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NEWS RELEASE

November 25th, 2011

***NEW BANKRUPTCY
PROOF OF CLAIM RULES
GO INTO EFFECT DECEMBER 1, 2011***

The U.S. Supreme Court has amended several rules of the Federal Rules of Bankruptcy Procedure. The amendments will go into effect on December 1, 2011 (unless Congress acts to delay the amendments, which is unlikely). As a practical matter creditors should comply with the new requirements for any claim filed on or after December 1, even if the bankruptcy case was filed before December 1.

We outline in this newsletter amendments to Bankruptcy Rule 3001(c) (regarding Proof of Claim information and format) and new Bankruptcy Rule 3002.1 (regarding supplemental claim notice requirements). These amendments apply when the bankruptcy debtor is an individual (a human being).

BANKRUPTCY RULE 3001(c)

Bankruptcy Rule 3001(c) requires that when a claim, or an interest in property of the debtor securing the claim, is based upon a writing, the original or a duplicate must be filed with the Proof of Claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction must be filed with the claim. This requirement was not changed by the amendments, and applies to any bankruptcy case (Chapter 7, Chapter 13, Chapter 11, Chapter 12) for individual debtors as well as entity debtors (i.e. LLC's, corporations).

AMENDMENT TO RULE 3001(c)

The amendment to Rule 3001(c) adds a new subsection that sets forth a number of new requirements in a case in which the debtor is an individual:

Itemization of claim. If, in addition to a claim for principal, the creditor's claim includes interest, fees, expenses or other charges incurred before the bankruptcy petition was filed, the creditor's Proof of Claim must include an itemized statement of interest, fees, expenses or other charges. This amendment, as written, applies to secured claims and unsecured claims in any type of bankruptcy case concerning an individual. This new requirement is consistent with our firm's longstanding practices. Nevertheless, the itemization is now a formal requirement if a creditor wishes to preserve its claim for such items. The amounts stated in the Proof of Claim are to be calculated as of the bankruptcy petition date.

Statement of Cure Amount. If the creditor asserts a security interest in the debtor's property, the creditor's Proof of Claim must also include a statement of the amount necessary to cure any default as of the bankruptcy petition date. (Note that secured claims include a loan or other debt secured by a mortgage on real estate, a security interest against personal property, or judgment lien against the debtor's assets or setoff rights.)

Claim Secured by Debtor's Principal Residence. Special Itemization Requirements. If a creditor asserts a security interest or mortgage in the debtor's principal residence, the amendment requires that the creditor's Proof of Claim include the Official Form "Mortgage Proof of Claim Attachment." The Mortgage Proof of Claim Attachment is a two-page document that requires detailed itemization of the principal amount due, interest amount due, installment payments past due, cure amount, and itemized fees, expenses and charges as listed on the form. [We can provide a copy of the Mortgage Proof of Claim Attachment form upon request.] Also, if the creditor maintains an escrow account in connection with the claim, the creditor must include with the Proof of Claim an escrow account statement prepared as of the day the bankruptcy petition was filed in a form consistent with applicable non-bankruptcy law.

Note: Application to Commercial Loans/Debt: The requirement to file the Mortgage Proof of Claim Attachment with the Proof of Claim certainly will apply to a traditional home loan. It is important to note, however, that the requirement to include the Mortgage Proof of Claim Attachment with the Proof of Claim may also apply to a commercial loan secured by the debtor's principal residence. For example, suppose ABC LLC is owned by Mr. and Mrs. Store. A lender provides a loan to ABC LLC and obtains a security interest and mortgage on ABC's personal property and real estate assets. The lender also obtains a mortgage on Mr. and Mrs. Store's principal residence (which mortgage either secures the loan to ABC directly or secures Mr. and Mrs. Store's guaranty of the loan to ABC). Mr. and Mrs. Store file a Chapter 11 case. The claim is secured by the debtor's principal residence and therefore the requirement to utilize the Mortgage Proof of Claim Attachment applies in that commercial loan scenario.

