RULE 3002.1 CHANGES: WHERE ARE WE NOW?

THIRTY-NINTH ANNUAL
SOUTHEASTERN BANKRUPTCY LAW SEMINAR
MARCH 21-23, 2013

John Rao
National Consumer Law Center, Inc.

In response to long-standing problems with mortgage servicing and claim documentation in chapter 13 cases, new bankruptcy rules and official forms went into effect on December 1, 2011. These rules and forms compel disclosure of prepetition default fees and arrearage amounts, postpetition mortgage payment changes, and postpetition fees and expenses. They also establish a procedure in mortgage cure cases for resolving payment disputes and determining whether the debtor has fully cured a mortgage default. Courts are authorized under the new rules to impose sanctions for noncompliance.

Application of Rule 3002.1

Bankruptcy Rule 3002.1, and the related rule amendments made to Rule 3001(c), apply to claims that are 1) secured by the debtor's principal residence and 2) provided for under section 1322(b)(5) in the debtor's plan.[1] If the debtor's plan does not provide for the curing of a mortgage default, for example because the mortgage is current and the case is filed to deal with a nonmortgage problem, or if the plan does not provide for the maintenance of postpetition mortgage payments, the creditor is not required to comply with Rule 3002.1.[2] One court has noted that section 1325(a)(5) covers all long-term debt, not just debt with a prepetition default, based on the provision's reference to the "maintenance of payments while the case is pending on **any** unsecured or secured

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[1] Fed. R. Bankr. P. 3002.1(a).

[2] *In re* Weigel, 2012 WL 6061023 (Bankr. E. D. Va. Dec. 6, 2012) (section 1322(b)(5) did not apply when there was no prepetition arrearage); *In re* Wallett, 2012 WL 4062657 (Bankr. D. Vt. Sep 14, 2012)(notices of postpetition fees were not required because the mortgage was not on the debtors' primary residence and the mortgage claim was not treated under § 1322(b)(5)); *In re* Garduno, 2012 WL 2402789 (Bankr. S.D. Fla. Jun 26, 2012)(Rule 3002.1 did not apply because the debtors' plan stated that mortgage creditor would receive $0.00 and claim was not provided for under § 1322(b)(5)).

claim....[3] Thus, if the plan provides for the maintenance of payments on a home secured mortgage, even though there is no prepetition arrearage, Rule 3002.1 should apply.

One court has erroneously held that Rule 3002.1 does not apply if the debtor is the disbursing agent for the postpetition maintenance payments under the plan.[4] Nothing in the rule suggests that it applies only in districts where the trustee disburses the postpetition mortgage payments. In fact, the Committee Note to Rule 3002.1 explicitly states that the rule applies "whether the trustee or the debtor is the disbursing agent for the postpetiton mortgage payments."[5]

Another issue courts have faced is how to deal with a Home Equity Line of Credit (HELOC), because the payments on such mortgages may change monthly. Some mortgage servicers have raised concerns that compliance with the payment change notice requirements for HELOCs is overly burdensome and have requested that courts exempt such loans from Rule 3002.1. One court has refused to grant such a request, finding that compliance with the rules is mandatory, and that the court lacks discretion to extend the time deadlines or excuse performance.[6]

Rule 3002.1 Compliance Following Surrender or Stay Relief

In *In re* Kraska,[7] the debtor's plan provided for surrender of the debtor's residence. A motion for relief filed by the secured creditor requested that the court waive the requirements of Rule 3002.1. In denying the request, the court found that the "absence of an arrearage claim does not obviate the need for the protections the rule provides." The court noted that the ongoing notice requirements were of particular value in the case because it might be a 100% plan and the creditor was likely to file a deficiency claim. Requiring the creditor to file notice of payment changes and the imposition of fees "will allow parties to examine the basis of the amounts due and challenge the figures when necessary." Although it could be argued that compliance with

[3] *In re* Cloud, 2013 WL 441543 (Bankr. S.D. Ga. Jan 31, 2013).
[4] *In re* Merino, 2012 WL 2891112 (Bankr. M.D. Fla. Jul 16, 2012)
[5] *See* Appx. B.3, *infra*.
[6] *In re* Adkins, 477 B.R. 71 (Bankr. N.D. Ohio 2012)(finding no exception to the payment change notice requirement for HELOCs or authority to excuse compliance).
[7] 2012 WL 1267993 (Bankr. N.D. Ohio Apr 13, 2012), *motion granted and opinion stricken* (Sept 19, 2012).

the notice requirements was not required under Rule 3002.1(a) because the debtor's plan did not provide for treatment of the creditor's claim under section 1322(b)(5), the result seems correct under the circumstances of the case. (The opinion was subsequently withdrawn by the court).

