The New Proof-of-Claim Rules: One Year Later

CONCURRENT SESSION

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By

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Summary of the Case Law

In re White, 2012 Bankr. LEXIS 1884 (Bankr. E.D. NC 2012):

Issue: Whether a creditor may recoup attorney fees in a Notice of Postpetition Mortgage Fees, Expenses and Charges ("the 180 day notice") for preparing a Notice of Mortgage Payment Change pursuant to F.R.Bankr.P. 3002.1.

Facts: Creditor filed an initial secured proof of claim but then further filed a Notice of Payment Change for the debtor's mortgage. In conjunction with the payment change notice, creditor filed a 180 day Notice seeking to recoup attorneys' fees in the amount of $50.00 for the preparation of the Notice of Payment Change. The chapter 13 trustee objected to the fees being sought by the creditor stating that the services did not require the assistance of legal counsel and were essentially a clerical duty of the creditor.

Held: Creditor may not recoup fees in a 180 day Notice for preparing a Notice of Payment Change pursuant to F.R.Bankr.P. 3002.1. Absent further evidence, the fees incurred for preparing the Notice of Payment Change are not allowable as attorneys' fees.

In re Carr, 468 B.R. 806 (Bankr. E.D. VA 2012):

Issue: Whether a creditor may charge a debtor a fee for filing the required response to the trustee's Notice of Final Cure Payment pursuant to F.R.Bankr.P. 3002.1(g).

Facts: Debtor was in arrears on the debtor's mortgage secured by the debtor's principal residence. The arrears were cured through the debtor's chapter 13 plan and the trustee filed the Notice of Final Cure Payment pursuant to F.R.Bankr.P. 3002.1. Creditor filed a response to the trustee's Notice on the court's docket but also filed a 180 day Notice as a supplement to its proof of claim stating that the debtor's loan was current. In its 180 day Notice, the creditor sought fees in the amount of $150.00 for preparing the response and for filing the 180 day Notice. Both documents included the same information. The Trustee objected to the fees of $150.00. Creditor's counsel argued that in preparing the two documents she reviewed the loan history to determine if the pre-petition arrearage had been cured and whether all cure payments had been made as required.

Held: Creditor may not charge a debtor a fee for filing a response to the Chapter 13 trustee's Notice of Final Cure Payment, which is required under the bankruptcy rule governing notice relating to claims secured by a security interest in a debtor's principal residence. The response is not a pleading, but is simply a statement by the creditor as to the status of the loan at the conclusion of the plan. The statement can be derived simply and quickly from creditor's records and poses no significant burden on creditor, as it is a business function, akin to issuing a receipt for payments received under the plan or providing an annual escrow statement, that can be done by a claims administrator in creditor's own office, and no legal analysis is generally required. The only instance where fees may be appropriate is if the trustee or debtor contests the creditor's response to the trustee's Notice of Final Cure Payment as legal representation would then be required.

In re Adams, 2012 WL 1570054 (Bankr. E.D. NC 2012):

Issue: Whether a creditor can charge attorney fees for the filing of a Notice of Payment Change and recoup the fees in a 180 day Notice.

Facts: Creditor filed a Notice of Mortgage Payment Change and on the same day filed a 180 day Notice seeking $50.00 in attorney's fees for the preparation of the Notice of Mortgage Payment Change. The trustee objected on the grounds that the preparation of the Notice was a ministerial task that did not require the assistance of counsel. Creditor argued that attorney involvement was necessary to prepare the Notice of Mortgage Payment Change because the attorney reviews the escrow analysis and the filings in the bankruptcy case in connection with preparing the Notice.

Held: Attorney fees requested in the 180 day Notice were denied. Counsel for the creditor failed to show that the services provided required the assistance of an attorney. The Court found that although F.R.Bankr.P. 3002.1 changed which parties were served with the Notice and new forms, the new Rule had no effect on the underlying services. (quoting *In re White)*.

In re Hunt, 2012 LEXIS 2981 (Bankr. M.D. N.C. 2012):

Issue: Whether a creditor can charge attorney fees for the filing of a Notice of Payment Change and recoup the fees in a 180 day Notice.

