



**The Honorable Dwight H. Williams, Jr.
Consumer Judges Panel 2012**

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**HAVE THE PROBLEMS OF SERVICING HOME MORTGAGES
IN CHAPTER 13 CASES BEEN SOLVED BY THE CHANGE TO RULE 3001
AND THE ADDITION OF RULE 3002.1?**

Dwight H. Williams, Jr.

While a chapter 13 plan may not modify the rights of holders of claims secured solely by an interest in real property that is the debtor's principal residence (11 U.S.C. § 1322(b)(2)), the plan may provide for the curing of any default and the maintenance of payments on a long term home mortgage while the case is pending (§ 1322(b)(5)). Yet, the administration of home mortgages in chapter 13 cases has been the source of a myriad of problems over the years.

For example, some mortgagees, fearing that contact with debtors would be construed as a violation of the automatic stay, would not advise debtors of changes in the installment payments due to changes in adjustable interest rates or escrow requirements. Instead, the creditors would either 1) seek stay relief alleging a post-petition default due to the shortfall in the monthly installment payments or 2) do nothing and assert an arrearage after the debtors faithfully completed their plans.

Similarly, some mortgagees would not advise debtors of post-petition fees, expenses, and charges which were assessed to their account. The creditors would either file motions for relief from stay or the debtors would exit bankruptcy still in default.

In recognition of these problems, the Supreme Court amended Rule 3001 and added new Rule 3002.1. Both of these changes became effective on December 1, 2011. New subsection (c) of Rule 3001 deals exclusively with a mortgagee's prepetition claim. Particularly, the home mortgage claim must now be supported with an itemization of prepetition interest, fees, expenses, or other charges as well as a statement of the escrow account if one has been established.

Rule 3002.1 concerns the administration of the home mortgage post-petition. First, the rule requires mortgagees to file a notice of any change in the monthly installment payment no later than 21 days prior to the date the new payment is due.

Next, the rule requires mortgagees to file and serve notice of all fees, expenses, and charges imposed post-petition. This notice is due no later than 180 days after the date incurred. Thereafter, the debtor or the trustee has one year to object to the claimed fees, expenses and charges.

Finally, the new rule requires the trustee, within 30 days after the debtor has completed plan payments, to give notice to the mortgagee that the debtor has fully cured any default on the claim. Within 21 days thereafter, the mortgagee must file a statement indicating whether it agrees with the trustee's notice and whether the debtor is otherwise current. Thereafter, the debtor or trustee may by motion seek a determination of whether the default has been cured and whether post-petition amounts have been paid.

Both Rules 3001 and 3002.1 contain provisions that prevent mortgagees who fail to supply the information required by the rules from using that same information later as evidence in a contested matter or adversary proceeding.

Practice in the Middle District

Notwithstanding these rule changes, many lawyers practicing in the Middle District continue to file motions to "deem the mortgage current" once the debtor has completed plan payments. They do so in cases where the mortgagees have not responded to the trustee's notice of cure. First, are such motions necessary, and secondly, are they procedurally flawed?

Why would a motion to deem a mortgage current be required in the first place? Other than to give finality to the matter, is anything really gained by bringing such a motion? The rule provides that a mortgagee is precluded from offering evidence in support of its claim if it failed to provide the information required by the new rules. Therefore, if the debtor exits bankruptcy only to face a claim by the mortgagee of a default occurring during the course of the plan, the bankruptcy case may be reopened and the matter remedied with sanctions, including attorney's fees.

Further, a motion to "deem the mortgage current" smacks of a declaratory judgment. Per Mr. Shakespeare, "[a] rose by any other name would smell as sweet." In effect, the debtor is asking the court to declare the mortgage

current. Should that not be sought by way of an adversary proceeding (Rule 7001(9))?

Finally, do motions to “deem the mortgage current” bypass the new rules and render them a nullity? Put another way, is there any purpose to revised 3001 and the addition of 3002.1 if motions to deem mortgages current are routinely filed?

Reported Cases on Rule 3002.1

In re Carr, 2012 WL 930337 (Bankr. E.D. Va. March 19, 2012).

