

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO
U.S. CUSTOM HOUSE
721 NINETEENTH STREET, FIFTH FLOOR
DENVER, COLORADO 80202-2508

09-BK-115

HOWARD R. TALLMAN
Chief Bankruptcy Judge

February 12, 2010

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comments on proposed Fed.R.Bankr.P. 3001 and 3002.1 from the District of Colorado.

Dear Secretary and Committee Members:

In conjunction with a group of practicing consumer debtor and creditor attorneys, I am providing you with our combined comments and concerns regarding proposed Fed.R.Bankr.P. 3001 and 3002.1. The common theme of the comments and concerns with the proposed rules are anticipated significant increases in costs and potential litigation.

By way of background, this group came together before proposed Rules 3001 and 3002.1 were published for comment and they drafted a proposed General Procedure Order to effectively and efficiently address similar matters to those in the proposed rules. The group put their efforts on hold when the proposed rules were published for comment. Enclosed, we are attaching the draft General Procedure Order for your consideration as we believe it more pragmatically and simply addresses the matters in proposed Rules 3001 and 3002.1 by balancing the responsibilities of the Trustee, debtor and creditor, streamlining the process for disclosure of post-petition fees and charges, and including a provision for declaring the loan current at the end of the plan in an effort to avoid future 524(i) and state-law foreclosure issues post discharge.

Proposed Rule 3001

- Historically, Rule 3001, and the proof of claim process generally, has been limited to pre-petition claims.
- Proposed Rule 3001 essentially puts into place best practices of providing all documents, itemizations of interest, fees, expenses, amount of secured claim and escrow analysis. For most lenders, the cost of this additional effort will be passed on to the debtor(s) as post-petition charges.

- Proposed Rule 3001 does not address the inherent conflict between the timing of the confirmation hearing required by the Code and the later deadline to file a proof of claim. It can be quite difficult for creditors to provide all of the information needed for a Proof of Claim in their objection to the plan. In our jurisdiction, pre-BAPCPA, this was addressed by In re Fewell, 164 B.R. 153 (Bankr. D. Colo. 1993).
- The Rule creates further tension between the provisions of 11 U.S.C. § 1324(b), mandating confirmation hearings within 20-45 days of the meeting of creditors, and the lender's ability to file a proof of claim that complies with the new dictates of Rule 3001.
 - Post-BAPCPA, our new Local Bankruptcy Rules and Forms deal with this issue by requiring debtors to file post-confirmation modifications to their Chapter 13 plans to address allowed priority and secured claims which were not filed and/or liquidated at the time of confirmation. The modification is due not later than one year after the petition date.
- In some jurisdictions, the inability to amend the proof of claim may interfere with the plan confirmation process.
- The proposed Rule may be cumbersome when applied to loans that are in a trial loan modification period rather than a final loan modification when the Proof of Claim is due, as the payment amounts change depending upon whether the modification actually becomes final.

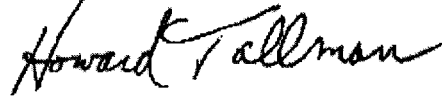
Proposed Rule 3002.1

- Proposed Rule 3002.1 fails to take into account Home Equity Lines of Credit. Depending upon rate fluctuations, payments could change monthly, making it difficult, if not impossible to comply with the Rule.
- The Rule conflicts with the longstanding principle that a secured debt passes through bankruptcy unaffected. Increased fees and burden are caused to creditors by requiring them to exam loans secured by the debtor's primary residence every 180 days or risk waiving fees, expenses and charges recoverable from the debtor under the terms of the loan documents.
- This increased participation by the secured creditor may result in significant additional costs to debtors:
 - Since the terms of most promissory notes provide that debtors can be charged reasonable legal fees and costs associated with legal actions, mandating the supplementation of the proofs of claim every six months will add significant, unnecessary costs to the post-petition loan balance.

- To the extent that the debtors dispute the amounts disclosed in the claim supplements, they may incur additional legal fees to hire counsel to challenge the charges. If counsel requires payment for services at the time of the challenge, debtors may be financially unable to fight the claim. Conversely, if counsel is willing to accept payment through the plan, the increase in plan payments to cover this representation may cause feasibility issues.
- As drafted, the Rule may result in at least yearly litigation if the debtor and/or trustee object to the recoverability of fees, expenses or charges. Both debtors' and creditors' counsel expressed concern about this potential increase in litigation over the course of a plan for potentially small disputes, taxing the resources of the Court and requiring hands-on case management from the date of filing through discharge.
- Since the new Rule requires the holder of a mortgage claim to file an itemization of fees and charges within 180 days of the fee being assessed, this could result in 12 supplemental filings over the life of a 60 month plan. Given the high percentage of cases that never reach discharge, the frequent supplementation of claims, and the resulting additional costs of the supplementation, may ultimately prove unnecessary in most cases.
- 3002.1(e) requires a holder to file a Response to the Notice of Final Cure, rather than treating silence as consent. Failure to file a response could subject the holder to possible sanctions, including an award of attorneys' fees and expenses.
- The mandatory response requirement ultimately increases the fees and costs for the debtors, both for their own attorneys and for the holder's attorneys under the terms of the note.
- Many consumer attorneys structure their fees so that confirmation of the plan is the end of their representation. Monitoring the supplemental claims, reviewing the Notice of Final Cure and Response (3002.1(d) & (e)), and filing a Motion to Determine Cure (3002.1(f)) will require counsel to either remain active in each Chapter 13 case filed for the life of the plan, or withdraw from the case.
- Numerous jurisdictions have adopted a Motion to Deem Current procedure, such as the one in the attached proposed GPO, which provides a process for determining if a debtor has any outstanding post-petition charges prior to entry of the discharge. In states which have adopted a Motion to Deem Current process, the new proposed Rule appears to be redundant.