Courts have also considered whether the rule requirements should continue to apply even after stay relief has been granted to the mortgage creditor. This issue is not addressed specifically in Rule 3002.1 Courts may conclude that the requirements should apply at least until the mortgage has been foreclosed, the plan is modified to provide for treatment of the claim other than under section 1322(b)(5), or the claim is withdrawn.[8]

The Initial Proof of Claim – Rule 3001(c)(2)(A) and (B)

Two changes to Rule 3001 relate to the information provided on a proof of claim (Official Form 10). These rule amendments actually do not impose new requirements because creditors were expected to provide this information based on instructions that have been on the proof of claim form for many years. What has changed is that these requirements are now also mandated by the Bankruptcy Rules and are therefore subject to the new sanction for noncompliance that was added in Rule 3001(c)(2)(D).

If a creditor claims that amounts other than principal are owed, Rule 3001(c)(2)(A) requires that the creditor file with its proof of claim an itemized statement of any interest, fees, expenses or charges. This rule applies to all proofs of claim filed in individual bankruptcy cases,[9]though it is implemented for home mortgage claims through a new Official Form as discussed below.

The second change applies to claims secured by the debtor's property and requires the creditor to provide a statement of the amount necessary to cure any default on the account as of the petition date.[10] Again, the instructions to Form 10 have long required

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[8]*In re* Thongta, 480 B.R. 317 (Bankr. E.D. Wis. 2012)(trustee was not required to file a Notice of Final Cure Payment under Rule 3002.1(f) because creditor withdrew its claim after stay relief was granted).

[9] In a chapter 7 case in which assets are available for distribution, claims for penalties such as late charges and over-limit fees have a lower priority in distribution. If the proof of claim does not separately itemize these charges, a court may find that the entire claim must be given this lower priority. *See In re* Plourde, 418 B.R. 495 (B.A.P. 1st Cir. 2009).

[10] Fed. R. Bankr. P. 3001(c)(2)(B).

secured creditors to provide this information, so making the requirement explicit in Rule 3001(c)(2)(B) should not alter existing practice.

Changes to the Proof of Claim -Official Form 10

A number of changes have also been made to the proof of claim form, Official Form 10. The most significant change is that the person who signs the proof of claim must now make the following declaration: "I declare under penalty of perjury that the information provided is true and correct to the best of my knowledge, information and reasonable belief." Although this declaration is arguably unnecessary because proofs of claim are subject to Bankruptcy Rule 9011(b), as well as criminal sanctions for the filing of fraudulent claims,[11] it should serve as a reminder of the Rule 9011 obligations and encourage the filing of accurate claims. Importantly, it should deter the practice of some large national default service provider firms in which an attorney signs a large number of claims but only reviews a small sample of these claims, and has no capacity to verify the information in the claim due to limited access to the client servicer's computer system.[12]

Amended Form 10 also now requires that the person signing the claim check a box indicating whether he or she is the creditor, an authorized agent for the creditor, a trustee or the debtor, or a guarantor (or other entity as provided in Rule 3005). If the claim is filed by an authorized agent, the instructions on Form 10 indicate that both the name of the individual signing the claim and the name of the agent should be provided. The form now includes lines to list the individual's title and name of company. The instructions further state that if the authorized agent is a servicer, the corporate servicer should be identified as the company.

Item 7 on Form 10, which is labeled "Documents" and deals with the documentation requirement in Rule 3001(c) and (d), has been revised to delete the statement: "You may also attach a summary." A new instruction for item 7 has also been

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[11] *See* 18 U.S.C. §§ 152 and 3571 (penalty for presenting fraudulent claim is fine up to $500,000 or imprisonment up to 5 years, or both).

