ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

San Antonio, TX
April 4, 2019

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

April 4, 2019

San Antonio, Texas

Discussion Agenda

1. Greetings and introductions (Judge Dow).

   Tab 1 Committee Roster
   Subcommittee Liaisons
   Chart Tracking Proposed Rules Amendments
   Pending Legislation Chart

2. Approval of minutes of the September 17, 2018 meeting in Washington DC (Judge Dow).

   Tab 2 Draft minutes

3. Oral reports on meeting of other committees:

   A. Standing Committee – January 3, 2019 (Judge Dow, Professors Gibson and Bartell).

      Tab 3A Draft minutes of the Standing Committee meeting

      Tab 3B March 2019 Report of the Standing Committee to the Judicial Conference

   B. Advisory Committee on Appellate Rules – October 26, 2018 (Judge Pepper).

   C. Advisory Committee on Civil Rules – November 1, 2018 (Judge Goldgar).

   D. Bankruptcy Committee – December 13-14, 2018 (Judge Bernstein, Judge Gorman).

4. Report of the Appeals, Privacy, and Public Access Subcommittee (Judge Ambro).

   A. Recommendation and review of public comments concerning proposed amendments to Rule 8012 (Professor Gibson).

      Tab 4A Memo of March 4, by Professor Gibson

B. Recommendation concerning suggestion 19-BK-A to amend Rules 3011 and 9006(b) regarding unclaimed funds (Professor Bartell).

Tab 4B Memo of March 1, by Professor Bartell

5. Report of the Business Subcommittee (Judge Bernstein).

A. Recommendation concerning suggestion 18-BK-D from CACM to expand electronic noticing with proposed amendment to Rule 9036; recommendation concerning proposed 'opt-in' (Professor Gibson).

Tab 5A Memo of March 5, by Professor Gibson

B. Recommendation and review of public comments concerning proposed amendments to Rule 2004 (Professor Gibson).

Tab 5B Memo of March 4, by Professor Gibson

C. Consider publication of amendment to Rule 7007.1 to parallel proposed amendment to Civil Rule 7.1 regarding requirements for intervenors. (Professor Gibson).

Tab 5C Memo of March 4, by Professor Gibson

6. Report of the Consumer Subcommittee (Judge Goldgar).

A. Consider suggestion 14-BK-E (from the National Bankruptcy Conference) (Professor Bartell).

Tab 6A Memo of March 1, 2019, by Professor Bartell

B. Recommendation and review of public comments concerning proposed amendments to Rule 2002 (Professor Gibson).

Tab 6B Memo of March 5, by Professor Gibson

7. Report of the Forms Subcommittee (Judge Hoffman).

A. Recommendation concerning suggestion 18-BK-F to amend Official Form 122A-1 (Professor Gibson).

Tab 7A Memo of March 4, by Professor Gibson

B. Recommendation concerning suggestion 19-BK-B to create a director's form Application for Unclaimed Funds (Professor Bartell).

Tab 7B Memo of March 4, by Professor Bartell

8. Report of the Restyling Subcommittee (Judge Krieger; Professor Bartell, and Scott Myers); Discussion of Civil Rules Restyling effort (Judge Lee H. Rosenthal, by telephone); Discussion of issues to consider with respect to restyling the Bankruptcy Rules (Abigail Willie).

Tab 8A Memo of January 26, by Abigail Willie, Supreme Court Fellow

Information Items

9. Review of notice provisions in Rule 3002.1 and affect on chapter 13 discharge where trustee payments through a plan are successfully completed, but direct payments by the debtor to a mortgagee are not current. (Elizabeth Jones, Supreme Court Fellow). *[Memo appended at end of agenda book]*.

10. Consumer Subcommittee status report on consideration of suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1 concerning home mortgage information.

Tab 10A Memo of March 6, by Professor Gibson

11. Update on possible amendments to Rule 5005 in connection with pending amendments to Rule 9036. (See 2018-09 agenda item 7).

Under consideration by Business Subcommittee. No report.

12. Future meetings:

The fall 2019 meeting will be in Washington, DC, on September 26, 2019.

Suggestions for location of spring 2019 meeting.

13. New Business.
Assign to the Forms Subcommittee for consideration: suggestion 19-BK-C to amend Official Form 309A to list address for the previous three years. *[Note that the suggestion seems to apply to all versions of Official Form 309]*.

14. Adjourn.

Proposed Consent Agenda

The Chair and Reporters have proposed the following items for study and consideration prior to the Advisory Committee's meeting**. Absent any objection, all recommendations will be approved by acclamation at the meeting.** Any of these matters may be moved to the Discussion Agenda if a member or liaison feels that discussion or debate is required prior to Committee action. Requests to move an item to the Discussion Agenda must be brought to attention of the Chair by noon, Eastern Time, on **Thursday, March 28, 2019.**

1. Consumer Subcommittee.

   A. Recommendation of no action regarding Suggestion 18-BK-I (to require the debtor's attorney to mail the statement of intent to creditors) because the rules already impose a duty on the debtor to send the statement of intent to creditor.

      Consent Tab 1A Memo of March 1, 2019, by Professor Bartell

   B. Recommendation for approval without publication of technical amendment to Rule 2005(c) to reflect statutory change.

      Consent Tab 1B Memo of March 5, 2019, by Professor Bartell.

TAB 1

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Dennis Dow** United States Bankruptcy Court Charles Evans Whittaker United States Courthouse 400 East Ninth Street, Room 6562 Kansas City, MO 64106
Reporter, Advisory Committee on Bankruptcy Rules	**Professor S. Elizabeth Gibson** Burton Craige Professor of Law University of North Carolina at Chapel Hill 5073 Van Hecke-Wettach Hall C.B. #3380 Chapel Hill, NC 27599-3380
Associate Reporter, Advisory Committee on Bankruptcy Rules	**Professor Laura Bartell** Wayne State University Law School 471 W. Palmer Detroit, MI 48202
Members, Advisory Committee on Bankruptcy Rules	**Honorable Thomas L. Ambro** United States Court of Appeals J. Caleb Boggs Federal Building 844 North King Street, Unit 32 Wilmington, DE 19801-3519 **Honorable Stuart M. Bernstein** United States Bankruptcy Court Alexander Hamilton Custom House One Bowling Green, Room 729 New York, NY 10004-1408 **Honorable A. Benjamin Goldgar** United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 638 Chicago, IL 60604 **Jeffery J. Hartley, Esq.** Helmsing Leach Post Office Box 2767 Mobile, AL 36652 **Honorable Melvin S. Hoffman** Chief Judge United States Bankruptcy Court John W. McCormack Post Office and Court House 5 Post Office Square, Room 1150 Boston, MA 02109-3945

Members, Advisory Committee on Bankruptcy Rules *(cont'd)*	**Honorable David A. Hubbert** Acting Assistant Attorney General, Tax Division (ex officio) United States Department of Justice 950 Pennsylvania Avenue N.W. Room 4141 Washington, DC 20530 **Honorable Marcia S. Krieger** Chief Judge United States District Court Alfred A. Arraj United States Courthouse 901 19th Street, Room A941 Denver, CO 80294 **Thomas Moers Mayer, Esq.** Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036 **Debra L. Miller, Esq.** Chapter 13 Bankruptcy Trustee P. O. Box 11550 South Bend, IN 46634 **Honorable Pamela Pepper** United States District Court United States Courthouse and Federal Building 517 East Wisconsin Avenue, Room 271 Milwaukee, WI 53202 **Jeremy L. Retherford, Esq.** Balch & Bingham LLP 1901 Sixth Avenue North, Suite 1500 Birmingham, AL 35203-4642 **Professor David Arthur Skeel** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104 **Honorable Amul R. Thapar** United States Court of Appeals United States Courthouse 35 West Fifth Street, Room 473 Covington, KY 41011 **Honorable George H. Wu** United States District Court U.S. Courthouse 350 West 1st Street STE 4311, Room 9151 Los Angeles, CA 90012-4565

Clerk of Court Representative, Advisory Committee on Bankruptcy Rules	**Kenneth S. Gardner** Clerk, United States Bankruptcy Court United States Custom House 721 19th Street, Room 116 Denver, CO 80202-2508
Consultants, Advisory Committee on Bankruptcy Rules	**Patricia S. Ketchum, Esq.** 113 Richdale Avenue #35 Cambridge, MA 02140 **James H. Wannamaker, Esq.** 780 Samantha Drive Palm Harbor, FL 34683
Liaison Member, Advisory Committee on Bankruptcy Rules	**Honorable William J. Kayatta, Jr.** (*Standing*) United States Court of Appeals Edward T. Gignoux Federal Courthouse 156 Federal Street, Suite 6740 Portland, ME 04101-4152
Liaison Member, U. S. Department of Justice, Executive Office for U. S. Trustees	**Ramona D. Elliott, Esq.** Deputy Director/General Counsel Executive Office for U.S. Trustees 20 Massachusetts Avenue, N.W. - Suite 8100 Washington, DC 20530
Liaison Member, Committee on the Administration of the Bankruptcy System	**Honorable Mary Patricia Gorman** Chief Judge United States Bankruptcy Court Paul Findley Federal Building and United States Courthouse 600 East Monroe Street, Room 235 Springfield, IL 62701
Secretary, Standing Committee and Rules Committee Chief Counsel	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820; Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

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Liaisons for the Advisory Committee on Appellate Rules	**Judge Frank Mays Hull** **Judge Pamela Pepper**	***(Standing)*** ***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge William J. Kayatta, Jr.**	***(Standing)***
Liaisons for the Advisory Committee on Civil Rules	**Peter D. Keisler, Esq.** **Judge A. Benjamin Goldgar**	***(Standing)*** ***(Bankruptcy)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Jesse M. Furman**	***(Standing)***
Liaisons for the Advisory Committee on Evidence Rules	**Judge Carolyn B. Kuhl** **Judge Sara Lioi** **Judge James C. Dever III**	***(Standing)*** ***(Civil)*** ***(Criminal)***

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Advisory Committee on Bankruptcy Rules

Subcommittee/Liaison Assignments, Effective October 25, 2018

Consumer Subcommittee Judge A. Benjamin Goldgar, Chair Judge Pamela Pepper Judge George H. Wu Jeff J. Hartley, Esq. Debra L. Miller, Esq. Jeremy L. Retherford, Esq. Ramona D. Elliott, Esq., *EOUST liaison* Kenneth S. Gardner, *ex officio*	**Business Subcommittee** Judge Stuart M. Bernstein, Chair Judge Thomas Ambro Judge Amul R. Thapar Judge Marcia S. Krieger Judge Melvin Hoffman Jeff J. Hartley, Esq. Tom Mayer, Esq. Professor David Skeel Ramona D. Elliott, Esq., *EOUST liaison* Kenneth S. Gardner, *ex officio*
Forms Subcommittee Judge Melvin Hoffman, Chair Judge George H. Wu Judge A. Benjamin Goldgar Debra L. Miller, Esq. Jeremy L. Retherford, Esq. Ramona D. Elliott, Esq., *EOUST liaison* David Hubbert, Esq., *ex officio* Kenneth S. Gardner, *ex officio*	**Privacy, Public Access, and Appeals Subcommittee** Judge Thomas Ambro, Chair Judge Pamela Pepper Judge A. Benjamin Goldgar Tom Mayer, Esq. Ramona D. Elliott, Esq., *EOUST liaison* David Hubbert, Esq., *ex officio*
Restyling Subcommittee Judge Marcia S. Krieger, Chair Judge Susan P. Graber, *Standing Committee Liaison* Judge A. Benjamin Goldgar Jeff J. Hartley, Esq Debra L. Miller, Esq. Kenneth S. Gardner, *ex officio* John Rao, Esq. *consultant*	**Technology and Cross Border Insolvency Subcommittee** Judge Amul R. Thapar, Chair Judge Melvin Hoffman Professor David Skeel Ramona D. Elliott, Esq., *EOUST liaison*
Civil Rules Liaison: Judge Benjamin Goldgar	**Appellate Rules Liaison:** Judge Pamela Pepper

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Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the "three day rule."	
AP 29	An exception added to Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using "bond or other security."	CV 62, 65.1
BK 8002(a)(5)	Adds a provison to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Revised March 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	Amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	Adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorized the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	Authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Revised March 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 23	Amendments (1) require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond"; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	Amendments to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

Revised March 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

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Effective (no earlier than) December 1, 2019 Current Step in REA Process: transmitted to Supreme Court (Oct 2018) REA History: approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised March 2019

Effective (no earlier than) December 1, 2020 Current Step in REA Process: published for public comment (Aug 2018-Feb 2019) REA History: approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendments clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
CV 30	Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.	
EV 404	Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: Introduced in the Senate; referred to Judiciary Committee

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TAB 2

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 17, 2018
Washington, D.C.

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Amul R. Thapar
District Judge Marica S. Krieger
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar (by phone)
Bankruptcy Judge Melvin S. Hoffman
Jeffrey J. Hartley, Esq. (by phone)
David A. Hubbert, Esq.
Thomas Moers Mayer, Esq.
Jill Michaux, Esq.
Debra Miller, Esq., Chapter 13 trustee
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Daniel Coquilette, reporter to the Standing Committee (by phone)
Professor Catherine Struve, associate reporter to the Standing Committee (by phone)
Circuit Judge Susan Graber, liaison to the Standing Committee (by phone)
Bankruptcy Judge Mary Gorman
Professor Cathie Struve, associate reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Vivian Jones, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Ahmad Al Dajani, Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Nancy Walle, National Association of Chapter 13 Trustees
Gary Seitz, representative of the National Association of Bankruptcy Trustees
Elizabeth Jones, Supreme Court fellow
Abigail Willie, Supreme Court fellow

Discussion Agenda

1. Greetings and introductions

Judge Sandra Ikuta welcomed the group and advised that this is her last meeting at chair of the Committee. Judge Dennis Dow will take over on October 1, 2018. She introduced Judge David Campbell, Professor Daniel Coquillette, and Professor Catherine Struve, the chair and reporters for the Standing Committee.

