CONCURRENT SESSION

Consumer Track:

Home Sweet Home: Residential Issues in Bankruptcy Cases Including Robo-signing, Mortgage Fraud, Standing and Relief from Stay

Rudy J. Cerone
McGlinchey Stafford, PLLC; New Orleans

Bernard R. Given, II
Loeb & Loeb LLP; Los Angeles

Karen L. Kellett
Armstrong Kellett Bartholow P.C.; Dallas

Tara Twomey
National Consumer Law Center; Carmel, Calif.

American Bankruptcy Institute
30 Years

DISCOVER

asset sales databank
363.abi.org

Retrieve Asset Sales Information

Asset Sales Databank – The Key to § 363

With 363:

- **View by asset sales price, circuit, date and court**
- **Read summaries of key terms of recent asset sales**
- **Receive notification of new asset sales via email or RSS**
- **Use it FREE as an ABI member**

Stay Current on Sales Trends
363.abi.org

44 Canal Center Plaza • Suite 400 • Alexandria, VA 22314-1546 • phone: 703.739.0800 • abi.org

Join our networks to expand yours:

20th ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

September 13-15, 2012
Four Seasons Hotel
Las Vegas, NV

Consumer Hot Topics:

Home Sweet Home: Residential Issues in Bankruptcy Cases

Karen L. Kellett
Armstrong Kellett Bartholow, P.C.
Dallas, TX

Barney Given
Loeb & Loeb, LLP
Los Angeles, CA

Tara Twomey
National Consumer Law Center
Carmel, California

Rudy J. Cerone
McGlinchey Stafford, PLLC
New Orleans, Louisiana
Moderator

20th ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

September 13-15, 2012
Four Seasons Hotel
Las Vegas, NV

Consumer Hot Topics:

Home Sweet Home: Residential Issues in Bankruptcy Cases

Panelists will discuss hot topics relevant to consumer bankruptcy professionals, including wrongful foreclosure and lender liability, new Federal Rules of 3001(c) and 3002.1, the use of non-standard chapter plan provisions and lien-stripping.

---

1. **Wrongful Foreclosure in the New Millennium: Beware of the FDIC Assignee**
2. **Hot off the Press: First Opinions Analyzing the New Mortgage Proof-of-Claim and Disclosure Rules**
3. **Section 524(i): Imposition and Enforcement of Non-Standard Chapter 13 Plan Provisions**
4. **Lien Stripping Home Mortgages: Chapter 20 and Beyond**

AMERICAN BANKRUPTCY INSTITUTE
20TH ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

Wrongful Foreclosure in the New Millennium:

Beware of the FDIC Assignee

September [13-15], 2012
Las Vegas, NV

Bernard Given, Esq.
Loeb & Loeb LLP
10100 Santa Monica Blvd, Suite 2200
Los Angeles, CA 90067
Tel: 310.282.2200

Debra Minoff, Esq.
Loeb & Loeb LLP
345 Park Avenue
New York, NY 10154
Tel: 212.407.4000

Wrongful Foreclosure in the New Millennium: Beware of the FDIC Assignee

I. INTRODUCTION

A staggering number of banks have failed within the last ten years, including several of the largest bank failures in history. With this slew of failed banks closing their doors, an increasing number of private entities are purchasing the assets (including mortgage loans) of these failed banks from the FDIC in its capacity as receiver over these failed institutions. Further, the significant increase in foreclosures across the country has resulted in a consequential increase in wrongful foreclosure actions. As many of these wrongful foreclosure actions are brought by mortgagors with regard to actions taken by failed banks under FDIC receivership, the applicability of the *D'Oench* Doctrine and its statutory counterpart, 12 U.S.C. § 1823(e), to FDIC assignees has become particularly relevant.

A. *The Federal Deposit Insurance Corporation (FDIC) as Receiver*

1. When a federal bank fails, a special administrative regime is triggered, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which governs the resolution of issues raised by this failure. 12 U.S.C. §§ 1821, et. seq.; Pub. L. No. 101-73, 103 Stat. 183 (1989). Under this regime, the FDIC is appointed as receiver and serves as the successor to the failed institution.

2. The directive of the FDIC, as receiver, is to maximize the failed bank's assets and minimize the loss to the insurance fund. In its receivership role, the FDIC has complete authority to wind down the affairs of the failed financial institution by managing and preserving the failed bank's assets (including mortgage loans), collecting all obligations, and conducting all other business. 12 U.S.C. § 1821(d)(2).

B. *Special Safeguards for the FDIC Receiver against Certain Claims and Defenses Embodied in the "*D'Oench *Doctrine" and its Statutory Counterpart, 12 U.S.C. § 1823(e)*

1. The law grants the FDIC potential safeguards against certain claims and defenses raised by consumers who entered into loans with a bank prior to its failure. These safeguards arise from two separate, but interrelated, sources – the federal common law "*D'Oench* Doctrine," and its statutory counterpart, 12 U.S.C. § 1823(e).

2. Both the *D'Oench* Doctrine and § 1823(e) apply to any agreement tending to diminish or defeat any interest that the FDIC might have in an asset in its capacity as receiver. 12 U.S.C. § 1823(e)(1); *see Caires v. JP Morgan Chase Bank*, 745 F.Supp.2d 40, 52 (D. Conn. 2010). Courts recognize that allowing parties to assert oral agreements, or agreements that otherwise fail to meet the doctrine's requirements

against a purchaser, would diminish the value of assets that the FDIC seeks to sell and undermine the deposit insurance system. *See, e.g., Caires v. JP Morgan Chase Bank*, 745 F.Supp.2d at 52; *Adams v. Madison Realty & Dev.*, 937F.2d 845, 852, 854 (3d Cir. 1991); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 380–81 (5th Cir.1990).

C. *Origins of the* D'Oench *Doctrine*

1. Modest Origins of the *D'Oench* Doctrine

The *D'Oench* Doctrine "holds a favored status in the arsenal of weapons" used by federal banking authorities to collect obligations facially owed to, or to avoid obligations facially owed by, a failed bank. 4 L. Distressed Real Est. § 45:1 (updated June 2012). Yet, while the *D'Oench* Doctrine has a substantial impact – by barring most claims raised in litigation – the doctrine itself possesses relatively modest origins. *Id.*

2. The Supreme Court Case that Created the Doctrine: *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

The *D'Oench* Doctrine was first articulated by its namesake in the United States Supreme Court's 1942 decision in *D'Oench, Duhme & Co. v. FDIC*, which provided that borrowers could not assert defenses based on secret side agreements with the failed institution in subsequent actions brought by the FDIC to collect on a loan. 315 U.S. 447 (1942).

a) **The *D'Oench* Facts.** The borrower, a sophisticated businessperson, executed a demand note, which a bank officer orally agreed not to enforce. This side agreement was evidenced on certain receipts for the notes, but was not evidenced on the notes themselves or the books of the bank. When the bank later failed and the FDIC acquired the note and demanded payment, the borrower asserted the secret, oral side agreement with the bank officer as a defense.

b) **The *D'Oench* Holding.** Precluding the borrower from asserting a defense based on the oral side agreement with the bank officer, the Supreme Court applied a rule of equity that a debtor is equitably estopped from asserting a defense based on collateral or secret agreements with the failed institution that are not evidenced in the institution's written books and records. *Id.* at 459.

3. **The Supreme Court's Reasoning in *D'Oench*.** The Supreme Court reasoned that to permit the enforcement of such side agreements would allow parties to misrepresent to the regulatory agencies the true status of a financial obligation. In rendering its decision, the Supreme Court sought to protect federal banking authorities from claims arising from fraudulent schemes unbeknownst to banking authorities. *Id.* at 457-60.

D. *The D'Oench Doctrine – Overview of the Doctrine*

1. **The *D'Oench* Doctrine Generally.** The D'Oench Doctrine is a federal common law principle of equitable estoppel generally construed in tandem with its statutory counterpart, 12 U.S.C. § 1823(e), that prohibits borrowers from asserting claims or defenses against the FDIC and its successors-in-interest or assignees which are not properly reflected in the official books or records of a failed bank or thrift. *See, e.g., Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 91–92, 108 S.Ct. 396 (1987) (*Langley*); *Goldstein v. F.D.I.C.*, 2012 WL 1819284, at *4 (D. Md. May 16, 2012); *Nat'l Enters., Inc. v. Barnes*, 201 F.3d 331, 333 n.3 (4th Cir. 2000) (citing *Resolution Trust Corp. v. Allen*, 16 F.3d 568, 574 (4th Cir. 1994)).

The *D'Oench* Doctrine precludes reformation of a written instrument to reflect oral representations not reduced to writing whenever the FDIC has assumed receivership of the assets in question. *Magdaleno v. IndyMac Bancorp., Inc.*, 2011 WL 338493, at *9 (E.D. Cal. Jan. 31, 2011).

2. **Purposes of the Doctrine. The Doctrine serves two general purposes:**

a) First, it allows federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. *See, e.g., Langley*, 484 U.S. at 91–92; *Goldstein v. FDIC*, 2012 WL 1819284 at *4; *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) (*Young*). Otherwise, "[n]either the FDIC, nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Langley*, 484 U.S. at 91-92; *see FDIC v. Twin Dev., LLC*, 2012 WL 1831639, at *5 (S.D. Cal. May 18, 2012).

b) Second, it "ensure[s] mature consideration of unusual loan transactions by senior bank officials, and prevent[s] fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Young*, 103 F.3d at 1187 (citing Langley, 484 U.S. at 91-92); *see, e.g., Goldstein v. FDIC*, 2012 WL 1819284 at *4; *FDIC v. Twin Dev., LLC*, 2012 WL 1831639 at *5.

3. **Broad Application of the *D'Oench* Doctrine.** The *D'Oench* Doctrine has been expanded by judicial interpretation and legislative codification. *See, e.g., Aurora Loan Services LLC v. Sadek*, 809 F.Supp.2d 235, 240 (S.D.N.Y. 2011); *FDIC v. Twin Dev., LLC*, 2012 WL 1831639 at *5 (noting the broad scope of *D'Oench* Doctrine and § 1823(e)). The original test for determining whether claims were barred under the *D'Oench* Doctrine was whether the agreement, oral or written, was designed to deceive the public authority or would tend to have that effect. *Young*, 103 F.3d at 1187. Courts, however, have broadly interpreted the scope of the doctrine such that it applies in virtually all cases where the FDIC is confronted with an agreement not documented in the institution's records. *See id.*

4. **Exceptions to the *D'Oench* Doctrine.** As described below, the *D'Oench* Doctrine and § 1823(e) do not apply to certain claims and defenses. Thus, certain causes of action could survive an FDIC receivership and an assignee would not be able to assert the *D'Oench* Doctrine to protect against such claims and defenses.

E. *The Intertwining of the Federal Common Law Articulation of the D'Oench Doctrine and 12 U.S.C. § 1823(e)*

1. The Common Law Articulation of the *D'Oench* Doctrine

Under federal common law, invalidation under the *D'Oench* Doctrine generally turns on "whether the purported agreement relied upon by the private party was ever memorialized in writing or otherwise made explicit such that ... the [FDIC] would have knowledge of the bank's obligations during an evaluation of the bank's records." *Aurora Loan Services LLC v. Sadek*, 809 F. Supp. 2d at 241.

2. Statutory Counterpart to the *D'Oench* Doctrine – 12 U.S.C. § 1823(e)

a) Congress extended the *D'Oench* Doctrine's reach by statute through the enactment of § 1823(e) of the Federal Deposit Insurance Act of 1950 (FDIA), as amended by FIRREA. 12 U.S.C. § 1823(e). FIRREA extended the protections of § 1823 given to the FDIC in its corporate capacity to the FDIC in its receivership capacity. Prior to FIRREA's enactment in 1989, § 1823 only explicitly applied to the FDIC in its corporate capacity, even though a large body of case law had developed since the *D'Oench* Doctrine's creation that expanded the statutory coverage to receivership situations. Thus, FIRREA essentially codified the common law which applied § 1823 to the FDIC as receiver.

b) Section 1823(e) provides that in order for any agreement between a failed bank and borrower to be valid and enforceable against the FDIC or its assignee, the agreement must be:

(1) in writing;
(2) executed by both parties;
(3) officially approved by the financial institution's board or loan committee; and
(4) maintained from the date of execution as an official record of the institution. 12 U.S.C. § 1823(e).

c) Section 1823(e) "essentially codifies the common law *D'Oench* doctrine," however, the "two remain separate and independent grounds for decision." *Nat'l Enters., Inc. v. Barnes*, 201 F.3d at 333 n. 4. It expands the common law doctrine with specific criteria that "an agreement that meets

the requirements of the statute survives even if the [FDIC] did not know of it; and an agreement that does not meet them fails even if the [FDIC] knew." *Aurora Loan Services LLC v. Sadek*, 809 F. Supp. 2d at 241.

F. *Expansive Scope of the D'Oench Doctrine and 11 U.S.C.A. § 1823(e)*

1. Since the doctrine's nascence 70 years ago, courts have expanded the *D'Oench* bar to an increasingly wider range of situations and afforded its protections to individuals further removed from the banking transaction – including to third party purchasers of assets of the insolvent bank from the FDIC – and have barred most otherwise "potent" defenses and affirmative claims. *See IndyMac Venture, LLC v. Silver Creek Crossing, LLC*, 2010 WL 1138391, at *2 (W.D. Wash. Mar. 19, 2010) (noting that courts have expanded the scope of the *D'Oench* Doctrine since its creation); *Rankin v. Toberoff*, 1998 WL 370305, at *4, n.3 (S.D.N.Y. June 30, 1998) (summarizing the developments of the protections afforded to the FDIC by *D'Oench* and concluding that the doctrine essentially provides blanket immunity to the FDIC by gradually having expanded into a "federal holder in due-course doctrine, permitting the FDIC to take assets of fails free of all defenses").

2. A survey of *D'Oench* decisions reveals this expansive application of the doctrine. Consider the following:

a) The *D'Oench* Doctrine can be asserted not only by the FDIC, the Resolution Trust Corporation (RTC) and a bridge bank, but by private parties purchasing the assets of a failed institution from federal authorities. *See Magdaleno* v. *IndyMac*, 2011 WL 338493 at *9 (listing cases).

b) The *D'Oench* Doctrine precludes both defenses to, and affirmative claims for, relief. *See Silver Creek Crossing, LLC*, 2010 WL 1138391 at *2-4; *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 50 (1st Cir. 1991). These include many typical oral contract claims relating to the liquidation of collateral, release of guaranties, and failure to fund or to renew loans.

c) The *D'Oench* Doctrine applies even where the entity asserting it had knowledge of the alleged "secret" or "side" agreement. *Point Developers, Inc. v. FDIC*, 961 F. Supp. 449, 457 (E.D.N.Y. 1997) (citing *Langley*, 484 U.S. at 93).

d) The *D'Oench* Doctrine applies even where the bank customer was innocent of misconduct and did not intend to deceive banking authorities. *See Young*, 103 F.3d at 1188; *FDIC v. Krause*, 904 F.2d 463 (8th Cir. 1990).

e) A misrepresentation or omission by a bank still constitutes an "agreement" triggering the categorical requirements of § 1823(e). *See Langley*, 484 U.S. at 87, 91-93; *see also FDIC v. Twin Dev., LLC*, 2012 WL 1831639 at *5.

II. ASSIGNEE'S PROTECTIONS UNDER THE *D'OENCH* DOCTRINE AND ITS STATUTORY COUNTERPART 12 U.S.C. § 1823(E)

A. *Categories of Assignees Asserting the Protections of the* D'Oench *Doctrine and 12 U.S.C. § 1823(e)*

1. **Holders of the note itself**. When the FDIC, as receiver, assigns a note that was previously held by a failed bank subject to receivership, the assignee becomes the holder of the note with the same rights and interests in the note and is entitled to the same protections under *D'Oench* and § 1823(e) as the FDIC itself. In other words, "if the note is enforceable in the hands of the FDIC, it is equably enforceable in the hands of the assignee bank." *See, e.g., Alarcon v. Williams*, 772 F. Supp. 334, 342-43 (E.D. Mich. 1991) (citing cases); *Kilpatrick v. Riddle,* 907 F.2d 1523, 1528 (5th Cir.1990); *FDIC v. Newhart,* 892 F.2d 47, 50 (8th Cir.1989).

2. **Holders of the servicing rights and obligations**. The right to service a loan constitutes a receivership asset that may be assigned by the FDIC. *See Caires v. JP Morgan Chase Bank*, 745 F. Supp. at 50. Therefore, an assignee of servicing rights and obligations held by a failed bank under receivership "steps into the shoes" of the FDIC, receiving the same protections under *D'Oench* and § 1823(e) as the FDIC itself. *See id.*

B. *The Common Law* D'Oench *Doctrine and 12 U.S.C. § 1823(e) Apply to FDIC Assignees*

1. **The Majority View is that Assignees Stand in the Same Protected Shoes as the FDIC and Receive the Benefits of the *D'Oench* Doctrine and 12 U.S.C. § 1823(e).** The majority of courts have found that the *D'Oench* Doctrine also applies to assignees of the FDIC that purchase assets of failed banks or thrifts from the FDIC or like federal agencies. *See, e.g., Magdaleno v. IndyMac Bancorp., Inc.*, 2011 WL338493 at *9 (listing cases and stating that "the [*D'Oench*] Doctrine and its statutory counterpart [§ 1823(e)] apply equally to successors in interest [and assignees] that purchase assets which FDIC as assumed receivership"); *Silver Creek Crossing,* LLC, 2010 WL 1138391 at *2 (same); *Caires v. JP Morgan Chase Bank*, 745 F. Supp.2d at 50 (same); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d at 380-81 (same); FSLIC *v. Murray*, 853 F.2d 1251, 1256 (5th Cir. 1988) (explaining that FDIC assignees also enjoy protection from claims or defenses based on unrecorded agreements); *FDIC v. Newhart*, 892 F.2d at 48-51 ("[A]ssertion of defenses based on oral agreements with the failed bank is transferred to a subsequent purchaser of the note from the FDIC.").

2. **Policy Rationale for Applying *D'Oench* to Assignees.** The policy justifications for expanding *D'Oench's* power to immunize the FDIC and other similar federal agencies from borrowers' claims and defenses carry less weight when applied to assignees of the loan or debtor, since upon transfer of the obligation into

private commerce, the burden or benefit on the federal government decreases. However, the majority of courts have found that the *D'Oench* Doctrine nevertheless should be expanded in order to promote the marketability of the failed bank's obligations by making them most attractive to prospective buyers, and thereby ultimately recouping more of the losses suffered by the federal government in taking over the failed institution.