Penalties for noncompliance. If a creditor fails to provide information required by the amendment to Rule 3001(c), the Bankruptcy Court may, after notice and hearing, take either or both of the following actions:

(i) Preclude the creditor from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case (i.e. a contested

motion for relief from stay or objection to the debtor's plan), unless the court determines that the failure was substantially justified or is harmless; or

(ii) Award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

NEW RULE 3002.1

If a debtor files a Chapter 13 case (commonly referred to as the "wage earnings reorganization case") and the creditor's claim is secured by the debtor's principal residence, new Bankruptcy Rule 3002.1 (subject to limited exception) imposes a number of obligations on the lender/creditor to file with the Bankruptcy Court (and serve on the debtor, debtor's counsel and the Chapter 13 Trustee) supplemental notices regarding post-bankruptcy petition date changes to the claim, as outlined as follows:

Notice of Change in Payment Amount. The holder of the claim [the creditor/lender] must file and serve on the debtor, debtor's counsel and the Chapter 13 Trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

Notice of Additional Fees, Expenses or Changes. The holder of the claim must file and serve 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 must be served within 180 days after the date on which the fees, expenses, or charges were incurred.

Official Forms For Notices. The notice of the change in payments and the notice of the fees, expenses and charges must be prepared on the Official Forms created for the Bankruptcy Court. There are two separate notice forms. One titled "Notice of Mortgage Payment Change" is set up to address changes in the escrow account payment, the mortgage payment and other payment changes. The other form is titled "Notice of Postpetition Mortgage Fees, Expenses and Charges" and includes an itemization similar to that found on the Proof of Claim form. [We can provide a copy of both Notice forms upon request.]

One year to Object to Creditor's Notice. The debtor or Trustee has one year after the creditor's service of a notice to file a Motion to contest whether the payment or any fee, expense or charge is in fact required to be paid by the debtor under the underlying agreement and applicable non-bankruptcy law.

Notice of Cure; 21 Day Deadline to Respond. Thirty (30) days after the debtor completes all payments under the plan, the Trustee is required to file and serve on the holder of the claim, the debtor and debtor's counsel, a notice stating that the debtor has paid in full the amount required to cure any default on the claim. If the Trustee does not timely file and serve that notice, the debtor may then file and serve the notice. The holder of the claim will then have 21 days after service of the

notice to file with the Court and serve on the debtor, debtor's counsel and the Trustee, a statement indicating whether the holder/creditor agrees that the debtor has paid in full the amounts required to cure the default and whether the debtor is otherwise current with the payments under the plan. The holder/creditor is also obliged to itemize any required cure or post-petition amounts, if any; the holder/creditor contends remains unpaid as of the date of the statement. After the creditor files the creditor's statement, the debtor and the Trustee are allowed 21 days to file a Motion to contest the statement.

Penalties If Creditor Does Not Timely Act. It is important that creditors, lenders and loan servicers have in place procedures to timely file and serve Notices for changes in payments and for additional fees, expenses and charges, and to timely act on cure/full payment notices. If a creditor fails to timely file a notice of changes or to timely respond to a Notice of cure, the Court may, after notice and hearing, take either or both of the following actions:

- (i) Preclude the creditor from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the Court determines that the failure was substantially justified or is harmless; or
- (ii) Award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Note: Application to Commercial Loans: New Rule 3002.1, as written, also applies to commercial loans secured by a security interest or mortgage in the debtor's principal residence. However, to qualify for Chapter 13, a debtor must have "regular income" and non-contingent, liquidated unsecured debt of less than \$360,475* and noncontingent liquidated secured debt of less than \$1,081,400* (*amounts subject to readjustment April 1, 2013). A Chapter 13 debtor liable on commercial debts that exceed those requirements may be forced to convert the case to a Chapter 11 (reorganization) or Chapter 7 (liquidation) or dismiss the bankruptcy case; in which case Rule 3002.1 won't apply.

These new amendments to the Rules will require careful calculation, itemization and documentation of the creditor's claim and timely attention to cure/payment notices in order to fully protect the creditor's right to payment. If you have any questions regarding these new rules or the new Official Forms, please contact [Matthew Gerdisch](mailto:mgerdisch@kmksc.com): (414) 962-5110; mgerdisch@kmksc.com.

About Kohner, Mann & Kailas, S.C.

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a transaction, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.

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