2. Approval of minutes of San Diego April 3, 2018 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) June 12, 2018 Standing Committee meeting

Professor Elizabeth Gibson provided the report. All proposed bankruptcy items were approved, including several items for final approval and publication. She reviewed the rule and form amendments that were approved by the Standing Committee, noting that those given final approval were just approved by the Judicial Conference. She advised that minor stylistic changes were made to the draft proposed Rule 8012 to conform with changes made to proposed Appellate Rule 26.1.

(B) April 10, 2018 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report. The Civil Rules Committee discussed many issues related to multi-district litigation, including interlocutory appeals, settlement, and third-party funding of litigation. There was a discussion of a recent Supreme Court decision *Hall v. Hall*, 138 S.Ct. 1118 (2018), in which the Court ruled that when originally independent cases are consolidated under Rule 42(a)(2), they remain separate actions for purposes of final-judgment appeal under 28 U.S.C. § 1291. The Court noted that changes in the meaning of final judgment should come from rulemaking rather than judicial decisions. The Civil Rules Committee determined to go forward with a study of the issue.

(C) April 6, 2018 Meeting of the Advisory Committee on Appellate Rules

No report.

(D) June 14-15, 2018 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report. She said the issue most relevant to this Committee was the discussion regarding unclaimed funds held by courts. The Bankruptcy Committee is considering submitting a suggestion for amendments to Rules 3011 and 9006 to

add a statute of limitations for unclaimed funds. Another possible solution is to reach out to larger claimants regarding the collection of unclaimed funds; however, there are practical issues with claiming the funds.

The Committee discussed the potential proposed rule changes, and whether a statute of limitations amendment is the proper solution to the issue of unclaimed funds.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Business Issues

(A) Status report concerning proposed amendments to Rules 2002(g) and Official Form 410A (held back at spring 2018 meeting) and related suggestion 18-BK-D from the Committee on Court Administration and Case Management to require certain high-volume notice recipients to transition from paper to electronic notices

Professor Gibson provided the report, advising that that no rule changes are being proposed at this time and that the subcommittee seeks guidance from the Committee as to how to proceed. She reminded the Committee that proposed amendments to Rules 2002(g) and 9036, along with Official Form 410, were published in August 2017. The amendments were intended to expand the use of electronic noticing and service. Following several comments raising concerns regarding the technological implementation of the proposed changes, including the potential for conflicting priorities of email addresses for notice, the Committee determined to hold back the amendments to Rule 2002(g) and Official Form 410. The Committee went forward with the proposed amendments to Rule 9036, which would permit clerks and parties to provide notices or serve using a court's electronic filing system (CM/ECF) on registered users of CM/ECF. The proposed amendments to Rule 9036 were approved by the Standing Committee and Judicial Conference.

After the spring meeting, the Committee on Court Administration and Case Management (CACM) filed suggestion 18-BK-D to further amend Rule 9036 to impose a requirement for mandatory electronic notice for certain high-volume notice recipients. The suggestion related to a previous suggestion from the Bankruptcy Judges Advisory Group (BJAG) which was discussed by the Committee but not adopted because of potential conflicts with Bankruptcy Code § 342.

The subcommittee discussed CACM's suggestion, which was modified from BJAG's suggestion to account for any potential conflicts with Bankruptcy Code § 342. The subcommittee contacted Administrative Office (AO) technology staff to determine any possible technological issues. The current proposal is to amend Rule 9036 to add a carve-out for section 342(e) and (f) and to distinguish between types of filers, i.e., registered users, non-registered users, and high-volume notice recipients (as defined by the Director of the Administrative Office). A further issue that arose in the discussions with the AO technology staff is the monitoring of bounce back emails if the email address provided is not valid or no longer valid. Ken Gardner completed an informal survey of clerks' office and found that most courts responding (about fifty percent) do some type of monitoring of bounce back emails.

Professor Gibson advised that the subcommittee is seeking feedback about whether the Committee should propose rule amendments adopting a program that impacts high-volume notice recipients. The Committee agreed that the subcommittee should continue to work on a proposed draft amendment for Rule 9036, in consultation with AO technology staff.

Judge Campbell asked about the current proposed amendments to Rule 9036 that were given final approval by the Standing Committee and Judicial Conference this year and will be forwarded to the Supreme Court for approval. If the current proposed amendments to Rule 9036 go forward, they will be effective December 1, 2019. He raised whether the current proposed amendments should be removed from consideration by the Supreme Court, and the entire set of proposed changes to Rule 9036 presented together in the future. Professor Gibson and Judge Ikuta responded that it could be several years until other amendments are proposed, and that technology could change prior to any further amendment. For these reasons, the current proposed amendments to Rule 9036 should go forward. Judge Campbell agreed with this conclusion.

(B) Recommendation to amend Rule 3007(a)(2)(ii) to eliminate the inclusion of credit unions from the heightened service requirements of Rule 7004(h).

Professor Gibson provided the report. The current version of Rule 3007 includes special requirements for serving insured depository institutions based on the congressionally enacted language in Rule 7004(h). At the spring meeting, the Committee determined not to expand Rule 7004(h) to include credit unions because of the limited definition of "insured depository institution" in that rule. However, Bankruptcy Code § 101 contains a definition of insured depository institution that is broader than the definition provided in Rule 7004, and that definition applies to Rule 3007. The Committee voted to propose for publication an amendment to Rule 3007(a)(2)(ii) to eliminate credit unions from the special service requirements of that rule.

5. Report by the Forms Subcommittee

(A) Recommendation for amendment to Official Form 113 based on Suggestion 18-BK-A

Professor Gibson provided the report, explaining that the suggestion was to change to Official Form 113 to avoid a possible ambiguity. On the current version of the form, the debtor is required to check a box identifying whether certain provisions are included in the proposed plan, and the form states the consequences of checking that a provision is not included or checking both boxes for a particular provision. The form is silent, however, about the consequence of failing to check either box, resulting in ambiguity. A second part of the suggestion was based, in part, on an issue with a local form in one jurisdiction, and the subcommittee's research shows that the local form at issue was amended to correct the mistake. The subcommittee agreed that the second part of the suggestion no longer required action, but it recommended accepting the first suggestion to amend the Official Form to include language to

address situations in which no box is checked. The Committee, by motion and vote, approved the amended language, and the approved amendment will be held pending other potential amendments to Form 113.

(B) Recommendation in support of Suggestion 18-BK-B to amend Director's Form 3180W

Professor Bartell explained the suggestion regarding Director's Form 3180W is to change the language about non-dischargeable fines and penalties. A revised version of the form was included in the materials, and no additional approval is required to implement the amendment. The revised form was approved by motion and vote.

(C) Recommendation of no action in response to Suggestion 18-BK-E to amend Official Forms 101A and 101B

Professor Bartell explained that the suggestion related to Official Forms 101A and 101B, which were both adopted as part of the Forms Modernization Project in December 2015. She explained that Bankruptcy Code § 362(b)(22) is the basis for the forms, but that Bankruptcy Code § 525(a) is the section at issue in the suggestion as it may preclude a debtor from being evicted from governmental housing. Professor Bartell noted that the law is not settled on the issue, so the subcommittee recommended that no action be taken on the suggestion at this time.

6. Report by the Restyling Subcommittee

(A) Recommendation regarding restyling the Federal Rules of Bankruptcy Procedure

Judge Dow introduced the topic of restyling the Bankruptcy Rules. He advised the subcommittee recommends that the Committee proceed with the restyling project and that it would be similar to the restyling of the other federal rules.

He provided detail of the work completed by the subcommittee. Following the spring meeting, the subcommittee completed a survey of the bankruptcy community regarding interest in restyling of the Bankruptcy Rules. The survey was drafted by Dr. Molly Johnson of the Federal Judicial Center and Professor Bartell, and included a sample restyled version of Rule 4001(a). The subcommittee sent the survey to bankruptcy judges, clerks, and bankruptcy organizations, and posted it on uscourts.gov. More than 300 people responded to the survey, including forty percent of bankruptcy judges and about fifty percent of bankruptcy clerks. The survey respondents overwhelmingly supported the restyling effort, but there were significant concerns raised regarding the protection of certain terms of art used in bankruptcy and the danger of unintended consequences of restyling. In addition, the survey showed that respondents supported restyling all the rules rather than a subset.

Judge Dow stated that following the survey results, the subcommittee determined that the project to restyle the Bankruptcy Rules should go forward. A caveat to the subcommittee's

recommendation is that any final decisions on whether to recommend any change to the Bankruptcy Rules rest with the Committee. Judge Dow noted that if the Committee approves the recommendation, there are still open questions with regard to how to proceed with the restyling project, and that the subcommittee will continue to work on these issues.

Judge Campbell stated that it is a big task, and it will take several years, advising that it is likely unavoidable that problems will be introduced through restyling, as seen with the restyling of other federal rules. He expressed his view that the recommendation regarding the restyled rules comes from the Committee, and the Committee has the final say regarding whether something is of substance rather than stylistic, including terms of art and terms used in the Bankruptcy Code. The Standing Committee will defer to the Committee regarding whether something is substantive and not stylistic, as well as language approved by the Committee because bankruptcy is a specialty area. Several Committee members and Professor Dan Coquilette noted their approval of Judge Campbell's comments.

Professor David Skeel added that the Committee should be wary of unintended consequences of rules restyling, stating that mistakes can be introduced easily even with careful attention to detail. Professor Catherine Struve echoed his comments, although both offered their support for the project. The recommendation to approve the restyling project subject to the caveat was approved by motion and vote.

Information Items

7. Business Subcommittee Consideration of possible changes to Rule 5005.

Professor Bartell explained that she is working with Ramona Elliott to determine if changes are needed to Rule 5005 as a result of the proposed amendment to Rule 9036. A further update will be provided at the spring meeting.

8. Coordination Items.

Scott Myers provided a brief report on the coordination of pending rule amendments.

9. Future meetings:

The spring 2019 meeting will be in San Antonio, Texas, on April 4, 2019, and the fall 2019 meeting will be in Washington D.C.

10. Adjournment

The meeting was adjourned at 12:00 p.m.

Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Subcommittee on Appellate Issues.

   (A) Recommendation for conforming technical changes to Rules 8012, 8013, and 8015.

   (B) Recommendation of no action in response to Suggestion 18-BK-C to amend Rule 9033.

2. Subcommittee on Business Issues.

   (A) Recommendations to refer Suggestion 14-BK-E (from the National Bankruptcy Conference) to the Consumer Subcommittee, and to take no action with respect to informal suggestions from committee member Jill Michaux, and former committee member David Lander.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2019 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee" or "Committee") held its winter meeting in Phoenix, Arizona, on January 3, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Judge William Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve (by telephone)
Elizabeth J. Shapiro, Esq.[1]
Judge Srikanth Srinivasan

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Providing support to the Committee were:

Professor Catherine T. Struve (by telephone)
Reporter, Standing Committee
Rebecca A. Womeldorf
Secretary, Standing Committee
Professor Daniel R. Coquillette
Consultant, Standing Committee
Professor Bryan A. Garner
Style Consultant, Standing Committee
Professor Joseph Kimble
Style Consultant, Standing Committee
Ahmad Al Dajani
Law Clerk, Standing Committee

Rules Committee Staff
Bridget Healy (by telephone)
Scott Myers
Julie Wilson

Federal Judicial Center
John S. Cooke, Director
Dr. Tim Reagan, Senior Research Associate

[1] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. He recognized the newest member of the Standing Committee, Judge William J. Kayatta, Jr., who sits on the U.S. Court of Appeals for the First Circuit. An attorney for many years in Maine, Judge Kayatta served in various capacities with the Maine Bar and the American Bar Association. Judge Campbell next welcomed Judge Kent A. Jordan, a new member of the Advisory Committee on Civil Rules who sits on the U.S. Court of Appeals for the Third Circuit.

Judge Campbell also recognized participants who are serving in new capacities including: Judge Dennis Dow – who began his tenure as Chair of the Advisory Committee on Bankruptcy Rules last October; Director John Cooke – who recently replaced Judge Fogel as Director of the Federal Judicial Center (FJC); and Professor Catherine Struve, who became the Standing Committee's Reporter as of the first of the year. Judge Campbell thanked Professor Dan Coquillette for his service as Reporter and announced that Professor Coquillette would continue to serve the Standing Committee in a consulting capacity. He presented a framed certificate of appreciation to Professor Coquillette on behalf of the Judicial Conference of the United States and signed by the Chief Justice.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process. The chart includes three-and-a-half pages of rules that went into effect on December 1, 2018. Also included are changes (to the Appellate and Bankruptcy Rules) that continue the rules committees' joint project of accommodating electronic filing and service. The Judicial Conference approved these rules in September 2018 and transmitted them to the Supreme Court the following month. The Court will consider the package and transmit any approved rules to Congress no later than May 1, 2019. Provided Congress takes no action, these rules will go into effect on December 1, 2019.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 12, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 26, 2018, in Washington, DC. The Advisory Committee presented five information items.