[12] *See, e.g., In re* Taylor, 655 F.3d 274 (3d Cir. 2011)(affirming bankruptcy court order imposing Rule 9011 sanctions against law firm, an attorney, and servicer; proofs of claim filed by national firm were prepared by clerks who are not legally trained and are not paralegals, and attorney for firm reviews only a random sample of ten percent of filed claims).

added: "You may also attach a summary in addition to the documents themselves." This resolves the potential conflict between the rule requirement that the writing upon which a claim is based and evidence of a security interest be filed with the proof of claim and the instruction of former Form 10 that had been construed by some as permitting a summary as a substitute for the actual documents.[13]

Claims on Debtor's Principal Residence - Rule 3001(c)(2)(C)

The new rules impose additional disclosure requirements on home mortgage creditors for the initial proof of claim. Rule 3001(c)(2)(C) requires a creditor whose claim is secured by the debtor's principal residence to attach to its proof of claim a new Official Form, the Mortgage Proof of Claim Attachment (Attachment A) form.[14] The form instructs the creditor to disclose and itemize the components of the prepetition mortgage arrearage.

Itemization of Default Fees. Before implementation of Attachment A, mortgage servicers generally provided some form of disclosure of the arrearage components. In her study of mortgage claims, Professor Katie Porter found that the majority of filed claims (83.9% of all proofs of claim in the sample) included an itemization of default fees, leaving one in six claims that had not been supported by an itemization.[15]However, the study concluded that the disclosure rate was "misleading" because the "itemizations revealed large discrepancies in the quantity of detail provided," in part because "no standard format exists for itemizations."[16] Even among servicers, the claim disclosures differed depending on the law firm hired to file the proof of claim. The new Official Form should address these concerns by requiring that the information be disclosed in a standardized format.

Escrow Account. If the mortgage account includes an escrow account, the mortgage creditor must also attach to the proof of claim an escrow account statement

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[13] Rule 3001(c)(3) permits a summary statement to be filed with claims based on an open-end consumer credit agreement in lieu of the actual documents.
[14] Fed. R. Bankr. P. 3001(c)(2)(C); Official Form 10 (Attachment A).
[15] Katherine M. Porter, Misbehavior and Mistake in Bankruptcy Mortgage Claims, 87 Tex. L. Rev. 121 (2008), p. 19.
[16] *Id*. at p. 24.

prepared as of the petition date "in a form consistent with applicable nonbankruptcy law." The Real Estate Settlement Procedures Act (RESPA) is the applicable nonbankruptcy law for purposes of an escrow statement.[17]

By requiring simply that the statement be in a form consistent with RESPA, the new rule does not take a position on the unsettled issue of how the escrow portion of the prepetition arrearage should be calculated. Most courts have held that in order to give effect to a cure plan, the unpaid prepetition escrow portion of the monthly mortgage payments must be included as part of the mortgage holder's arrearage claim to be paid under the plan and cannot be collected in the postpetition maintenance payments.[18] Thus, the creditor should treat all unpaid prepetition escrow payments as if they have been paid in conducting the postpetition escrow analysis and in preparing the escrow statement as of the petition date. The portion of the prepetition escrow account arrearage attributable to the monthly payments in arrears should be listed on Attachment A (Mortgage Proof of Claim Attachment) in Part 3, Item 2, under "Amount of installment payments due." Any other amount representing a prepetition "escrow shortage or deficiency" that is not already included in the installment payments due as listed in Part 3 can be listed in the form's Part 2, Item 13.

Notice of Payment Change – Rule 3002.1(b)

Rule 3002.1(b) requires the mortgage creditor to file and serve "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." The notice must be given on Official Form 10 (Supplement 1), the Notice of Mortgage Payment Change.[19]

The new Supplement 1 form requires the mortgage creditor to state the basis for the changed payment amount, the current and new payment amounts, and the date when

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[17] For a discussion of RESPA escrow requirements, *see* National Consumer Law Center, Foreclosures, ch. 8 (3d ed. 2010).

[18] *In re* Rodriguez, 629 F.3d 136 (3d Cir. 2010); Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (5th Cir. 2008); *In re* Beaudet, 455 B.R. 671 (Bankr. M. D. Tenn. 2011).