Facts: Creditor filed a Notice of Mortgage Payment Change and a 180 day Notice seeking $50.00 for the preparation and filing of the Notice of Mortgage Payment Change. The trustee objected on the basis that the preparation of the Notice of Mortgage Payment Change was a

simple business function that required no legal research or analysis and requested the attorney fees be denied.

Held: The Court denied the fees requested by the creditor finding that Federal Rule of Bankruptcy Procedure 3002.1 placed no additional legal burden on mortgage companies but merely clarified which parties must receive notice of the payment change. The preparation of a Notice of Payment Change is a business function and does not require the assistance of an attorney.

In re Baines, 2012 LEXIS 2980 (Bankr. M.D. N.C. 2012):

Issue: Whether a creditor can charge attorney fees for the filing of a Notice of Payment Change and recoup the fees in a 180 day Notice.

Facts: Creditor filed a Notice of Mortgage Payment Change and a 180 day Notice seeking $50.00 for the preparation and filing of the Notice of Mortgage Payment Change. The trustee objected on the basis that the preparation of the Notice of Mortgage Payment Change was a simple business function that required no legal research or analysis and requested the attorney fees be denied.

Held: The Court denied the fees requested by the creditor finding that F.R.Bankr.P. 3002.1 placed no additional legal burden on mortgage companies but merely clarified which parties must receive notice of the payment change. The preparation of a Notice of Payment Change is a business function and does not require the assistance of an attorney.

In re Garduno, 2012 WL 2402789 (Bankr. S.D. FL 2012):

Issue: Whether a Notice of Payment Change filed pursuant to F.R.Bankr.P. 3002.1 by a creditor for real property that is not the debtor's principal residence has any effect in a debtor's case.

Facts: Creditor filed a Notice of Mortgage Payment Change under F.R.Bankr.P. 3002.1 in a case where the property was not the principal residence and the claim was not being treated in the plan (Debtor listed the payment as $0). Debtors filed an objection to the Notice of Payment Change requesting that it be stricken, disallowed and for an award of attorney fees.

Held: The Court denied the objection in full indicating that the rule did not apply to the creditor and filing the Notice had no effect. Since the Notice had no effect, the debtor need not object. The last sentence of the opinion is of interest, "The Bank filed the Notice in the good faith belief that failing to do so may prejudice its rights against the Debtors and/or their property. There is no cause for an award of attorney's fees in this case."

In re Wallett, 2012 WL 4062657 (Bankr. D. VT 2012):

Issue: Whether a creditor may collect post petition attorney fees in a 180 day Notice when the debtors are current on a mortgage secured by property other than the debtor's principal residence.

Facts: Debtor's confirmed chapter 13 plan provided for the debtor to make direct payments to the mortgage creditor as the debtor was current on the underlying obligation. Creditor filed a 180 day Notice seeking fees to review the plan, prepare and file a proof of claim and for the preparation of the 180 day Notice. Debtor objected to the 180 day Notice.

Held: The Court denied the fees requested finding that the creditor was not required to file the 180 day Notice pursuant to F.R.Bankr.P. 3002.1 as the collateral securing the mortgage was not the debtor's principal residence and that creditor's claim was not treated in the debtor's plan pursuant to 11 U.S.C. 1322(b)(5).

In re Merino, 2012 WL 2891112 (Bankr. M.D. FL 2012):

Issue: Is the debtor required to respond to a Notice of Mortgage Payment Change filed by a creditor for a property that is not treated in the debtor's plan pursuant to 11 U.S.C. 1322(b)(5)?

Facts: Creditor filed a Notice of Mortgage Payment Change and the debtor objected requesting that the Notice be stricken and that debtor be awarded attorney's fees for prosecuting the objection.

Held: The court agreed with the reasoning set forth in *In re Garduno,* that F.R.Bankr.P. 3002.1 does not apply to claims being paid directly by the debtor outside the plan. Citing the legislative history of Rule 3002.1, the court found that where the plan does not provide for the curing of a default and maintenance of payments, the Rule does not apply. As such, the filing of the

creditor's Notice did not trigger the need for the debtor to file a response and the debtor was not entitled to any award of attorney's fees.

In re Sheppard, 2012 WL 1344112 (Bankr. E.D. VA 2012):

Issue: Whether a 180 day Notice needs to be filed when the amount reflected in the Notice is duplicative of an amount included in a consent order and whether the Notice should be construed as a claim or demand for payment to be paid by the trustee.