Information Items

Rules 35 & 40 – Petitions for Panel and En Banc Rehearing, and Initial Hearing En Banc. At the June 2019 Standing Committee meeting, the Advisory Committee plans to seek the Standing Committee's final approval to amend Rules 35 and 40. These amendments, which concern length

limits applicable to responses to a petition for rehearing, are currently published for public comment.

The Advisory Committee is also considering additional changes to Rules 35 and 40 aimed at reconciling discrepancies between the two rules. These discrepancies trace back to a time when parties could petition for panel rehearing but only "suggest" rehearing en banc. The Advisory Committee has identified three possible approaches that further revisions might take. One approach would be to align Rules 35 and 40 more closely with each other. A second approach would use Rule 21 (extraordinary writs) as a model for revising both Rules 35 and 40. A third approach would be to consolidate the provisions governing both types of rehearing (panel and en banc) in a revised Rule 40, leaving revised Rule 35 to cover only initial hearing en banc.

Rule 3 – Notices of Appeal and the Merger Rule. At the next Standing Committee meeting, the Advisory Committee will seek approval to publish amendments to Rule 3 for public comment. These amendments would address the relationship between the contents of the notice of appeal and the scope of the appeal. The Advisory Committee's research revealed that when a notice of appeal from a final judgment also designates a specific interlocutory order, some courts (invoking the "expressio unius" canon) take the view that the additional specification limits the scope of appellate review to the designated interlocutory order.

Judge Chagares explained how the proposed amendments would address this issue. First, because the merger rule provides that interlocutory orders become appealable once they merge into a final judgment, adding the term "appealable" to Rule 3(c)(1)(B) would indicate that a party need only specify the judgment or order that grants an appellate court jurisdiction over the matter. Second, the amendments would add two rules of construction for notices of appeal. The first rule of construction rejects the *expressio unius* approach that some courts use to limit the scope of appellate review. The second clarifies, for purposes of civil appeals, that courts should construe a notice designating an order resolving all remaining claims as designating the final judgment, whether or not the final judgment is set out in a separate document.

Judge Chagares asked members of the Standing Committee for their views on two issues: whether the text of Rule 3 should explicitly discuss the merger rule, and whether removing the phrase "part thereof" from Rule 3(c)(1)(B) would help to avoid encouraging undue specificity in notices of appeal.

A judge member asked whether framing the proposals as rules of construction undermines their binding effect. Why say that additional specificity in the notice "must not be construed to limit" the notice's scope rather than simply saying that such specificity "does not limit" the notice's scope? Another participant asked whether such phrasing would remove an appellant's ability to intentionally limit the scope of the appeal. Professor Hartnett agreed that the goal is not to foreclose intentional limitations, but rather to protect an appellant from *unintentionally* limiting the appeal's scope through the inclusion of superfluous detail in the notice.

A judge member stated that courts should interpret the notice of appeal so as to bring up for review as much as possible; the parties' appellate briefing suffices to narrow the issues. A different member noted that allowing appellants to curtail their appeal in the notice can conserve

resources for the parties because it alerts the opposing party to the narrowed scope of the appeal. The member expressed support for a rule change to displace the *expressio unius* approach, and also suggested that framing the amendments as rules of construction would leave an appellant with the option to limit the notice's scope if the appellant desires.

The same member asked whether the Advisory Committee considered citing in the Committee Note the cases that the amendment would overrule. Professor Coquillette noted that citing cases in a Committee Note is a risky endeavor because case law continues to develop, and one cannot amend the Committee Note without a corresponding rule change. Sometimes, though, a Committee Note cites cases in order to illustrate the problems that a rule or amendment is addressing. Another judge member asked whether it might be worthwhile to incorporate the merger rule into the Rule 3 text. Judge Chagares explained that the Advisory Committee did not want to risk freezing the merger rule's development by explicitly defining it in rule text.

A style consultant suggested revising the second rule of construction to use "is" rather than "must be construed as." Judge Campbell asked whether the second rule of construction is inconsistent with Civil Rule 58 since it refers to "a designation of the final judgment" even in instances when Civil Rule 58 requires that the judgment be set out in a separate document and this requirement has been disregarded. Professor Cooper said that a court's failure to enter a Civil Rule 58 judgment in a separate document does not defeat finality, and therefore, the clause's directive to treat a reference to an order adjudicating all remaining claims as a reference to the final judgment is not a problem. He also remarked that the phrase "an appealable order" is fraught with the potential for confusion that could create a host of problems, and noted his support for referring to the merger rule without attempting to define it in the rule text. This approach, he suggested, would make clear that the merger rule applies without constraining its development.

Finally, Professor Coquillette reflected on a suggestion to reorder and renumber Rule 3's subparts. He noted that renumbering a rule can raise practical legal research problems which is why the traditional practice has been to maintain the same numbering. Even when abrogating a rule, he observed, the practice is to state that the rule is abrogated rather than remove it and renumber the set. Professor Cooper recalled that, in restyling the Civil Rules, the rule makers made sure to leave untouched the "iconic" subdivision numbers – for example, Civil Rule 12(b)(6) – but Appellate Rule 3's subdivisions, he suggested, were not in that "iconic" category.

Rule 42(b) – Voluntary Dismissals and Judicial Discretion. The Advisory Committee is considering whether granting voluntary dismissals should be mandatory under Rule 42(b). Rule 42(b) provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. Under this formulation, attorneys have noted that they cannot guarantee their clients that the court will dismiss the appeal if the parties file a dismissal agreement. Judge Chagares noted that one argument in favor of mandating dismissals is that prior to restyling, Rule 42(b) stated that the clerk "shall" dismiss the appeal – a term that arguably did not leave the courts any discretion. On the other hand, some have argued that requiring a court to grant a stipulated dismissal when an opinion has already been prepared and is ready for filing would waste judicial resources.

A judge member expressed support for making the rule mandatory to provide clarity for the parties. Another judge member stated that it would be improper to allow a court to file an opinion once the dispute is no longer justiciable. But the member distinguished stipulated dismissals that do not require any further action by the court from those that do. Some types of cases – such as Fair Labor Standards Act cases – require court review of settlements. Where an action by the court is needed, such as a remand for the district court to review a proposed settlement, courts should have the discretion to decide whether to take the action proposed in the parties' agreement. But when no further action (other than dismissing the appeal) is needed, mandatory dismissal is appropriate.

A style consultant noted that the choice between mandatory and permissive terms is a substance issue, not a style issue. Professor Gibson pointed out that in Part VIII of the Bankruptcy Rules – a subset of the Bankruptcy Rules modeled after the Appellate Rules – Bankruptcy Rule 8023 mandates dismissal of an appeal to a district court or bankruptcy appellate panel if the parties file a signed dismissal agreement, specify allocation of costs, and pay any fees.

Potential Amendment to Rule 36 – Effect of Votes Cast by Former Judges. Also under consideration is an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office. Judge Chagares noted that a case pending before the Supreme Court raises the issue, and the Advisory Committee will refrain from further action pending resolution of that case.

Other Matters Under Consideration. Judge Chagares noted that the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), distinguished time limits imposed by rule from those imposed by statute. The Court characterized time limits set only by court-made rules as non-jurisdictional procedural limits. The Advisory Committee is considering whether this decision raises practical issues for the rules but will refrain from acting on any issues until the Court decides *Nutraceutical Corp. v. Lambert*, No. 17-1094, which asks the Court to address whether Civil Rule 23(f)'s 14-day deadline for filing a petition for permission to appeal is subject to equitable exceptions.

Finally, Judge Chagares noted that the Advisory Committee received a letter from the Committee on Court Administration and Case Management (CACM Committee) requesting that all Rules Committees ensure that the rules provide privacy safeguards in social security and immigration matters. The Advisory Committee concluded that this request did not require action to amend the Appellate Rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 13, 2018, in Washington, DC. The Advisory Committee sought approval of one action item and presented two information items.

Action Item

Restyling the Federal Rules of Bankruptcy Procedure. Professor Bartell reported the results of a spring 2018 survey that was both posted on the internet and sent to judges, court clerks, and stakeholder organizations. The survey responses revealed widespread support for restyling the Federal Rules of Bankruptcy Procedure to make them clearer and easier to understand. The Advisory Committee accordingly sought the Standing Committee's approval to begin the restyling process.

She explained that the unique nature of bankruptcy procedure means that restyling poses a risk of unintended consequences resulting from inadvertent changes to the substance of the rules. As a result, the Advisory Committee recommended that the restyling process go forward on the condition that the Advisory Committee, not the Style Consultants, retains final authority to recommend any modifications to the Standing Committee for final approval.

Judge Dow noted that the Advisory Committee, in collaboration with the Style Consultants, drafted a restyling protocol. The protocol outlines the timing, grouping, and phasing of the restyling process, identifies methods for tracking comments and revisions to the rules, and establishes policies to ensure that the style consultants can meaningfully participate in the restyling process.

The protocol also addresses the style consultants' concerns regarding the use of statutory terms. Judge Dow explained that statutory terms are used throughout the rules because the rules are closely tied to the Bankruptcy Code. That said, the Advisory Committee pledged not to reject a proposed change solely because existing language tracked statutory language, unless the change would have an adverse effect on daily bankruptcy practice.

The Style Consultants expressed their satisfaction with the restyling protocol that the Advisory Committee continues to develop. Judge Dow further noted that the Advisory Committee is not seeking the Standing Committee's approval of the draft protocol because it is subject to ongoing revisions.

Judge Campbell expressed his view that the Advisory Committee should have final say on what to recommend to the Standing Committee. He explained that the Standing Committee generally would not overrule the Advisory Committee's recommendations on matters of substance within bankruptcy expertise. That said, Judge Campbell noted that the Standing Committee retains its authority to review, discuss, and modify any recommendations made by the Advisory Committee. Judge Dow agreed with Judge Campbell's views on this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the commencement of the effort to restyle the Federal Rules of Bankruptcy Procedure with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval.**

Judge Campbell mentioned how helpful it had been to obtain the guidance of a number of current and former rulemaking colleagues who had participated in the restyling of other sets of rules. That guidance had stressed, inter alia, the desirability of keeping members of Congress apprised of the restyling project, and had suggested that this would be particularly important with respect to the Bankruptcy Rules. It was noted that, in contrast to the other sets of rules, the Rules Enabling Act framework does not provide that Bankruptcy Rules amendments supersede contrary statutory provisions.

Judge Campbell also suggested that a primer on bankruptcy law for the stylists and members of the Standing Committee might be helpful to the restyling process. A judge member noted that it would be helpful to have the primer before the next meeting at which restyled bankruptcy rules will be considered.

Information Items

Expansion of Electronic Notice and Service. Professor Gibson noted that the Advisory Committee has been considering ways to increase the use of electronic notice and service in bankruptcy courts. In addition to adversary proceedings, notice is often required in other aspects of a bankruptcy case, and notice by mail has proven costly for the judicial system as well as the parties. The Advisory Committee is considering ways to reduce costs (while still meeting the requirements of due process) by shifting to electronic noticing and service.

One suggestion from the CACM Committee is to mandate electronic notice for certain high-volume notice recipients. Professor Gibson explained that the Advisory Committee declined to act on an earlier version of this suggestion because the Bankruptcy Code provides some parties with the right to insist upon mail delivery at a particular mailing address. The current CACM Committee suggestion, however, explicitly recognizes that such parties retain the statutory right to opt for delivery at a stated physical address. Accordingly, the Advisory Committee is reexamining the idea and may have a proposal for publication this summer.

Suggested Amendment to Bankruptcy Official Form 113 – Chapter 13 National Plan. Another suggestion under consideration concerns instructions provided on the national form for chapter 13 plans. The form currently asks debtors to indicate whether the plan includes certain important provisions using two alternative checkbox answers to three questions on the front page. The instructions state that if the debtor marks the "Not Included" checkbox or marks both "Not Included" and "Included" checkboxes, then the relevant provision will not be effective.

The suggestion points out that the instructions do not address what happens if the debtor marks neither box. Professor Gibson explained that if one of the listed provisions is included in the plan, but the debtor fails to check the box stating that it is included in the plan, then the provision should be ineffective because the blank checkbox failed to alert creditors to the provision's presence. She noted that while the Advisory Committee agrees with the suggestion, the form is relatively new. The Advisory Committee thus will defer proceeding with the proposed amendment in order to see whether experience under the new form and related rules suggests the need for additional adjustments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met on November 1, 2018, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Multidistrict Litigation (MDL) and Social Security Disability Review subcommittees.

Information Items

Rule 30(b)(6) – Deposition Notices or Subpoenas Directed to an Organization. Judge Bates reported that the Advisory Committee received comments regarding its proposed changes to Rule 30(b)(6), and twenty-five witnesses will testify on the matter at a hearing scheduled for January 4, 2019. The subcommittee will hold the hearing at the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona.

Judge Bates noted that most comments focus on proposed language requiring the party taking the deposition and the organization to confer about the identity of the witness(es) the organization will designate to testify on behalf of the corporation. Some submissions raised concerns that this will cause an unwarranted intrusion into the corporation's prerogative to designate who will testify. The Advisory Committee looks forward to hearing further input from stakeholders regarding the matter.

Judge Campbell invited those at the meeting to attend the hearing.