[19] Fed. R. Bankr. P. 3002.1(d).

the change will take effect. The two most common payment changes on mortgage accounts result from interest rate and escrow account adjustments. These changes are subject to disclosure requirements under the Truth in Lending Act for adjustable rate mortgages and RESPA for escrow accounts. With respect to these payment changes, the new form operates essentially as a cover sheet by providing limited information and relying upon the more extensive disclosures given by the notices under these other laws. Thus, the mortgage creditor is required to attach to the new Supplement 1 form an escrow account statement or interest rate change notice in a form consistent with applicable nonbankruptcy law (TILA and RESPA). Because mortgage servicers routinely provide these notices to borrowers outside bankruptcy without the assistance of counsel, debtors should not be charged attorney fees for the servicer's preparation and filing of the Rule 3002.1(b) notices.[20]

The form can accommodate payment changes for reasons other interest rate or escrow adjustments. For example, the debtor and creditor may enter into a loan modification while the chapter 13 case is pending. If the loan modification results in a payment change, the creditor should file and serve Supplement 1, noting the change in Part 3 of the form and attaching a copy of the loan modification agreement to the form.[21]

Notice of Postpetition Fees – Rule 3002.1(c)

Rule 3002.1(c) requires the mortgage creditor to give notice of any postpetition fees or charges assessed against the debtor's account within 180 days of when they are incurred. The notice must be given on Official Form 10 (Supplement 2), the Notice of Postpetition Mortgage Fees, Expenses and Charges.[22] As with the payment change notice, the postpetition fee notice should be filed as a supplement to the creditor's proof of claim and is not entitled to presumptive validity under Rule 3001(f).[23]

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[20] *In re* Adams, 2012 WL 1570054 (Bankr. E.D.N.C. May 03, 2012)(disallowing $50 charge for filing a Notice of Mortgage Payment Change).

[21] Some bankruptcy courts require that a loan modification agreement be approved by the court in chapter 13 cases before it can take effect. The filing of Supplement 1 would not be a substitute for this court approval, unless such practice is permitted by the court.

[22] Fed. R. Bankr. P. 3002.1(d).

[23] Fed. R. Bankr. P. 3002.1(d).

In the event that multiple Supplement 2 forms are filed during a chapter 13 case, creditors are instructed on the form to list a particular fee only once as the form does not request a cumulative or running account of the fees. Additionally, amounts for taxes and insurance disbursed under an escrow account and fees that have been previously itemized and approved by the court, for example as in a consent order relating to a stay relief motion, would not be listed on the new form.

This issue concerning previously approved fees arose in *In re* Sheppard.[24] The debtor and secured creditor entered into a consent decree on a stay relief motion. The parties agreed that $800 would be paid to the secured creditor for attorney's fees and costs. The consent decree was incorporated into a modified plan approved by the court. Subsequently the secured creditor filed a Supplement 2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges) listing the same $800 in fees and costs. In response to the trustee's motion under Rule 3002.1(e), the creditor argued that it was simply intending to comply with the requirements of Rule 3002.1(c). The court agreed that there was no explicit exception in the Rule to cover this situation, but noted that the "Official Form provides that a creditor asserting post-petition fees, expenses, or charges must include on the form "any amounts [not] previously itemized in a notice filed in this case or ruled on by the bankruptcy court." Thus, the court held that there was no need for the creditor to file the Notice listing the fees as they had been previously ruled on by the court. In response to the trustee's request for further clarification, the court noted that the Notices should not be treated as a claim or a demand for payment.

Not all fees incurred on the debtor's mortgage account are subject to the rule. Only those fees that are incurred in connection with the claim and the creditor contends are recoverable against the debtor or the debtor's principal residence must be noticed. Thus, the creditor might incur an attorney's fee on the account but determine that it is not recoverable against the debtor or the debtor's property. In that case, the creditor should not list the fee on the new Supplement 2 form. The creditor's decision to treat the fee as non-recoverable (and therefore not noticed during the 180-day period) should also mean that the creditor is precluded from seeking collection of the fee from the debtor after the 180-day notice period has passed. The judicial estoppel doctrine or general estoppel

[24] 2012 WL 1344112 (Bankr. E.D. Va. Apr 18, 2012).

principles also may preclude the creditor from attempting to collect the fee in a subsequent foreclosure proceeding even if the debtor fails to complete the plan.

As for the timing of the disclosure, it is based on the time when the fee is incurred, not when it is determined to be recoverable. Thus, the notice shall be served within 180 days after the date on which the fees are incurred.