C. *Do Assignees Benefit from the Federal Six-Year Statute of Limitations Period Provided by FIRREA?*

1. **FIRREA's Six-Year Statute of Limitations Period.** FIRREA grants to the FDIC, in its receivership and corporate capacities, a six-year statute of limitations period to bring suit on debts. 12 U.S.C. § 1821(d)(14) (FDIC may also take advantage of a longer limitations period under a state provision).

2. **FDIC Assignees Generally Receive the Protections of FIRREA's Six-Year Statute of Limitations Period.** Most courts have held that transferring the federal six-year statute of limitations from the FDIC, and the now defunct Federal Savings and Loan Insurance Corporation (FSLIC), to its assignees is consistent with the common law of assignments, furthers congressional policy, and is supported by the cases that extend the *D'Oench* Doctrine to assignees in the private market. *See FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) (holding that lender, as an FSLIC assignee, was entitled to the same six-year statute of limitations as the FSLIC).

3. **Policy Rationale for Why Assignees Should Not Be Limited to State Statute of Limitations Periods.** To hold that assignees of the FDIC are relegated to the state statute of limitations periods would serve to shrink the private market for assets of failed banks. *See FDIC v. Bledsoe*, 989 F.2d at 805. Such a result would run contrary to judicial and congressional policy allowing the FDIC to rid the federal system of failed bank assets. *See id.*

4. **The Shift in Judicial Basis for Applying FIRREA's Statute of Limitations Period to FDIC Assignees: The Supreme Court Case of *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (*O'Melveny*)**

a) While modern courts generally recognize that FIRREA's six-year statute of limitations period applies to FDIC assignees seeking to enforce loan obligations, the underlying analysis justifying this application has shifted largely as a result of the Supreme Court's 1994 decision in *O'Melveny & Myers v. FDIC,* which disapproved of federal common law and held that claims against the FDIC as receiver are generally governed by state law. 512 U.S. 79 (1994) (*O'Melveny*).

b) **The *O'Melveny* Case.** In *O'Melveny*, the FDIC, as receiver of a California savings bank, sued a law firm that had provided legal services for the bank. The FDIC asserted that the firm was negligent and breached its

fiduciary duty by failing to uncover the wrongdoing of certain officers of the bank. *Id.* The Supreme Court held that FIRREA preempted the creation of federal common law on this issue and that the rule of decision, therefore, should be found either in the federal statute itself or in state law. *Id.*

c) Pre-*O'Melveny* Basis for Applying FIRREA's Statute of Limitations Period to FDIC Assignees.

Prior to the Supreme Court's decision in *O'Melveny*, courts generally extended FIRREA to assignees simply by reasoning that federal common law provided for assignees to step into the shoes of their assignors. *See, e.g., Bledsoe*, 989 F.2d at 805; *Mountain States Fin. Res. Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991); *White v. Moriarty*, 19 Cal. Rptr. 2d 200 (App. 1993); *but see WAMCO, III v. First Piedmont Mortgage Corp.*, 856 F. Supp. 1976 (E.D. Va. 1994) (finding that only the RTC and FDIC could take advantage of the FIRREA limitations period).

d) Post-*O'Melveny* Basis for Applying FIRREA's Statute of Limitations Period to FDIC Assignees.

Following the *O'Melveny* decision decrying the application of federal common law, the majority of courts still find that assignees should receive the benefit of the FIRREA six-year statute of limitations period, but reach this conclusion more indirectly.

Post-*O'Melveny* courts tend to analyze the issue by referring to the rights granted by the relevant state to an assignee, rather than by applying FIRREA's federal statute of limitations period to the assignee directly. Thus, under this analysis, if state law allows assignees to step into the shoes of the assignor, then the courts typically will extend that right and permit the assignee to adopt the FIRREA statute of limitations period. *See, e.g., Nat'l Enters. v. Barnes*, 201 F.3d at 333 (finding that assignee gets benefits of FIRREA's six-year limitations period where state law provides that assignees step into the shoes of the assignor); *UMLIC-Nine Corp. v. Lipan Springs Dev. Corp.*, 168 F.3d 1173 (10th Cir. 1999) (finding that the statute of limitations period "reset" when the RTC took over as receiver after the note previously had been held by the FDIC as receiver for a different bank). *But see Beckley Capital L.P. v. DiGeronimo*, 184 F.3d 52, 58 (1st Cir. 1999) (finding that in a suit against a deceased guarantor, where the obligation was in default before the FDIC received it, the FDIC's assignee could not claim the benefit of the six-year limitations period, but instead was restricted to the one-year state limitations period governing suits brought against estates).

III. WHERE THE *D'OENCH* DOCTRINE DOES NOT APPLY: CLAIMS AND DEFENSES THAT CARRY THROUGH FDIC RECEIVERSHIP

A. *While the* D'Oench *Doctrine and 12 U.S.C. § 1823(e) are broad, they are not limitless. Certain claims and defenses are not barred by the D'Oench Doctrine*

Courts have found that the following non-exhaustive list of claims and defenses generally are not barred by the *D'Oench* Doctrine and § 1823(e):

1. Claims that do not relate to a specific asset (the "no asset exception," as discussed below) or not related to an agreement
2. Claims based on the actions of the FDIC itself
3. Breach of fiduciary duty and other "free standing torts"
4. Breach of the duty of food faith and fair dealing based on obligations in written agreement
5. Fraud in the factum
6. Illegality
7. Economic duress (in certain circumstances)
8. Discharge in bankruptcy
9. Expiration of the applicable statute of limitations
10. Usury that is apparent on the face of the document
11. Release
12. Equitable subordination claims
13. Equitable defenses such as laches
14. State consumer fraud (UDAP) claims
15. Truth in lending rescission

B. *The No Asset Exception of 12 U.S.C. § 1823(e)*

1. While assignees generally stand in the same protected shoes as the FDIC, there are certain exceptions in the mortgage loan context whereby certain claims or defenses can survive FDIC receivership and liability can carry over or be imputed to the FDIC's assignee. One widely recognized exception is the "no asset exception."

a) The "no asset exception" to the *D'Oench* Doctrine and its statutory counterpart § 1823(e) is generally defined as precluding application of *D'Oench* where parties contend that no asset exists or the asset is invalid and that such invalidity is caused by acts independent of understanding or side agreement. *see, e.g., FDIC v. McFarland,* 33 F.3d 532, 537 (5th Cir.1994); *FDIC v. Zook Bros. Constr. Co.,* 973 F.2d 1448, 1452 (9th Cir.1992); *Commerce Federal Savings Bank v. FDIC,* 872 F.2d 1240, 1244 (6th Cir.1989); *Beighley v. FDIC,* 868 F.2d 776 (5th Cir.1989); *FDIC v. P.L.M. Int'l, Inc.,* 834 F.2d 248 (1st Cir.1987); *Howell v. Cont'l Credit Corp.,* 655 F.2d 743 (7th Cir.1981); *cf. Langley v. FDIC,* 484 U.S. 86, 93–94, 108 S.Ct. 396, 402–03, 98 L.Ed.2d 340 (1987)).

b) One example of where the no asset exception applies can be found in the securitization context. In securitization arrangements or vehicles, the mortgage loans would not be assets acquired by the FDIC when it became the receiver of the bank that originated the loan. In turn, an assignee of the FDIC would not receive the protection of the *D'Oench* Doctrine and its counterpart § 1823(e), and the consumer would be free to raise its claims and defenses against the assignee as the current holder.

2. The no-asset exception precludes the application of the doctrine when no asset actually existed at the time the bank was acquired by the FDIC. Accordingly, the *D'Oench* Doctrine would not apply to protect an assignee:

a) **Where the failed bank did not own the mortgage and note at the time it failed and the FDIC became the receiver of the bank that originated the loan.** For claims and defenses arising from a loan origination, one threshold question is whether the bank actually owned the mortgage and note at the time it failed and closed. If a bank has sold most of its loan portfolios in the secondary market, often through securitization, then the bank did not own the underlying mortgage and note upon commencement of the FDIC receivership, then the mortgage and note is an asset obtained by the FDIC receiver. *See, e.g., Booker v. Sarasota, Inc.*, 707 So. 2d 886 (Fla. 1998) (stating that before *D'Oench* can apply, assignee must properly prove its status as legal owner and holder of the note); *Ledo Financial Corp. v. Summers*, 122 F.3d 825, 829 (9th Cir. 1997) (finding that the *D'Oench* Doctrine and 12 U.S.C. § 1823(e) did not apply because the FDIC had not acquired the underlying note).

b) **Where the bank did not service the note at the time it closed.** For claims and defenses arising out of the bank's servicing activities, the critical question is whether the bank serviced the mortgage account at the time it failed. If the bank committed servicing abuses, but sold its servicing rights (an asset) before it failed, the FDIC has no right to that asset upon the bank's closure. In that case, the *D'Oench* Doctrine and § 1823(e) will be inapplicable to claims based on servicing abuses because a claim regarding servicing abuses would not tend to diminish or defeat the FDIC's interest in a specific asset acquired by it. Additionally, many claims regarding servicing abuses typically are based on the servicer's violation of the contract terms, which also would render *D'Oench* and § 1823(e) inapplicable.

Further, if the claim is based on the Real Estate Settlement Procedures ACT (RESPA), then the "free-standing" tort exception would apply. The "free standing" tort exception provides that a tort claim, which is "free standing" and not linked to any unwritten agreement, is not barred by *D'Oench* or 12 U.S.C. § 1823(e).

IV. CONCLUSION

As can be seen above, Congress and the courts have taken broad measures to protect financial institutions and capital markets. With the substantial increase in foreclosures has come an increase in wrongful foreclosure litigation. For those institutions that have followed proper protocol and procedure, there is great protection. For those that have not, courts are willing to avoid applying the robust protections afforded to FDIC Assignees.

20th ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

September 13-15, 2012
Four Seasons Hotel
Las Vegas, NV

Hot Off the Press: First Opinions Analyzing the New Mortgage Proof-of-Claim and Disclosure Rules

by:
Karen L. Kellett
Armstrong Kellett Bartholow P.C.*
Dallas, TX

On December 1, 2011, new provisions of Bankruptcy Rule 3001, and new Bankruptcy Rule 3002.1 became effective. New Official Forms have been promulgated as well.[1] This paper summarizes the new rules pertaining to mortgage lenders and the opinions that have been issued which analyze those new rules.

A. Summary of New Rule 3001(c) and Rule 3002.1

1. Original Proof of Claim

a. Requirements for Original Proof of Claim

When a claim or security interest is based on a writing, the original or duplicate **shall** be filed with the claim. Fed. R. Bankr. P. 3001(c)(1).

- Use new Official Form B10.

Actual writing must be attached - a "summary" of the documents is insufficient without copies of the actual documents being attached as well. Official Form 10 2011 Committee Note.

A proof of claim in an individual debtor case must attach an itemized statement of interest, fees, expenses or other charges. Fed. R. Bankr. P. 3001(c)(2)(A).

---

* This presentation summarizes certain cases and developments, and is for educational purposes only. This author's analysis and opinions are not, and should not be, attributed as the views of any of the other panel members, their firms or clients.

[1] The new rules and forms are discussed at length in an article by John Rao, "New Bankruptcy Rules & Forms Respond to Mortgage Claim Documentation Problems," 30 NCLC Reports 9 (Nov./Dec. 2011), a copy of which is attached hereto.

If a security interest is claimed in the individual debtor's property, the creditor must file a statement of the cure amount. Fed. R. Bankr. P. 3001(c)(2)(B).

If a security interest is claimed in the individual debtor's principal residence, the creditor must provide this information using new Official Form B 10A (Attachment A). Fed. R. Bankr. R. 3001(c)(2)(C).

If a security interest is claimed in the individual debtor's principal residence, and an escrow account has been established, the creditor must attach to the proof of claim an escrow account statement "prepared as of the petition date in a form consistent with applicable nonbankruptcy law." Fed. R. Bank. P. 3001(c)(2)(C).

No separate Official Form for this statement.

b. Penalties for Failure to Comply

If the creditor fails to provide any information required by Rule 3001(c), after notice and hearing, the court may take "**either or both** of the following actions":

- "preclude the claimant 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"

- "award other appropriate relief, including reasonable expenses and attorneys' fees for the failure"

See Fed. R. Civ. P. 3001(c)(2)(D).

2. New Rule 3002.1

Applies only in chapter 13 case to claims secured by the debtor's principal residence and provided for under § 1322(b)(5) of the debtor's plan. Fed. R. Bankr. P. 3002.1(a).

a. Notice of Payment Changes

Creditor **shall** give 21 day advance notice to the debtor, debtor's counsel and the trustee of any payment change, including changes that result from an interest rate or escrow account adjustment. Fed. R. Bankr. P. 3002.1(b).

- Use new Official Form B 10S1 (Supplement 1). *See* Fed. R. Bankr. P. 3002.1(d).

- The notice does not have Rule 3001(f) *prima facie* validity. *See* Fed. R. Bankr. P. 3002.1(d).

b. Notice of Postpetition Fees, Expenses and Charges

Creditors **shall** file and serve on the debtor, debtor's counsel and the trustee a notice itemizing all fees, expenses or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or the debtor's principal residence. Fed. R. Bankr. P. 3002.1(c).

- The notice **shall** be served within 180 days after fee was "incurred." Fed. R. Bankr. P. 3002.1(c).

- Use new Official Form B 10S2 (Supplement 2). *See* Fed. R. Bankr. P. 3002.1(d).

- The notice does not have Rule 3001(f) *prima facie* validity. *See* Fed. R. Bankr. P. 3002.1(d).

Debtor or trustee has one year after service of the notice to challenge the fee by filing a "**motion**." Fed. R. Bankr. P. 3002.1(e).

If the debtor or trustee files such a motion, after notice and hearing, the court then determines whether payment of the fee is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5). Fed. R. Bankr. P. 3002.1(e)

c. Notice of Final Cure Payment

(1) Trustee's Obligations

Within 30 days "after the debtor completes all payments under the plan," the trustee **shall**:

- file and serve a **"notice"** stating that the debtor has paid in full the amount "required to cure any default on the claim." Fed. R. Bankr. P. 3001(f).

- the notice must tell the creditor that it has an obligation to file and serve a response pursuant to Rule 3002.1(g). Fed. R. Bankr. P. 3002.1(f).

If the trustee does not file the notice of final cure required by Rule 3002.1(f), the debtor may file and serve the notice. Fed. R. Bankr. P. 3002.1(f).

(2) Creditor's Obligations

Within 21 days of the trustee serving its notice of final cure, the creditor **shall** file and serve a **statement**:

- indicating whether the creditor agrees that the debtor has paid in full the amount required to cure the default on the claim, **and**
- indicating whether the debtor "is otherwise current on all payments consistent with § 1322(b)(5)," **and**
- itemizing "the required cure or postpetition amounts, if any, the holder contends remain unpaid as of the date of the statement."

Fed. R. Bankr. P. 3002.1(g).

The **"statement"** is filed as a "**supplement**" to the creditor's proof of claim. Fed. R. Bankr. P. 3002.1(g).

Such statement/POC supplement is not given Rule 3001(f) *prima facie* validity. Fed. R. Bankr. P. 3002.1(g).

No Official Form for this statement/POC supplement.

(3) Response to the Creditor's Statement/POC Supplement

Within 21 days of creditor filing the statement/POC supplement required by Rule 3002.1(g), the debtor or the trustee may file a **"motion"** challenging the creditor's statement/POC supplement. Fed. R. Bankr. P. 3002.1(h).

If the debtor or trustee files such a motion, after notice and hearing, the court shall "determine whether the debtor has cured the default and paid all required post-petition amounts." Fed. R. Bankr. P. 3002.1(h)

As set forth in the Committee Notes:

> Subdivision (h) [Rule 3002.1(h)] provides a procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. Within 21 days after the service of the [creditor's] statement under [Rule 3002.1(g)], the trustee or debtor may move for a determination by the court of whether any default has been cured and whether any other non-current obligations remain outstanding.

d. Penalties for Failure to Comply

If the creditor fails to provide any information required by Rule 3002.1(b), 3002.1(c) or 3002.1(d), the court may, after notice and hearing, take "**either or both** of the following actions:"

- "preclude the claimant 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"

- "award other appropriate relief, including reasonable expenses and attorneys' fees caused by the failure"

See Fed. R. Bankr. P. 3002.1(i).

After the case is closed, if the creditor seeks to recover amounts that should have been, but were not, disclosed under Rule 3002.1, the debtor may move to reopen the case "in order to seek sanctions against the holder of the claim under subdivision (i) [Rule 3002.1(i)]." *See* Committee Note to Rule 3002.1(i).

B. Summary of Home Mortgage Cases Interpreting New Rule 3001(c) and New Rule 3002.1

1. In re Carr, 468 B.R. 806 (Bankr. E.D. Va. 2012)(Judge Robert G. Mayer)

Held: Creditor cannot charge fee for filing the required response under Rule 3002.1(g) to trustee's Rule 3002.1(f)) notice of final cure payment.

Creditor only required to fill out Official Form 10 (Supplement 2) as a supplement to its proof of claim, which "is not the practice of law." Creditor should not have filed an additional pleading on the docket, as only Form 10 (Supplement 2) is required.

Court noted that no fee would be allowed whether or not the creditor agreed or did not agree with the trustee's notice, or whether or not all post-petition payments had been made. If, however, the debtor or trustee contested the creditor's response by filing a motion under Rule 3002.1(h), the matter would become a "contested matter," and the creditor might be entitled to fees for that if such fees were allowed by underlying loan documents and were not otherwise prohibited by nonbankruptcy law or the Bankruptcy Code.

2. **In re Adams, 2012 WL 1570054 (Bank. E.D.N.C. May 3, 2012)(Judge Randy D. Doubm)**

Held: Creditor cannot charge a fee for attorney's fees for preparation of the notice of mortgage payment change form.

Court noted that mortgage companies have routinely served notices of mortgage payment changes on debtors without the assistance of an attorney. Because creditor failed to show that the services provided required the assistance of an attorney, the trustee's objection to the $50.00 fee was sustained.

