

The Honorable Margaret A. Mahoney Consumer Judges Panel 2012

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IT'S ALL ABOUT CLAIMS

RULE 3001 – EFFECTIVE DECEMBER 1, 2011

Rule 3001 was amended as of December 1, 2011 to read as follows:

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 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.

The purpose of the amendment to this rule was to require additional information on or with proofs of claim in cases involving individual debtors and to set out the consequences of not providing the information. Why? There have been numerous cases in which creditors claimed interest, fees or expenses or other charges without making clear to the debtor what comprised the amount claimed. *See, e.g., Am. Express Bank, FSB v. Askenaizer (In re Plourde)*, 418 B.R. 495

(B.A.P. 1st Cir. 2009) (holding that failure of unsecured credit card creditors to provide an itemized statement of all interest or additional charges resulted in their claims being subordinated to general unsecured claims under § 726(a)(4)); *In re Taylor*, 363 B.R. 303 (Bankr. M.D. Fla. 2007) (sustaining a debtor's objections to claims of assignees of credit card accounts for failure to provide proper documentation). Besides these two cases there are a host of other cases, many of which are from Texas courts, with similar holdings.

Initially, the rule as drafted required the last account statements sent to the debtor in an open-end or revolving credit agreement to be attached to the proof of claim form. After numerous comments, the drafters revised the rule to require only an itemized statement of the interest, fees, expenses or charges added to the debt.

The creditor must also file a statement of the amount necessary to cure a prepetition default, if one exists. This allows the debtor to be sure of what is needed to pay a lien entirely if, for instance, foreclosure is threatened.

Finally, (c)(2) requires still more protections if the debtor is an individual. The creditor must attach to any proof of claim for a debtor's homestead a document that states (1) the amount of interest, fees, expenses, or other charges added to the mortgage balance, itemizing what the basis for the claims is; (2) a calculation of the amount necessary to cure the prepetition default, if any; and (3) an escrow account statement that shows the account balance and any amount owed as of the date of the filing of the bankruptcy case. The statement must be provided in a form "consistent with the requirements of nonbankruptcy law." The Committee Notes suggest that an appropriate form might be the form required by 12 U.S.C. § 2601 (RESPA). The Real Estate Settlement Procedures Act uses the HUD-1 Settlement Statement with which most people are familiar. It details the costs and fees a borrower and seller will owe at closing. The escrow portion of the statement includes a breakdown of hazard and any other insurance amounts, city and county property tax amounts, and assessment amounts.

The National Consumer Law Center states that "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." *New Bankruptcy Rules & Forms Respond to Mortgage Claim Documentation Problems,* 30 NCLC Reports November/December 2011, Bankruptcy and Foreclosures Edition, p.10. *See, e.g., In re Rodriguez*, 629 F.3d 136 (3rd 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).

Section (d) of the Rule provides that a court may sanction the holder of a claim who does not provide what the rule requires or may prevent the holder from presenting the evidence in any hearing on the claim, unless the failure is substantially justified or harmless. The practical result of this rule is that improperly documented claims may be disallowed. However, failure to provide the required information cannot result, by itself, in the denial of the creditor's claim. Lack of documentation will just leave the creditor with a weak case.

