

5. Part 3 - this is the “totals” portion, as of the petition date. It makes no accommodation for receipt of payments after the bankruptcy was filed.

a. Part 3 Line 1 should be the actual date that the lender last received any money from the debtor, even if it was only a partial payment and even if it was received AFTER the petition date.

b. The calculation in Lines 2 & 3 results in the number inserted in Box 4 of the POC form, reading “Amount of arrearages and other charges, as of the time case was filed, included in secured claim, if any:_____”. They better match.

6. . Unlike the other 3 new forms, this one alone is NOT signed by the lender or the preparer. It is a mandatory Attachment to the POC, not separately filed. Claims bar dates apply to this Attachment because it is part of the POC.

D. The penalties of non-compliance with ANY of the above regarding the pre-petition arrearage are severe. BR 3001(c)(2)(D).

1. Lender can be barred from presenting any of the omitted info if the debtor objects to the statement of arrearage amt. on POC Box 4. That means you eat the loss. BR 3001(c)(2)(D)(i)
2. "Other appropriate relief [*i.e.*, whatever the Judge wants] including reasonable expenses and attorney fees caused by the failure." BR 3001(c)(2)(D)(ii). That means you pay the debtor's lawyer to beat you out of your un-itemized arrearage.

E. Special side-Note for WDNC bankruptcies only - Local Form 14 "Addendum to Chapter 13 Proof of Claim for Real Property Creditor [Conduit Mortgages]".

1. Peculiar to WDNC Ch. 13s, *required in addition to Attachment A*, where:
 - a. Case filed is a Ch. 13 only; AND
 - b. Loan is secured by the debtor's residential real estate; AND
 - c. Lender's ongoing regular monthly payment is to be made by the Trustee instead of by the debtor directly. (Trustees now do that for revenue enhancement.)
 - d. For both fixed and adjustable rate loans.
2. Intended to spell out exactly what the Trustee should remit to the lender as ongoing mortgage payments within a confirmed Ch. 13. It has nothing to do w/ pre-petition arrearages.
3. WDNC Administrative Order dated 11/30/11 makes it plain that its Local Form 14 is NOT made obsolete by Form B10A (Attachment A).
 - a. Both remain required per para. 4 of the Administrative Order.
 - b. Unless & until the lender files Local Form 14, the Trustee can remit whatever the debtor claims is the monthly payment as the proper payment.
4. Land-mines for lenders secured by debtors' residence are planted in that Administrative Order
 - a. "Payments made prior to the filing of the claim are presumed to be the proper payment amount and are deemed accepted by the Real Property Creditor", per para, 9 of the Administrative Order.

b. That's not all. "In addition, if a claim is not properly filed prior to confirmation [of the Ch. 13 plan], the pre-petition mortgage arrearage, if any, will be determined by the amount provided by the Debtor [...][.]" (*Id.*)

c. Moral: *get the POC & Local Form 14 filed ASAP after the petition is filed, if you want to receive correct, timely payments from the Trustee.*

IV. For residence-secured claims in Ch. 13s only - new Form B 10 S1 (Supplement 1) (12/11) "Notice of Mortgage Payment Change". Only this specific Form will do.

A. BR 3002.1 requires lenders to file this Form at any time during a Ch. 13, IF all the following are true:

1. Where the lender is "secured by a security interest in the debtor's principal residence" (whether real estate or otherwise, including mobile homes without land); and
2. Where the debtor files a Ch. 13 bankruptcy; and
3. Where the debtor does NOT propose to pay off the entire loan balance within the plan (*e.g.*, a "long-term non-dischargeable debt" that will remain unpaid after Ch. 13 discharge; and
4. Where the periodic payment amount due to the lender changes (up or down) after the Ch. 13 petition is filed.
5. This form is required whether the payment is being made directly by the debtor or through the Trustee's office

B. Applies to payment amount changes caused by any of the following:

1. Escrow Acct payment adjustment (up or down), regardless of whether this is a fixed-rate or ARM. See Part 1.
 - a. Escrow account statement must ALSO be attached if the change is caused by the escrow account.
 - b. Both old & new escrow payments must be disclosed
2. Interest rate change (up or down) if this is an ARM. See Part 2.
 - a. Old & new interest rates must be disclosed. The old rate had better match the one disclosed on the original B10 A (Attachment A) Part 1.

b. Old & new P & I payments must be disclosed. The old payment had better match the one disclosed on the original B10 A (Attachment A) Part 1 Line 3.

3. Any other reason for the payment to change. See Part 3. Spell out the reason, and disclose the old payment and the new payment.

a. Post-petition loan modifications usually require advance permission from the Court, including a modification of the §362 stay. *Do not modify a loan agreement with the debtor post-petition without the Court's OK.*

b. Even if the modification is Court-approved, lender must STILL file a Form B 10 S1 and musts STILL attach a copy of the modification agreement.