Rule 73(b)(1) – Consent to Magistrate Judge. The Advisory Committee's Report details three issues that have been raised about the procedure for consenting to referral for trial before a magistrate judge. One issue – concerning a question of consent by late-added parties – has been set aside. Another issue – relating to the means for obtaining consent after an initial random referral of a case to a magistrate judge – is still being considered. A third issue relates to the lack of anonymity, under the CM/ECF system, concerning consents to trial before a magistrate judge.

Judge Bates explained that the CM/ECF system currently notifies the judge assigned to the case whenever a party files its individual consent. This automatic notification defeats the anonymity provision of Rule 73(b)(1) that allows a district judge or magistrate judge to be informed of a party's consent only if all parties consent. During its April 2019 meeting, the Advisory Committee will review options for preserving anonymity in this process.

Rule 7.1 –Disclosure Statements. Also under consideration are changes to Rule 7.1 that would require a non-governmental corporation that seeks to intervene to file a corporate disclosure statement. These changes parallel pending proposals to amend the Appellate and Bankruptcy Rules.

The Advisory Committee is also considering a proposal relating to the disclosure of the names and citizenship of members in a limited liability company (LLC) or similar entity. Judge

Bates explained that the citizenship of LLCs, partnerships, and similar entities depends on the citizenship of their members. As a result, disclosing the citizenship of an entity's members is necessary for determining the existence of a federal court's subject matter jurisdiction in diversity cases. But, Judge Bates noted, in some cases a member of a partnership or LLC is itself a partnership or an LLC. The Advisory Committee is considering the extent to which citizenship disclosures should extend up the chain of ownership in such cases. Judge Bates noted that, in considering whether to propose requiring additional disclosures, the Advisory Committee is taking into consideration the underlying reason for the disclosure. It is important to know whether the goal is to demonstrate the court's subject matter jurisdiction or to provide judges with information necessary to make recusal decisions.

A judge member noted that a rule alerting judges and parties to the necessity of pleading citizenship in diversity cases would be helpful, so long as it accounts for the variation in entity types. Judge Campbell agreed. He noted that standing orders are often used to remind parties pleading diversity jurisdiction that they need to take into consideration the citizenship of members in an LLC or partnership. He also noted that lawyers representing such entities often miss this crucial step.

Judge Bates noted, as well, a third type of disclosure issue that has come to the Advisory Committee's attention. This third issue has to do with third-party litigation funding (TPLF). Here a concern might be that judges need information concerning TPLF in order to know whether they have a recusal issue. Though it is very unlikely that judges would invest in well-known third-party litigation funders, the dynamic nature of the field raises the possibility that a company not known for engaging in such funding might in fact turn out to do so. Judge Bates noted that the Advisory Committee could look into the TPLF disclosure issue or could wait for practice to evolve further.

Judge Campbell suggested that the Advisory Committee might initially train its focus on the question of disclosures relevant to diversity jurisdiction, while also continuing to study TPLF. An inter-committee project on recusal-related disclosures, though, might not be warranted at this time.

Timing of Final Judgments in Cases Consolidated under Rule 42(a). Judge Bates said that the Advisory Committee has taken up consideration of the effect of consolidation under Civil Rule 42(a) on final judgment appeal jurisdiction. In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court held that an individual case consolidated under Rule 42(a) maintains its independent character, such that a judgment resolving all claims as to all parties in that case is an appealable final judgment, regardless of whether proceedings are ongoing in the other consolidated cases. Chief Justice Roberts, writing for the Court, noted that the appropriate Rules Committees could address any practical problems resulting from this holding.

Professor Cooper noted that the salient rules are Rule 42(a), which provides for consolidation, and Rule 54(b), which governs the entry of a partial final judgment. In considering whether and how to amend these rules in light of *Hall v. Hall*, the goal should be to minimize the risk that parties to a consolidated case might unwittingly forfeit their appeal rights out of confusion as to the effect of the consolidation.

Judge Bates noted that a subcommittee would be formed to consider these matters and that the subcommittee would benefit from the involvement of Judges Jordan and Chagares.

MDL Subcommittee. Judge Bates stated that the MDL Subcommittee, chaired by Judge Dow, has consulted various stakeholders and narrowed the subjects on which it will consider possible rulemaking. While some advocate rulemaking to govern MDL proceedings others stress the need to retain judicial flexibility and innovation in this area. The subcommittee has yet to reach any conclusions.

There are six topics under the subcommittee's consideration. These are:

1) Early procedures to winnow out unsupportable claims;
2) Interlocutory appeals;
3) Formation and funding of plaintiffs' steering committees (PSCs);
4) Trial issues;
5) Settlement promotion and review; and
6) TPLF.

1) *Winnowing Unsupportable Claims*. Judge Bates noted that certain laws require companies to report claims made against them, including unsupportable claims made in MDLs. Judge Bates explained that a number of MDL judges currently winnow unsupportable claims by requiring the submission of plaintiff fact sheets. These sheets are specific to the MDL under consideration and lack uniformity. He also noted that using these sheets to eliminate unsupportable claims early in the proceeding is difficult and requires that the court and parties expend substantial time and effort. Other suggestions under consideration include expanded initial disclosure requirements, Rule 11 sanctions, master complaints, requiring each plaintiff in an MDL to pay a filing fee, and/or requiring early consideration of screening tools.

2) *Interlocutory Appellate Review*. Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*. Judge Bates noted that the scope of this problem is not yet apparent and that the input received by the subcommittee imparts a healthy skepticism regarding this topic.

The subcommittee needs further information to resolve crucial questions including, but not limited to, whether appellate review should be mandatory or discretionary, what role trial courts should have in certifying issues for appellate review, and how to determine which orders will be subject to interlocutory appellate review. If the subcommittee decides to move forward, Judge Bates explained that it would do so in coordination with the Advisory Committee on Appellate Rules.

A judge member expressed support for an interlocutory appeal mechanism, to the extent that the avenue currently provided by 28 U.S.C. § 1292(b) is inadequate. That said, the member opposed expedited review because the timing of appellate decision making is affected by many variables that are difficult to control. One such variable is determining which cases to delay in

exchange for expediting review of an MDL ruling. Judge Bates noted that not expediting the appeal would cause further delay, and that delay impairs the MDL's efficiency and harms the parties. Judge Campbell agreed, stating that each interlocutory appeal in an MDL could take several years to resolve, and that if more than one such appeal occurs they could add up to many years of delay. Another member observed that key rulings may occur at different stages of the litigation; perhaps it would be possible to identify a single time when an interlocutory appeal might bring such rulings up for review. A different member suggested that the parties could brief questions of timing, so as to inform the courts' determinations about the proper balance between the need for appellate review and the risk of delay.

Another member expressed strong support for interlocutory appeals in MDLs, reasoning that, by definition, MDLs are important. Legal issues such as preemption or failure to state a claim can give rise to critical rulings with huge settlement values. The goal, this member suggested, is to reach the right result. And some courts of appeals, he reported, have been known to refuse to take up an issue that the district court has certified for interlocutory review under 28 U.S.C. § 1292(b).

A judge member, citing his experience presiding over an MDL, expressed skepticism that the challenges of MDL management are susceptible to rulemaking reforms. MDL judges, he stressed, need flexibility because every MDL is different. He suggested that sorting issues into dispositive and non-dispositive categories would help the subcommittee determine which issues are suitable for interlocutory appellate review, and he noted that more use could be made of the Section 1292(b) mechanism.

3) *Plaintiff Steering Committees*. A member suggested that the subcommittee should consider providing guidance for the appointment of lead counsel and PSCs. It might be helpful to examine the lead-plaintiff-appointment provisions in the Private Securities Litigation Reform Act (PSLRA). By analogy to the PSLRA's rebuttable presumption in favor of appointing the plaintiff with largest financial interest, he suggested, perhaps there should be a presumption in favor of appointing the lawyer with the largest number of cases in the MDL. The member stated that if the judge appoints too many law firms to the PSC, this may increase the complexity and expense of managing the MDL.

A judge member disagreed with the proposed presumption in favor of appointing to the PSC the lawyer with the largest number of cases; such a presumption, he argued, could exacerbate the problem of unsupported claims. This member said that he would not oppose possible amendments to Civil Rules 16 and/or 26 to require early discussion of screening tools such as plaintiff fact sheets (though he is not sure that such amendments are necessary).

Another judge member suggested that California state-court practice with PSC selection may be instructive. In California, she explained, the plaintiffs' lawyers organize themselves, subject to court approval; this approach relies on the plaintiffs' bar's knowledge concerning which lawyers conduct themselves fairly.

4) *Trial Issues*. Judge Bates noted several trial issues that are currently being considered by the subcommittee. One issue is whether MDL judges should have the authority to require party

witnesses to appear at trial to testify live. Another issue is whether a transferee court should only hold bellwether trials with the consent of all parties.

5) *Settlement Promotion, Review, and Approval*. The subcommittee is also evaluating whether it could provide a structure for courts to review settlements in MDL proceedings. Judge Bates distinguished MDL settlements from class action settlements (which are subject to court review and approval under Civil Rule 23(e)): whereas each plaintiff in an MDL is represented by his or her own counsel and can consult that counsel about a settlement's advisability, that is not the case in a class action. The subcommittee is considering whether any aspects of MDL settlement are suitable topics for rulemaking, or whether other measures, such as updates to the Manual on Complex Litigation, would be more appropriate.

A judge member suggested that an apparent lack of interest from stakeholders does not provide a reason to drop the topic of settlement from the subcommittee's agenda. This member observed that the ALI's Principles of the Law of Aggregate Litigation reflect concern for the lack of voice that individual plaintiffs may have in nonclass aggregate settlements.

6) *TPLF*. TPLF is a growing field with varied subparts. Funders might finance the prosecution of a case by a plaintiffs' firm, might finance individual plaintiffs' claims, or might finance the defense of a lawsuit. Some funding arrangements may raise concerns about who has control over the litigation.

Judge Bates noted that the Advisory Committee is looking at this issue through the MDL prism, though it is not a discrete MDL issue. One approach would be to focus on what disclosures may be necessary for purposes of judges' assessment of recusal issues. A question facing the subcommittee is whether the scope of the disclosure should be limited to the fact of funding and identity of the funder, or should include terms of the finance agreement as well. Another question is whether discovery in this area should be permissible.

Professor Coquillette cautioned that these issues are closely interwoven with the laws regulating lawyers. For example, this past fall the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 484, "A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee." This opinion addresses the financing of individual plaintiffs' claims and explains that when the plaintiff's counsel becomes involved in such financing, a great many of the ABA's Model Rules of Professional Conduct come into play. Professor Coquillette said that the Rules Committees' last foray into areas affecting the rules of professional conduct united every state bar association against them.

Subcommittee on Social Security Disability Review. A suggestion from the Administrative Conference of the United States asked the Advisory Committee to create rules governing cases in which an individual seeks district court review of a final decision of the Commissioner of Social Security. A subcommittee, chaired by Judge Lioi, created to address this suggestion has not yet concluded its work. Judge Bates noted that the most significant issues arising in these cases concern considerable administrative delay within the Social Security Administration as well as variation among districts in both local practices and rates of remand. The Social Security

Administration strongly supports the proposal for national rules, while the Department of Justice appears neutral on this topic. Claimants' attorneys generally oppose the idea of national rules, but if such rules are to be adopted they have views on what the rules' content should be. There is a real question whether any proposed rules would reduce the government's staffing burdens. And there is a question whether reducing the government's staffing burdens is an appropriate goal for the rulemakers. Judge Bates further noted that whatever rules the subcommittee might recommend, if any, still need to be considered by the Advisory Committee.

Professor Cooper reported that the subcommittee is approaching consensus on what the rules would look like if they were to be proposed. The subcommittee currently envisions (for discussion purposes) a narrow set of rules focused on pleading, briefing, and timing. There is a lingering tension between two possible models for the pleading rules. One, patterned after the appellate process, would cast the complaint as a limited document with the simplicity of a notice of appeal and would provide that the government's answer is to consist of the administrative record. In this model, further particulars would develop during briefing. The other model would provide for additional detail in both the complaint and the answer. As to briefing, one question is whether the plaintiff should be required to submit a motion for the relief requested in the complaint along with the brief.

A judge member reported that magistrate judges in his district were concerned about a uniform rule because approaches vary depending on the facts and circumstances of the individual case – such as whether the plaintiff has a lawyer or not. These circumstances may affect the judge's approach to (for example) the order and timing of briefing. In this member's view, flexibility is necessary to ensure adequate representation for parties proceeding pro se. Participants observed that there are variations both across and within districts concerning the extent to which these cases are referred to magistrate judges.

Judge Bates noted that the subcommittee is close to reaching a recommendation whether to abandon the effort or move forward. It will continue to include various stakeholders in the process and will ask for feedback and suggestions.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on October 10, 2018, in Nashville, Tennessee. The Advisory Committee presented five information items.

Information Items

Rule 16 – Expert Disclosures. The subcommittee, chaired by Judge Kethledge, is currently considering whether Rule 16 should be amended to expand pretrial discovery of expert testimony in criminal cases – a change that would bring Rule 16 closer to the more robust expert discovery requirements in Civil Rule 26. Judge Molloy announced plans for a mini-conference. This conference presents an opportunity for the Rule 16 Subcommittee to receive input from

prosecutors, private practitioners, and federal defenders around the country about whether an amendment is warranted and, if so, what its content should be.