Facts: Pursuant to the confirmed plan, the debtors were required to make direct mortgage payments to the creditor. The debtors became delinquent and a Motion for Relief from Stay was filed by the creditor. The Motion was settled via Consent Order. The Consent Order permitted the creditor to file an amended secured proof of claim for post petition arrearages and attorney's fees and costs related to the filing of the motion. Creditor filed an amended proof of claim but further filed a 180 day Notice to include the attorney fees and costs that were included in the amended proof of claim. The trustee filed a Motion under F.R.Bankr.P. 3002.1(e) to determine whether the charges incurred were permitted under the underlying agreement and applicable nonbankruptcy law and for clarification as to whether the fees and charges in the 180 day notice should be construed as a claim or demand for payment to be paid by the trustee.

Held: The 180 day notice was unnecessary because the creditor's fees and costs were already included in the consent order. While the rule does not include the language regarding the exclusion of items "previously ruled on," (referencing the language on Official Form B10 Supplement 2), the language is on the required form and such a consent order meets the

provisions of the form. The 180 day notice is only a notice filed for informational purposes and is not a request for payment. The Trustee has no obligation and no authority to make payments from estate property based upon notices filed under F.R.Bankr.P. 3002.1 to supplement proofs of claim. The notices required by Rule 3002.1 are not intended to be either pleadings or claims but are simply statements filed to inform the debtor that postpetition expenses have been incurred.

In re Kraska, 2012 WL 1267993 (Bankr. N.D. Ohio 2012):

Issue: Whether the Court may order a blanket waiver of F.R.Bankr.P. 3002.1 in an order granting a Motion for Relief from the Automatic Stay.

Facts: Debtor's confirmed chapter 13 plan provided for the surrender of the debtor's principal residence. Creditor filed a motion seeking relief from stay and further requested the court to waive any requirements under Rule 3002.1 for the creditor and the trustee. The motion was not opposed by debtor or the trustee.

Held: *Sua Sponte,* the Court denied the waiver request for the following reasons: (1) 1322(b)(5) is applicable because it covers both secured and unsecured claims; while a mortgage claim may originally be secured, post-foreclosure it may result in an unsecured deficiency claim; (2) the purpose of the rule is claim accuracy and the amount contained within the claim is consequential even where the arrears are not being cured under the deficiency scenario -requiring a creditor to provide notice of the information allows parties to examine the basis of the amounts due and challenge the figures when necessary; and (3) the rule provides no exceptions.

In re Adkins, 2012 WL 3860593 (Bankr. N.D. Ohio 2012):

Issue: Whether the holder of an open-end revolving credit line is required to file a payment change notice under F.R.Bankr.P. 3002.1.

Facts: Creditor held a second mortgage on the debtor's residence based on a HELOC loan. Creditor acknowledged that F.R.Bankr.P. 3002.1(b) applied to creditor, however, creditor filed a motion to be excused from the filing of the Notice of Payment Change contending that compliance with the rule was "virtually impossible" due to the varying amounts of payments under the HELOC agreement .

Held: While the court sympathized with the creditor's difficulties, the court held that it lacked authority to excuse compliance with Rule 3002.1. The court cited the mandatory nature of the Rule finding that where the court has authority to extend time or excuse performance, the Bankruptcy Rules so provide. Since there is no explicit authority in the Bankruptcy Rules eliminating open-end revolving credit lines from the scope of Rule 3002.1, the motion was denied.

In re Lee, 2012 Bankr. LEXIS 1465 (Bankr. N.D. Ohio 2012):

Issue: When the new Federal Rule is in conflict with or overlaps an existing local rule, which takes precedence?

Facts: The trustee filed a Motion of Intent to Declare Debtor Current as required by local rule with a 14 day response time. Contemporaneously with the filing of the Motion, the trustee filed a

Notice of Final Cure Mortgage Payment as required by F.R.Bankr.P. 3002.1(f) providing a 21 day response period. Creditor objected on the basis that the trustee's action was (1) confusing; (2) in conflict with the Federal Rule; and (3) threatened the Creditor's entitlement to 21 days to respond to the trustee's notice.