What is substantial justification? Substantial justification will require more than a response that the creditor forgot or that the information was not readily available. "Substantial justification" is a term already used in the Rules at Fed. R. Civ. P. 37(a)(5)(B), Fed. R. Bankr. P. 7037 (a)(5)(B), in the Bankruptcy Code at section 523(d), and in the Equal Access to Justice Act at 28 U.S.C. § 2412(a)(1)(A). Substantial justification means that an action is justified to a degree that could satisfy a reasonable person. "A request for discovery is 'substantially justified' under [Rule 26] if reasonable people could differ as to whether the party requested must comply." *Reygo Pacific Corp. v. Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982). "When a dispute involves differing interpretations of governing law, opposition is substantially justified unless it involves an unreasonable, frivolous or completely unsupportable reading of the law." *Bowne of New York City, Inc. v. AmBase Corp*., 161 F.R.D. 258, 265 (S.D.N.Y. 1995). Cases involving § 523(d) have stated that establishment of "substantial justification" requires proof of 3 criteria: "(1) a reasonable basis in law for the theory it propounds; (2) a reasonable basis in truth for the facts alleged; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *In re Walker*, 439 B.R.854 (Bankr. W.D. Pa. 2010) (*citing In re Ritter*, 404 B.R. 811, 832 (Bankr. E.D. Pa. 2009)); *FIA Card Services, N.A v. Flowers (In re Flowers)*, 391 B.R. 178 (M.D. Ala. 2008); *First Deposit National Bank v. Mack (In re Mack*), 219 B.R. 311 (Bankr. N.D. Fla. 1998). Therefore, for instance, a creditor who provides some information, believing it is enough may be "substantially justified" in its omission if it has not been required to produce the missing information before and there are no opinions from the district that have required the missing documents. Possibly, failure of production of information that would be very expensive to provide would be "substantially justified" if the information was provided in another form or was not essential to understanding the claim. However, bulk claim filers have weighed in on this rule and said they can provide the documentation the rule requires. What is a harmless failure to produce information? A "harmless" failure to provide information might involve a situation in which a small charge was not documented.

RULE 3002.1- EFFECTIVE DECEMBER 1, 2011

Rule 3002.1, effective December 1, 2011, reads as follows:

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 u9nder § 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 (i) that were incurred in connection with the claim after the bankruptcy case was filed, and (ii) 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 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.

This new rule "aid[s] 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." *Committee Note to Rule 3002.1*. It applies whether the debtor pays his/her mortgage through the chapter 13 plan or pays it directly to the mortgagee. If the debtor must pay fees and expenses that change over time, such as interest or taxes, during a plan, the debtor must be allowed to be informed of changes in those amounts. In the past, mortgagees worried that notice to debtors of payment changes on mortgages could be violations of the stay. *See e.g.*, *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. 2008); *Zotow v. BAC Home*

Loans Servicing, LP (In re Zotow), 432 B.R. 252 (B.A.P. 9th Cir. 2010). This rule makes clear that sending the notices to debtors is not a potential automatic stay issue. It also clarifies who must receive notice of any changes. The rule also provides a clear procedure for a finding that no amount remains owing in the cure of a default on a homestead at the time of completion of a chapter 13 plan. In the past, as soon as a discharge was entered, mortgagees would declare a mortgage in default even though the debtor made all of the payments under the plan. This should no longer occur.

The rule requires that these notices be filed as a supplement to the proof of claim form, not as a pleading or notice in the case file. There was disagreement among the parties who commented on this rule as to where the filings should be made. The form is filed as a supplement to the proof of claim because that filer does not have to be an attorney. Therefore, an attorney's fee may be avoided.

The form is not a claim amendment. The filing of the form does not require the trustee to pay the new amount. The fees will only be paid once a debtor objects to the fees and the court orders the fees to be paid, or, the debtor amends his/her plan to pay the fees.

Even though the rule may be harder to implement in districts that do not require payments on mortgages to be made through the debtor's plan, the rule is applicable to both "plan-pay" and "direct-pay" districts. Direct pay districts may have more trouble determining the status of payments at a case's end simply because the debtor and mortgagee will control the records of payment instead of the trustee.

It would appear that the procedure of filing a Notice of Final Cure Payment will take the place of the Motions to Deem Mortgage Current and adversary proceedings alleging that the creditor violated the discharge injunction by adding the fees and costs and seeking to collect them post-discharge. *See, e.g., In re Foreman*, 2010 WL 2696630 (Bankr. M.D.N.C. 2010); *In re Ramsey*, 421 B.R. 431 (Bankr. M.D. Tenn. 2009) (holding that creditor objection to plan provision that required mortgage creditor to provide notice to trustee and debtor of changes in interest rates and escrow amounts was appropriate); *In re Hurt*, 2007 WL 7141217 (Bankr. N.D. Ga. 2007) (holding that motion to deem mortgage current was not proper and should have been an adversary proceeding but concluding notice was sufficient to deny reconsideration in this case); *Glenn v. Ocwen Loan Servicing (In re Glenn)*, 2010 WL 2203042 (Bankr. S.D. Ala. 2010) (holding that prepetition fees on mortgage disallowed in case were not owed or collected so they did not constitute a violation of the discharge); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 430 B.R. 764 (Bankr. S.D. Tex. 2010) (holding that mortgage creditor that failed postdischarge to honor agreement made in court order regarding mortgage amount was liable for sanctions and fees); *In re Janssen*, 396 B.R. 624 (Bankr. E.D. Pa. 2008) (holding that court could reopen case to determine whether prepetition arrearage had been cured during case); *In re Perry*, 388 B.R. 330 (Bankr. E.D. Tenn. 2008) (holding, in motion to reopen ruling, that court could not determine whether mortgagor was in default or not on jurisdictional grounds).