A related question with respect to timing is on which new form should postpetition, pre-confirmation fees be disclosed, Attachment A or Supplement 2? Before implementation of Rule 3002.1, some courts had held that attorney fees for the preparation of a proof of claim could be listed on the proof of claim even though the fees are incurred postpetition.[25]Arguably nothing in the new rules explicitly overrules these decisions, so that the proof of claim fee could be listed in Part 2 of Attachment A by listing the amount and date incurred on Line 3 for "Attorney's fees."[26] Disclosing such fees on Attachment A and including them in the arrearage amount, assuming the debtor is not disputing that the fees are authorized, has the advantage of facilitating payment of the fees under the plan as part of the claim amount. However, a mortgage creditor can also disclose any postpetition, pre-confirmation fees on Supplement 2, assuming the notice is filed and served within 180 days of when they are incurred.

Filing and Service Requirements – Rule 3002.1(d)

The payment change and postpetition fee notices are to be served on the debtor, debtor's counsel, and the trustee. Unlike pleadings and other documents filed in a bankruptcy case, these notices are not filed on the main docket. Instead, both new notices are filed by the mortgage creditor as a supplement to the claim holder's original proof of claim.[27] A new selection on the Bankruptcy Events menu in the CM/ECF system has been added for these filings.[28]

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[25]*E.g.*, *In re* Atwood, 293 B.R. 227 (B.A.P. 9th Cir. 2003); *In re* Madison, 337 B.R. 99 (Bankr. N.D. Miss. 2006); *In re* Powe, 281 B.R. 336 (Bankr. S.D. Ala. 2001).

[26] Of course, Attachment A is the form used by mortgage creditors to satisfy the itemization requirement in Rule 3001(c)(2)(A), and that rule refers to fees "incurred before the petition was filed." Also, the instruction for Part 2 of Attachment states that the creditor should itemize fees "due on the claim as of the petition date."

[27] Fed. R. Bankr. P. 3002.1(d).

[28] When docketed, this event appears in the history section of the Claims Register, and no

By referring to the postpetition fee notice as a claim supplement, the rules do not intend for the new notice to be treated as a claim amendment.[29] Thus, the filing of the notice without any further action should not mean that the fees listed in the notice will be paid by the trustee under the plan. If the debtor does not object to the fees and intends for the fees to be paid under the plan and disbursed by the trustee, a chapter 13 plan modification or some other court order may be necessary.

Consistent with this position that the payment change and fee notices are not claim amendments, Rule 3002.1(d) provides that these notices are not subject to Rule 3001(f). Thus, the notices shall not constitute prima facie evidence of the validity and amount of the supplemental information. By not affording presumptive validity to the information in the notices, the rules permit the normal evidentiary burdens to apply in any dispute over claimed payment changes or fees. For example, in *In re* Lopez,[30] the creditor filed a notice of postpetition fees claiming that $4,145.19 in attorney's fees, appraisal, property inspection and other fees were owed. In disallowing the fees, the court noted that the notice was not entitled to a presumption of validity and that the creditor had failed to respond to the debtor's objection or appear at the hearing to support its fee Notice.

Fee Dispute Procedure – Rule 3002.1(e)

If the debtor or trustee disputes that postpetition fees are owed, Rule 3002.1(e) establishes a procedure for resolving the dispute. The debtor or trustee may file and serve a motion within one year after service by the mortgage creditor of the fee notice (Form 10 - Supplement 2) seeking a determination of the propriety of the fee.[31] If a motion is filed,

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document number is assigned. Because no document number is associated with any of these new events, the word "doc" appears as a document hyperlink, rather than a document number.

[29] *See In re* Sheppard, 2012 WL 1344112 (Bankr. E.D. Va. Apr 18, 2012)(finding that documents filed as claim supplements under the rules should not be treated as a claim or a demand for payment).

[30] *In re* Lopez, 2012 WL 6760175 (Bankr. S.D. Tex. Dec 31, 2012).

[31] Fed. R. Bankr. P. 9014(b), applicable to "contested matters," incorporates the service of process rules of Fed. R. Bankr. P. 7004. If the creditor holding the claim is an insured

the court shall determine, after notice and hearing, whether any claimed fee, expense or charge is required by the mortgage agreement and applicable nonbankruptcy law to cure a default or maintain payments under Code section 1322(b)(5).[32] This clearly defined procedure should be helpful to debtors in certain jurisdictions in which courts have previously refused to address disputes involving postpetition fees, particularly in cases in which the debtor is the disbursing agent for ongoing mortgage payments.[33]

By providing a one-year period for filing a motion, the new rule attempts to set up an efficient and economic method for resolving challenges in which the amount of particular fees in dispute may be small. Rather than being required to file multiple motions in response to numerous fee notices that may have been sent during a one-year period, involving for example repeated property inspections the debtor believes are unauthorized, debtor's counsel may respond with a single motion that will initiate a single proceeding. At the same time, if the court determines that the fees are proper, the one-year deadline provides the debtor with a determination before the fees accumulate to an amount the debtor may be unable to pay directly or through a possible plan modification.