Task Force on Protecting Cooperators. Judge Amy St. Eve provided an update on the progress of the task force. The task force's work is complete, and its reports and recommendations were finalized and delivered to Director Duff. These reports recommended practices to be implemented by the Bureau of Prisons (BOP) in ensuring the safety of cooperators. One recommendation asks the government to start tracking whether assaults on prisoners are related to the victim's status as a cooperator. The BOP wishes to avoid collecting this information within correctional institutions, so the information would instead be collected by the DOJ into an anonymized database that would be securely stored within the DOJ.

Another recommendation is that courts should store plea and sentencing documents in separate case subfolders with public access restricted to those physically present at the courthouse. Doing so allows the Clerk of Court to maintain an access log that would be useful in any investigations arising from retaliation against cooperators. Director Duff has referred this recommendation to the CACM Committee.

Judge Molloy noted that there continue to be concerns about the balance between protecting cooperators, on one hand, and government transparency and the public's right to information, on the other.

Rule 43(a) – Defendant's Presence at Plea and Sentencing. The Advisory Committee received a suggestion concerning the Rule 43(a) requirement that a defendant be physically present in court at plea and sentencing. In *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), the Seventh Circuit vacated a judgment of conviction due to the district court's decision to conduct the plea and sentencing proceeding with the defendant appearing by videoconference; the defendant's serious health issues made him susceptible to injury from even limited physical contact. The Seventh Circuit determined that Rule 43(a) by its terms permits no exceptions to the requirement of physical presence in the courtroom at sentencing and suggested that "it would be sensible" to amend Rule 43(a). In considering whether to propose an explicit exception in the rule, the Advisory Committee is investigating the frequency with which such extenuating circumstances occur.

Time for Ruling on Habeas Motions (Suggestion 18-CR-D). The Advisory Committee received a suggestion to require that judges decide habeas motions within 60-90 days. Judge Molloy explained the Advisory Committee's view that this is more of a systemic problem resulting from the fact that habeas petitions and Section 2255 motions are exempt from the reporting requirements of the Civil Justice Reform Act (CJRA). The Advisory Committee discussed the impact of these delays and decided to refer the suggestion to the CACM Committee to evaluate whether this exemption from the CJRA's reporting requirements should be reconsidered.

Disclosure of Defendants' Full Name and Date of Birth. The Advisory Committee received a suggestion to revise applicable rules and the PACER search structure so that users could search PACER using a defendant's full name and/or date of birth. The suggestion argues that providing this search capacity would enable background screening services to perform their

functions accurately and efficiently. A similar suggestion was rejected in 2006, and the Advisory Committee likewise decided not to pursue the current proposal.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which last met on October 19, 2018, in Denver, Colorado. The Advisory Committee presented four information items.

Information Items

Rule 702 – Admission of Expert Testimony. A September 2016 report issued by the President's Council of Advisors on Science and Technology contained a host of recommendations for federal agencies, DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee's consideration of changes to Rule 702.

In fall 2017, the Advisory Committee held a conference on Rule 702 and forensic feature-comparison evidence. Subsequently a subcommittee was formed to study what the Advisory Committee might do to address concerns relating to forensic evidence; Judge Schroeder chairs the subcommittee. The subcommittee recommended against attempting to draft a freestanding rule governing forensic expert testimony, because such a rule would overlap problematically with Rule 702. The subcommittee also advised against trying to craft Rule or Note language setting out detailed requirements for forensic evidence, and it concluded that a "best practices manual" could not be issued as a formal product of the Advisory Committee. The Advisory Committee concurred in these assessments, but it will explore judicial education measures to undertake in collaboration with the FJC.

The subcommittee did suggest considering whether to amend Rule 702 to address the problem of expert witnesses overstating their conclusions, and the Advisory Committee is proceeding with that suggestion. A roundtable discussion held during the last Advisory Committee meeting asked for input from practitioners on an amendment that would target the overstatement problem. The debate produced a variety of diverging views among civil and criminal practitioners. As a result, the Advisory Committee is carefully weighing the effects such an amendment would have for expert evidence across the spectrum of legal practice.

Another amendment under consideration would emphasize that Rule 702's admissibility requirements of sufficient basis and reliable application present Rule 104(a) questions that must be determined by the court using a preponderance standard.

One member raised a concern with the feasibility of creating a rule addressing the accuracy of expert opinion because it would be difficult to craft a rule that would tell experts how to present a test's error rate. Judge Livingston explained that black-box studies provide an error rate associated with some types of expert evidence. She noted that studies had not considered every aspect of expert evidence, and it would be difficult to determine standards for evaluating expert opinions where the data are murky.

Judge Campbell noted that it is a real challenge to articulate in a rule what constitutes an overstated opinion, and the Advisory Committee is working on fleshing out its definition of the term "overstatement." Another participant noted that the DOJ has been strongly opposed to such a rule and asked whether the DOJ changed its position. The DOJ's representative noted that the word "overstatement" was fraught with confusion. She explained that the DOJ is working with the subcommittee to craft a rule addressing this issue. The DOJ is also implementing a set of internal directives, targeting overstatement, that regulate how Department scientists can phrase their opinions when testifying at trial.

Finally, Professor Capra noted that the Advisory Committee is considering several approaches, some of which were suggested by Judge Campbell. One suggestion is to state that experts may not overstate the conclusion that can be drawn from the methodology they employ. Another suggestion is to state that the expert's conclusion should accurately relate the methods used. Articulating the standard in a rule remains a challenge that the Advisory Committee continues to study.

Rule 106 – The Rule of Completeness. Judge Livingston said that the Advisory Committee is considering a suggestion to amend Rule 106 to provide that oral statements, in addition to written or recorded statements, fall within the rule's scope. Another change would provide that a completing statement is admissible under this Rule notwithstanding hearsay objections. Judge Livingston noted that this is not the first time the Advisory Committee has considered amending Rule 106, and it previously declined to act on a similar suggestion.

She also noted a few additional concerns including that a cure might have the unintended consequence of creating another hearsay exception permitting parties to introduce an out of court statement whenever a party can persuade the court that a statement should, in fairness, be considered given the admission of another statement. Another concern is that an amendment adding oral statements to Rule 106 risks disrupting the presentation of evidence with side litigation on whether a completing oral statement was actually made.

Proposed Amendment to Rule 404(b) – Bad-Act Evidence. Professor Capra stated that the Advisory Committee received two comments so far on the proposed amendment to Rule 404(b). The proposed amendment would require that prosecutors in a criminal case provide more notice of their intent to offer bad-act evidence and would require the notice to articulate support for the non-propensity purpose of the evidence. Professor Capra predicted that the Advisory Committee would replace the term 'non-propensity' with 'non-character' since 'character' is used throughout the rule.

Proposed Amendment to Rule 615 – Excluding Witnesses from Court. Professor Capra said that the Advisory Committee decided against acting on some suggestions, but other suggestions for amending Rule 615 remain pending. The Advisory Committee decided against acting on a suggestion proposing that the rule provide for judicial discretion in determining whether a witness should be excluded, reasoning that the purpose of exclusion is to prevent witnesses from tailoring their testimony according to what other witnesses testified. Accordingly, the parties are in the best position to determine whether a witness should be excluded. The

Advisory Committee also decided against acting on another suggestion concerning issues of timing and dealing with experts under this rule because case law research did not reveal any significant problems.

In studying these suggestions, however, the Advisory Committee came to consider a few other changes. The original purpose for excluding witnesses from trial was to prevent witnesses from tailoring their testimony according to the testimony of prior witnesses. However, technological developments have made mere exclusion from trial less than completely effective because the testimony of prior witnesses is now accessible beyond the courtroom. Professor Capra noted that most courts hold that a Rule 615 order extends to an excluded witness's access to trial testimony outside the courtroom. However, some courts have held that such orders do not extend beyond the courtroom unless the parties specifically ask the judge to extend the order. One change would clarify how courts should determine the extent of a Rule 615 order and provide judges with discretion to extend orders beyond the courtroom.

Judge Campbell asked whether a rule amendment would have the effect of overruling circuits who have held otherwise. Professor Capra said it would and, for this reason, the Advisory Committee is carefully considering this amendment.

Finally, Judge Campbell noted that the Advisory Committee at its October meeting considered but decided against recommending a rule that would provide a roadmap for impeachment and rehabilitation of witnesses, similar to a rule adopted by the State of Maryland.

OTHER COMMITTEE BUSINESS

Procedure for Handling Comments Made Outside the Ordinary Process. Professor Struve noted a recurring issue regarding public submissions outside the formal public comment period, including submissions addressed directly to the Standing Committee.

There are instances when the Standing Committee receives submissions that discuss a proposal that an advisory committee will be presenting at an upcoming Standing Committee meeting. The context might be a proposal of an amendment for publication, or it might be a proposal of an amendment for final approval after the public comment period has expired. It would be desirable to publish a policy for handling such comments.

Professor Struve asked Standing Committee members and other participants for feedback on the memo and tentative draft included in the agenda materials. One judge member observed that it is useful to be transparent about the process, but that it would be better to require off-cycle submitters to show cause why their input is off-cycle. Judge Campbell responded by pointing out proposed language in the agenda book that listed examples of reasons that might suffice to show such cause. The participant responded that it would be preferable to make more explicit that a person wishing to make an off-cycle submission must make a showing of why their submission is off-cycle. When the discussion later returned to the language in that paragraph, one participant observed that if someone at the last minute spots a glitch in a proposal, the rulemakers would want to take account of that insight. Professor Struve observed that the language in the agenda book did not account for that scenario. Another participant questioned that paragraph's use of the term

"extraordinary circumstances," and pointed out that it is not extraordinary for a proposal's language to be amended after the publication of the advisory committee's agenda book. A participant wondered if "good cause" would be a better term than "extraordinary circumstances." One participant argued that it would be better if the paragraph did not provide examples of instances that could justify an off-cycle submission.

Another thread in the discussion related to the norms for Committee members in settings where discussion turns to a matter that is currently before the Committee. A judge member asked what level of formality Committee members should undertake; when does a communication with an outsider to the Committee process trigger the constraints outlined in the materials (e.g., forwarding comments to the Standing Committee's Secretary)? Professor Struve suggested distinguishing between communications made to a Committee member qua Committee member and communications that are part of a more general discussion (e.g., on a listserve or at a conference). Professor Coquillette observed that there is a distinction between someone lobbying a Committee member and someone engaging in a general discussion. Subsequently, a participant proposed defining the term "submission" in the proposed website language; such a definition, this participant suggested, could help to address this issue. Professor King noted that her practice, after receiving a comment on a rule amendment, was to provide the sender with a link to the rules committee website and to explain the submission process. She suggested that members can use this technique to educate the public on how to participate in the process.

Judge Campbell thanked participants for their input, which will be incorporated into any proposal put forward at the June meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019. Any legislation introduced in the last Congress will have to be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 25, 2019, in Washington, DC. He reminded members that at this next meeting the Committee would resume its discussion (noted in the preceding section of these minutes) regarding submissions made outside the public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
March 2019

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 3, 2019. All members were present.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC); and Judge Kent A. Jordan, member of the Advisory Committee on Civil

Rules. Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Deputy Attorney General Rod J. Rosenstein.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and engaged in discussion of three information items.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

Possible Amendment to Rule 3 – the Content of Notices of Appeal

At its fall 2018 meeting, the Advisory Committee continued discussion of possible amendments to clarify the content of notices of appeal under Rule 3. Some cases apply an *expressio unius* rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order. Other courts treat a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment, even if the notice of appeal also references a specific interlocutory order in addition to the judgment.

The Advisory Committee is considering whether Rule 3 should contain some statement of the merger rule – the rule that earlier interlocutory orders merge into the final judgment. The Advisory Committee is also considering whether the phrase "or part thereof" should be deleted from Rule 3(c)(1)(B)'s directive that an appellant "designate the judgment, order, or part thereof being appealed" because the phrase has been read to require the designation of each order sought to be reviewed. The Advisory Committee is mindful that any amendment to Rule 3 would

require an amendment to Form 1 (the form notice of appeal). Finally, as part of its consideration of Rule 3, the Advisory Committee is considering whether to address problems in appeals from orders denying reconsideration.

Proposal to Amend Rule 42(b) – Agreed Dismissals

The Advisory Committee is considering a proposal to amend Rule 42(b). The current rule provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due." Some have suggested that a dismissal in these circumstances should be mandatory. Prior to the 1998 restyling of the rules that intended no substantive change, Rule 42(b) used the word "shall" instead of "may" dismiss. Rule 42(b) also provides that "no mandate or other process may issue without a court order." The Advisory Committee believes that the key distinction is between situations in which the parties seek nothing but a dismissal of the appeal, and situations in which the parties seek some judicial action in addition to dismissal.

Where the parties seek additional judicial action, the parties cannot control that judicial action. However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal might be appropriate, if not constitutionally compelled.

The Advisory Committee will continue to discuss whether the rule should mandate dismissal upon presentation to the clerk of an agreed dismissal request. If it decides to recommend that dismissal be made mandatory in some or all such circumstances, one approach would be simply to change the existing word "may" in Rule 42(b) to "must" or "will." Another option would be to revise the rule more thoroughly to mirror Supreme Court Rule 46, which provides more detailed guidance than current Rule 42(b) on the appropriate treatment of dismissal agreements or motions, including the circumstances under which dismissal is mandatory.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

The proposed amendments to Rules 35 and 40 that were published for public comment in August 2018 would create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider the significant disparities between Rules 35 and 40. The disparities are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could "suggest" rehearing en banc. The Advisory Committee continues to consider different approaches to harmonize the two rules.