C. Like the POC and unlike Attachment A, Form B 10 S 1 must be signed, and the signer's contact info disclosed.

1. Signer does not have to be the same person who signed the POC.

2. Penalties for false Notices are equal to those for false POCs. Make sure your info is right, or face a claim for sanctions under BR 9011 including attorney fees.

D. Form B10 S 1 Notice of Mortgage Payment Change must be filed at least 21 calendar days before the new payment amount first falls due.

1. Original is filed or e-filed with the Clerk, with any attachments AND

2. *Copies must also be mailed to the debtor(s), the debtor's att'y and the Trustee.*

3. Attached to this outline is a completed, filed copy of an early user's Form B 10 S 1, together with a certificate of service. Copy the format of the certificate. The Form must be mailed to the 3 required recipients, but the Form does not provide an example of such a certificate. Use this one.

E. After Form B 10 S 1 is filed, debtor's att'y or Trustee has 365 days (one full year) after the filing date to file an Objection to the Notice of Payment Change.

1. If an Objection is filed, the Court will set a hearing. A corporate lender must use a lawyer to attend the hearing.

2. At the hearing, the Court will decide if the claimed change is or is not required to cure a default or maintain contract payments. BR 3002.1(d).

3. If the Court agrees, the lender gets the changed payment amount. If the Court disagrees, the lender eats the changed payment amount forever.

F. Penalties for non-compliance are spelled out in BR 3002.1(i): After a notice and hearing, the Judge may:

1. Make the lender absorb any payment increase for any reason, if its failure to file the Form was not excused; and / or

2. Pay the debtor's reasonable expenses plus legal fees.

V. For residence-secured claims in Ch. 13s only - new Form B 10S2 (Supplement 2) 12/11 "Notice of Post-Petition Mortgage fees, Expenses and Charges". Only this specific Form will do.

A. Bankruptcy Courts and debtors despise "junk fees" assessed by consumer lenders on debtors post-petition in Ch. 13. Such fees are used to "ambush" debtors immediately after discharge by lenders who demand recoupment, declare the loan still in default, and begin foreclosure. This Form is designed to defeat those.

1. Form must be filed within 180 days after any post-petition charge was incurred. That means lenders must expect to file one every 180 days or less during the Ch. 13s entire lifespan.

a. The Form anticipates that a series of them will be filed. See the question above Part 1, and the requirement the prior S 2's filing date be disclosed.

b. Expenses falling within any gap period (after the prior S 2 was filed but more than 180 days before the current filing) will almost certainly be disallowed.

2. Copies must be mailed to the debtor(s), debtor's counsel & Trustee just like Form S 1. See Certificate of Service discussion above. Model your Certificate after the one attached to the completed, filed Form S 1 attached.

B. Part 1. Use this form to collect ANYTHING from the debtor other than principal, interest or escrow shortages which result in a payment change. That includes:

1. Part 1, Line 1. That includes late charges, but expect the Trustee to object if late charges are assessed on mortgage payments being made through the Trustee's office.

2. NSF fees, inspection fees, unpaid property taxes, force-placed insurance premiums, unpaid HOA dues, repair costs, legal expenses, etc., are all spelled out here. Be ready to supply receipts, etc. if challenged.

3. Form B 10 S 2 is now the sole means by which to recoup these fees. A separate Motion for Administrative Cost Award is no longer correct. Accumulating them and pursuing them post-discharge is no longer allowed.

C. Part 2. Like the POC & Form S 1, this Form S 2 must be signed and the signer's contact info disclosed.

1. The S 2 signer need not be the POC signer or the S 1 signer.
2. Same BR 9011 penalties for spurious filings apply as with S 1 filings.

D. After Form B 10 S 2 is filed, Trustee & debtors also have 365 days (one year) from filing to file an Objection.

1. As with Form S 1, the Court sets a hearing to determine the validity of the charges. They can be allowed or disallowed, in whole or in part. You will need a lawyer to defend your filing.
2. Disallowed post-petition charges must be absorbed by the lender forever. The lender cannot expect to pursue them post-discharge from the debtor, or to declare a default and foreclose because disallowed charges went unpaid.
3. The lender can be barred from introducing at a hearing any info that should have been disclosed on a properly filed Form S 2.

E. Penalties for non-compliance by a lender are the same as for Form S 1: eat the loss and potentially pay the debtor's expenses and attorney fees too.

1. Chances are greatest that Form S 2 will trigger objections from debtors or Trustees, because of their suspicion that such fees are assessed for abusive purposes.
2. Be ready to defend every dollar or every element, in Court, using a lawyer.