Thank you to the Rules Committee for addressing this difficult and pervasive issue and for considering our comments. Please contact me if you require further information.

Best regards,

A handwritten signature in black ink that reads "Howard Tallman". The signature is written in a cursive style with a large, stylized 'H' and 'T'.

Howard Tallman

cc: Secretary of the Committee on Rules of Practice and Procedure (by mail and email)
Hon. Judith Wizmur, Chief Bankruptcy Judge, District of New Jersey (by mail and email)

Plan Language Committee

PROPOSED GPO

A. NOTICE OF FINAL CHAPTER 13 CURE PAYMENT.

1. Within 30 days of making the final payment of any cure amount made on a claim secured by a security interest in the debtor's real property, the trustee in a Chapter 13 case shall file and serve upon the claimant of record, the claimant's counsel, the debtor, and debtor's counsel a notice stating that the amount required to cure the default has been paid in full.

2. If the debtor contends that the final cure payment has been made and the trustee does not file and serve the notice within the specified time period, the debtor may file and serve upon the claimant of record, claimant's counsel, last known servicer and the trustee a notice stating that the amount required to cure the default has been paid in full.

B. MOTION TO DEEM PRE-PETITION ARREARS CURED.

1. Within 30 days of service of the notice, the debtor may file a Motion to Deem Pre-Petition Arrears Cured and a Notice of Opportunity for a Hearing pursuant to L.B.R. 9013-1. The Notice shall provide 35 days for the claimant of record to respond. Debtor shall serve the Motion and Notice upon the Chapter 13 Trustee, the claimant of record and the claimant's counsel.

2. If the claimant of record objects to the Motion to Deem Pre-Petition Arrears Current, it shall file with its objection a statement of the outstanding pre-petition arrears or any other payment to be paid through the Chapter 13 Plan, including attorneys' fees and costs with supporting documentation.

3. If the claimant of record does not object, the court shall enter an order that all pre-petition amounts required by the underlying agreement and applicable non-bankruptcy law in connection with the security interest have been paid in accordance with the Chapter 13 Plan and as of the date the Verified Motion to Deem Pre-Petition Arrears Cured was filed.

C. MOTION TO DEEM LOAN CURRENT

1. No later than 60 days prior to the due date of the Debtor's last scheduled plan payment, the debtor may file a Verified Motion to Deem Loan Current and a Notice of Opportunity for Hearing pursuant to L.B.R. 9013-1. The Notice shall provide 35 days for the claimant of record to respond. Debtor shall serve the Motion and Notice upon the claimant of record, claimant's counsel, last known servicer and the trustee.

2. If the claimant of record or Trustee, should Trustee pay post-petition amounts pursuant to the plan, objects to the Motion to Deem Loan Current, it shall file with its objection a statement of past due amounts, including attorneys' fees and costs with supporting documentation.

3. If the claimant of record does not object, the court shall enter an order that all post-petition amounts required by the underlying agreement and applicable non-bankruptcy law in connection with the security interest have been paid as of the date the Verified Motion to Deem Loan Current was filed.

D. COMPLIANCE WITH SECTION 524(i):

1. For purposes of establishing a cause of action under 11 U.S.C. §524(i), confirmation of the plan shall impose a duty on the holders and/or servicers of claims secured by liens on real property to:

a. Apply the payments received from the trustee to the prepetition arrearages, if any, and only to such arrearages unless the confirmed plan states otherwise;

b. To apply the post-petition mortgage payments, whether paid by the Trustee or paid directly by the debtor(s) to the oldest, post-petition month due, whether such payments are immediately applied to the loan or placed into some type of suspense account;

c. To notify the debtor(s) of any changes in the interest rate for an adjustable rate mortgage which result in changes in the monthly payment and the effective date of the adjustment;

d. To notify the debtor(s) of any change that would either increase or reduce the escrow portion of the monthly mortgage payment, the resulting changes in the monthly mortgage payment and the effective date of the adjustment.

2. For purposes of bankruptcy accounting and Regulation X of RESPA the pre-petition arrears will be treated as current, subject to and contingent on completion of the plan, so as to preclude imposition of any default-related fees and services based solely on any pre-petition default. This obligation will have no force or effect if the case is dismissed or converted.

E. The Bankruptcy Court may retain jurisdiction during the pendency of the Chapter 13 case to adjudicate the reasonableness of charges and/or fees which the holder and/or servicer of the

claims secured by the liens on real property asserts have accrued since the filing of Debtor's voluntary petition if the property is retained by the Debtor.