Given that many local rules address the relationship between panel rehearing and rehearing en banc, the Advisory Committee will consider whether there are local practices that should be adopted in Rules 35 and 40.

Counting of Votes by Departed Judges

Finally, the Advisory Committee has started considering how to handle the vote of a judge who leaves the bench, whether by death, resignation, impeachment, or expiration of a recess appointment. The question arises when an opinion has been drafted or a judge has voted in conference, and the judge leaves the bench before the opinion is filed by the court. This is a recurrent issue, and one treated differently across the circuits. One possibility is to amend Rule 36 to provide that an opinion may issue if it has been delivered to the clerk for filing before the judge leaves the bench. A subcommittee has been formed to consider this issue. The Committee recognizes that a case currently pending before the Supreme Court may affect this issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented one action item for the Standing Committee regarding restyling of the Federal Rules of Bankruptcy Procedure, but no action is needed by the Judicial Conference at this time.

Information Items

Restyling of the Federal Rules of Bankruptcy Procedure

At its fall 2017 meeting, the Advisory Committee established a Restyling Subcommittee to consider restyling the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The proposed project follows similar restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. To inform its decision, the Restyling Subcommittee worked with the FJC and the Standing Committee's style consultants to solicit feedback from the bankruptcy community. A survey, along with a restyled version of Rule 4001(a) offered as an exemplar of the final product, was sent to all bankruptcy judges and clerks of court, as well as leaders of interested organizations. A link to the survey was also posted on the federal judiciary's website.

The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks, 19 respondents from organizations, and 109 members of the public. Over two-thirds of all respondents in every category supported restyling of the Bankruptcy Rules. Some respondents expressed concern that restyling could introduce unintended consequences, and that project members should take great care to avoid changes in a rule's meaning. Given the positive response to the survey, the Restyling Subcommittee recommended going forward with the project, consistent with the unique features of the Bankruptcy Rules.

The Bankruptcy Rules have not previously been restyled because bankruptcy is particularly statute-driven, and many rules echo statutory language. Bankruptcy is a highly technical area of practice, and one particularly prone to terms of art as well as generally understood terms, concepts, and procedures. To ensure consistency and clarity in the revised rules, the Restyling Subcommittee recommended, and the Advisory Committee agreed, that the linkage between the Bankruptcy Code and the Bankruptcy Rules should presumptively be retained, even if application of restyling guidelines might arguably improve or simplify existing statutory language.

The Advisory Committee recommended that the Standing Committee authorize commencement of the restyling process with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval. The Standing Committee discussed the considerable deference due to the Advisory Committee in restyling and accepted the Advisory Committee's recommendation, noting that final approval of the Advisory Committee's recommendation rests, as always, with the Standing Committee.

The Advisory Committee provided a tentative timeline for restyling the rules, which anticipates publishing the restyled rules for public comment in three batches beginning in August 2020 as follows:

Parts I and II of the Rules	August 2020 – February 2021
Parts III, IV, V, and VI of the Rules	August 2021 – February 2022
Parts VII, VIII, and IX of the Rules	August 2022 – February 2023

Although the Advisory Committee expects to restyle the rules in batches and obtain public comment on each group as it is restyled, none of the restyled rules would become effective until all groups have been approved. Absent delays and assuming approvals by the

Conference and the Supreme Court, and no contrary action by Congress, the full set of restyled rules would go into effect December 1, 2024. These dates are aspirational, however, and may change as the project develops.

Expansion of the Use of Electronic Noticing and Service

In August 2017, proposed amendments to two rules and one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts were published for public comment. Rule 2002(g) (Addressing Notices) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and Official Form 410 would be amended to add a checkbox for opting into email service and noticing. As published, the amendments to Rule 9036 (Notice or Service Generally) would allow clerks and parties to provide notices or serve most documents through the court's electronic-filing system on registered users of that system. It also would allow service or noticing on any person by any electronic means consented to in writing by that person.

In response to publication, several comments raised substantial issues about the proposed amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions. Based on consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee voted at its spring 2018 meeting to hold back the amendments to Rule 2002(g) and Official Form 410, but to move forward with the amendments to Rule 9036, with minor revisions. The Standing Committee recommended and the Judicial Conference approved the proposed amendments to Rule 9036 in September 2018, and that revised rule is on track to go into effect December 1, 2019.

After the spring 2018 Advisory Committee meeting, the Committee on Court Administration and Case Management (CACM Committee) submitted a suggestion for a further

amendment to Rule 9036 that would require mandatory electronic service on most "high volume notice recipients," a category that would initially be composed of entities that receive more than 100 court-generated paper notices from one or more courts in a calendar month. The CACM Committee's suggestion built upon a 2015 suggestion submitted by the Administrative Office's (AO) Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The prior suggestion was rejected as being inconsistent with § 342(e) and (f) of the Bankruptcy Code, which allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. The CACM Committee's version of the proposed mandatory electronic service requirement would be "subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code."

The CACM Committee strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. The AO has estimated that the savings could reach $3 million or more a year.

The Advisory Committee's Subcommittee on Business Issues is evaluating the CACM Committee's suggestion as well as revisions to proposed Rule 2002(g) and Official Form 410 that address the concerns raised in the comments. The subcommittee hopes to present drafts for Advisory Committee review at its spring 2019 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on November 1, 2018. Discussion focused primarily on reports from two subcommittees tasked with long-term projects, as well as consideration of new suggestions related to expanding the scope of disclosure statements in Rule 7.1.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over the past year, the subcommittee has engaged in a substantial amount of fact gathering, in part with valuable assistance from the Judicial Panel on Multidistrict Litigation (JPML). The outreach has included participating in several conferences hosted by different constituencies, including transferee judges. The purpose of the fact gathering is to identify issues on which rules changes might focus. While the subcommittee's work remains in an early stage, the information gathered thus far has allowed it to identify six issues for consideration: (1) early procedures to winnow out unsupportable claims; (2) interlocutory appellate review; (3) formation and funding of plaintiff steering committees; (4) trial issues (e.g., bellwether trials); (5) settlement promotion, review, and approval; and (6) third party litigation funding. Going forward, the subcommittee will continue to gather information with the assistance of the JPML and the FJC.

Social Security Disability Review Subcommittee

As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules to assist in focusing the discussion. While the subcommittee has not determined whether to recommend new rules, there is a growing consensus that the scope of any such rules would be limited to cases seeking review of a single administrative record, and would focus on pleading, briefing, and timing.

Disclosure Statements

Expanding the scope of the disclosure statements required by Civil Rule 7.1 and the analogous provisions in Appellate Rule 26.1, Bankruptcy Rule 8012, and Criminal Rule 12.4 has been the subject of several suggestions in recent years. The Advisory Committee has determined to move forward with a suggestion that it amend Rule 7.1 to include a nongovernmental corporation that seeks to intervene, a change that will parallel the proposed amendments to Appellate Rule 26.1 (approved by the Conference at its September 2018 session and forwarded to the Supreme Court on October 24, 2018) and Bankruptcy Rule 8012 (published for public comment on August 15, 2018). At its November 2018 meeting, the Advisory Committee also kept on its agenda a suggestion to address the problem of determining the citizenship of a limited liability company (or similar entity) in diversity cases by requiring that the names and citizenship of any member or owner of such an entity be disclosed.

Proposed Amendment to Rule 30(b)(6) Published for Public Comment

On August 15, 2018, a proposed amendment to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, was published for public comment. The proposed amendment requires the parties to confer about the number and descriptions of the matters for examination, and the identity of each witness the organization will designate to testify. The comment period closes on February 15, 2019. A public hearing was held in Phoenix, Arizona on January 4, 2019. Twenty-five witnesses presented testimony. A second hearing is scheduled to be held in Washington, DC on February 8, 2019. Fifty-five witnesses have asked to testify.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

The Advisory Committee met on October 24, 2018. A large portion of the meeting was devoted to discussion of the work of the Rule 16 Subcommittee. The Advisory Committee also determined to retain on its agenda a suggestion to amend Rule 43.

Expert Disclosures

As previously reported, the Advisory Committee added to its agenda two suggestions from district judges that pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the more robust expert disclosure requirements in Civil Rule 26. The Advisory Committee devoted a portion of its October 2018 meeting to a presentation by the Department of Justice on its development and implementation of new policies governing disclosure of forensic and non-forensic evidence.

The Rule 16 Subcommittee will consider whether an amendment is warranted and, if so, what features any recommended amendment should contain. To assist in its work, the subcommittee is planning to hold a mini-conference this spring. Participants will include prosecutors, private practitioners, and federal defenders.

Defendant's Presence at Plea and Sentencing

At its October 2018 meeting, the Advisory Committee created a subcommittee to consider the panel's suggestion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentencing.

Although the Advisory Committee has twice rejected suggestions that it expand the use of video conferencing for pleas or sentencing, members concluded the issue should be revisited

given the explicit invitation in *Bethea*. The subcommittee is tasked with assessing the need for a narrow exception to the requirement of physical presence, how such an exception could be defined, what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and how to accommodate the right to counsel when the defendant and counsel are in different locations.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 19, 2018. At that meeting, the Advisory Committee conducted a roundtable discussion with a panel of invited judges, practitioners, and academics regarding four agenda items, including two proposed amendments to Rule 702, proposed amendments to Rule 106, and proposed amendments to Rule 615. Each is discussed below. The roundtable discussion provided the Advisory Committee with helpful insight, background, and suggestions.

Possible Amendments to Rule 702

Addressing Forensics. The Advisory Committee has been exploring the appropriate response to the recent scientific studies regarding the potential unreliability of certain forensic evidence. A subcommittee was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. After extensive discussion, the subcommittee concluded that it would be difficult to draft a new freestanding rule on forensic expert testimony because any such rule would have an inevitable and problematic overlap with Rule 702. Further, the subcommittee concluded it would not be advisable to set forth detailed requirements

regarding forensic evidence in rule text because substantial debate exists in the scientific community as to appropriate requirements.

The Advisory Committee agreed with the subcommittee's recommendations and is considering ways other than rule changes to assist courts and litigants in meeting the challenges of forensic evidence. These include assisting the FJC with judicial education. The Advisory Committee continues to consider a proposal to amend Rule 702 to focus on one important aspect of expert testimony: the problem of overstating results (for example, by stating an opinion as having a "zero error rate" when that conclusion is not supportable by the methodology).

Admissibility/Weight. The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence. Extensive case law research suggests confusion on whether courts should apply the admissibility requirements of a preponderance of evidence under Rule 104(a), or the lower standard of prima facie proof under Rule 104(b). Based on the roundtable discussion and other information, the Advisory Committee will continue to consider whether an amendment to Rule 702 is necessary to clarify that the court must find these admissibility requirements met by a preponderance of the evidence.

<u>Possible Amendment to Rule 106</u>

Over its last three meetings, the Advisory Committee has been considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement to correct the misimpression. The Advisory Committee has focused on whether Rule 106 should be amended to provide: (1) that a

completing statement is admissible over a hearsay objection; (2) that the rule covers oral as well as written or recorded statements; and (3) more specific language about when the rule is triggered (i.e., by a "misleading" statement) and when a completing portion must be admitted (i.e., when it corrects the misleading impression). The roundtable discussion provided important input on these questions.

Possible Amendments to Rule 615

The Advisory Committee considered a suggestion to amend Rule 615, the rule on sequestering witnesses. The suggestion noted three concerns: (1) the rule provides no discretion for a court to deny a motion to sequester; (2) there is no timing requirement for when a party must invoke the rule, so it would be possible for a party to make a mid-trial request for exclusion of witnesses from the courtroom after some witnesses had already testified; and (3) there should be an explicit exemption from exclusion for expert witnesses to substitute for the current vague exemption for witnesses who are "essential to presenting the party's claim or defense." These proposed changes were raised at the roundtable discussion, and the Advisory Committee obtained valuable information, especially from the participating judges.

The Advisory Committee rejected the proposal to make sequestration discretionary. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware of the risks of tailoring trial testimony. Also, discretion still exists in the rule given the exceptions to exclusion provided. Similarly, the Advisory Committee determined that the concerns regarding timing and an explicit exemption from exclusion for expert witnesses were not pervasive or significant issues.

In researching the operation of Rule 615, the Advisory Committee found another issue that has produced a conflict among the courts. The issue involves the scope of a Rule 615 order

and whether it applies only to exclude witnesses from the courtroom, as stated in the text of the rule, or extends outside the confines of the courtroom to prevent prospective witnesses from being advised of trial testimony. The Advisory Committee has agreed to further consider an amendment that would clarify the extent of an order under Rule 615.

Proposed Amendment to Rule 404(b) Published for Public Comment

On August 15, 2018, the Advisory Committee published for public comment a proposed amendment to Rule 404(b), the rule that addresses character evidence of other crimes, wrongs, or acts. The proposal would expand the prosecutor's notice obligations by requiring that the prosecutor "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Three comments have been submitted thus far.

OTHER ITEMS

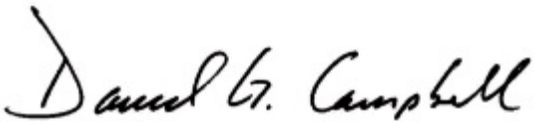
The Standing Committee's agenda also included three information items. First, the Committee was briefed on the status of legislation introduced in the 115th Congress that would directly or effectively amend a federal rule of procedure.

Second, the Committee engaged in a discussion of whether to develop procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. Based on that discussion, the Reporter to the Committee will draft proposed procedures to be discussed at the June 2019 meeting.