3. **In re Kraska, 2012 WL 1267993 (Bankr. N.D. Ohio April 13, 2012) (slip opinion)(Judge Russ Kendig).**

Held: Rule 3002.1 is applicable even to situations in which the debtor will surrender the house.

Creditor presented an order lifting stay to the Court that contained a provision waiving compliance with Rule 3002.1.

The court held that Rule 3002.1 is not inapplicable just because the debtor indicated his intent to surrender. First, § 1322(b)(5) applies to both secured and unsecured claims, and, at present, the claim is a secured claim secured by the debtor's residence, making § 1322(b)(5) applicable. Second, the creditor would be filling a deficiency claim, and the point of Rule 3002.1 is to ensure the mortgage creditor files an accurate claim. Parties need to be able to see and challenge, if necessary, changes in escrow, added fees, etc. that comprises the creditor's claim. Third, the rule does not contain "a pass" for situations outside the norm.

Case is good because it discusses purposes of new rules and attaches an excerpt from the Report of the Judicial Conference, Committee on Rules of Practice and Procedures.[2]

---

[2] The Report of the Judicial Conference, Committee on Rules of Practice and Procedure can be found on the link to "Report" on the webpage at: *http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules/JudConReportSept10.aspx.*

The Report of the Advisory Committee on Bankruptcy Rules, May 27, 2010 (Revised June 14, 2010) can be found on the link to "Appendix B" on that same webpage. Excerpts of both are attached to this paper.

4. **In re Sheppard, 2012 WL 1344112 (Bankr. E.D. Va. April 18, 2012)(Judge Kevin R. Huennekens).**

Held: Creditor should not file a notice under Rule 3002.1(c) for fees already approved pursuant to a relief-from-stay order and cannot, by using a Rule 3002.1 notice, obtain additional fees not approved in that order.

Held: The trustee had no obligation or authority to pay any fees, expenses or charges identified in a notice filed in accordance with Bankruptcy Rule 3002.1. Creditor that wants to be paid for post-petition fees or charges through the chapter 13 plan must file a formal amended proof of claim.

Creditor filed a motion for relief from stay and consent order was entered requiring debtor to resume regular payments and cure the post-petition arrearage due to the creditor in the amount of $6,164.63, which included attorney's fees.

Later, the creditor filed a notice under Rule 3002.1(c) asserting $800 in attorney's fees and $150 in filing fees with respect to the motion for relief from stay. The trustee timely objected by filing a Rule 3002.1(e) motion.

The court held that the creditor could not now demand an extra $150 that was not previously approved in the consent order. The court rejected the creditor's argument that it was compelled to file a 3002.1(c) notice. Official Form B10 (Supplement 2) states that a creditor asserting post-petition fees must include on the form "any amounts [not] previously itemized in a notice filed in this case *or ruled on by the bankruptcy court."* (emphasis added). Because the court had already "ruled on" the fees and charges related to the motion for relief, the creditor should not have included them in a separate notice filed under 3002.1(c).

5. **In re Staffieri, 2012 WL 1945697 (Bankr. E.D.N.Y. May 30, 2012)(Judge Alan S. Trust)**

Debtor filed a motion to compel creditor to turn over $6,123.91 in escrow surplus funds indicated on an escrow analysis creditor sent to debtor post-petition. Creditor did not object and court entered order compelling turnover of the funds.

Creditor moved for reconsideration under Fed. R. Civ. P. 60(b), arguing that the debtor actually had a $16,619.00 pre-petition escrow *deficiency*, which was shown on creditor's amended proof of claim. However, even though the amended proof of claim indicated that an escrow analysis was attached, as required by new Rule 3002.1, no such analysis was attached.

Court denied motion for reconsideration. Creditor had service of the motion to compel and otherwise participated in the bankruptcy. Creditor failed to explain the

escrow discrepancy, failed to provide a reconciliation of the escrow discrepancy on its amended claim, as required, and failed to show any excusable neglect or mistake in failing to bring any evidence forward when the motion to compel was filed.

6. Pompa v. Wells Fargo Home Mortgage, Inc. (In re Pompa), 2012 WL 2571156 (Bankruptcy S.D. Tex. June 29, 2012)(Judge Marvin Isgur)

The debtors' plan provided for arrears on creditor's secured claim to be paid and cured through the plan. Court issued an order deeming the debtors' mortgage to be current, and later the debtors brought suit, alleging that the bank misapplied payments and improperly charged undisclosed fees during the pendency of their chapter 13 plan.

Creditor filed motion to dismiss. It argued, among other things, that inclusion of new Rule 3002.1(i)(2), which allows a court to "Award other appropriate relief" for a mortgage creditor's failure to give notice of fees under that rule, is evidence of a lack of intent to allow sanctions for the same conduct under § 105. The court refused to draw such inference, and noted that the text of the new provisions does not exclude sanctions under § 105. The court noted, "It is equally possible that Rule 3002.1 was amended to clarify that [§ 105] relief already existed." The Court ruled that because the Court had the power to enforce its own orders, the debtors are permitted to sue pursuant to § 105 for violating the Court's orders and the § 524(i) discharge provision.

With respect to § 524(i), the creditor argued that the fees in question "were not discharged." [3] The Court held that under § 524(i), willful failure to credit payments received under a plan constitutes a violation of the discharge injunction, regarding of whether the debt at issue was discharged. If § 524(i) applied only to discharged debts, the provision would be superfluous. § 524(i) was intended to provide a remedy for failure to credit payments on debts not discharged under the plan. Deeming willful misapplication of plan payments a violation of the discharge injunction under § 524(i) does not impermissibly modify home mortgage lenders' rights in violation § 1322(b)(2); rather, it simply enforces the plan provisions and ensures that the completion of the plan will actually result in a fresh start for the debtor.

7. In re Garduno, 2012 WL 2402789 (Bankr. S.D. Fla. June 26, 2012)(Judge Erik P. Kimball)

In case where debtors' plan listed the creditor as secured creditor but stated that the bank would receive "$0.0," the debtor had left the bank out of the plan entirely, and thus § 1322(b)(5) was not applicable. Rule 3002.1 only applies where the claim in question is provided for under § 1322(b)(5). Thus, the creditor gained noting by filing the notice, and failure to file the notice would not have resulted in the creditor's waiving any right it may have had with regard to the debtors or their property. The debtor's objection to the notice and request for attorneys' fees were denied.

---

[3] Judge Isgur has held that unapproved and undisclosed fees and charges added to a debtor's mortgage loan during the bankruptcy "were not discharged," but that the Court could otherwise provide relief to debtors harmed by such actions. Other courts have held that such fees and charges are discharged.

8. **In re Merino, 2012 WL 2891112 (Bankr. M.D. Fla. July 16, 2012)(Judge Caryl E. Delano)**

Held: Rule 3002.1 does not apply to mortgage claims where the debtor pays the post-petition monthly mortgage payment directly to the creditor, or "outside the plan."

In a five-paragraph opinion, the court states:

> Rule 3002.1 does not specifically state that it applies only to payments being made "inside the plan" (i.e., though the Chapter 13 trustee's office); likewise, Rule 3002.1 does not clearly state that the rule does not apply to claims being paid "outside the plan" (i.e., paid directly by the debtor) ...

Id. The court inferred that Rule 3002.1 does not apply to claims being paid outside the plan. The court relied on *Garduno* and held that Rule 3002.1 does not apply to payments where the debtor is paying the mortgage creditor directly "outside the plan."

Author's Comment - In this author's humble opinion, *Merino* and *Garduno* are wrongly decided and ignore the new Bankruptcy Rules' clear intent to assist debtors in allowing them to emerge from bankruptcy with a current mortgage. Saving a debtor's home from foreclosure is one of the primary rights given to a debtor by chapter 13.[4] 11 U.S.C. §1322(b)(5) is the Bankruptcy Code section that implements that right.

11 U.S.C. § 1321 states: "The debtor shall file a plan."[5]

11 U.S.C. § 1322 sets forth what the debtor's plan **shall** provide, and what it **may** provide.

11 U.S.C. § 1322(b)(5) provides that the debtor's plan may:

> notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

---

[4] *See, e.g., Rodriguez v. Countrywide Home Loans (In re Rodriguez)*, 421 B.R. 356, 380 (Bankr. S.D. Tex. 2009); *In re Carr*, 468 B.R. 806 (Bankr. E.D. Va. 2012)(discussing how new Rule 3002.1 was promulgated to redress the practices of mortgage lenders who fail to provide notice of payment changes or of hidden fees and charges being assessed to the debtors' mortgage accounts. Such practices led mortgage lenders to declare debtors in default upon emerging from faithfully completed three-to-five year plans. Such practices thwarted key goal of chapter 13, which is to allow debtors to cure mortgage arrears.)

[5] There is no such thing as "standard" plan language.

Thus, in any plan that provides that the debtor will cure his mortgage deficiency, if any, and continue to maintain his mortgage payments during his chapter 13 case, the mortgage holder's claim is being "provided for under § 1322(b)(5) of the Code in the debtor's plan" and is thus subject to new Rule 3002.1.

Historically, the debtor's payments to "cure" the deficiency to the mortgage lender pursuant to § 1325(b)(5) flowed through the chapter 13 trustee, while the debtor would exercise his rights to "maintain" his mortgage payments while the case was pending by paying the mortgage lender or servicer directly. This is often referred to as a "direct pay" plan, or described as a plan where the debtor is "paying outside the plan." The phrase "paying outside the plan" is a misnomer. Neither the Bankruptcy Code nor the Rules contain these phrases or terms. Rather, such phrases were coined by practitioners and simply mean that payments for the "maintenance" of the loan post-petition under § 1322(b)(5) will be paid by the debtor directly to the mortgage holder, while payments for the "cure" of any deficiency under § 1322(b)(5) will flow from the debtor through the chapter 13 trustee's hands on their way to the mortgage holder.

In more recent years, several jurisdictions have established procedures whereby the debtor's payments for *both* the "maintenance" of the monthly mortgage payments and the payments to "cure" any deficiency flow from the debtor through the chapter 13 trustee's hands on their way to the mortgage lender. Plans which provide for the chapter 13 trustee to pay both the cure payments and the monthly mortgage payments are often referred to as "conduit" plans.

It is irrelevant whether the debtor sends funds to cure the deficiency or funds to make the post-petition monthly mortgage payments directly to the mortgage holder, or whether such funds pass through the hands of the chapter 13 trustee on their way to the mortgage holder. Even if the debtor is making his ongoing monthly mortgage payments "outside the plan," i.e., sending the funds for such monthly mortgage payments directly to the mortgage holder, the debtor still is exercising his right save his home from foreclosure by invoking the plan maintenance provisions of §1322(b)(5). Courts and chapter 13 trustees may not impinge on the debtor's fundamental right to save his home from foreclosure through chapter 13 by imposing local fund-transfer procedures inconsistent with that right.

The *Garduno* and *Merino* courts ignore the above analysis, and the analysis of the Advisory opinions of the Rules Committee.

As noted, the new Bankruptcy Rules are meant to remedy the practices of mortgage lenders which, in the past, have thwarted and often destroyed debtors' rights to cure their mortgage deficiency and be current on their mortgage upon emergence from bankruptcy.

As noted in the Judicial Conference Report of the Rules Committee:

> Proposed new Rule 3002. 1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. The rule is intended to provide the mortgagor-debtor information necessary to determine the exact amount needed to cure any pre-petition arrearage and the amount of the postpetition payments. If the latter amount changes over time because of changing interest rates, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment must be conveyed to the debtor and trustee. Numerous consumer bankruptcy lawyers, trustees, and judges have reported that debtors often do not learn until after completing a chapter 13 plan that the mortgage payments have changed. In particular, debtors do not learn that fees, expenses, or other charges have been imposed during the life of the plan. As a result, debtors may face renewed foreclosure proceedings immediately after emerging from bankruptcy. Timely notice of such changes will permit the debtor and trustee to adjust post-petition mortgage payments and, if appropriate, challenge the validity of fees, expenses, or other charges assessed during the bankruptcy.

Report of the Judicial Conference, Committee on Rules of Practice and Procedures, p. 13.[6]

Indeed, the Committee Note to new Rule 3002.1 provides:

> This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. *It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments.*

Advisory Committee Note to Bankruptcy Rule 3002.1 (emphasis added). This sentence was specifically added to the Committee Note after several commentators stated that the Rule 3002.1 appeared to be appropriate for "conduit" districts only. The committee added the sentence specifically to clarify that Rule 3002.1 "applies in all districts, regardless of whether ongoing mortgage payments are made directly by the debtor or by the chapter 13 trustee." *See* Report of the Advisory Committee on Bankruptcy Rules, May 27, 2010 (revised June 14, 2010), p. 14 and Rules Appendix B-45 and B-48.

---

[6] See footnote 2, *infra*.

B 10 (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT		PROOF OF CLAIM
Name of Debtor:	Case Number:	
NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*		
Name of Creditor (the person or other entity to whom the debtor owes money or property):		**COURT USE ONLY**
Name and address where notices should be sent: Telephone number: email:		❒ Check this box if this claim amends a previously filed claim. **Court Claim Number:**_____ (*If known*) Filed on:_____
Name and address where payment should be sent (if different from above): Telephone number: email:		❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:	**3a. Debtor may have scheduled account as:** (See instruction #3a)	**3b. Uniform Claim Identifier (optional):** (See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒ Real Estate ❒ Motor Vehicle ❒ Other
Describe:

Value of Property: $_____

Annual Interest Rate_____% ❒ Fixed or ❒ Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:
$_____

Basis for perfection: _____

Amount of Secured Claim: $_____

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).

Amount entitled to priority:
$_____

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):

_____ (Signature) _____ (Date)

_____
_____
_____
Telephone number: email:

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

B 10A (Attachment A) (12/11)

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ **Case number:** _____

Name of creditor: _____ **Last four digits** of any number you use to identify the debtor's account: ____ ____ ____ ____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. **Principal due** (1) $ _____

2. **Interest due**

Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
_____%	_____	_____	$ _____
_____%	_____	_____	$ _____
_____%	_____	_____	+ $ _____
Total interest due as of the petition date			$ _____

Copy total here ▶ (2) + $ _____

3. **Total principal and interest due** (3) $ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
1. **Late charges**	_____	(1) $ _____
2. **Non-sufficient funds (NSF) fees**	_____	(2) $ _____
3. **Attorney's fees**	_____	(3) $ _____
4. **Filing fees and court costs**	_____	(4) $ _____
5. **Advertisement costs**	_____	(5) $ _____
6. **Sheriff/auctioneer fees**	_____	(6) $ _____
7. **Title costs**	_____	(7) $ _____
8. **Recording fees**	_____	(8) $ _____
9. **Appraisal/broker's price opinion fees**	_____	(9) $ _____
10. **Property inspection fees**	_____	(10) $ _____
11. **Tax advances (non-escrow)**	_____	(11) $ _____
12. **Insurance advances (non-escrow)**	_____	(12) $ _____
13. **Escrow shortage or deficiency** (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13) $ _____
14. **Property preservation expenses. Specify:** _____	_____	(14) $ _____
15. **Other. Specify:** _____	_____	(15) $ _____
16. **Other. Specify:** _____	_____	(16) $ _____
17. **Other. Specify:** _____	_____	(17) + $ _____
18. **Total prepetition fees, expenses, and charges. Add all of the amounts listed above.**		(18) $ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

☐ No

☐ Yes Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

---

1. **Installment payments due**

Date last payment received by creditor _____ mm/dd/yyyy

Number of installment payments due (1) _____

2. **Amount of installment payments due**

_____installments @ $ _____

_____installments @ $ _____

_____installments @ + $ _____

Total installment payments due as of the petition date $ _____ Copy total here ► (2) $ _____

3. **Calculation of cure amount**

Add total prepetition fees, expenses, and charges Copy total from Part 2 here ► + $ _____

Subtract total of unapplied funds (funds received but not credited to account) - $ _____

Subtract amounts for which debtor is entitled to a refund - $ _____

Total amount necessary to cure default as of the petition date (3) $ _____

Copy total onto Item 4 of Proof of Claim form

Official Form 10 (Attachment A) – Cumulative Committee Note

2011 COMMITTEE NOTE

This form is new. It must be completed and attached to a proof of claim secured by a security interest in a debtor's principal residence. The form, which implements Rule 3001(c)(2), requires an itemization of prepetition interest, fees, expenses, and charges included in the claim amount, as well as a statement of the amount necessary to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement must also be attached to the proof of claim, as required by Rule 3001(c)(2)(C).

B 10S1 (Supplement 1) (12/11)

UNITED STATES BANKRUPTCY COURT

In re _____, Debtor

Case No. _____

Chapter 13

Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice
_____ mm/dd/yyyy

New total payment:
Principal, interest, and escrow, if any
$ _____

Part 1: Escrow Account Payment Adjustment

Will there be a change in the debtor's escrow account payment?

- ☐ No
- ☐ Yes Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

- ☐ No
- ☐ Yes Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Other Payment Change

Will there be a change in the debtor's mortgage payment for a reason not listed above?

- ☐ No
- ☐ Yes Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date _____
Signature mm/dd/yyyy

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Official Form 10 (Supplement 1) – Cumulative Committee Note

2011 COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to provide notice at least 21 days prior to a change in the amount of the ongoing mortgage installment payments. The form requires the holder of the claim to indicate the basis for the changed payment amount and when it will take effect. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

B 10S2 (Supplement 2) (12/11)

UNITED STATES BANKRUPTCY COURT

In re _____, Debtor

Case No. _____

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no.** (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ☐ No
- ☐ Yes. Date of the last notice: _____ mm/dd/yyyy

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates Incurred	Amount
1. Late charges	_____	(1) $ _____
2. Non-sufficient funds (NSF) fees	_____	(2) $ _____
3. Attorney fees	_____	(3) $ _____
4. Filing fees and court costs	_____	(4) $ _____
5. Bankruptcy/Proof of claim fees	_____	(5) $ _____
6. Appraisal/Broker's price opinion fees	_____	(6) $ _____
7. Property inspection fees	_____	(7) $ _____
8. Tax advances (non-escrow)	_____	(8) $ _____
9. Insurance advances (non-escrow)	_____	(9) $ _____
10. Property preservation expenses. Specify: _____	_____	(10) $ _____
11. Other. Specify: _____	_____	(11) $ _____
12. Other. Specify: _____	_____	(12) $ _____
13. Other. Specify: _____	_____	(13) $ _____
14. Other. Specify: _____	_____	(14) $ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor.

❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date _____
Signature mm/dd/yyyy

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

2011 COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to file a notice of all postpetition fees, expenses, and charges within 180 days after they are incurred. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Official Form 11B
6/90

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

SPECIAL POWER OF ATTORNEY

To _____ of * _____, and
_____ of * _____.

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned [*if desired*: and with full power of substitution,] to attend the meeting of creditors of the debtor or any adjournment thereof, and to vote in my behalf on any question that may be lawfully submitted to creditors at such meeting or adjourned meeting, and for a trustee or trustees of the estate of the debtor.

Dated: _____

Signed: _____

By _____

as _____

Address: _____

_____

[*If executed by an individual*] Acknowledged before me on _____.

[*If executed on behalf of a partnership*] Acknowledged before me _____, by _____, who says that he [*or* she] is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on _____, by _____, who says that he [*or* she] is _____ of the corporation named above and is authorized to execute this power of attorney in its behalf.

_____

_____
[*Official character.*]

* State mailing address.

INSTRUCTIONS FOR COMPLETING OFFICIAL FORM 11B
SPECIAL POWER OF ATTORNEY

I. INTRODUCTION

A power of attorney is an instrument that allows an individual, partnership, or corporation to authorize a specific individual to act as its agent or "attorney in fact" for certain matters. An "attorney in fact" is an agent who is appointed and authorized to act in place of another as distinguished from an "attorney at law". A power of attorney does not authorize an individual to practice law and should not be confused with legal representation by an attorney, who is licensed by the state to engage in the practice of law.

A power of attorney may be either general or special. A general power of attorney is broader in scope. For example, it may authorize the agent to handle all general business transactions. On the other hand, a special power of attorney limits the scope of authority to acting for a particular purpose or performing a particular act. Official Form 11A may be used for a general power of attorney, and Official Form 11B may be used for a special power of attorney.

II. APPLICABLE LAW AND RULES

Rule 9010(c) of the Federal Rules of Bankruptcy Procedure (referred to as "Bankruptcy Rule" or "Fed. R. Bankr. P.") states that a power of attorney must conform substantially to the Official Form, and that it must be acknowledged before an authorized person.

> The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U.S.C. § 459, § 953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.

Fed. R. Bankr. P. 9010(c).

Bankruptcy judges, clerks, and deputy clerks of bankruptcy courts are authorized by statute to administer oaths and affirmations and to take acknowledgments, 28 U.S.C. §§ 459, 953. Moreover, Bankruptcy Rule 9012 provides that the following persons may administer oaths and affirmations and take acknowledgments: a bankruptcy judge, clerk and deputy clerks of the bankruptcy court, United States trustee, officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country. Additionally, Bankruptcy Rule 9010(c) authorizes the use of a notary public, who is authorized by the state government to administer oaths, take acknowledgments, and attest to and certify with an official seal the authenticity of signatures.

The Official Form should be used with alterations as may be appropriate. Fed. R. Bankr. P. 9009.

III. DIRECTIONS

The caption should be placed at the top of the page and should conform to Official Form 16B. Instructions for Official Form 16B, Caption (Short Title), may be found following that form.

The name of the individual who is being authorized to act as attorney in fact on behalf of the creditor should be placed on the first line. The address of the "attorney in fact" should be placed after the (*) asterisk. A second line is provided and should be used only if more than one individual is being authorized to act as "attorney in fact." The name and address of a second person should be place on the second line.

The individual (or the individual acting on behalf of a partnership or corporation) that is granting a power of attorney should date and sign the document in the presence of a notary public or other person authorized to take acknowledgments. An individual should sign on the first line after the word "Signed," and print the individual's name on the second line after the word "By." An individual acting on behalf of a partnership or corporation should place the name of the partnership or corporation on the first line, sign the individual's own name on the second line, and state the individual's title on the third line. Additional lines are provided for the address of the person granting the power of attorney.

Official Form 11B - Cumulative Committee Note

1991 COMMITTEE NOTE

This form previously was numbered Official Form No. 18.

Official Form 11A
6/90

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

GENERAL POWER OF ATTORNEY

To _____ of * _____, and
_____ of * _____.

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to vote on any question that may be lawfully submitted to creditors of the debtor in the above-entitled case; [*if appropriate*] to vote for a trustee of the estate of the debtor and for a committee of creditors; to receive dividends; and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: _____

Signed: _____

By _____

as _____

Address: _____

_____

[*If executed by an individual*] Acknowledged before me on _____.

[*If executed on behalf of a partnership*] Acknowledged before me on _____, by _____, who says that he [*or* she] is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on _____, by _____, who says that he [*or* she] is _____ of the corporation named above and is authorized to execute this power of attorney in its behalf.

_____

_____
[Official character.]

* State mailing address.

INSTRUCTIONS FOR COMPLETING OFFICIAL FORM 11A
GENERAL POWER OF ATTORNEY

I. INTRODUCTION

A power of attorney is an instrument that allows an individual, partnership, or corporation to authorize a specific individual to act as its agent or "attorney in fact" for certain matters. An "attorney in fact" is an agent who is appointed and authorized to act in place of another, as distinguished from an "attorney at law". A power of attorney does not authorize an individual to practice law and should not be confused with legal representation by an attorney, who is licensed by the state to engage in the practice of law.

A power of attorney may be either general or special. A general power of attorney is broader in scope. For example, it may authorize the agent to handle all general business transactions. On the other hand, a special power of attorney limits the scope of authority to acting for a particular purpose or performing a particular act. Official Form 11A may be used for a general power of attorney, and Official Form 11B may be used for a special power of attorney.

II. APPLICABLE LAW AND RULES

Rule 9010(c) of the Federal Rules of Bankruptcy Procedure (referred to as "Bankruptcy Rule" or "Fed. R. Bankr. P.") states that a power of attorney must conform substantially to the Official Form, and that it must be acknowledged before an authorized person.

> The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U.S.C. § 459, § 953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.

Fed. R. Bankr. P. 9010(c).

Bankruptcy judges, clerks, and deputy clerks of bankruptcy courts are authorized by statute to administer oaths and affirmations and to take acknowledgments, 28 U.S.C. §§ 459, 953. Moreover, Bankruptcy Rule 9012 provides that the following persons may administer oaths and affirmations and take acknowledgments: a bankruptcy judge, clerk and deputy clerks of the bankruptcy court, United States trustee, officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country. Additionally, Bankruptcy Rule 9010(c) authorizes the use of a notary public, who is authorized by the state government to administer oaths, take acknowledgments, and attest to and certify with an official seal the authenticity of signatures.

The Official Form should be used with alterations as may be appropriate. Fed. R. Bankr. P. 9009.

III. DIRECTIONS

The caption should be placed at the top of the page and should conform to Official Form 16B. Instructions for Official Form 16B, Caption (Short Title), may be found following that form.

The name of the individual who is being authorized to act as "attorney in fact" (as distinguished from an "attorney at law") on behalf of the creditor should be placed on the first line. The address of the "attorney in fact" should be placed after the (*) asterisk. A second line is provided and should be used only if more than one individual is being authorized to act as attorney in fact. The name and address of a second person should be place on the second line.

The individual (or the individual acting on behalf of a partnership or corporation) that is granting a power of attorney should date and sign the document in the presence of a notary public or other person authorized to take acknowledgments. An individual should sign on the first line after the word "Signed," and print the individual's name on the second line after the word "By." An individual acting on behalf of a partnership or corporation should place the name of the partnership or corporation on the first line, sign the individual's own name on the second line, and state the individual's title on the third line. Additional lines are provided for the address of the person granting the power of attorney.

Official Form 11A - Cumulative Committee Note

1991 COMMITTEE NOTE

This form previously was numbered Official Form No. 17.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

DATE: May 27, 2010

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 29 and 30, 2010, in New Orleans, Louisiana.

* * * * *

The Committee took action on the following matters, which it presents to the Standing Committee with the indicated recommendations:

* * * * *

(c) approval for publication for comment of amendments to Rules 3001, 7054, and 7056, and Official Forms 10 and 25A, and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2).

* * * * *

II. Action Items

* * * * *

B. Items for Publication in August 2010

The Advisory Committee recommends that the proposed amendments and new forms that are summarized below be published for public comment. The texts of the amended rules and official forms and the new official forms are set out in Appendix B.

Rule 3001 is amended to provide, in new subdivision (c)(3), requirements for the documentation of claims based on an open-end or revolving consumer credit agreement. Subdivision (c)(1) requires the attachment to a proof of claim of the writing, if any, on which a claim or an interest in property is based. That provision is amended to create an exception for claims governed by paragraph (3) of the subdivision. New paragraph (3) requires for an open-end or revolving consumer credit claim that a statement be filed with the proof of claim that provides the information specified in that provision. This information may be needed by the debtor to associate the claim with a known account, since claims of this type – primarily for credit card debts – are frequently sold one or more times before ending up in the hands of the claim filer, which may be an entity unknown to the debtor. The required information will also provide a basis for assessing the timeliness of the claim.

As published in August 2009, a proposed amendment to Rule 3001(c) would have required the holder of a claim based on an open-end or revolving consumer credit agreement to attach to its proof of claim the last account statement sent to the debtor prior to the commencement of the bankruptcy case. Representatives of bulk purchasers of credit card debt objected on several grounds to this requirement. Their arguments included the assertion that the statement will often not be available when the proof of claim is filed. They said that under federal record retention policies for financial institutions, credit card account records generally need to be retained for only two years. Furthermore, they asserted, account information is usually stored in an electronic format, and it may not be practicable to produce a duplicate of an account statement.

The proposal for the attachment of the last account statement for credit card claims arose from a concern that the requirement for the attachment of the writing on which a claim is based is frequently not complied with by holders of credit card debt. When little supporting information is provided with a proof of claim, the burden is placed on a debtor or trustee to seek, through informal means or by discovery, information that Rule 3001(c) or Form 10 requires the claimant to provide in support of its claim. The Committee concluded, however, that the rule should not require the attachment of information that is frequently unavailable or impracticable to obtain. Likewise, it concluded that if there is a less burdensome way for a creditor to provide the information needed to assess the validity of its claim, the rule should not insist on the provision of that information in a more costly or difficult manner.

The Committee therefore voted to withdraw the proposal for the attachment of the last account statement and in its place to recommend for publication new subdivision (c)(3). That provision requires a statement of the following information, to the extent applicable: (1) the name of the entity from whom the creditor purchased the account; (2) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder; (3) the date of the last transaction on the account by an account holder; (4) the date of the last payment on the account; and (5) the date on which the account was charged to profit and loss. In addition to this information, which must be routinely provided, a party in interest may obtain the writing on which an open-end or revolving consumer credit claim is based by making a request in writing for that documentation from the holder of the claim.

Rule 7054 is amended in subdivision (b) to provide more time for a party to respond to a prevailing party's bill of costs and to increase the time for seeking review of the clerk's taxing of costs. The existing rule provides for the taxing of costs on one day's notice. That time period is extended to 14 days in order to provide a more realistic opportunity for a party to prepare a response. The five-day period for seeking court review is changed to seven days to conform to the convention used throughout the rules of specifying time periods of fewer than 30 days as multiples of seven. These changes bring the rule into conformity with Civil Rule 54(d).

Rule 7056 is amended to alter the incorporated Civil Rule 56's default deadline for filing a motion for summary judgment. Rule 7056 makes Civil Rule 56 applicable in bankruptcy adversary proceedings. As of December 1, 2009, Civil Rule 56(c) provides that, unless a local rule or court order otherwise provides, the deadline for filing a motion for summary judgment is 30 days after the close of discovery. Because of the swift pace of some bankruptcy proceedings and contested matters (to which Rule 7056 applies by virtue of Rule 9014(c)), a default deadline based on the scheduled hearing date, rather than the close of discovery, is adopted.

Official Form 10, the proof of claim form, is amended in several respects:

(1) Additional information is sought concerning the interest rate specified for secured claims. The filer of the claim must indicate whether the rate is fixed or variable, and the form clarifies that the rate in question is the one applicable when the bankruptcy case was filed.

(2) Part 7 of the form and related instructions are revised to clarify that, consistent with Rule 3001(c), a filer must attach redacted copies of documents that support a claim or provide evidence of the perfection of a lien; the attachment of only a summary of those documents is not sufficient. The need for the redaction of documents is highlighted.

(3) In order to emphasize the duty imposed on a party filing a proof of claim, the signature box of the form now includes a declaration that the information provided is true and correct to the best of the filer's knowledge, information, and reasonable belief. The related instruction also reminds the filer that the signature constitutes a certification that the claim meets the requirements

of Rule 9011(b). An individual filing a claim must indicate the capacity in which he or she is doing so, and check boxes are added to the signature block for that purpose.

(4) A new space is provided for indicating a uniform claim identifier. The use of this 24-character identifier is optional for the claim filer and is intended to facilitate the making of chapter 13 disbursements by means of electronic fund transfers.

(5) Stylistic and formatting changes are made throughout the form.

Official Form 10 (Attachment A) is new. It is a required proof of claim attachment for home mortgage claims that implements Rule 3001(c)(2). The form provides a uniform format for setting forth the following components of the amount of a mortgage claim: principal, interest, fees, expenses, and charges owed as of the petition date. It also requires the filer to state the amount necessary to cure any prepetition default, break out the components of that amount, and attach an escrow account statement if the mortgage installment payment includes an escrow deposit.

Official Form 10 (Supplement 1) is new. It implements Rule 3002.1(b). The filer of a claim secured by a security interest in the debtor's principal residence must use this form during the course of a chapter 13 case to provide notice of changes in the ongoing installment payment amount. This notice will allow a debtor to properly maintain mortgage payments while in bankruptcy as permitted by § 1322(b)(5) of the Bankruptcy Code.

Official Form 10 (Supplement 2) is new. It implements Rule 3002.1(c) by providing a uniform format for the filer of a claim secured by a security interest in the debtor's principal residence to provide notice of fees, expenses, and charges that are incurred during the course of a chapter 13 case.

Form 25A, a model plan of reorganization for small businesses, is amended to change the effective date provision. On December 1, 2009, the concurrent periods for filing a notice of appeal and for the automatic stay of an order of confirmation were changed from 10 to 14 days. The effective date of the plan is therefore changed to the first business day following the expiration of those 14 days, unless the stay remains in effect on that date. In the latter case, the effective date is the first business day after the stay expires or is terminated, so long as the confirmation order has not been vacated.

* * * * *

PART III—CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3001. Proof of Claim

(a) FORM AND CONTENT. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

(b) WHO MAY EXECUTE. A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall 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 shall be filed with the claim.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder 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.

(d) EVIDENCE OF PERFECTION OF SECURITY INTEREST. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

(e) TRANSFERRED CLAIM.

(1) *Transfer of Claim Other Than for Security Before Proof Filed.* If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.

(2) *Transfer of Claim Other than for Security after Proof Filed.* If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

(3) *Transfer of Claim for Security Before Proof Filed.* If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(4) *Transfer of Claim for Security after Proof Filed.* If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(5) *Service of Objection or Motion; Notice of Hearing.* A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.

(f) EVIDENTIARY EFFECT. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

(g)[1] To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.

(As amended Pub. L. 98–353, title III, §354, July 10, 1984, 98 Stat. 361; Apr. 30, 1991, eff. Aug. 1, 1991; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2011, eff. Dec 1, 2011.)

[1] So in original. Subsec. (g) enacted without a catchline.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under §341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under §1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under §1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. The court may, for cause, enlarge the time for a governmental unit to file a proof of claim only upon motion of the governmental unit made before expiration of the period for filing a timely proof of claim.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.

(6) If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 23, 2008, eff. Dec. 1, 2008.)

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under §1322(b)(5) of the Code in the debtor's plan.

(b) NOTICE OF PAYMENT CHANGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the 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.

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with §1322(b)(5) of the Code.

(f) NOTICE OF FINAL CURE PAYMENT. Within 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 shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with §1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder 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

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

(Added Apr. 26, 2011, eff. Dec. 1, 2011.)

MEMORANDUM

TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Judge Laura Taylor Swain, Chair**
Advisory Committee on Bankruptcy Rules

RE: **Report of the Advisory Committee on Bankruptcy Rules**

DATE: **May 27, 2010 (revised June 14, 2010)**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 29 and 30, 2010, in New Orleans, Louisiana. Among the matters before the Committee were the proposed amendments and new rules that were published for public comment in August 2009. More than 150 written comments were submitted in response to the publication. The Committee held a hearing in New York City on February 5, 2010. Fifteen witnesses testified on the proposed amendments to two rules and on one proposed new rule. The Committee also conducted a telephonic hearing with one witness on December 22, 2009.

Through a series of telephonic subcommittee meetings and at its New Orleans meeting, the Committee carefully considered all of the comments and testimony it had received and, as is discussed below, it is recommending changes to several of the published rules in response. The Committee also studied a number of new proposals for amendments to the Bankruptcy Rules and Forms.

The Committee took action on the following matters, which it presents to the Standing Committee with the indicated recommendations:

(a) approval for transmission to the Judicial Conference of published amendments to Rules 2003, 2019, 3001, 4004, 6003, . . . and new Rules 1004.2 and 3002.1;

* * * * *

II. Action Items

A. Items for Final Approval

1. Amendments and New Rules Published for Comment in August 2009. **The Advisory Committee recommends that the proposed amendments and new rules that are summarized below be approved and forwarded to the Judicial Conference.** The texts of the amended rules and forms and of the new rules are set out in Appendix A.

- revision of subdivision (e) to limit the scope of this sanctions provision to failures to comply with the provisions of Rule 2019 and to eliminate the enumeration of materials the court may examine in making a determination of noncompliance; and
- the addition of a sentence to the Committee Note stating that the rule does not affect the right to obtain information by means of discovery or as ordered by the court under authority outside the rule.

Rule 3001 is amended to prescribe in greater detail the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the possible consequences of failing to provide the required information. As published, existing subdivision (c) was redesignated as (c)(1), and it included a new provision applicable to a claim based on an open-end or revolving consumer credit agreement. The new clause would have required the proof of claim to be accompanied by the last account statement sent to the debtor prior to the filing of the bankruptcy petition. Based on the testimony and comments that were submitted, the Committee voted to withdraw that proposed provision. In its place, the Committee recommends approval for publication of a new subdivision (c)(3), which is discussed below in section II B of this report.