Notice of Final Cure Payment – Rule 3002.1(f)

Rule 3002.1(f) provides that "[w]ithin 30 days after the debtor completes all payments under the plan, the trustee shall 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." The notice must also inform the creditor of its obligation to file a response to the notice. Because the notice indicates only that the debtor has cured any defaults on the claim and does not represent that all postpetition

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depository institution, service of this motion generally will not be effective unless an officer of the institution is served by certified mail. *See* Fed. R. Bankr. P. 7004(h).*See also In re* Tuneberg, 2012 WL 3744719 (Bankr. S.D. Tex. Aug 28, 2012)(court refused to rule on debtor's objection to fee notice because creditor's counsel had not been served with objection in accordance with local rule).

[32]*In re* Cloud, 2013 WL 441543 (Bankr. S.D. Ga. Jan 31, 2013)((treating a motion to "strike" a fee notice as a motion for determination of fees, and finding that $84 appraisal fee was not required by the agreement or applicable nonbankruptcy law).

[33]*See, e.g*., Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000).

payments have been made, trustees should be willing to file the notice upon plan completion even in non-conduit districts in which the debtor directly disburses postpetition mortgage payments to the creditor. However, if for some reason the trustee does not file the notice within the 30-day period following plan completion, it may be filed and served by the debtor.[34]

Creditor Response to Notice of Final Cure Payment – Rule 3002.1(g)

The mortgage creditor is then given twenty-one days to respond to the notice by filing a statement indicating (1) whether it agrees that the debtor has fully cured the default on the claim, and (2)whether the debtor is current on all postpetition payments consistent with the "maintenance of payments" requirement in section 1322(b)(5). If the creditor states that postpetition amounts are owed, it must itemize any amounts it claims are due and unpaid as of the date of the statement.[35]The statement shall be filed as a supplement to the creditor's claim and is not entitled to presumptive validity under Rule 3001(f).

In *In re* Baca,[36] there was no dispute that the debtor had not made all postpetition payments, and that the amount listed in the creditor's Rule 3002.1(g) response was correct as to the missed payments. However, the debtor later disputed that any additional fees were due because the creditor failed to list them in the response. The court agreed that the creditor should be barred from collecting the fees. Rather than apply the sanction under Rule 3002.1(i), however, the court relied upon the equitable estoppel doctrine. The court also left for another day whether the debtor was entitled to a discharge if the postpetition payments were not all made.

Determination of Final Cure and Payment of All Postpetition Payments– Rule 3002.1(h)

The debtor or the trustee may, within twenty-one days after service of the creditor's statement, file and serve a motion requesting the court to determine whether the

[34] See sample Notice of Final Mortgage Cure Payment, Form 145.2, Appx. G.12, NCLC's Consumer Bankruptcy Law and Practice (2011 Supp.).
[35] Fed. R. Bankr. P. 3002.1(g).
[36] 2012 WL 6647733 (Bankr. D. N.M. Dec 20, 2012).

amounts claimed on the statement are owed and seeking an order declaring that the debtor has cured the default and paid all required postpetition amounts.[37] It may be advisable for the debtor to file this motion even if the mortgage holder has failed to respond to the Notice of Final Mortgage Cure Payment in order to obtain an order that the mortgage has been fully cured and current.

It is important to note that the triggering event for the cure notice is plan completion even though the default may have been cured months or years earlier depending upon how the chapter 13 distributions were made by the trustee. Thus, debtors' attorneys should carefully review the creditor's statement to ensure that fees or amounts are not claimed as due for the first time in the statement when they should have been previously disclosed in a timely manner under Rules 3002.1(b) and 3002.1(c). As discussed below, the debtor may seek sanctions in this situation.