Third, Committee members were provided with materials summarizing the September 12, 2018 long-range planning meeting of Conference committee chairs and members of the Executive Committee, as well as the status of the strategic initiatives meant to support

implementation of the *Strategic Plan for the Federal Judiciary* that have been identified by each Judicial Conference committee.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Rod J. Rosenstein
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: COMMENTS ON PROPOSED AMENDMENTS TO RULE 8012 (CORPORATE DISCLOSURE STATEMENT)

DATE: MARCH 4, 2019

Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10% or more of the party's stock (or file a statement that there is no such corporation). It is modeled on FRAP 26.1. The Appellate Rules Committee proposed amendments to FRAP 26.1 that are pending before the Supreme Court, including one that is specific to bankruptcy appeals.

At the spring 2018 meeting, the Advisory Committee considered and approved for publication amendments to Rule 8012 that track the relevant amendments to FRAP 26.1. These amendments would add a new subdivision (b) to Rule 8012, addressing disclosure about the debtor. This subdivision would require the disclosure of the names of any debtors in the underlying bankruptcy case that are not revealed by the caption of an appeal and, for any corporate debtors in the underlying bankruptcy case, the disclosure of the information required of corporations under subdivision (a) of the rule. Other amendments tracking FRAP 26.1 would add a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal and would make stylistic changes to what would become subdivision (c), regarding supplemental disclosure statements. The text of Rule 8012 as published follows this memo in the agenda book.

The Rule 8012 amendments were published in August 2018, and three comments were submitted concerning them. All were supportive.

Ellie Bertwell of Aderant CompuLaw (BK-2018-0002-0009) wrote, "[W]e agree that provisions of the Bankruptcy Rules generally should be consistent with the other Federal Rules. The revisions to Bankruptcy Rule 8012 would make this rule consistent with the pending amendment of Appellate Rule 26.1." The National Association of Bankruptcy Trustees commented similarly: "The NABT supports the amendment for the sake of uniformity with FRAP 26.1." Finally, the Bankruptcy Section of the Federal Bar Association (BK-2018-0002-0011) stated that it "supports the proposed amendment to Rule 8012 to conform it to FRAP 26.1."

In light of the conforming nature of the amendments and the lack of any negative comment on them, the Subcommittee recommends that the Advisory Committee give them final approval. One member of the Subcommittee expressed the need for additional amendments to the disclosure statement rules to extend the requirements to a broader range of entities. The Subcommittee, however, concluded that any such expansion should be undertaken in coordination with the other advisory committees and should not hold up amendments that are designed to conform to amendments to FRAP 26.1 that are expected to go into effect on December 1 of this year.

Rule 8012. ~~Corporate~~ Disclosure Statement

(a) ~~WHO MUST FILE~~ NONGOVERNMENTAL CORPORATIONS AND INTERVENORS. Any nongovernmental ~~corporate party~~ corporation appearing in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) DISCLOSURE ABOUT THE DEBTOR. The debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 8012(a).

~~(b)~~ (c) TIME TO FILE; SUPPLEMENTAL FILING. ~~A party must file the~~ A Rule 8012 statement must:

(1) be filed with ~~its~~ the principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must~~ be included ~~include a statement~~ before the table of contents in the principal brief~~.~~; and

(3) ~~A party must supplement its statement~~ be supplemented whenever the ~~required~~ information required by Rule 8012 changes.

Committee Note

The rule is amended to conform to recent amendments to Fed. R. App. P. 26.1(c). Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) requires disclosure of the name of all of the debtors in the bankruptcy case. The names of the debtors are not always included in the caption of appeals. It also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a).

Subdivision (c), previously subdivision (b), now applies to all the disclosure requirements in Rule 8012.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: PRIVACY, PUBLIC ACCESS, AND APPEALS SUBCOMMITTEE

SUBJECT: 19-BK-A – PROPOSAL TO AMEND RULES 3011 AND 9006(b) REGARDING UNCLAIMED FUNDS

DATE: MAR. 1, 2019

We received a suggestion from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), 19-BK-A, requesting the Advisory Committee recommend amendments to Federal Rule of Bankruptcy 3011 (and a conforming change to Rule 9006(b)) for the purpose of limiting the time for requesting withdrawal of unclaimed funds from the bankruptcy court. The proposed suggestion is attached as Exhibit A.

Under 11 U.S.C. 347(a), "[n]inety days after the final distribution . . . in a case under chapter 7, 12, or 13 of this title, as the case may be, the trustee shall stop payment on any check remaining unpaid, and any remaining property of the estate shall be paid into the court and disposed of under chapter 129 of title 28."

28 U.S.C. § 2041, entitled "Deposit of moneys in pending or adjudicated cases," states as follows:

> All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.
>
> This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

Withdrawal of such funds is governed by 28 U.S.C. § 2042, which states:

> No money deposited under section 2041 of this title shall be withdrawn except by order of court.
>
> In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled

> thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

Neither the Judicial Code nor the Bankruptcy Code imposes any limit on the time within which a claimant entitled to the unclaimed funds may seek withdrawal of those funds, but Section 2042 clearly contemplates that such petitions may be filed more than five years after the money is deposited.

Millions of dollars of unclaimed funds are held in the bankruptcy court and in the U.S. Treasury. The Bankruptcy Committee established an Unclaimed Funds Task Force comprised of district and bankruptcy judges, clerks of court, and liaisons from the Bankruptcy Administrators program and the EOUST. The Task Force examined ways to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds.

The Task Force intends to seek amendment to 11 U.S.C. § 347(a) to provide that unclaimed funds remain with the bankruptcy court for five years, and at the end of that period all parties (including any claimant entitled to those funds) would be barred from asserting any claim against them. The clerks of court would have no further obligations with respect to the funds after that time.

However, whether or not such legislation is introduced or enacted into law, the Task Force proposes that the Advisory Committee accomplish the same goal by recommending an amendment to Rule 3011 to set a deadline for seeking withdrawal of unclaimed funds. Although the aims of the members of the Task Force are laudatory, the Subcommittee does not believe that such an amendment falls within the scope of the Supreme Court's authority under the Rules Enabling Act for the adoption of bankruptcy rules. Under 28 U.S.C. § 2075, the 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." However, the statute cautions, "Such rules shall not abridge, enlarge, or modify any substantive right."

The Task Force analogizes the proposed amendment to deadlines imposed on substantive rights created by the Bankruptcy Code under Rules 4004(a) and 4007(a), which establish deadlines for filing objections to discharge and determinations of the dischargeability of debts, respectively. Neither § 727(c) nor § 523(c) provides any statutory time limit on when such objections may be made. The Supreme Court has concluded that Rule 4004(a) is nonjurisdictional, and that a bankruptcy court has the authority to decide an objection to discharge that was filed out of time. *See* Kontrick v. Ryan, 540 U.S. 443 (2004). The Court characterized the rule as "claim-processing" rather than one that delineates the cases within the competence of the bankruptcy court. *Id*. at 454. By their terms, Rule 4004(a) and Rule

4007(b)(1) allow the court "for cause [to] extend the time" for objecting to discharge or for filing a complaint under § 523(c). Neither of those Rules is listed in § 9006(b)(2) as ones for which the court may not enlarge the time for taking action. The time periods in Rules 4004 and 4007 are less like statutes of limitations and more like procedural deadlines, subject to adjustment.[1]

The proposed amendment to Rule 3011 goes well beyond establishing a presumptive time period for seeking unclaimed funds; if the deadline passes without a petition being filed, the proposed amendment would bar any request. The proposed amendment to Rule 9006 precludes any enlargement to the time period set forth in the amended Rule 3011. By amending Rule 3011 to limit the time period within which a claimant may seek withdrawal of unclaimed funds to five years, the Court would arguably be abridging the rights conferred under 28 U.S.C. § 2042 to obtain payment of unclaimed funds after they had been deposited with the U.S. Treasury at the end of five years, a right recognized by statute.

Although the Associate Reporter suggested alternative amendments that would change the language of new Rule 3011(b) to make it more parallel to Rule 4004(a) and (b)(1), and Rule 4007(c), would eliminate the proposed Rule 3011(c), and would make Rule 3011(b) subject to the restrictions of Rule 9006(b)(3) rather than Rule 9006(b)(2), the Subcommittee did not believe these alternatives solved the jurisdictional problem. Therefore, the Subcommittee does not recommend any change to the rules in response to Suggestion 19-BK-A.

[1] Even Rule 4004(a) and (c) have been held invalid under the Rules Enabling Act insofar as they direct the bankruptcy court to grant a discharge to a debtor ineligible for one under § 727(a)(8) if no objection is filed. *See* Felice v. U.S. (*In re* Felice), 580 B.R. 259 (Bankr. E.D. Cal. 2018).

Exhibit A

19-BK-A

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

January 15, 2019

Honorable Dennis Dow
United States Bankruptcy Court
Charles Evans Whittaker
United States Courthouse
400 East Ninth Street, Room 6562
Kansas City, MO 64106

Dear Judge Dow:

I write on behalf of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) to request that the Advisory Committee on Bankruptcy Rules (Rules Committee) consider amendments to Rules 3011 and 9006(b) of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules).

In December 2017, the Bankruptcy Committee established an Unclaimed Funds Task Force (Task Force) to explore options for improving the judiciary's management of unclaimed funds attributable to bankruptcy courts. The Task Force is comprised of district and bankruptcy judges, clerks of court, and liaisons from the Bankruptcy Administrators program and the Department of Justice Executive Office for United States Trustees. Two of the overarching goals of the Task Force are to reduce the increasing unclaimed funds balance and future deposits[2] and to mitigate the potential liability borne by clerks of court in connection with record-keeping and payments of unclaimed funds.[3]

[2] As of July 2018, approximately $299 million in unclaimed funds was attributable to the bankruptcy system. Of that amount, $82,961,000 was held at the bankruptcy court level (in the 6047BK account), and $216,623,000 was held at the United States Treasury (in the 6133BK account).

[3] The clerks' liability arises under statute, with additional guidance set out in the *Guide to*

The Task Force developed several proposals and made recommendations to the Bankruptcy Committee at its December 2018 meeting, including a recommendation approved by the Bankruptcy Committee to request that the Rules Committee consider amendments to Bankruptcy Rules 3011 and 9006(b).

The Bankruptcy Committee's request and the proposed amendments to the Bankruptcy Rules relate to another Task Force recommendation that the Bankruptcy Committee intends to make to the Judicial Conference at its March 2019 session. The Bankruptcy Committee will recommend that the Judicial Conference seek legislation that would set a statute of limitations for the filing of an application to withdraw unclaimed funds attributable to bankruptcy courts and expressly eliminate any liability borne by the clerks of court. Specifically, an amendment to 11 U.S.C. § 347(a) would provide that unclaimed funds remain in the bankruptcy court account for five years, at which time the rightful owner (and all other parties) would be barred from asserting any claim against any party to retrieve those funds, thereby eliminating the clerks' (and any other party's) liability exposure.

As you are aware, the process of enacting legislation can be unreliable and take years to accomplish, if it is accomplished at all, and the proposed legislation will face all the usual legislative hurdles. Amending the Bankruptcy Rules would achieve the same goals by setting a deadline for the filing of an application to withdraw unclaimed funds.[3] Like the proposed statutory amendment, the proposed amendment to Bankruptcy Rule 3011 would provide that unclaimed funds remain in the bankruptcy court account for five years, at which time the rightful owner (and all other parties) would be barred from asserting any claim against any party to retrieve those funds. The proposed amendment to Bankruptcy Rule 9006(b), which addresses extending time under the Bankruptcy

responsibilities and liabilities); 31 U.S.C. §§ 3527(a), 3527(c), 3528(b) (setting forth the disbursing officer, certifying officer, and accountable official's relief from liability); *Guide to Judiciary Policy*, Vol. 13, Ch. 13, §§ 1315(a), 1315(b), 1320(a) (setting forth the accountable officer's responsibilities, liabilities, and relief from liability). The court is indefinitely responsible for keeping records of the claim against the funds. The clerk of court, as the officer tasked with recordkeeping at the court, is required to keep a record of the property and the owner's pertinent information indefinitely for the purposes of ensuring that any requests for withdrawal of unclaimed funds are paid to the rightful owners of such funds. Clerks therefore may be exposed to personal liability to the extent that the court erroneously pays unclaimed funds to the wrong owner.

[3] Imposing a deadline in the Bankruptcy Rules on substantive rights created by the Bankruptcy Code is not without precedent. In fact, a number of substantive rights created by the Bankruptcy Code are subject to deadlines set by the Bankruptcy Rules. For example, the right to object to a debtor's discharge under certain subsections of 11 U.S.C. § 727 is limited by Bankruptcy Rule 4004(a), and the right to file a complaint to determine the dischargeability of a debt under 11 U.S.C. § 523(c) is limited by Bankruptcy Rule 4007(c).

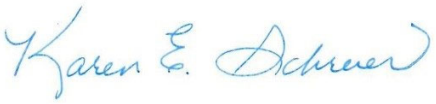
Judiciary Policy. *See* 28 U.S.C. § 613 (setting forth the disbursing officer and certifying officer's

Rules, would provide that the deadline set pursuant to Bankruptcy Rule 3011 cannot be enlarged. The proposed language amending the Bankruptcy Rules is included in the attachment.

While these proposed amendments to the Bankruptcy Rules may not completely eliminate clerks' liability in connection with unclaimed funds, the Bankruptcy Committee believes that they will greatly reduce the increasing unclaimed funds balance and future deposits and provide some protection to clerks regarding their liability exposure.