New subdivision (c)(2) requires additional information to be filed with a proof of claim in a case in which the debtor is an individual. This additional information includes an itemization of interest, fees, expenses, and other charges incurred prior to the petition and included in a claim; a statement of the amount necessary to cure any prepetition default on a claim secured by a security interest in the debtor's property; and, for a claim secured by a security interest in the debtor's principal residence, an escrow account statement as of the petition date if an escrow account has been established. Subdivision (c)(2) also authorizes the imposition of sanctions on a creditor who fails to provide the information required by this subdivision.

The Committee received numerous comments and testimony favoring and opposing the published version of Rule 3001(c)(2) – both as applied to credit card and other unsecured claims and as applied to home mortgage claims. They are summarized below.

Requirement in subparagraph (A) for itemized statement of interest, fees, expenses, or charges. Most of the comments concerning this provision related to unsecured claims, particularly those based on credit card debt. Despite the current and longstanding requirement of the proof of claim form that an "itemized statement of interest or charges" be attached if the "claim includes interest or other charges in addition to the principal amount of claim," commentators opposing this proposed rule provision asserted that it is often impossible to break out the components of credit card debt because, depending upon the terms of the applicable credit agreement, unpaid interest and fees may be folded into the principal balance. They further contended that in most bankruptcy cases the debtor has no need for this information. While they acknowledged that mortgage lenders may have a history of including inflated or unnecessary fees and charges in their claims, they argued that this problem does not generally exist with respect to unsecured credit card claims.

Two comments addressed this requirement as it applies to mortgage claims. Attorney John Cannizzaro suggested that this provision should require more detail. He proposed that the following

sentence be added to subparagraph (A): "The itemized statement shall include evidence of the expenditure, the identity of the entity to whom the payment was made and the reason for the expenditure." The other comment was submitted by Judge Marvin Isgur, and it is discussed below in connection with subparagraph (B).

Requirement in subparagraph (B) for a statement of the amount necessary to cure any default as of the date of the petition. Three comments addressed this requirement. The written comment submitted on behalf of the American Bankers Association, the Financial Services Roundtable, and the Mortgage Bankers Association raised two objections to this requirement. First, it noted that in the case of a judgment lien, the cure amount would be the entire indebtedness. Second, it questioned the need for the inclusion of this requirement in the rule since the proof of claim form already requires this information to be provided.

Another comment on this subparagraph was submitted by Bankruptcy Judge Marvin Isgur of the Southern District of Texas in his written comments. While supporting the purpose behind this provision and subparagraph (A), Judge Isgur questioned the effectiveness of the two provisions in addressing the problems that he has encountered with home mortgage proofs of claim. He said that a full loan history, which provides more detailed information about the assessment of fees, expenses, charges, and the application of payments, is needed. Judge Isgur expressed particular concern that, without the submission of a full loan history, it may not be evident when payments were actually made by the debtor (as opposed to the months for which payments were applied by the mortgagee). He advocated the use of a form similar to the local form that has been adopted by his district.

The National Association of Consumer Bankruptcy Attorneys also urged that a complete loan history be required. It stated that "[w]ithout such documents, a trustee cannot know how much of the amount claimed is for penalties, such as late charges and overbalance fees, that are classified differently in bankruptcy."

Requirement in subparagraph (C) for an escrow account statement. Three comments specifically addressed this provision. First, the written comment of the American Bankers Association, the Financial Services Roundtable, and the Mortgage Bankers Association noted that an escrow statement is already required to be provided by local rules in many jurisdictions. The comment expressed the need for a uniform national form to provide this information and suggested that the proposal be withdrawn until such a form is developed.

Second, chapter 13 trustee Debra Miller, on behalf of the National Association of Chapter Thirteen Trustees' Mortgage Liaison Committee, raised concerns about this provision. She explained that some smaller servicers lack the capacity to run an escrow analysis as of a particular date (such as the date of the filing of the petition).

Finally, Judge Isgur, in both his testimony on December 22, 2009, and his written comments, raised a concern about subparagraph (C). He stated that the requirement of an escrow account statement prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law might conflict with the Fifth Circuit's decision in *Campbell v. Countrywide*

Home Loans, Inc., 545 F.3d 348 (2008). He described that decision as holding that the prepetition arrearage includes all amounts that the home mortgage lender could have demanded be paid into an escrow account prior to the petition date. He was concerned that an escrow account statement prepared according to applicable nonbankruptcy law would result in a smaller prepetition escrow arrearage, which could be cured over the life of the plan, and would lead to a larger postpetition escrow adjustment, which would have to be paid as part of the debtor's ongoing mortgage payments.

Sanctions under subparagraph (D). This is the part of proposed Rule 3001(c)(2) that attracted the most attention and opposition. Several of the comments submitted by persons other than members of the consumer bankruptcy bar raised concerns about this provision. The overall theme of these comments was that the proposed sanctions are overly harsh, are inconsistent with the Code, exceed the authority under the Rules Enabling Act, and are attempting to address a problem that has not been shown to exist. The sanctions in proposed Rule 3001(c)(2)(D) can be imposed on all types of claimants in cases of individual debtors, and the comments generally did not distinguish between the impact of the provision on inadequately documented home mortgage proofs of claim and on unsecured or other types of secured claims.

The most detailed critique of this provision was submitted by Professor Bernadette Bollas Genetin of the University of Akron School of Law. She argued that the provision sweeps too broadly and that by requiring the attachment of additional supporting documentation in every case, even when there is no demonstrated need for the information, the proposed amendments to Rule 3001(c), including its sanction provision, would abridge creditors' substantive rights in violation of the Rules Enabling Act. Viewing the sanction in subparagraph (D) as being tantamount to claim disallowance, she contended that it is inconsistent with § 502 of the Code, as well as disproportionate to the violation in most cases.

Representatives Lamar Smith (ranking minority member of the House Judiciary Committee) and James Langevin of Rhode Island also expressed concerns about the sanctions, focusing primarily on the impact of the rule on unsecured creditors. Both Congressmen questioned whether there was evidence of a significant problem of unsupported claims being filed in consumer cases, and Rep. Smith noted the potential for litigation over compliance and the imposition of new sanctions and attorney's fees for failure to abide by the requirements. He further questioned the authority to provide for the disallowance of claims for failure to comply with the requirements of a rule, as opposed to the grounds for disallowance listed in § 502(b) of the Code.

Likewise, attorney Patti H. Bass contended that subparagraph (D) in effect provides a new basis for the disallowance of a claim, one that is not authorized by the Code. She argued that the provision is therefore in conflict with the Supreme Court's decision in *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007), which holds that the grounds for disallowance are limited to the ones statutorily specified. She further submitted that the sanction provision would create an incentive for debtors to refrain from scheduling debts that they know they owe if they believe that the creditor lacks all of the documentation that would be required under the rule. The debtor would just object to the creditor's insufficiently supported proof of claim, and the

creditor would be prevented by the sanction provision from presenting its proof of the validity of the claim in response to the objection.

The comment of John McMickle on behalf of the Housing Policy Council, Financial Services Roundtable, American Bankers Association, and the Mortgage Bankers Association argued that the sanction provision "runs afoul of the Rules Enabling Act by 'modifying' and 'diminishing' a mortgage servicer's statutory right to rely on a presumption of validity for timely-filed proofs of claim." The comment made by Philip Corwin on behalf of several of the same organizations was similar.

Finally, the Insolvency Law Committee of the Business Law Section of the California State Bar commented that the proposed sanctions are too harsh. This group suggested that instead of precluding the creditor from using any omitted information to prove its claim, an insufficiently supported proof of claim should be temporarily disallowed and the claimant should be given an opportunity to provide the missing documentation.

On the other side of the issue, numerous comments filed by consumer bankruptcy lawyers and trustees strongly supported the proposed amendments. They recounted their frustrating experiences in dealing with bare proofs of claim filed by bulk purchasers of credit card debt. They said that claims often failed to comply with existing documentation requirements and that it was impossible to determine how the claim amounts were calculated. Furthermore, they argued, when additional information was sought, claimants frequently failed to respond until an objection was filed, at which point they either withdrew their claims or belatedly provided information that should have been attached to the proof of claim.

Consumer lawyers also expressed frustration with the failure of mortgage claimants to comply with the existing rule requirements and noted their gratitude for the Committee's efforts to address the problems. Representatives John Conyers, Jr., (chair of the House Judiciary Committee) and Steve Cohen (chair of the Subcommittee on Commercial and Administrative Law) submitted a comment that expressed the need for "more enforcement tools" to "polic[e] creditor abuses in consumer bankruptcy cases." They noted testimony given at a congressional hearing that asserted that the filing of false proofs of claim in bankruptcy cases had led families to lose their homes.

Debtors' lawyers explained the disincentives to challenging inadequately documented claims. Debtor's counsel often receives no additional compensation for the effort, and any money freed up from payment to the creditor whose claim is challenged goes to other unsecured creditors. In some cases, they said, the cost of objecting would exceed the payment that would be made to the creditor. Nevertheless, some lawyers or trustees said that, when they had pursued challenges to claims filed by bulk purchasers of credit card claims, they had discovered claims that were time-barred, filed against the wrong debtor, or excessive in amount.

Supporters of the amendments applauded the proposal to provide sanctions for the failure of claimants to comply with the rules. They noted the burdens the Bankruptcy Code and Rules place on debtors seeking bankruptcy relief and expressed the view that bulk purchasers should not be free

to ignore rule requirements based on assertions that compliance would be unduly burdensome. Some members of the consumer bar advocated strengthening the proposed requirements and sanctions.

The Committee carefully considered all of the comments and testimony regarding Rule 3001(c)(2), and it engaged in extensive discussion of the sanction provision. Following its deliberations, the Committee voted to recommend final approval of the provision, with the following changes made to the published draft of subdivision (c)(2):

- Subparagraph (C) was revised to refer to the official form that is being proposed as a required attachment for a proof of claim filed by a creditor with a security interest in the debtor's principal residence. The Committee is recommending that form (Official Form 10 (Attachment A)) for publication for comment in August 2010.
- In subparagraph (D), the sanction provision was revised to eliminate the phrase "shall be precluded," and to provide that the court "may, after notice and hearing, take either or both" of the listed actions.
- The term "security interest" was added to the discussion in the Committee Note of subdivision (c)(2)(B) to underscore that the requirement of a statement of the amount required to cure a prepetition default applies only to consensual liens, and not to judgment liens.
- The discussion in the Committee Note of subparagraph (D) was expanded. As revised, it states that grounds for disallowance of a claim are governed by § 502(b) of the Code and that inadequate documentation of a proof of claim, by itself, is not a basis for disallowance. The Committee Note now also points out that the court retains discretion to allow an amendment to a proof of claim under appropriate circumstances and to impose a sanction different from or in addition to the preclusion of the introduction of evidence.
- Stylistic changes were made to the provision.

Rule 3002.1 is new. It assists in the implementation of § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. As published, subdivision (a) required the holder of a claim secured by a security interest in the debtor's principal residence to provide at least 30 days' notice to the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. Subdivision (b) prescribed the procedure for giving that notice. Subdivision (c) required the holder of a home mortgage claim to give an itemized notice of any postpetition fees, expenses, or charges within 180 days after they are incurred, and it allowed the debtor or trustee to challenge those additional charges within a year after notice is given.

Subdivisions (d)-(f) established a procedure for determining whether the debtor has cured any default and is otherwise current on the debtor's mortgage payments at the close of a chapter 13 case. Subdivision (g) specified sanctions that could be imposed if the holder of a claim secured by the debtor's principal residence failed to provide any of the information required by this rule.

The Committee received approximately 100 written comments on the published rule, and three witnesses testified concerning it. About three-fourths of the comments were submitted by members of the consumer bankruptcy bar in support of the rule. Several of those commentators described the difficulty they have encountered with the misapplication of payments during the pendency of a chapter 13 case and the lack of information about postpetition mortgage payment changes and the assessment of charges. Attorney Annabelle Patterson, for example, stated that she has had clients successfully emerge from chapter 13, believing that they were current on their mortgage payments, only to be immediately confronted with a notice of delinquency.

None of the comments or testimony opposed the rule in its entirety, but some suggested the need for revision of certain of its provisions. The most significant of these comments are briefly summarized below by category.

Timing of notice of payment changes. Three comments raised questions about the proposed requirement of published subdivision (a) that a mortgagee file a notice of payment change "no later than 30 days before a payment at the new amount is due." They expressed concerns about how this provision would apply to loan payments that adjust frequently. One comment suggested that to be consistent with the Truth in Lending Act's notice requirement for adjustable rate mortgages, the notice required by the rule should be given "at least 25, but no more than 120, calendar days prior to the due date of the new payment amount."

Filing of notice of payment changes. The comments reflected a division of opinion within the court system about the requirement that the notice of payment change be filed as a supplement to the proof of claim (i.e. on the claims register), rather than on the case docket. A comment submitted on behalf of the Bankruptcy Judges Advisory Group supported the rule's provision for the filing of the notice as a supplement to the proof of claim, which filing can be made by a creditor without the assistance of a lawyer. Another comment, however, indicated that a majority of bankruptcy clerks prefer that payment change notices be filed on the case docket.

Timing of notice of fees, expenses, and charges and of motion for court determination of validity. Three comments expressed concern about the requirements of subdivision (c) of the published rule that the mortgagee serve a notice of fees, expenses, and charges "no later than 180 days after the date when the fees, expenses, or charges are incurred" or that the debtor or trustee file a motion "no later than one year after service of the notice" to obtain a court determination of the validity of the fees, expenses, and charges. Testifying at the New York hearing, attorney Philip Corwin stated that compliance with the 180-day requirement may not be feasible in a significant number of cases. His later-submitted written comments did not elaborate on this assertion. The comment submitted by John McMickle on behalf of the Housing Policy Council and other groups suggested without explanation that the 180-day provision be changed to one year and that the provision for filing a motion to seek a judicial determination be changed from one year to 90 days. Finally, Bankruptcy Judge Howard R. Tallman of the District of Colorado stated that the 180-day notice requirement could result in unnecessary supplementation in chapter 13 cases that are never successfully completed. He also noted that both debtors' and creditors' lawyers in his district

expressed concern about the costly prospect of annual litigation over potentially small amounts of fees and charges.

Procedure for determining the status of the debtor's payments at the end of the case. Several comments raised issues about the procedure provided in subdivisions (d) - (f) of the published rule regarding the debtor's successful cure of any default and completion of all payments due after the petition. One concern related to the timing of the notice provision. Marie-Ann Greenberg, a standing trustee in the District of New Jersey, pointed out that mortgage defaults, especially when the amounts are relatively small, are sometimes cured early in the case. In such cases the procedure specified in subdivisions (d) - (f) would not result in a determination upon the conclusion of the case that the debtor was current on all payments. Two other comments expressed similar concerns.

Another issue was raised by Bankruptcy Judge Marvin Isgur of the Southern District of Texas in his written comments. He suggested that, in place of the proposed procedure, the rule should authorize a motion at the end of the case for a determination that the debtor is current on all ongoing mortgage payments and has paid all arrearages. The court's ruling on this motion would have a preclusive effect on both parties. Thus if the mortgage were determined to be current at the end of the case, the mortgagee would be precluded from declaring a default and initiating foreclosure proceedings in state court once the bankruptcy case was closed.

Appropriateness of the rule in all districts. Several comments suggested that proposed Rule 3002.1 is designed for or is appropriate only in so-called "conduit" districts – those in which the chapter 13 trustee disburses all mortgage payments – as opposed to districts in which the debtor makes ongoing mortgage payments directly to the mortgagee. These comments were based on the provisions of the rule that require notices to be filed on the claims register and service to be made on the trustee (as well as on the debtor and debtor's counsel).

The Committee made several changes to the published Rule 3002.1 in response to the comments and testimony it received:

- As a result of an organizational revision of the rule, the subdivision designations were changed.
- The timing of the notice of payment change, now addressed by subdivision (b), was changed from 30 to 21 days before payment must be made in the new amount.
- The triggering event for the filing of the notice of final cure payment, now addressed by subdivision (f), was changed to the debtor's completion of all payments required under the plan. The subdivision now requires that notice be given to the holder of the mortgage claim of its obligation to file and serve a response under subdivision (g).
- The provision governing the consequences of the failure to provide information as required by the rule, now subdivision (i), was revised in the same manner as the sanction provision of Rule 3001(c)(2)(D).

- A sentence was added to the first paragraph of the Committee Note that clarifies that the rule applies in all districts, regardless of whether ongoing mortgage payments are made directly by the debtor or by the chapter 13 trustee.
- Stylistic changes were made throughout the rule and Committee Note.

With these changes made to the preliminary draft of Rule 3002.1, the Committee unanimously recommends that it be given final approval.

Rule 3001. Proof of Claim

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall 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 shall be filed with the claim.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder 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.

* * * * *

COMMITTEE NOTE

Subdivision (c). Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information.

Existing subdivision (c) is redesignated as (c)(1).

Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement

itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.

If a claim is secured by a security interest in the property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default.

If the claim is secured by a security interest in the debtor's principal residence, the proof of claim must be accompanied by the attachment prescribed by the appropriate Official Form. In that attachment, the holder of the claim must provide the information required by subparagraphs (A) and (B) of this paragraph (2). In addition, if an escrow account has been established in connection with the claim, an escrow account statement showing the account balance, and any amount owed, as of the date the petition was filed must be submitted in accordance with subparagraph (C). The statement must be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.*, 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act). Thus the holder of the claim may provide the escrow account statement using the same form it uses outside of bankruptcy for this purpose.

Subparagraph (D) of subdivision (c)(2) sets forth sanctions that the court may impose on a creditor in an individual debtor case that fails to provide information required by subdivision (c). Failure to provide the required information does not itself constitute a ground for disallowance of a claim. *See* § 502(b) of the Code. But when an objection to the allowance of a claim is made or other litigation arises concerning the status or treatment of a claim, if the holder of that claim has not complied with the requirements of this subdivision, the court may preclude it from presenting as evidence any of the omitted information, unless the failure to comply with this subdivision was substantially justified or harmless. The court retains discretion to

allow an amendment to a proof of claim under appropriate circumstances or to impose a sanction different from or in addition to the preclusion of the introduction of evidence.