Sanctions for Noncompliance – Rules 3001(c)(2)(D) and 3002.1(i)

The enforcement mechanism for the new rules is contained in Rule 3001(c)(2)(D) and Rule 3002.1(i). In general, it is modeled after the sanctions provided in the Federal Rules of Civil Procedure for noncompliance with discovery rules.[38] If a creditor fails to comply with the requirement for notice of prepetition arrearage amounts and postpetition payment changes or fees, or if it fails to respond to the notice of final cure, the court may, after notice and hearing, take either or both of the following actions:

- preclude it from offering the omitted information (i.e., arrearage amounts, payment change shortages, fees, or other amounts allegedly due but unpaid at the end of the case) as evidence in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless.[39]
- award other appropriate relief, including reasonable attorney's fees and expenses to the debtor for the additional proceedings necessary to resolve the issue or otherwise caused by the creditor's noncompliance.[40]

[37]Fed. R. Bankr. P. 3002.1(h).
[38] See Fed. R. Civ. P. 37.
[39] Fed. R. Bankr. P. 3001(c)(2)(D)(i) and 3002.1(i)(1).
[40] Fed. R. Bankr. P. 3001(c)(2)(D)(ii) and 3002.1(i)(2).

An appropriate use of the sanction, for example, would come in the situation where a mortgage creditor has failed to notify the debtor of escrow account payment changes during the chapter 13 case as required by Rules 3002.1(b). If the creditor responds to the Notice of Final Mortgage Cure Payment by filing a statement asserting that the debtor owes $4,250 in missed escrow payments, the debtor may respond with a combined motion for sanctions under Rule 3002.1(i) and a motion under Rule 3002.1(h) seeking an order declaring that the account is fully cured and that all postpetition payments have been made. In ruling on the motion, the court may prevent the creditor from offering any proof that that the claimed escrow payments are owed, award attorney's fees to the debtor, and enter an order that the account is fully cured and current, thereby prohibiting collection of the claimed escrow payments.

A potential problem with the sanction for debtors is that the evidence preclusion applies only in proceedings in the bankruptcy court. Thus, if a creditor asserts for the first time that fees incurred during the bankruptcy case are owed in a foreclosure proceeding initiated after the debtor completes the chapter 13 plan, the debtor may need to file a motion to reopen the bankruptcy case and seek sanctions under Rule 3002.1(i). This approach by the debtor is supported by an Advisory Committee Note to the rule.[41]

Another strong response to the threatened foreclosure would be for the debtor to argue in the state court foreclosure proceeding that the creditor should be judicially estopped from asserting that the account is in default, based on the fees that should have been disclosed in the bankruptcy case. Judicial estoppel is an equitable doctrine under which a party is precluded from asserting a claim in a legal proceeding that is inconsistent with a claim made in a previous proceeding.[42] The doctrine is particularly appropriate in cases in which a party was aware at the time of the earlier proceeding of the factual basis for a claim they are pursuing in the later proceeding and there was a duty

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[41] The Committee Note to Rule 3002.1(i) states: "If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i)."

[42] *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice, § 14.3.2.6.3 (9th ed. 2009 and Supp.).

to disclose information related to the claim in the earlier proceeding.[43]This would apply to a mortgage creditor who was clearly obligated to disclose fees under Rule 3002.1(c).

Impact on Pending Cases

The new rules and forms took effect on December 1, 2011 and apply to all cases filed on or after that date. Thus, a creditor would not need to file a new proof of claim and Attachment A in a pending case in which the creditor had filed a proof of claim before December 1, 2011. However, some of the new requirements should apply to pending cases to the extent that an action subject to a new rule occurs after December 1, 2011. For example, if there is a payment change or a fee incurred on a debtor's account after the effective date in a case filed before December 1, 2011, the creditor should comply with Rules 3002.1(b) and (c) and send the required notices. Similarly, the notice of final cure payment and related procedure for determining whether the debtor has fully cured the default should apply to pending cases if the debtor completes the plan payments after December 1, 2011.