A creditor may not charge attorney's fees for filing the response required by Rule 3002(g) to a trustee's "Notice of Final Cure Payment." The response is not a pleading but merely a supplement to the creditor's proof of claim. Preparing the response does not constitute the practice of law, and an attorney need not sign the response.

In re Kraska, 2012 WL 1267993 (Bankr. N.D. Ohio April 13, 2012)*

The mortgagee filed a motion for relief from stay to enforce a lien on property the debtor proposed to surrender. The motion requested the court to waive the requirements of Rule 3002.1 for both the mortgagee and the chapter 13 trustee. The court declined to waive the rule, noting that the rule would facilitate the obtaining of accurate information for the calculation of any deficiency claim. The court further noted that Rule 3002.1 contains no exceptions and that 11 U.S.C. § 1322(b)(5) applies to secured and unsecured claims alike.

*This decision was not intended for publication or citation.

In re Sheppard, 2012 WL 1344112 (Bankr. E.D. Va. April 18, 2012)

The mortgagee filed a notice under Rule 3002.1(c) of fees incurred with respect to a motion for relief from stay. However, the motion and fees had already been addressed by a consent order that added the fees to the plan. The court noted that Official Form B 10S2 instructs against including "any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court." Because the fees had already been "ruled on" in a consent order, the fees were not separately recoverable against the debtors, and no notice was required. A notice that duplicates a court order creates "uncertainty" with regard to a debtor's liability upon "emerging from bankruptcy."

The court further held that the notice required by Rule 3002.1 is merely a supplement to a proof of claim. It does not constitute a claim or an amended claim and is filed for informational purposes only. Therefore, the trustee has no obligation to pay the amount disclosed in the notice.

SUMMARY OF RELEVANT RULES

Rule 3001. Proof of Claim

(c) Supporting information.

(2) Additional requirements in an individual debtor case.

(A) If, in addition to its principal amount, the claim includes pre-petition interest, fees, expenses or other charges, an itemized statement shall be filed with the claim.

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

(C) If a security interest is claimed in the debtor's principal residence Official Form B 10 (Attachment A) shall be filed with the claim.

If an escrow account has been established, an escrow account statement as of the petition date shall be filed with the claim.

(D) If the claimant fails to provide information required in subsection C, the court, after notice and hearing, may take either or both of the following actions—

(i) preclude the claimant from presenting evidence of the omitted information at a contested hearing or adversary proceeding unless the failure was substantially justified or was harmless, OR

(ii) award other appropriate relief including reasonable expenses and attorney's fees.

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

(a) This rule applies in chapter 13 cases to claims that are secured by the debtor's principal residence and that are provided for by § 1322(b)(5) in the debtor's plan.

(b) the claimant 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. See Official Form B 10, Notice of Mortgage Payment Change.

(c) the claimant shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges that were incurred post-petition. This notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred. See Official Form B 10, Notice of Postpetition Mortgage Fees, Expenses, and Charges.

(d) the notices required in subsections (b) and (c) shall be prepared as prescribed by an Official Form.

(e) the debtor or the trustee have one year after service of the notice under subsection (c) (those advising of postpetition fees, expenses, or charges) to file a motion challenging the postpetition fees, expenses, or charges.

(f) within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the mortgagee, the debtor, and the debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim.

(g) within 21 days after trustee's notice of cure has been served, the mortgagee shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating whether it agrees that the debtor has paid the amount required to cure the default and whether the debtor is otherwise current on all payments. If the claimant contends that the cure is not complete, it shall itemize the required cure or postpetition amounts that are unpaid.

(h) within 21 days after service of the mortgagee's response to trustee's cure notice, the debtor or the trustee may file a motion seeking a determination of whether the default has been cured and all postpetition amounts paid.

(i) if the mortgagee fails to provide information required in subdivisions (b), (c) or (g), the court, after notice and hearing, may take either or both of the following actions:

(1) preclude the mortgagee from presenting evidence of the omitted information at a hearing on a contested matter or adversary proceeding unless it determines that the omission was substantially justified or was harmless, OR

(2) award other appropriate relief including reasonable expenses and attorney's fees.