Changes Made After Publication

Subdivision (c)(1). The requirement that the last account statement sent to the debtor be filed with the proof of claim was deleted.

Subdivision (c)(2). In subparagraph (C), a provision was added requiring the use of the appropriate Official Form for the attachment filed by a holder of a claim secured by a security interest in a debtor's principal residence.

In subdivision (c)(2)(D), the clause "the holder shall be precluded" was deleted, and the provision was revised to state that "the court may, after notice and hearing, take either or both" of the specified actions.

Committee Note. In the discussion of subdivision (c)(2), the term "security interest" was added to the sentence that discusses the required filing of a statement of the amount necessary to cure a prepetition default.

The discussion of subdivision (c)(2)(D) was expanded to clarify that failure to provide required documentation, by itself, is not a ground for disallowance of a claim and that the court has several options in responding to a creditor's failure to provide information required by subdivision (c).

Other changes. Stylistic changes were made to the rule and the Committee Note.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(b) NOTICE OF PAYMENT CHANGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the 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.

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed,

and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) NOTICE OF FINAL CURE PAYMENT. Within 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 shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2)

whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder 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

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

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the

part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a). Subdivision (a) specifies that this rule applies only in a chapter 13 case to claims secured by a security interest in the debtor's principal residence.

Subdivision (b). Subdivision (b) requires the holder of a claim to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount at least 21 days before the new payment amount is due.

Subdivision (c). Subdivision (c) requires an itemized notice to be given, within 180 days of incurrence, of any postpetition fees, expenses, or charges that the holder of the claim asserts are recoverable from the debtor or against the debtor's principal residence. This might include, for example, inspection fees, late charges, or attorney's fees.

Subdivision (d). Subdivision (d) provides the method of giving the notice under subdivisions (b) and (c). In both instances, the holder of the claim must give notice of the change as prescribed by the appropriate Official Form. In addition to serving the debtor, debtor's counsel, and the trustee, the holder of the claim must also file the notice on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to any notice given under subdivision (b) or (c), and therefore the notice will not constitute prima facie evidence of the validity and amount of the payment change or of the fee, expense, or charge.

Subdivision (e). Subdivision (e) permits the debtor or trustee, within a year after service of a notice under subdivision (c), to seek a determination by the court as to whether the fees, expenses, or charges set forth in the notice are required by the underlying

agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (f). Subdivision (f) requires the trustee to issue a notice to the holder of the claim, the debtor, and the debtor's attorney within 30 days after completion of payments under the plan. The notice must (1) indicate that all amounts required to cure a default on a claim secured by the debtor's principal residence have been paid, and (2) direct the holder to comply with subdivision (g). If the trustee fails to file this notice within the required time, this subdivision also permits the debtor to file and serve the notice on the trustee and the holder of the claim.

Subdivision (g). Subdivision (g) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (f). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and also whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code. If the holder of the claim contends that all cure payments have not been made or that the debtor is not current on other payments required by § 1322(b)(5), the response must itemize all amounts, other than regular future installment payments, that the holder contends are due.

Subdivision (h). Subdivision (h) provides a procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. Within 21 days after the service of the statement under (g), the trustee or debtor may move for a determination by the court of whether any default has been cured and whether any other non-current obligations remain outstanding.

Subdivision (i). Subdivision (i) specifies sanctions that may be imposed if the holder of a claim fails to provide any of the information as required by subdivisions (b), (c), or (g).

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).

Changes Made After Publication

Subdivision (a). As part of organizational changes intended to make the rule shorter and clearer, a new subdivision (a) was inserted that specifies the applicability of the rule. Other subdivision designations were changed accordingly.

Subdivision (b). The timing of the notice of payment change, addressed in subdivision (a) of the published rule, was changed from 30 to 21 days before payment must be made in the new amount.

Subdivision (d). The provisions of the published rule prescribing the procedure for providing notice of payment changes and of fees, expenses, and charges were moved to subdivision (d).

Subdivision (e). As part of the organizational revision of the rule, the provision governing the resolution of disputes over claimed fees, expenses, or charges was moved to this subdivision.

Subdivision (f). The triggering event for the filing of the notice of final cure payment was changed to the debtor's completion of all payments required under the plan. A sentence was added

requiring the notice to inform the holder of the mortgage claim of its obligation to file and serve a response under subdivision (g).

Subdivision (h). The caption of this subdivision (which was subdivision (f) as published), was changed to describe its content more precisely.

Subdivision (i). The clause "the holder shall be precluded" was deleted, and the provision was revised to state that "the court may, after notice and hearing, take either or both" of the specified actions.

Committee Note. A sentence was added to the first paragraph to clarify that the rule applies regardless of whether ongoing mortgage payments are made directly by the debtor or disbursed through the chapter 13 trustee. Other changes were made to the Committee Note to reflect the changes made to the rule.

Other changes. Stylistic changes were made throughout the rule and Committee Note.

NCLC REPORTS

Bankruptcy and Foreclosures Edition

Volume 30
November/December 2011

Developments and Ideas For the Practice of Consumer Law

Special Issue: New Proof of Claim and Mortgage Rules and Forms

New Bankruptcy Rules & Forms Respond to Mortgage Claim Documentation Problems

In response to long-standing problems with mortgage servicing and claim documentation in chapter 13 cases, new bankruptcy rules and official forms have been adopted. The new rules and forms, which go into effect on December 1, 2011, 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.

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

The first two changes relate to 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 a new sanction for noncompliance.

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,[1] though it is implemented for dwelling-secured claims through a new Official Form as discussed below. Thus, debt buyers who file claims on open-end credit card accounts will be required to comply. Based on testimony several debt-buyer organizations filed with the Rules Committee during the rule comment period, some creditors may take the position that an itemization on a credit card debt is not needed because they contend that the total amount owed is principal. These creditors argue that the accounting conventions for such accounts permit them to treat all unpaid interest and fees from prior payment periods as principal. Thus, courts may be asked to decide whether the failure to include an itemization on claims for such accounts is in compliance with the rule.

[1] 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).

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.[2] Again, the instructions to Form 10 have long required secured creditors to provide this information, so making the requirement explicit in Rule 3001(c)(2)(B) should not alter current 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. Most significantly, 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,[3] 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.[4]

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 added: "You may also attach a summary in addition to the documents themselves." This clarifies that a summary alone is insufficient and resolves an apparent conflict between the current rule requirement that the writing upon which a claim is based and evidence of a security interest be

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

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

[4] *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 for filing proofs of claim that were prepared by clerks who were not paralegals or legally trained, and attorney for firm reviewed only a random sample of ten percent of filed claims).

filed with the 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. However, proposed new Rule 3001(c)(3), which would take effect on December 1, 2012 if adopted, would permit a summary statement to be filed with claims based on an open-end consumer credit agreement in lieu of the actual documents.[5] The claim holder will be required to provide the actual documents upon which the claim is based if a written request is made by the debtor or other party in interest.[6]

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 form,[7] where the creditor discloses and itemizes the components of the prepetition mortgage arrearage.

Itemization of Default Fees. Before implementation of this new form, mortgage servicers generally provided some form of disclosure of the arrearage components. In her study of mortgage claims, Professor 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.[8] 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."[9] 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 prepared as of the petition date "in a form consistent with applicable non-bankruptcy law." The Real Estate Settlement Procedures Act (RESPA) is the applicable non-bankruptcy law for purposes of an escrow statement.[10]

By requiring that the statement simply 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 hold that, 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.[11] Thus, creditors 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 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." Other amounts representing a prepetition "escrow shortage or deficiency" not already included in installment payments due as listed in Part 3 can be listed in Part 2, Item 13. Debtor's counsel should review these two entries carefully to check whether the creditor is attempting to recover the same amount twice.

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." This notice requirement as well as the other new requirements for home mortgages under Rule 3002.1 apply only to claims that are 1) secured by the debtor's principal residence and 2) provided for under § 1322(b)(5) in the debtor's plan. Thus, if debtors file a chapter 13 case to deal with a non-mortgage problem and their plan does not provide for the curing of a mortgage default because the mortgage is current, the creditor is not required under Rule 3002.1(b) to send payment-change notices. Of course, nothing would prohibit the creditor from voluntarily providing such notices in this situation, and that would certainly be good practice.[12] Moreover, local rules may require that such notices be given even when there is no cure plan.

Notice must be given on Official Form 10 (Supplement 1), the Notice of Mortgage Payment Change.[13] The form requires the creditor to state the basis for the changed payment amount, the current and new payment amounts, and the date when 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 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 non-bankruptcy law (TILA and RESPA).

The form can accommodate payment changes for reasons other than 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

---

[5] An earlier proposal to require the filing of the last account statement with claims on open-end accounts was withdrawn. The proposed rule amendment can be viewed at: www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules.aspx.

[6] *See* proposed Rule 3001(c)(3)(B).

[7] Fed. R. Bankr. P. 3001(c)(2)(C); Official Form 10 (Attachment A).

[8] Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008).

[9] *Id.*.

[10] For a RESPA escrow discussion, see NCLC's Foreclosures Ch. 8 (3d ed. 2010 and 2011 Supp.).

[11] *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).

[12] A creditor that has not filed a claim because the debtor was current when the case was filed can provide notice to the debtor and trustee for informational purposes without filing it with the court as a claim supplement, unless local rules provide otherwise.

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

and attaching a copy of the loan modification agreement to the form.[14]

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. [15] In the event that multiple Supplement 2 forms are filed during a chapter 13 case, creditors should be careful in listing 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, as in a stay relief consent order for example, would not be listed on the new form. The instruction in Part 1 of the form makes this clear by stating: "Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court."

Not all fees incurred on the debtor's mortgage account are subject to the rule. Only those fees which are incurred in connection with the claim and which the creditor contends are recoverable against the debtor or the debtor's principal residence must be noticed. Thus, the creditor might incur an attorney 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 nonrecoverable (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.

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 these new rules, some courts had held that attorney fees for claim preparation could be listed on the proof of claim even though the fees are incurred postpetition.[16] Arguably nothing in the new rules explicitly overrules these decisions, so that a 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."[17] 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.[18] A new selection on the Bankruptcy Events menu in the CM/ECF system has been added for these filings.[19]

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. Thus, the filing of the notice without any further action should not result in the listed fees being paid by the trustee under the plan. If the debtor does not object to the fees and intends for the fees to be paid by the trustee under the plan, an explicit plan provision, a chapter 13 plan modification, or a 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.

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 of the fee notice (Form 10-Supplement 2) seeking a determination of the propriety of the fee.[20] If a motion is filed, 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 Bankruptcy Code § 1322(b)(5). This clearly defined procedure should be helpful to debtors in districts where courts have previously refused to address disputes involving postpetition fees, particularly in cases in which the debtor is the disbursing agent for ongoing payments.[21]

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

---

[14] Some bankruptcy courts require in a chapter 13 that the court approve a loan modification agreement before it can take effect. Filing Supplement 1 is not a substitute for court approval, unless permitted by the court.

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

[16] *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).

[17] 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."

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

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

[20] *See* sample motion, *infra*.

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

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 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 thirty-day period following plan completion, it may be filed and served by the debtor.[22]

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.[23] The statement shall be filed as a supplement to the creditor's claim and is not entitled to presumptive validity under Rule 3001(f).

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 claimed amounts are owed and seeking an order declaring that the debtor has cured the default and paid all required postpetition amounts.[24] It is advisable for the debtor to file this motion even if the mortgage holder has failed to respond to the Notice of Final Cure Payment in order to obtain an order that the mortgage has been fully cured and is 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 plan 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.

[22] *See* sample Notice of Final Mortgage Cure Payment, *infra*.
[23] Fed. R. Bankr. P. 3002.1(g).
[24] Fed. R. Bankr. P. 3002.1(h). *See* sample Motion for Determination of Final Cure and Payment of All Postpetition Payments, *infra*.

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.[25] 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 at case closing) as evidence in a contested matter or adversary proceeding in the case, unless failure was substantially justified or is harmless.[26]
- Award other appropriate relief, including reasonable attorney fees and expenses to the debtor for the additional proceedings necessary to resolve the issue or other problems caused by the creditor's noncompliance.[27]

An appropriate use of the sanction, for example, would come in the situation where a creditor has failed to notify the debtor of escrow account changes during the case as required by Rule 3002.1(b). If the creditor responds to the Notice of Final 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 the claimed escrow payments are owed, award attorney 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 is that the evidence preclusion applies only in proceedings in the bankruptcy court. Thus, if a creditor asserts for the first time in a state foreclosure proceeding initiated after the debtor completes the chapter 13 plan that fees incurred during the bankruptcy case are owed, 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.[28]

Another possible response to the threatened foreclosure would be for the debtor to argue in the state court foreclosure proceeding that the creditor is judicially estopped from asserting that the account is in default based on 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.[29] The

[25] *See* Fed. R. Civ. P. 37.
[26] Fed. R. Bankr. P. 3001(c)(2)(D)(i) and 3002.1(i)(1).
[27] Fed. R. Bankr. P. 3001(c)(2)(D)(ii) and 3002.1(i)(2).
[28] 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)."
[29] *See* NCLC's Consumer Bankruptcy Law and Practice § 14.3.2.6.3 (9th ed. 2009 and 2011 Supp.).

doctrine is particularly appropriate in cases in which a party was aware in the earlier proceeding of the factual basis for a claim they are pursing in the later proceeding and there was a duty to disclose information related to the claim in the earlier proceeding.[30] 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 take effect on Dec. 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 has filed a proof of claim before Dec. 1, 2011. However, the new requirements may apply to pending cases to the extent that an action subject to a new rule occurs after Dec. 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 Dec. 1, 2011, the creditor should comply with Rules 3002.1(b) and (c) and send the required form 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 Dec. 1, 2011.

Sample Pleadings Under the New Rules

Debtor's counsel can use the following sample pleadings to implement the new rules. If the creditor holding a claim is an insured depository institution, service of these documents generally will not be effective unless an officer of the institution is served by certified mail. *See* Fed. R. Bankr. P. 7004(h).

[*Caption: Official Form 16A*]

Motion for Determination of Whether Fees, Expenses, and Charges Are Required to Cure or Maintain Payments

This motion is filed by the Debtors [*name*] in the above captioned chapter 13 case pursuant to Fed. R. Bankr. P. 3001.2(e) and 9014 to obtain an order determining that the fees, expenses, and charges claimed by [*name of mortgage holder*] are not required to cure the default or maintain payments in accordance with 11 U.S.C. § 1322(b)(5). In support of this motion the debtors state as follows:

1. The debtors commenced this case on [*date*] with the filing of a petition for relief under chapter 13 of the Bankruptcy Code. The debtors' plan was confirmed on [*date*] providing for a cure of the default on the mortgage held by [*name of mortgage holder*].

2. During the last year, from [*date*] to [*date*], [*name of mortgage holder*] filed six Notices of Postpetition Mortgage Fees, Expenses, and Charges asserting that fees, expenses, and charges in the amount of [*$ amount*] were incurred in connection with the claim and are recoverable against the debtor or the debtor's residence.

3. The property inspection fees in the amount of [*$ amount*] listed in the Notice(s) dated [*date(s)*] are not authorized under the mortgage between the parties because the debtor is current with all plan and postpetition payments and such inspections are therefore not reasonable or appropriate to protect [*name of mortgage holder's*] interest in the property and rights under the mortgage.

4. The attorney fees in the amount of [*$ amount*] listed in the Notice dated [*date*] were incurred prepetition and should have been disclosed on [*name of mortgage holder's*] Proof of Claim and Mortgage Proof of Claim Attachment.

5. The late fees in the amount of [*$ amount*] listed in the Notice(s) dated [*date(s)*] are not authorized under the mortgage between the parties and applicable nonbankruptcy law because the debtors have timely made all postpetition mortgage payments.

6. The appraisal fee in the amount of [*$ amount*] listed in the Notice dated [*date*] was incurred more than 180 days before the Notice was filed and served, and therefore [*name of mortgage holder*] should be precluded from recovering the fee from the debtor or the debtor's residence in accordance with Fed. R. Bankr. P. 3002.1(i).

WHEREFORE, the debtors request that this Court enter an Order:

a. Determining that the fees, expenses and charges listed above are not required by the mortgage agreement and applicable nonbankruptcy law to cure the default on the debtors' mortgage account or to maintain postpetition payments in accordance with § 1322(b)(5);

b. [*optional clause if noncompliance with notice requirements*] Awarding reasonable attorney fees to the debtors pursuant to Fed. R. Bankr. P. 3002.1(i) for their expenses in bringing this proceeding as a result of the [*name of mortgage holder's*] failure to provide debtors with the information required by Fed. R. Bankr. P. 3002.1(b), (c), or (g);

c. Granting such other relief as is just and equitable.

Dated: [*date of signature*]

[*signature*]
Attorney for Debtor

[*Caption: Official Form 16A*]

Debtors' Notice of Final Mortgage Cure Payment

Debtors [*name*] hereby give notice under Fed. R. Bankr. P. 3002.1(f) that they have completed all payments under their confirmed chapter 13 plan and have paid the amounts necessary to cure the default on the mortgage held by [*name of mortgage holder*].

Within 21 days after service of this notice, [*name of mortgage holder*] must file as a supplement to its proof of claim and serve on the trustee, debtor, and debtor's counsel, pursuant to Federal Rule of Bankruptcy Procedure 3002.1(g), a statement indicating whether it agrees that:

1. The debtor has paid in full the amount required to cure the default on the claim; and
2. The debtor is otherwise current on all payments consistent with 11 U.S.C. § 1322(b)(5).

If [*name of mortgage holder*] contends that any cure or postpetition amounts remain unpaid as of the date of that statement, such amounts must be itemized in that statement.

Dated: [*date of signature*]

[*signature*]
Attorney for Debtor

[*Caption: Official Form 16A*]

Motion for Determination of Final Cure and Payment of All Postpetition Payments

The debtors move the Court pursuant to sections 1322, 1327, and 1328 of the Bankruptcy Code, and Bankruptcy Rule 3002.1(h), for the entry of an order in this case to declare the mortgage loan currently held [*or serviced*] by [*mortgage holder or servicer*] to have been cured by the completion of the debtors' chapter 13 plan and to be current as of the date of entry of the order granting this motion. In support of their motion the debtors state:

1. This case was commenced by the filing of a petition with the Clerk of this court on [*date*].

[30] *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).