The application of the rules to pending cases, where the initial proof of claim was not filed subject to the new rules, may present some problems for debtors and servicers. For example, the creditor in *In re* Creggett[44] sent a payment change notice two years into the plan indicating that the payment had increased by over $1361 per month based on a $15,000 escrow shortage. Although the facts are not clear, it appears that the creditor attached an escrow statement to Supplement 1 as required by the rule, but that this statement did not give sufficient information about the shortage or deficiency. The court correctly held that Rule 3002.1 applied as to the payment change notice but not as to the initial proof of claim, because the claim filing predated the effective date of the Rule 3001(c) requirements. Thus, the court found that no sanctions could be imposed based on the filing of the initial proof of claim. Although not raised by the court, however, it is doubtful that the escrow statement attached to the payment change notice was prepared in

[43]*See, e.g.*, Lewis v. Weyerhaeuser Co., 141 Fed. Appx. 420 (6th Cir. 2005) Barger v. City of Cartersville, 348 F.3d 1289 (11th Cir. 2003); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001); *In re* Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999).

[44] 2012 WL 6737813 (Bankr. S.D. Tex. Dec 28, 2012).

a form consistent with applicable nonbankruptcy law. RESPA requires that the statement contain information about the escrow payments and disbursements made in the prior year and an explanation as why there was a shortage or deficiency. If the statement failed to contain this information, the court could have imposed sanctions for noncompliance with Rule 3002.1(b) and (d).

Attorney's Fees for Sending Notices under Rules 3002.1

The new notice requirements provide debtors with information needed to successfully complete their chapter 13 plans. A potential concern for debtors is that they may be charged attorney's fees by the servicer for getting this basic information, some of which is provided to consumers free of charge outside of bankruptcy. The initial court opinions to address this issue have disallowed fees for compliance with the new notice requirements.

In *In re* Carr,[45] the debtor successfully completed her chapter 13 plan and the trustee filed a Notice of Final Cure Payment under Rule 3002.1(f). In its response required by Rule 3002.1(g), the creditor affirmed that the debtor had cured the prepetition default and was current with respect to all postpetition payments. However, the creditor also filed a Supplement 2 under Rule 3002.1(c), signed by the attorney for the creditor. This Notice stated that the debtor owed a $150 fee for the preparation of the creditor's Rule 3002.1(g) response that simply stated everything was current. The trustee objected to the $150 fee and the court held that it would not approve fees simply for preparing and filing the Rule 3002.1(g) response. The court noted:

> The purpose of Rule 3002.1 was to provide a prompt, efficient, and cost-effective means to determine whether there is a question as to the status of a debtor's home loan at the conclusion of the chapter 13 case…. This response is not a pleading. It is a supplement to the creditor's proof of claim and is filed in the claims registry not on the court's docket. It is simply a statement by the creditor as to the status of the loan at the conclusion of the chapter 13 plan. This can be derived simply and quickly from the creditor's records and poses no significant burden on the creditor. This is a business function that can be done by a claims administrator in the creditor's own office. It is akin to issuing a receipt for payments received under the chapter 13 plan and during the course of the chapter 13 case or providing

[45] 468 B.R. 806 (Bankr. E. D. Va. 2012).

> an annual escrow statement. Its preparation is not the practice of law. No legal analysis is generally required. An attorney need not sign it. No additional pleading is required and none should be filed on the court's docket in response to the trustee's notice. No additional fee is permitted to satisfy the creditor's response requirement under Rule 3002.1(g).[46]

The *Carr* court noted that the result might have been different if the debtor or trustee had contested the notice and initiated a hearing seeking a determination whether the account was current or that claimed fees were not owed by the debtor. In that case, the creditor could request an award of attorney's fees for representation in the contested hearing, if such a fee award was permitted under the mortgage documents and nonbankruptcy law.

In *In re* Adams,[47] the servicer filed a Notice of Mortgage Payment Change under Rule 3002.1(b), noting that the debtor's monthly escrow payment was decreasing. The servicer also filed a Notice of Postpetition Mortgage Fees, Expenses, and Charges stating that a $50.00 charge had been incurred on the debtor's account as attorney's fees for preparation of the notice. In granting the trustee's objection, the *Adams* court reasoned that "mortgage companies have routinely served notices of mortgage payment change on debtors without the assistance of an attorney."[48]The court cited an earlier decision disallowing fees in this situation, *In re* White,[49] which found that the new rules merely changed which parties should receive the payment change notice and provided new official forms, but the rules did not change the "underlying services" or the need for the assistance of counsel.

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[46]*Id*. at 808.
[47] 2012 WL 1570054 (Bankr. E. D. N.C. May 03, 2012)
[48]*Id*. at * 1.
[49] 2012 Bankr. LEXIS 1884 (Bankr. E.D.N.C. Apr. 30, 2012.