The debtor should always file the motion requesting the court to determine whether the mortgage is current as allowed in Rule 3002.1(h). This is so even if the creditor does not

respond to the trustee's notice of final cure payment. A debtor wants an order from the court stating that the mortgage has been fully cured and is current.

OFFICIAL FORM 10 AND ATTACHMENT A AND SUPPLEMENT 1 AND 2 – EFFECTIVE DECEMBER 1, 2011

A copy of Official Form 10 (the Proof of Claim form), Attachment A and Supplements 1 and 2 to the form are attached. Each is discussed below.

Form 10 now requires more information about the interest rate specified for secured claims. The form requires the filer to note whether the interest rate is fixed or variable and states that the rate to be placed in the form is the rate applicable at the petition filing date. Therefore, if a default interest rate is in effect before the filing of the case, that rate should be the rate stated in the form.

Form 10 now requires the signer to declare that the information in the proof of claim is true and correct to the filer's knowledge, information and reasonable belief. The instructions remind the filer that the certification constitutes a declaration that the filing meets the requirements of Rule 9011(b). This change may have been made in light of the allegations being made about the incorrect and improper mortgage proofs of claim. This change makes improper filings clearly sanctionable.

A space is provided in the form for a uniform claim identifier for use by high volume claim filers. The identifier consists of 24 digits and is designed to speed electronic transfers by chapter 13 trustees to creditors who use it.

Attachment A is an entirely new form that is required when the claimant is a home mortgage lender. The form requires a breakdown of the following information: principal, interest, fees, expenses, and charges owed. It also requires the creditor to state the amount necessary to cure prepetition defaults and itemizes the components of that amount. This will aid debtors in chapter 13 cases in plan proposals. The form also requires the attachment of an escrow statement if the mortgage has an escrow. Many districts have required this information to be furnished in affidavits or other forms at the time of the filing of relief from stay motions by creditors. This will standardize the information to be provided in all districts as it exists at filing. It will provide a clear picture of the loan at filing so that any affidavit filed at the time of a relief from stay motion can be compared to it.

Supplement 1 is also an entirely new form. It implements Rule 3002.1. Any home mortgage lender must use this form in ongoing chapter 13 cases to notify debtors of changes in monthly mortgage payments due to interest rate or escrow fluctuations. The form must be filed under oath and served upon the debtor, debtor's counsel and the trustee. This form should insulate creditors from violation of the stay arguments by debtors' counsel. It is unclear what the result might be if the creditor fails to file the form and raises a debtor's payments with different notification or leaves the amount in default until discharge and then seeks to foreclose. Could failure to properly notify the debtor of the payment changes constitute a waiver of the increase?

Supplement 2 is also new. Home mortgage lenders must use this form to notify debtors of the incurrence of fees, expenses and charges on the loan during the pendency of chapter 13 cases. It must be served on the debtor, debtor's counsel and the trustee. The form is signed under penalty of perjury. It is unclear what the result might be if the form is not filed when fees and expenses are incurred. Debtors cannot modify their home mortgages under § 1322(b)(2), so, if the fees and expenses are allowable under the mortgage documents, they are owed. However, debtors may argue that failure to file Supplement 2 constitutes a waiver of the right to collect the fees and expenses or that failure to file operates as a kind of estoppel.

RULE 3001 – CHANGES EFFECTIVE DECEMBER 1, 2012

As of December 1, 2012, Rule 3001 will change again. The new sections are:

Rule 3001. Proof of Claim

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(c) SUPPORTING INFORMATION.
(1) ***Claim Based on a Writing*****.** Except for a claim governed by paragraph (3) of this subdivision, 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.