NCLC REPORTS

Developments and Ideas for the Practice of Consumer Law

The National Consumer Law Center, Inc. (NCLC), a non-profit legal organization which represents the interests of low-income consumers, publishes NCLC REPORTS 24 times a year. NCLC REPORTS consists of four separate editions: *Bankruptcy & Foreclosures* (ISSN 1054-3775); *Consumer Credit & Usury* (ISSN 0890-2615), *Debt Collection & Repossessions* (ISSN 0890-2607); and *Deceptive Practices & Warranties* (ISSN 0890-0973). Each edition is published six times a year.

NCLC REPORTS is sent free to every neighborhood legal services office funded by the Legal Services Corp. Other individuals and institutions may purchase subscriptions for the entire NCLC REPORTS at a price of $175 (which includes a three ring binder to file NCLC REPORTS) or for each edition at a price of $60 per edition/year, plus $10 for the three ring binder.

For subscription orders or more information, write or call:

National Consumer Law Center, Inc.

NCLC REPORTS
7 Winthrop Sq., 4th Floor, Boston, MA 02110-1245
Phone: 617-542-9595, Fax: 617-542-8028
E-Mail: publications@nclc.org
Visit our website: www.consumerlaw.org

NCLC REPORTS
National Consumer Law Center, Inc.
7 Winthrop Sq., 4th Floor
Boston, MA 02110-1245

NONPROFIT ORG.
U.S. POSTAGE
PAID
BOSTON, MA
PERMIT NO. 57091

2. The debtors' chapter 13 plan provided for a cure of the debtor's prepetition mortgage default and the maintenance of current mortgage payments during the plan pursuant to 11 U.S.C. § 1322(b)(5).

3. The debtors' prepetition mortgage default was determined by the allowance of mortgagee's Proof of Claim and the Mortgage Proof of Claim Attachment (Attachment A), in the amount of [*total amount necessary to cure the default as of the petition date as set forth in proof of claim and Part 3 of Attachment A or as determined by court*].

4. The debtors' chapter 13 plan providing for payment of that amount and maintenance of current payments by the debtor was confirmed by order of this Court and is binding on [*mortgage holder or servicer*] under 11 U.S.C. § 1327.

5. After the debtors completed their plan payments, on [*date*], the trustee [*or debtors*] filed a Notice of Final Mortgage Cure Payment in this case pursuant to Fed. R. Bankr. P. 3002.1(f).

6. The amount established as the arrearage to be cured by the debtors on their mortgage has been paid in full, as confirmed by the Notice of Final Cure Payment filed the trustee [or debtors].

7. The Notice of Final Cure Payment filed by the trustee [*or debtors*] informed [*mortgage holder or servicer*] of its obligation to respond and to file a statement indicating whether it agrees that: a) the debtor has paid in full the amount required to cure the default on the claim, and b) the debtor is otherwise current on all payments consistent with 11 U.S.C. § 1322(b)(5).

8a. [*Alternative A*] In response to this Notice, [*mortgage holder*] filed on [*date*] a statement as a supplement to its proof of claim indicating that fees, expenses, and charges in the amount of [*$ amount*] are due and unpaid, and that postpetition mortgage payments in the amount of [*$ amount*] are due and unpaid. The alleged fees, expenses and charges, and postpetition mortgage payments have been paid by the debtors or are not required to cure the default or maintain payments in accordance with 11 U.S.C. § 1322(b)(5) for the following reasons: [*list fees and payments and explanation why not due*].

8b. [*Alternative B*] Despite the requirement in Bankruptcy Rule 3002.1(g) to file a statement in response to this Notice, [*mortgage holder*] failed to file and serve such a statement within 21 days after service of the Notice.

9. All fees, expenses, and charges asserted as recoverable against the debtors or the debtors' residence in the Notices of Postpetition Mortgage Fees, Expenses, and Charges filed by [*mortgage holder*] during the pendency of this chapter 13 case have either been paid by the debtors or the court has determined that they are not required to cure the default or maintain payments in accordance with 11 U.S.C. § 1322(b)(5).

10. The debtors have made all of their postpetition mortgage payments to [*mortgage holder*] up to and including the date of the filing of this motion.

WHEREFORE, the debtors request this Court enter an Order:[31]

a. Declaring that the debtors' mortgage loan has been cured so that it is current as of the date of the order granting this motion and that the debtors' remaining balance due on the mortgage is the amount that would have existed if their default had never occurred.

b. Declaring that any amounts for fees, charges, or expenses that [*mortgage holder*] may allege the debtors owe as of the date of the order granting this motion in connection with any alleged default on their mortgage or otherwise, that have not been approved by this Court through the allowance of the claim of [*mortgage holder*] or otherwise, be deemed cured by completion of the plan and therefore canceled and discharged.

c. Declaring that any attempt to collect these discharged charges, fees, or expenses be deemed to be a willful violation of the discharge injunction and 11 U.S.C. § 524(i), and contempt of the orders of this Court.

d. [*optional clause if noncompliance with notice requirements*] Awarding reasonable attorney fees to the debtors pursuant to Fed. R. Bankr. P. 3002.1(i) for their expenses in bringing this proceeding as a result of the [*name of mortgage holder's*] failure to provide debtors with the information required by Fed. R. Bankr. P. 3002.1(b), (c), or (g);

e. Awarding such other and further relief as is just and proper.

Dated: [*date of signature*]

[*signature*]
Attorney for Debtor

[31] A sample Order is provided as Form 147, Appx. G.12, in the 2011 Supplement to NCLC's Consumer Bankruptcy Law and Practice (9th ed. 2009 and 2011 Supp.).

20th ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

September 13-15, 2012
Four Seasons Hotel
Las Vegas, NV

Section 524(i): Imposition and Enforcement of Non-Standard Chapter 13 Plan Provisions

by:
Rudy J. Cerone
Cullen J. Brown
McGlinchey Stafford, PLLC
New Orleans, LA*

In BAPCPA, Congress considered and enacted certain provisions enhancing the protections afforded to consumer bankruptcy debtors. *See* BAPCPA Title II. Subtitle A of Title II of BAPCPA enacts penalties for abusive creditor practices. The second section of Subtitle A of the Act is Section 202. In that section, Congress amended § 524 of the Bankruptcy Code by, *inter alia,* adding a new subsection (i) thereto. This paper presents an overview of § 524(i) and other non-standard Chapter 13 plan provisions and their implicative for both debtors and creditors.

A. Overview of Section 524(i)

Section 524(i) reads as follows:

> The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.[1]

Section 524(i) changes bankruptcy practice by potentially allowing Chapter 13 debtors to file suit to force a creditor to credit plan payments in a specific manner. To make use of § 524(i), the

---

* This presentation summarizes certain cases and developments, and is for educational purposes only. It is not, and should not be attributed as, the views of the authors or of their firm or clients.

[1] Section 524(i) is applicable to all bankruptcy cases filed after October 17, 2005. BAPCPA § 1501; *In re Padilla,* 365 B.R. 492, 504 n.20 (Bankr. E.D. Pa. 2007).

debtor's Chapter 13 plan must contain precise language directing how payments are to be applied. In other words, § 524(i) is not self-executing and can only be invoked if the debtor proves that the creditor failed to "credit payments in the manner required by the plan." As noted in a First Circuit opinion, this may require the reliance on non-standard plan provisions. In *In re Nosek*,[2] the First Circuit held that sanctions could not be imposed on the servicer for misapplication of plan and mortgage payments because the debtor's plan failed to specify how payments were to be applied. The First Circuit noted that Congress added § 524(i) in 2005 precisely to address the payment application problems raised in the case, but that it is necessary to first insert the appropriate plan provisions dealing with payment application.[3]

What follows are examples of some non-standard plan provisions that relate to payment allocation and that could give rise to a § 524(i) right of action.[4]

1. Effect of Cure

> Postpetition Mortgage Payments. Payments received by holders and/or servicers of mortgage claims for ongoing postpetition installment payments shall be applied and credited to the debtors' mortgage account as if the account were current and no prepetition default existed on the petition date in the order of priority specified in the note and security agreement and applicable nonbankruptcy law. Postpetition installment payments made in a timely manner under the terms of the note shall be applied and credited without penalty.

Consistent with case-law interpreting § 1322(b)(5), this provision requires the creditor to override its regular payment application regime of applying payments to the first installment due.[5] It also requires the creditor to apply payments in the customary order of priority under the terms of the mortgage,[6] and recognizes that late fees may be charged only if postpetition payments are not made timely.[7]

---

[2] 544 F.3d 34 (1st Cir. 2008).

[3] *In re Nosek*, 544 F.3d 34, 49-50 (1st Cir. 2008) (footnotes omitted).

[4] The examples are taken from John Rao, *Fresh Look at Curing Mortgage Defaults in Ch. 13*, 27 A.B.I.J. 14 (Feb. 2008), a copy of which is attached hereto. The National Consumer Law Center promulgated a model § 524(i) provision to be included by counsel for debtors in chapter 13 plans. Ryan W. Johnson, *Post-Closing Demands for Mortgage-Related Fees Assessed During a Chapter 13 Plan Part III: What Can Be Done?*, 25 Am. Bankr. Inst. J. 18, 61 (July/Aug. 2006); Patrick E. Mears and John T. Gregg, *What Congress Hath Wrought: Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act Affecting Real Estate Interests*, 19 Probate & Prop. 23, 29 (Nov./Dec. 2005); Kilpatrick, *supra*, 79 Am. Bankr. L.J. at 824-25. The model chapter 13 plan provision prepared by the NCLC is contained in 25 NCLC Reports Bankruptcy and Foreclosure Edition 11-14 (Nov./Dec. 2006).

[5] *See In re Jones*, 366 B.R. 584 (Bankr.E.D.La. 2007) (confirmation of plan providing for cure "recalibrates" amounts due as of petition date).

[6] For post-January 2001 Fannie Mae/Freddie Mac uniform instruments, the order of application of payments is 1) interest; 2) principal; 3) escrow; 4) late fees and 5) any other charges due under the security instrument.

[7] *See In re Perez*, 339 B.R. 385 (Bankr.S.D.Tex. 2006)(finding that Home Mortgage Payment Procedures and Uniform Plan approved in district which limit assessment of postpetition late fees was not impermissible modification of mortgage holder's rights).

2. Escrow and ARM Issues

Postpetition Payment Changes. Holders and/or servicers of mortgage claims shall make adjustments to the ongoing installment payment amount as required by the note and security agreement and applicable nonbankruptcy law, including changes based on an escrow analysis for amounts required to be deposited in any escrow account or based on an interest rate provision in an adjustable rate mortgage. Holders and/or servicers shall timely notify the debtors, debtors' attorney and trustee of such payment adjustments and any shortage, deficiency or surplus of funds in any escrow account.

This provision simply requires mortgage creditors to service the loan in the customary manner as they would for homeowners outside of bankruptcy. Based on the Real Estate Settlement Procedures Act, this would mean performing an annual escrow analysis and notifying borrowers of any changes in escrow deposits and balances at least once per year within 30 days of the analysis.[8] The creditor must also inform the debtor if there are insufficient funds in the escrow account.[9] For adjustable rate mortgages based on the Truth in Lending Act, it would require notification of payment amount changes at least 21 days before the due date for the new payment amount.[10]

3. Separate Treatment of Arrearage

Prepetition Arrearages. Payments disbursed by the trustee to holders and/or servicers of mortgage claims shall be applied and credited only to the prepetition arrearages necessary to cure the default, which shall consist of amounts listed on the allowed proof of claim and authorized by the note and security agreement and applicable nonbankruptcy law. Holders and/or servicers of mortgage claims shall deem the prepetition arrearages (and postpetition arrearages, if any) as contractually current upon confirmation of the plan.

A mortgage account being cured in a chapter 13 is not fully reinstated until the prepetition arrearage has been paid.[11] To effectuate a cure plan and avoid the imposition of late fees and other charges, however, it is critical that the mortgage creditor segregate payments being made on the prepetition arrearage and treat the arrearage amounts as if they are not in default.[12] Several courts have approved similar provisions.[13]

---

[8] 12 U.S.C. § 2609. *See In re Herrera*, 422 B.R. 698 (9th Cir. B.A.P. 2010) (proposed plans incorporating provisions approved by the district's bankruptcy judges that imposed reporting and other requirements on mortgage creditors do not conflict with the Real Estate Settlement Procedures Act or violate section 1322(b)(2)), *aff'd In re Monroy*, 650 F.3d 1300 (9th Cir. 2011).

[9] Several courts have held that a servicer's failure to notify debtors during the plan of escrow account shortages and deficiencies as required by RESPA amounts to a waiver of the servicer's right to collect those amounts. *See Chase Manhattan Mortg. Corp. v. Padgett*, 268 B.R. 309 (S.D. Fla. 2001); *In re Dominique*, 368 B.R. 913 (Bankr.S.D.Fla. 2007).

[10] 12 C.F. R. § 226.20(c).

[11] *In re Wilson,* 321 B.R. 222 (Bankr.N.D. Ill.2005).

[12] *Newcomer v. Litton Loan Servicing, L.P.,* 438 B.R. 527 (Bankr. D. Md. 2010) (ordering servicer to recalculate money due on mortgage including removal of post-petition obligation used to pay pre-petition escrow deficiencies).

B. Debtors Often Do Not Meet Section 524(i) Predicates

Inclusion of non-standard provisions is not the sole predicate for a § 524(i) claim. Additional predicates are that the order confirming the plan is not revoked, that the plan is not in default and that the creditor has received all of the payments required to be made by the debtor under the plan. Finally, if the failure of the lender to credit those payments in the manner required by the plan was *willful* and caused material injury to the debtor, and if the debtor has received her discharge, then the debtor can recover.

In other words, to have a claim for maintenance and cure accounting problems, a debtor must: (1) provide for specific accounting methods in the Chapter 13 plan; (2) successfully complete the plan and receive a discharge; and (3) be materially injured by a willful violation of that plan provision.

Often the conditions precedent required under § 524(i) are not complied with by the debtor. First, debtors often brings a claim before they receive their discharges. Section 524(i) is exclusively a post-discharge remedy, so there is no actionable claim pre-discharge. Second, and perhaps most crucially, the required bookkeeping obligations on the creditor are not in their confirmed chapter 13 plans, despite the literature being replete with sample provisions.[14] Even if those predicates are present, the debtor must show any violation was willful.

Therefore, because the conditions precedent required under § 524(i) for the assertion of a stand-alone improper bookkeeping claim often will not be alleged by the debtor (because they did not occur), the debtor's claims for breach of contract and/or breach of chapter 13 may not be viable. But, when they are, and are not followed by the creditor, sanctions and punitive damages may be ordered. *See, e.g., In re Wright,* 2011 WL 6813179 (Bankr. N.D. Iowa Dec. 28, 2011) (servicer willfully violated terms of confirmed chapter 13 plan by failing to notify changes in plan payments, failing to respond to debtor's requests for payment information and failing to prepare and distribute annual statements showing activity on debtor's loan, warranting an award of $10,000.00 in actual damages and $40,000.00 in punitive damages).

C. Section 524(i) May Limit Alternative Remedies

There is virtually no legislative history in regards to Section 524(i). But, when Congress amends an existing statute, that amendment must be given effect by the courts. *Stone v.*

---

[13] *In re Ramsey*, 421 B.R. 431 (Bankr. M.D. Tenn. 2009); *In re Booth,* 399 B.R. 316 (Bankr. E.D. Ark. 2009); *In re Emery,* 387 B.R. 721 (Bankr. E.D. Ky. 2008); *In re Patton*, 2008 WL 5130096 (Bankr, E.D. Wis. Nov. 19, 2008); *In re Andrews,* 2007 WL 2793401 (Bankr. D. Kan. Sep 26, 2007). This provision does not take a position on whether certain fees may be properly included in the arrearage amount, such as postpetition, pre-confirmation bankruptcy fees. Some courts have held that the inclusion in a proof of claim of attorney fees incurred in connection with a bankruptcy case which are to be paid from estate property is improper unless the fees have been sought and approved under Federal Rule of Bankruptcy Procedure 2016. *See, e.g., In re Tate,* 253 B.R. 653 (Bankr. W.D.N.C. 2000).The more widely accepted position as to postpetition, pre-confirmation fees, however, is that a creditor may include such fees in a proof of claim without filing a Rule 2016 application if the claim is sufficiently detailed and provides adequate notice to the debtor. *In re Atwood*, 293 B.R. 227 (B.A.P. 9th Cir. 2003) (proof of claim lacking specific detail fails to meet creditor's evidentiary burden on reasonableness of fees); *In re Madison*, 337 B.R. 99 (Bankr. N.D. Miss. 2006); *In re Powe,* 281 B.R. 336 (Bankr. S.D. Ala. 2001).

[14] See footnote 4, *supra.*

Immigration and Naturalization Serv., 514 U.S. 386, 397 (1995) (*citing Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court must construe statute to give effect, if possible, to every provision); *Moskal v. United States*, 498 U.S. 109-11 (1990) (same)). In circumstances such as this, an amendment is presumed to effect a change in the law applicable to the subject covered by the amendment. *Ruiz v. Estelle*, 161 F.3d 814, 820 (5th Cir. 1998) (*citing Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968)); *Resolution Trust Corp. V. Miramon,* 22 F.3d 1357, 1360 (5th Cir. 1994) (when Congress speaks directly to an issue in legislation, it preempts any resort to federal common law).

Thus, it may be argued that, when Congress enacted § 524(i), it defined both the nature of a stand-alone improper bookkeeping claim and the conditions which must be satisfied before the creditor may be held liable during a chapter 13 case. Enactment of § 524(i) also can be seen as negating the creation or implementation thereafter of additional or contrary remedies by the courts. When a statute (such as the Bankruptcy Code) expressly provides a particular remedy for a particular wrong, a court should not graft additional or different remedies into the statute. *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. 11, 19 (1979); *Bd. of Trustees v. City of Painsville*, 200 F.3d 396, 399 (6th Cir. 1999); *In re Yancey,* 301 B.R. 861, 870 (Bankr. W.D. Tenn. 2003).

Congress determined that any improper bookkeeping claim is actionable only after the discharge has been granted because, during the case, the order confirming the plan may be revoked, the debtor may default in her obligations under the plan or the creditor might not receive the payments provided for in the plan. If the plan fails, then the parties revert to the terms of their loan documents. At that point, accounting for payments received in accordance with the loan documents is perfectly proper.