Held: The Notice and process set forth in Rule 3002.1 of the Federal Rules of Bankruptcy Procedure control. Trustee's motion denied.

In re Tuneberg, 2012 WL 3744719 (Bankr. S.D. TX 2012):

Issue: Whether a creditor may recoup attorney fees in a 180 day Notice when the fees were incurred more than 180 days before the Notice was filed.

Facts: Pursuant to the debtors' confirmed plan, creditor's claim was provided for in the debtors' plan pursuant to 11 U.S.C. 1322(b)(5). Creditor filed a 180 day Notice seeking $400 in attorney fees for objecting to the plan and $50 in fees for preparing the 180 day Notice. Debtors objected to the Notice asserting that the attorney fees incurred for objecting to the plan were incurred more than 180 days before the Notice was filed. Debtors further objected to the $50 fee for preparing the Notice as the nature of expense was unclear.

Held: The Court denied the debtors' objection without prejudice as the debtors failed to serve creditor's counsel with the objection. Further, the Court stated that it was unable to make the required determination under F.R.Bankr.P. 3002.1(e) that the payment of the fees was required by the underlying agreement without the submission of the underlying agreement.

In re Pompa, 2012 WL 2571156 (Bankr. S.D. TX 2012):

Issue: Whether the passing of F.R.Bankr. P. 3002.1 negates the Court's ability to issue sanctions under 11 U.S.C. § 105.

Facts: Debtors alleged multiple allegations including an assertion that the creditor improperly charged fees during the pendency of the chapter 13 plan and improperly applied their payments resulting in violations of the Bankruptcy Code. Creditor moved to dismiss. Creditor asserted in part that with the passing of Rule 3002.1(i)(2), the Court's ability to issue sanctions under 11 U.S.C. §105 was not permitted.

Held: The Court declined to adopt the creditor's argument that the implementation of Rule 3002.1 demonstrated a lack of intent to permit the Court to issue sanctions under 11 U.S.C. §105.

Local Decisions:

Creditor Post Petition/Pre Confirmation Attorney Fees:

Issue: Can a creditor recoup post petition/pre confirmation attorney fees in the arrearage portion of the original proof of claim or is the creditor required to seek recoupment of the fees in the 180 day notice?

Held: Post-petition attorney fees can no longer be in the prepetition arrearage portion of the claim and must be in a 180 day notice.

In re Rusch, Case No. 11-67578 (Bankr. E.D. Mich. 2012)-MBM

In re Delise, Case No. 12-42111 (Bankr. E.D. Mich. 2012)- SWR

In re Dionne, Case No. 11-69703 (Bankr. E.D. Mich. 2012) – PJS

In re Stark, Case No. 12-31230 (Bankr. E.D. Mich. 2012) – DOF

In re Taylor, Case No. 11-71587 (Bankr. E.D. Mich. 2012) – TJT

In re Hughes, Case No. 12-41532 (Bankr. E.D. Mich. 2012) – TJT

In re Pasko, Case No. 12-41172 (Bankr. E.D. Mich. 2012)- WS

Termination of Rule 3002.1:

In re Marquez, Case No. 11-12659 (Bankr. W.D. Mich. 2012) - SWD

Issue: Do the provisions of F.R.Bankr.P. 3002.1 remain in effect (i.e., filing Notices of Payment Change, Responses to Notices of Final Cure, and the filing of 180 Day Notices) after the automatic stay has been vacated?

Facts: Parties submitted a stipulation for relief from stay in resolution of the creditor's motion providing for the termination of the provisions of 3002.1 upon relief from the automatic stay. The court *sua sponte* set the matter for hearing.

Held: Court allowed termination of Rule 3002.1 where the stay was vacated. The Court considered the language in the order granting relief and found that it was not offensive since upon termination of the stay, the plan will no longer provide for curing any arrearage claim or maintaining payments under 11 USC 1322(b)(5) making the rule inapplicable. For purposes of those loans that change monthly and compliance with payment change notices is impossible or

impracticable, the Court has considered whether Rule 9006(b) could be used to extend the time frames for payment changes to be filed at a different interval.