* * * * *

(3) ***Claim Based on an Open-End or Revolving Consumer Credit Agreement****.*
(A) When a claim is based on an open-end or revolving consumer credit agreement, a statement shall be filed with the proof of claim including, as applicable, the following information:
(i) the name of the entity from whom the creditor purchased the account;
(ii) 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;
(iii) the date of the last transaction on the account by an account holder;
(iv) the date of the last payment on the account;
(v) the date on which the account was charged to profit and loss.
(B) On written request, the holder of a claim based on an open-end or revolving consumer credit agreement shall provide a party in interest the documentation specified in paragraph (1) of this subdivision.

* * * * *

COMMITTEE NOTE

Subdivision(c). Subdivision (c) is amended to add paragraph (3), which specifies information that must be provided in support of a claim based on an open-end or

> revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off' date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit.
>
> To the extent that paragraph (3) applies to a claim, paragraph (1) of subdivision (c) is not applicable. A party in interest, however, may obtain the writing on which an open-end or revolving consumer credit is based by requesting in writing that documentation from the holder of the claim.

This amendment has been opposed by the American Bankers Association. It is concerned that the rule will put unreasonable burdens on consumer lenders and debt buyers, encourage litigation, have a negative impact on the availability of credit and a negative impact on the market for purchased debt.

The rule change contemplates that a debtor may request the information required of other claimants in Rule 3001(c)(1) – "the original or duplicate" of the writing upon which the claim is based. The rule does not specify within what period that documentation, if requested, must be provided. The Committee has voted to change the rule to add a 30-day deadline for responding to a written request for documentation. The time limit would be subject to reduction or enlargement under Rule 9006.

Some creditors, at least at hearings on the new Rule, have taken the position that they do not need to comply with Rule (c)(2)(A) that requires a creditor to provide an itemized statement of any interest, fees, expenses or charges that are part of the claim. The creditors assert that the total amount owed is principal. Courts may be required to decide this issue.

In *In re Hood*, 449 Fed. Appx. 507, 2011 WL 6144364 (7th Cir. 2011), a claimant, although not attaching the outdated credit card agreement to the claim, did produce sufficient documents to prove the validity of its claim. The creditor lost its presumption of validity of its claim, but was able to produce all necessary documents at a hearing on the debtor's objection.

In *In re Taylor*, 655 F.3d 274 (3rd Cir. 2011), the Court held that creditor's counsel was properly sanctioned under Rule 9011 for its failure to file pleadings reasonably supported by the facts. HSBC used the NewTrak system of LPS to send cases to attorneys. The attorneys did not check the information or change it when it was obviously wrong. *See also* John W. Schoen, *Inside the foreclosure factory, they're working overtime*, http://economywatch.msnbc.msn.com/_news/2012/04/19/11269115-inside-the-foreclosure-factory-pushing-the-files (last visited April 20, 2012).

In re Velez, 465 B.R. 912 (Bankr. S.D.Fla.2012) held that debtor's attorney was properly sanctioned for filing 12 claim objections in a case. 41 of 52 debts listed on the schedules were marked as disputed and 8 were marked as unliquidated. The claims were objected to on grounds of failure to attach required documentation. The claims were all ones the debtor admitted to owing in some amount, usually an amount very close to the proof of claim amount. The court chastised the attorney for filing claim objections to debts that were basically undisputed. "A claim objection seeking to strike and disallow must contain both an affirmative assertion and a reasonable basis to conclude the debtor owes nothing or owes less than the amount claimed. . . Simply marking a debt as contingent, unliquidated, or disputed will not change the result, and doing so disingenuously or without reasonable care will subject the debtor's attorney to sanctions." *Id*. at 920. "The gig is up . . . on debtors taking advantage of the cost of responding to claims objections and obtaining orders striking claims which the debtor has acknowledged owing in whole or substantial part." *In re Moreno*, 341 B.R. 813 (Bankr. S.D.Fla.2006).

Pursley v. eCAST Settlement Corporation (In re Pursley), 451 B.R. 213 (Bankr. M.D.Ga.2011) catalogues most of the issues and arguments in regard to documentation issues in claim disputes. The case involves credit card debt but the issues discussed are more universal than that.