Congress also determined that the plan itself must impose upon the lender an obligation to adapt a particular bookkeeping regime, rather than (as is typical) simply obligating the debtor to make a stream of payments. Congress determined, further, that only willful violations are actionable. *Cf.* Bankruptcy Code § 362(k). Finally, Congress found that only those violations that caused the debtor "material" injury are actionable. The obvious purpose of this provision is to weed out cases where little or no actual damages have been suffered by an individual debtor, and to prevent the aggregation of immaterial injury cases into a class action suit. Only if the debtor establishes all of these preconditions will the improper bookkeeping by the creditor constitute a violation of the discharge injunction.

D. Section 524(i) May Impose Limits on the "Appropriate Relief" Available Under New Bankruptcy Rules 3001(c) and 3002.1(i)

Effective December 1, 2011, new provisions were added to Bankruptcy Rule 3001, regarding proofs of claim, and a new Bankruptcy Rule 3002.1, regarding notices relating to home loan mortgage servicing in chapter 13, was added. If those provisions are violated by the secured creditor, the new provisions allow the court to "award other appropriate relief, including reasonable expenses and attorney's fees caused by the [creditor's] failure." Bankruptcy Rules 3001(c)(2)(D)(ii) and 3002.1(i)(2). Because they are so new, few cases have been reported implementing those two provisions. However, § 524(i), may limit the "appropriate relief" the courts can impose thereunder.

First, to the extent Rules 3001 and 3002.1 overlap with § 524(i), the provisions of § 524(i) govern because a procedural rule cannot expand or enlarge substantive law. 28 U.S.C. § 2075 ("The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. *Such rules shall not abridge, enlarge or modify any substantive right.*") (emphasis added); *see also In re Montagne,* 421 B.R. 65, 82-83 (Bankr. D. Vt. 2009) ("[C]ourts cannot add non-compliance with Rule 3001(c) as a basis for disallowing a claim under Bankruptcy Code § 502; to do so would improperly enlarge a substantive right provided by the Code") (*citing* 28 U.S.C. § 2075). None of the predicates detailed in § 524 are included in the new rules and only a "material injury" is compensable under § 524(i). And, because the Bankruptcy Rules are rules of procedure not substantive law, Bankruptcy Rule 1001, they do not provide a basis for a cause of action independent of the Bankruptcy Code itself (specifically § 524(i)), s*ee, Winslow, supra,* 759 F.Supp. at 674, and do not enlarge or modify any substantive right covered by § 524(i). *See* 28 U.S.C. § 2075; *Adams, supra,* 734 F.2d at 1099.

Accordingly, when faced inevitably with a debtor's claim under the new "appropriate relief" provisions of Rules 3001 and 3002.1, a secured creditor should be mindful of the restrictions placed on § 524(i) claims and on private rights of action based on procedural rules. They may provide viable defenses to the expansion of the remedies provided in the new Rules beyond reasonable fees and costs associated directly with the Rule violation.

E. Limits on Non-Standard Plan Language

A debtor's ability to craft non-standard plan language is not unlimited. Counsel should be aware that a plan provision that substantially alters or impedes the rights of creditors may be invalidated down the road. Accordingly, it is important to ensure that non-standard plan language does not undermine the provisions of the Code.

The District of Colorado's decision in *In re Gordon*, 2010 WL 1020643 (D. Col. March 27, 2012) illustrates the disallowance of a non-standard plan provision. In that case, the debtor submitted a Chapter 13 plan with a non-standard plan provision that reduced certain secured creditors' claims to zero unless they objected to the plan. The plan was confirmed before all creditors had filed proof of claims. Before the filing deadline (but post-confirmation) one secured creditor filed a proof of claim that was disallowed under the non-standard terms of the plan. The debtor moved to strike that proof of claim, claiming that the claim was adjudicated by the confirmed Chapter 13 plan and that the *res judicata* effect of the plan precluded any revisiting the claim. The bankruptcy court agreed.

The District Court reversed, finding that a Chapter 13 plan could not abrogate the Code-imposed scheme for claim allowance. Specifically, the District Court addressed the limits of the *res judicata* effect of the Chapter 13 plan. While a Chapter 13 plan is typically entitled to preclusive effect, most plans include standard language requiring the plan be revised after confirmation to account for later filed claims (though the plan in question omitted this language). Since most Chapter 13 plans are subject to modification, the District Court found that the *res judicata* effect of a Chapter 13 plan is mitigated by the claims allowance process of the Code. Moreover, the District Court found the Chapter 13 plan language in that case contradicted the

normal claims allowance process and, accordingly, held the plan provision in question was invalid.

As *Gordon* shows, a debtor can include non-standard provisions in a Chapter 13 plan, but cannot thereby displace or abrogate the provisions of the Code. Non-standard plan language must not deviate from the Code and, when it does, creditors' attorneys must be ready to identify and object to non-standard plan language that reaches too far.

20th ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

September 13-15, 2012
Four Seasons Hotel
Las Vegas, NV

Lien Stripping Home Mortgages: Chapter 20 and Beyond[1]

Tara Twomey
National Consumer Law Center
Carmel, CA

A. Relevant Statutes

11 U.S.C. 506(a)(1)

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. 506(d)

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 1322 (b)(2)

Debtors may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's

[1] Adapted from NCLC Reports, Bankruptcy and Foreclosure Edition, May/June 2011, Sept./Oct. 2011.

principal residence[.]"

11 U.S.C. § 101(13A)

The term "debtor's principal residence"-

(A) means a residential structure, including incidental property, without regard to whether that structure is attached to real property; and (B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer.

11 U.S.C. § 349(b)(1)(C)

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title –

(1) reinstates –

(C) any lien voided under section 506(d) of this title

B. Lien Stripping in Chapter 13

Mortgages secured only by the debtor's principal residence cannot be modified in a chapter 13 case based on the limitation in Bankruptcy Code § 1322(b)(2). However, if senior mortgages or liens on a debtor's home exceed the property's value, a creditor having a junior mortgage on the property would not be the "holder of a secured claim" under section 506(a) and would not be entitled to the protection of section 1322(b)(2). Thus, most courts have held that a junior mortgage creditor whose lien is effectively "underwater" can be treated as a wholly unsecured claim and "stripped off" by the debtor's chapter 13 plan (for example, a $60,000 second mortgage on a $200,000 home subject to a first mortgage of $210,000).

No circuit courts have disallowed mortgage strip offs in chapter 13. The Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have explicitly ruled that strip off is permissible.[2] The Bankruptcy Appellate Panels for the First, Eighth and Tenth Circuits have also held that strip off is permissible.[3] The Eighth Circuit Court of Appeals currently has a case under

---

[2] *First Mariner Bank v. Johnson*, 411 B.R. 221 (D. Md. 2009), *aff'd*, 2011 WL 52358 (4th Cir. Jan. 6, 2011) (unpublished); *In re* Zimmer, 313 F.3d 1220 (9th Cir. 2003); *In re* Lane, 280 F.3d 663 (6th Cir. 2002); *In re* Pond, 252 F.3d 122 (2d Cir. 2001); *In re* Tanner, 217 F.3d 1357 (11th Cir. 2000); *In re* Bartee, 212 F.3d 277 (5th Cir. 2000); *In re* McDonald, 205 F.3d 606 (3d Cir. 2000).

[3] *In re* Fisette, 455 B.R. 177 (B.A.P. 8th Cir. 2011); *In re* Griffey, 335 B.R. 166 (B.A.P. 10th

advisement.[4]

C. Lien Stripping in Chapter 20

The most controversial issue at present is whether a debtor may strip off a mortgage in a no-discharge chapter 13 case. A debtor may not receive a discharge if the debtor received a discharge in a chapter 7 case filed within 4 years prior to the current chapter 13 case (a so-called "chapter 20" case), or if the debtor received a discharge in a chapter 13 case filed during the 2-year period prior to the current chapter 13 case.[5] Courts agree that the inability to receive a discharge does not make a debtor ineligible for chapter 13 relief.[6] Moreover, *Johnson v. Home Bank*[7] makes clear that a mortgage creditor has a claim against the debtor's property even though the debtor's personal obligation on the mortgage has been discharged in an earlier chapter 7 case.

Some courts have held that the § 1328(a) discharge deals only with the debtor's personal liability and not with lien avoidance. They reason further that the language added by BAPCPA in § 1328(f) to preclude a discharge in certain cases makes no mention of lien avoidance, no other provision in the Code makes lien stripping dependent upon receipt of a discharge, and § 1325(a)(5)(B)(i)(II) is simply not applicable.[8] As one court has stated, it is not a discharge but rather "completion of the plan and performance under the new contract created under the Bankruptcy Code which result in the debtors having the right to demand and receive the release of the lien."[9]

Debtors arguing for strip off under section 506(d) have generally faired less well. These courts have held that such debtors are merely circumventing the Supreme Court's decision of *Dewsnup v. Timm*,[10] which courts have interpreted as limiting the application of § 506(d) in chapter 7 cases.[11] These courts

---

Cir. 2005); *In re* Mann, 249 B.R. 831 (B.A.P. 1st Cir. 2000).

[4] *Keller v. Fisette*, No. 11-3119 (8th Cir.).

[5] 11 U.S.C. § 1328(f).

[6] *See, e.g., In re* Bateman, 515 F.3d 272 (4th Cir. 2008).

[7] 501 U.S. 78 (1991)

[8] *In re* Fair, 450 B.R. 853 (E.D. Wis. 2011); *In re* Fisette, 455 B.R. 177 (B.A.P. 8th Cir. 2011); *In re* Gloster, 459 B.R. 200 (Bankr. D.N.J. 2011); *In re* Okosisi, 451 B.R. 90 (Bankr. D. Nev. 2011); *In re* Davis, 447 B.R. 738 (Bankr. D. Md. 2011); *In re* Waterman, 447 B.R. 324 (Bankr. D. Colo. 2011); *In re* Hill, 440 B.R. 176 (Bankr. S.D. Cal. 2010); *In re* Grignon, 2010 WL 5067440 (Bankr. D. Or. Dec. 7, 2010).

[9] *In re* Frazier, 448 B.R. 803, 810 (Bankr. E.D. Cal. 2011).

[10] 502 U.S. 410 (1992).

[11] *In re* Mendoza, 2010 WL 736834 (Bankr. D. Colo. Jan. 21, 2010); *In re* Blosser, 2009 WL

conclude that § 506(d) alone cannot be used to strip a lien,[12] or that the only way to make a strip off under § 506(d) "permanent" is to obtain a discharge.[13] These courts generally equate a "chapter 20" filing with a case conversion, and rely upon congressional intent expressed in §348(f)(1)(C)(I). Despite the creditor's lack of an allowed secured claim under § 506(a), another reason often stated is that § 1325(a)(5)(B)(i)(II) prohibits lien stripping in no-discharge cases.[14]

D. Lien Stripping in Chapter 7

Most courts have denied this relief to chapter 7 debtors, □ generally finding that the Supreme Court decision is *Dewsnup v. Timm*[15] to be controlling.[16] A few courts have ruled otherwise.[17] However, recently in In re McNeal,[18] the Eleventh Circuit in an unpublished decision held that lien stripping in chapter 7 was permissible. The Eleventh Circuit joined the minority view that the decision in *Dewsnup* does not extend to wholly unsecured liens. After listing the cases that have found such lien strips to be prohibited under *Dewsnup*, the court turned to its own precedent for guidance. In *Folendore v. United States Small Bus. Admin.*,[19] the court found that section 506(d) permits strip-off of an allowed claim that is wholly unsecured. In *McNeal*, the court found that *Dewsnup* did not abrogate this decision because *Dewsnup* dealt with a partially secured claim while *Folendore* was precisely on point, dealing with a wholly unsecured lien. The *McNeal* court noted that some of the reasoning used in *Dewsnup* did not support its decision, but it did not find that discrepancy to be determinative for two reasons. First, the holding in *Dewsnup* was not directly on point, and the

---

1064455 (Bankr. E.D. Wis. Apr. 15, 2009); *In re* Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008).

[12] *In re* Gerardin, 447 B.R. 342 (Bankr. S.D. Fla. 2011).

[13] *In re* Victorio, 454 B.R. 759 (Bankr. S.D. Cal. 2011).

[14] *See In re* Lindskog, 451 B.R. 863 (Bankr. E.D. Wis. 2011); *In re* Woolsey, 438 B.R. 432 (Bankr. D. Utah 2010); *In re* Fenn, 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re* Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008).

[15] 502 U.S. 410 (1992).

[16] *E.g.*, Ryan v. Homecomings Fin. Network, 253 F.3d 778 (4th Cir. 2001); *In re* Laskin, 222 B.R. 872 (B.A.P. 9th Cir. 1998); *In re* Cater, 240 B.R. 420 (M.D. Ala. 1999); *In re* Grano, 422 B.R. 401 (Bankr. W.D.N.Y. 2010); *In re* Bessette, 269 B.R. 644 (Bankr. E.D. Mich. 2001); *In re* Keltz, 261 B.R. 845 (Bankr. W.D. Pa. 2001); *In re* Fitzmaurice, 248 B.R. 356 (Bankr. W.D. Mo. 2000); *In re* Cunningham, 246 B.R. 241 (Bankr. D. Md. 2000); *In re* Virello, 236 B.R. 199 (Bankr. D.S.C. 1999); *In re* Swiatek, 231 B.R. 26 (Bankr. D. Del. 1999).

[17] *In re* Lavelle, 2009 WL 4043089 (Bankr. E.D.N.Y. Nov. 19, 2009); *In re* Zempel, 244 B.R. 625 (Bankr. W.D. Ky. 1999); *In re* Howard, 184 B.R. 644 (Bankr. E.D.N.Y. 1995).

[18] 2012 WL 1649853 (11th Cir. 2012)(unpublished).

[19] 862 F.2d 1537 (11th Cir. 1989).

reasoning that would seem to abrogate *Folendore* was not essential to its holding. Second, the Court in *Dewsnup* was careful to limit its holding to the issue before it, thereby discouraging extrapolation of its holding to cases beyond its four corners.

E. Other Lien Stripping Issues

1. Lien Stripping Procedure

The Federal Rules of Bankruptcy Procedures do not address the proper procedure for stripping off a wholly unsecured mortgage in a chapter 13 case based on the application of section 1322(b)(2) and 506(a). The following methods have been adopted:

Adversary Proceeding: Several courts have held that debtors much initiate an adversary proceeding in order to strip of a lien.[20] According to these courts, debtors may not rely on a chapter 13 plan provision to achieve this result. However, debtors in these cases generally had sought a determination of the lien's validity rather than a valuation of the collateral.[21]

Plan Provision and/or Motion to Value: A debtor who strips off a wholly unsecured junior mortgage in a chapter 13 case is primarily seeking a determination of the amount of the creditor's secured claim, if any, for the purposes of plan treatment. Most courts prefer that the matter be raised in a plan provision alone or a related motion.[22] Some courts do not permit debtors to proceed by adversary proceeding.[23] In addition to the plan provision, some courts may require that the debtor file and serve a separate motion pursuant to the Federal Rules of Bankruptcy Procedure 3012 to value the creditor's secured claim, with a notice of hearing set for the plan confirmation date.

---

[20] *E.g., In re* Forrest, 424 B.R. 831 (Bankr. N.D. Ill. 2009); *In re* Enriquez, 244 B.R. 156 (Bankr. S.D. Cal. 2000).

[21] *See In re* Mansaray-Ruffin, 530 F.3d 230 (3d Cir. 2008); Cen-Penn Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995); *see also* Fed. R. Bankr. P. 7001(2).

[22] *See, e.g., In re* Stassi, 2009 WL 3785570 (Bankr. C.D. Ill. Nov. 12, 2009); *In re* Millspaugh, 302 B.R. 90 (Bankr. D. Idaho 2003); *In re* Sadala, 294 B.R. 180 (Bankr. M.D. Fla. 2003); *In re* Hoskins, 262 B.R. 693 (Bankr. E.D. Mich. 2001).

[23] *E.g., In re* Pereira, 394 B.R. 501 (Bankr. S.D. Cal. 2008).

2. Who Owns the Loan?

From the debtor's perspective, the goal of a lien strip off proceeding is to provide clear title to the home with respect to the underwater mortgage. Debtor will want to get an order from the bankruptcy court voiding the underwater mortgage that can be recorded in the land records office. To satisfy most local title standards and to avoid any subsequent legal challenge, the lien avoidance proceeding should be brought against the owner and holder of the note and mortgage. This is not necessarily the entity that files a proof of claim in the case as the creditor on the mortgage. If there are any doubts about who is the true owner, all parties having an interest in the note or mortgage, including parties designated as "mortgage of record" and "nominee" for the holder (such as MERS) should be named.

Checking the local registry where deeds and assignments are recorded is one way to identify the actual holder, but many assignments are not recorded. In fact, if MERS is named as the mortgagee, typically as "nominee" for the lender and its assigns, then mortgage assignments will not be recorded in the registry of deeds. There are a number of tools available to debtor's counsel for identifying the proper party such as:

- Send a Truth in Lending Act (TILA) § 1641(f)(2) request to the servicer;
- Send a Real Estate Settlement Procedures Act (RESPA) § 2605(e) "qualified written request" to the servicer;
- Send a RESPA § 2605(k)(1)(D) loan ownership inquiry □ to the servicer; □
- Review TILA § 1641(g) transfer of loan ownership notices sent to the borrower;
- Check the Fannie Mae and Freddie Mac loan lookup□ web portals.

3. Non-filing Spouses

The majority of the few decisions in the area find strip off effective only as to the debtor's interest in the property; the mortgage lien continues on any non-debtor's interest.[24] How- ever, the result may be different if the property is held by ten- ants by the entireties, because the bankruptcy estate's interest in

[24] *In re* Baker, 2010 WL 2836785 (Bankr. N.D. Ga. June 28, 2010); *In re* To, 2010 WL 1508291 (Bankr. E.D. Va. Apr. 14, 2010).

entireties property is in whatever equity is available in the property that can be liquidated for the benefit of joint creditors of the debtor and the non-filing spouse. One court has ruled that there was no estate interest and therefore the entire lien including the non-filing spouse's interest could be voided.[25]

[25] *In re* Strausbough, 426 B.R. 243 (Bankr. E.D. Mich. 2010). *But see In re* Hunter, 284 B.R. 806 (Bankr. E.D. Va. 2002).