Confirmation:

In re Rentshcler, Case No. 11-63839 (Bankr. E.D. Mich, 2012) – MBM

At the confirmation hearing, where the plan provided for the surrender of the debtor's principal residence, the Court ruled that it would not require Rule 3002.1 waiver language as a term of confirmation because it was advisory at that point. The creditor has to either file one of the notices and have it objected to or decline to file the notice and have it challenged at a later date resulting in a decision at that time. The Trustee argued that the language was not needed because a property being surrendered was not being treated via the plan pursuant to 11 USC 1322(b)(5) but the Court declined to adopt that interpretation.

In re Stark, Case No. 12-31230 (Bankr. E.D. Mich. 2012) – DOF

At the confirmation hearing, where the plan provided for the debtor's mortgage obligation to be paid directly and the stay was lifted, the Court permitted language in the Order Confirming Plan terminating creditor's obligation to comply with Rule 3002.1. The Trustee appeared to argue that the rule should not be terminated because the rule applies regardless of disbursing agent. The Judge disagreed and said the claim was not being treated via 11 USC 1322(b)(5) because there was no default.

Notices of Final Cure:

In re Staley, Case No. 07-02051 (Bankr. W.D. Mich. 2012) - JDG

Facts: Creditor filed a response to the Trustee's notice of final cure stating that Rule 3002.1 was not applicable as Creditor had already obtained relief from the Automatic Stay.

Held: The Court declined to allow an across-the-board indication that Rule 3002.1 is not applicable where Creditor has relief from stay or on cases where the trustee is not the disbursing agent with respect to the continuing mortgage payment. The Court was concerned about the possibility of the assessment of previously unknown fees and costs immediately after a Chapter 13 discharge. Thus, the Court was unwilling to preemptively eliminate the possible utility of compliance with Rule 3002.1 to debtors in such instances when the response and objection filed by 1st and 2nd mortgages, respectively, were not objected to by the debtors. The distinction between an objection and response was also discussed. The Court found that in this instance, the objection filed was to the language of the Notice of Final Cure itself.

In re Davidson, Case. No. 10-73709 (Bankr. E.D. Mich. 2012) – SWR

Creditor filed a response to the trustee's Notice of Final Cure Payment which indicated a delinquency without stating that the automatic stay had been vacated at confirmation. The Court ruled that if the stay was lifted, and the Creditor chose to respond, the response would be clearer if it indicated that the stay had been terminated.

In re Hager, Case No. 11-63365 (Bankr. E.D. Mich. 2012) - PJS

Issue: Whether the Court may approve a blanket waiver of Rule 3002.1.

Facts: Creditor filed a response to the trustee's Notice of Final Cure Payment based on its belief of the non-applicability of Rule 3002.1 due to the property being surrendered at confirmation. The trustee opposed any clarifying language based upon the language of Rule 3002.1(a) which the trustee asserted did not apply because the creditor's claim was not a "cure and maintain" claim provided for in the debtor's plan under 11 U.S.C. 1322(b)(5). While creditor agreed with the trustee's position with respect to the non-applicability, creditor sought a ruling from the Court since at least one other court (*In re Kraska)*, had come to an opposite conclusion.

Held: A response and clarifying language were not necessary in this case as creditor's claim was not a 1322(b)(5) "cure and maintain" claim but that it may rule otherwise with different facts. The Court further indicated that in a plan that provides for the surrender of property that is not the debtor's principal residence, Rule 3002.1 in not applicable on its face.

In re Miller, Case No. 06-53019 (Bankr. E.D. Mich. 2012) - MBM

Facts: Creditor filed a response disagreeing with the trustee's Notice of Final Cure Payment as the creditor asserted that the debtor was in default in payments on the debtor's direct pay mortgage. The parties could not reach a resolution regarding the language in the stipulation and a hearing was held. Creditor argued that Rule 3002.1 was not applicable to direct pay mortgages and if it were applicable, the trustee should not have to sign the stipulation resolving the matter

as the trustee was not the disbursing agent and, thus, would have no knowledge with respect to the status of the mortgage.

Held: The Court ruled that the matter of whether the rule was applicable in this instance was not properly before the Court so it declined to give a comfort ruling. The Court stated that the trustee should continue to be a party to any stipulation resolving an objection to the trustee's Notice of Final Cure Payment.