Chief Judge Mary P. Gorman (Bankr. C.D. Ill.), the Bankruptcy Committee liaison to the Rules Committee and a Task Force member, and I are both available should you have any questions or wish to discuss further.

Sincerely,



Karen E. Schreier, Chair

cc: Honorable David G. Campbell
Honorable Stuart M. Bernstein
Honorable Mary P. Gorman
Ms. Mary Louise Mitterhoff
Ms. Michele E. Reed
Ms. Rebecca Womeldorf
Ms. Bridget M. Healy
Mr. Scott Myers

Attachment

ATTACHMENT

Proposed Amendments to Federal Rules of Bankruptcy Procedure 3011 and 9006(b)

Rule 3011. Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases

(a) List of Names, Addresses, and Amounts. The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.

(b) Deadline for Filing Petition for Unclaimed Funds. In any case where remaining property of the estate is paid into court pursuant to § 347(a) of the Code, a request by a claimant seeking an order directing payment to such claimant of such money must be filed no later than five years after (1) the trustee files the list pursuant to Rule 3011 of all known names and addresses of the entities and the amounts that they are entitled to be paid or (2) [date of enactment of new Bankruptcy Rule]), whichever occurs later.

(c) Bar on Claims to Unclaimed Funds. After five years from (1) the filing of the list pursuant to Rule 3011 or (2) [date of enactment of new Bankruptcy Rule]), whichever occurs later, all persons, including any claimant who does not file a request for an order directing payment to such claimant within five years, will be forever barred and enjoined from asserting any claim against the debtor, the court, or any other party or entity on account of such money.

Rule 9006. Computing and Extending Time

(b) Enlargement.

…

(2) Enlargement Not Permitted. The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 3011(b) and (c), 7052, 9023, and 9024.

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TAB 5A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: ELECTRONIC NOTICING AND SERVICE

DATE: MARCH 5, 2019

On the Advisory Committee's recommendation, the Standing Committee in August 2017 published for public comment proposed amendments to two rules and to one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts. The proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. As published, the amendments to Rule 9036 (Notice or Service Generally) allowed clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system. It also allowed service or noticing on any person by any electronic means consented to in writing by that person. Under the proposed amendments, electronic service was declared to be complete upon filing or sending, unless the filer or sender received notice that the electronic service was not received by the person to be served. Finally, the proposed amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. It instructed the creditor to check the box "if you would like to receive all notices and papers by email rather than regular mail."

In response to publication, four sets of comments were submitted that addressed the proposed amendments. Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised several substantial issues about the published amendments. Those issues fell into three groups: (1) technological

feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions.

Based on its careful consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Subcommittee recommended that the amendments to Rule 2002(g) and Official Form 410 be held in abeyance, but that the Advisory Committee give its final approval to the amendments to Rule 9036, with some minor revisions. The Advisory Committee accepted these recommendations at the spring 2018 meeting, and it referred the Rule 2002(g) and Official Form 410 amendments back to the Subcommittee for consideration of what further actions, if any, should be taken regarding electronic noticing and service. In September 2018 the Judicial Conference gave final approval to the Rule 9036 amendments, sending them on to the Supreme Court.

CACM Suggestion

After the spring 2018 meeting, the Committee on Court Administration and Case Management (CACM) submitted a suggestion (18-BK-D) that Rule 9036 be amended to provide for mandatory electronic service on "high volume notice recipients," a category that would initially be composed of entities that each receive more than 100 court-generated paper notices from one or more courts in a calendar month. Judge Wm. Terrell Hodges, CACM chair, explained that the suggestion built upon a 2015 suggestion submitted by the Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The Advisory Committee had voted not to act on that suggestion for mandatory electronic service on high volume notice recipients because it concluded that § 342(e) and (f) of the Bankruptcy Code allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. Judge Hodges explained that the current suggestion takes account of

that concern by making the mandatory electronic noticing program "subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code."

In support of the CACM suggestion, Judge Hodges explained that for the 2019 fiscal year, the judiciary has budgeted $14 million for bankruptcy noticing, and his committee has developed several proposals for reducing that expense. CACM strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. Administrative Office of the Courts (AO) staff members who work with noticing issues have estimated that the savings could equal $3 million or more a year.

Drafting of New Amendments to Rule 9036

Judge Bernstein, Scott Myers, and the reporter have had several telephone discussions with a member of the Bankruptcy Noticing Working Group, AO staff, and Judge Marvin Isgur (Bankr. S.D. Tex.), chair of the CACM subcommittee that developed the CACM suggestion. Those discussions have been helpful in clarifying current noticing practices and understanding how those practices would be affected by proposed suggestions for expanding electronic noticing. Based on those discussions, we reached a tentative conclusion that the Bankruptcy Rules should address electronic noticing and service by the courts separately from noticing and service by parties. Doing so would take into account that courts have access to addresses registered with the Bankruptcy Noticing Center (BNC), while parties do not. We also noted that CACM's proposed draft of the amendments regarding the high-volume-notice-recipient program probably contained more detail than was needed in a procedural rule. Instead, details about the operation of the program could be left up to the AO and BNC. Rule 9036 could then just recognize the existence of such a program and provide for service and noticing on its participants.

If court noticing and servicing are treated separately from party noticing and service, the priority problems in the case of conflicting email addresses that were raised in response to the proposed amendments to Rule 2002(g) and Official Form 410 could be eliminated. The email address on a proof of claim could have a priority just after CM/ECF for parties and a lower priority for court-generated documents.

At the fall 2018 Advisory Committee meeting, the Subcommittee presented as an information item a draft of proposed amendments to Rule 9036 that embodied the principles outlined above. It obtained feedback from the committee and support for presenting at the spring 2019 meeting a draft to be considered for publication. We have continued to receive helpful assistance from AO staff members who are involved with noticing issues and have revised the draft presented in the fall.

Proposed Draft

The Subcommittee recommends that the following draft and accompanying committee note be published for comment this summer. This is a clean draft, showing how the rule would appear if amended. Attached to this memo is a marked-up draft that shows the changes that would be made to the version of Rule 9036 that is expected to take effect on December 1, 2019.

Rule 9036. Notice and Service by Electronic Transmission

(a) SENDING NOTICE OR MAKING SERVICE. Whenever these rules require or permit sending a notice or

serving a paper by mail or other means, the notice may be sent—or the paper served— as follows:

(1) *Notices from and Service by the Court.* The clerk may send notice to or serve

(A) a registered user—by filing it with the court's electronic-filing system; or

(B) any recipient—by sending it by electronic means that the recipient consented to in writing, including by designating an electronic address for receipt of notices pursuant to Rule 2002(g)(1); but

(i) if a recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy noticing program, the clerk shall send the paper to that address; or

(ii) subject to the right of an entity to designate an address pursuant to § 342(e) or

(f) of the Code, if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume-paper-notice recipient, the clerk may send it electronically to an address designated by the Director.

(2) *Notices from and Service by Others.* An entity may send notice to or serve

(A) a registered user—by filing it with the court's electronic-filing system; or

(B) any recipient—by sending it by electronic means that the recipient consented to in writing, including by designating an electronic address for receipt of notices pursuant to Rule 2002(g)(1).

(b) COMPLETION OF NOTICE OR SERVICE. Electronic notice or service is complete upon filing or

sending but is not effective if the filer or sender receives notice that it did not reach the person to be served.

(c) INAPPLICABILITY. This rule does not apply to any paper required to be served in accordance with Rule 7004.

Committee Note

The rule is amended to take account of the Administrative Office of the United States Courts' program for providing notice to high-volume-paper-notice recipients. Under this program, when the Bankruptcy Noticing Center ("BNC") has sent by mail more than a designated number of notices in a calendar month (initially set at 100) from bankruptcy courts to an entity, the Director of the Administrative Office will notify the entity that it is a high-volume-paper-notice recipient. As such, this "threshold notice" will inform the entity that it must register an electronic address with the BNC. If, within a time specified in the threshold notice, a notified entity enrolls in Electronic Bankruptcy Noticing with the BNC, it will be sent notices electronically at the address maintained by the BNC upon a start date determined by the Director. If a notified entity does not timely enroll in Electronic Bankruptcy Noticing, it will be informed that court-generated notices will be sent to an electronic address designated by the Director. Any designation by the Director, however, is subject to the entity's right under § 342(e) and (f) of the Code to designate an address at which it wishes to receive notices in chapter 7 and chapter 13 cases, including at its own electronic address that it registers with the BNC.

> The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. As a result of a contemporaneous amendment to Rule 2002(g)(1) and Official Form 410, this consent may be indicated by providing an electronic address for the receipt of notices on a proof of claim. Only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program, and any such address will supersede for court-generated notices an electronic address specified on a proof of claim.
>
> The title of the rule is revised to more accurately reflect the rule's applicability to methods of electronic noticing and service. Rule 9036 does not preclude noticing and service by physical means otherwise authorized by the court or these rules.

Next Steps

If the proposed amendments are published this summer, the amended rule would be on track to take effect on December 1, 2021. That is a date by which implementation of the opt-in system for electronic service and noticing—at an email address indicated on a proof of claim—ought to be feasible. At the same time, the previously published amendments to Rule 2002(g)(1)

and Official Form 410 could also take effect.[1] They do not require further publication, although they may require some minor revisions in response to the earlier comments that were submitted.

[1] In response to the publication of the amendments to Rule 2002(g)(1) and Official Form 410 in August 2017, some commenters stated that the programming and testing that would be required to implement the proposed opt-in rule most likely could not be undertaken for some time. They explained that resources were currently being devoted to implementing the NextGen system for the bankruptcy courts, and in addition the contract with BNC was to expire in 2018 and would be "recompeted." In light of these complications, these commenters asked that the effective date of the proposed amendments to Rule 2002(g) and Official Form 410 be delayed for two years from final approval, that is, until December 1, 2021.

Attachment

Draft of Proposed Amendments to the Version of Rule 9036 Expected to Take Effect on 12/1/2019

Rule 9036. Notice and Service ~~Generally~~ by Electronic Transmission

(a) SENDING NOTICE OR MAKING SERVICE.

Whenever these rules require or permit sending a notice or serving a paper by mail or other means, the ~~clerk, or some other person as the court or these rules may direct,~~ notice may be sent ~~send the notice to~~ or the paper served ~~serve the paper on~~ as follows:

(1) *Notices from and Service by the Court.* The clerk may send notice to or serve

(A) a registered user—by filing it with the court's electronic-filing system~~.~~; or

(B) any recipient—by sending it ~~Or it may be sent to any person~~ by ~~other~~ electronic means that the ~~person~~ recipient consented to

in writing, including by designating an electronic address for receipt of notices pursuant to Rule 2002(g)(1)-; but

(i) if a recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy noticing program, the clerk shall send the paper to that address; or

(ii) subject to the right of an entity to designate an address pursuant to § 342(e) or (f) of the Code, if an entity has been designated by the Director of the Administrative Office of the United States as a high-volume-paper-notice recipient, the clerk may send it electronically to an address designated by the Director.

(2) *Notices from and Service by Others.* An entity may send notice to or serve

(A) a registered user—by filing it with the court's electronic-filing system; or

(B) any recipient—by sending it by electronic means that the recipient consented to in writing, including by designating an electronic address for receipt of notices pursuant to Rule 2002(g)(1).

(b) COMPLETION OF NOTICE OR SERVICE. ~~In either of these events,~~ Electronic ~~service or~~ notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served.

(c) INAPPLICABILITY. This rule does not apply to any ~~pleading or other~~ paper required to be served in accordance with Rule 7004

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: COMMENTS ON PROPOSED AMENDMENTS TO RULE 2004 (EXAMINATION)

DATE: MARCH 4, 2019

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion (17-BK-B) that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information ("ESI"). The Advisory Committee discussed the suggestion at the fall 2017 and spring 2018 meetings. By a close vote, the Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

Background

The proposal before the Committee at the fall 2017 meeting, recommended by this Subcommittee, would have added to Rule 2004(c) a provision similar to the proportionality requirement of Civil Rule 26(b)(1). The following sentence would have been added to the end of the paragraph:

> A request for the production of documents or electronically stored information in connection with an examination under this rule shall be proportional to the needs of the case and of the party seeking production, in light of the following factors, to the extent relevant: the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving issues, whether the burden or expense of the proposed discovery outweighs its likely benefit, and the purpose for which the request is being made.

Members of the Advisory Committee expressed differing views about whether consideration of proportionality is appropriate for Rule 2004 examinations and what factors a bankruptcy court should consider in assessing proportionality. Some members said that the current rule is working and that Rule 2004 examinations are supposed to be broad, so no additional limitation should be imposed. Another member suggested that proportionality should be required for requests for ESI but not for paper documents. Others agreed with the Subcommittee that a proportionality requirement should be imposed both for requests for documents and for ESI. A judge member said that disputes arise concerning the scope of document and ESI requests in connection with Rule 2004 examinations and that it would be helpful to have a standard in the rule that imposes some limit. The Associate Reporter said that it seemed that the main concern expressed by those supportive of the proposed amendment was that documents and ESI are sometimes sought for an improper purpose, and she suggested that any amendment should focus on that concern.

In a straw poll, the Committee voted 6 to 5 in favor of the concept of adding a proportionality requirement, although specific language was not agreed upon. There seemed to be general support for the other proposed amendments to Rule 2004(c), which would add references to ESI and conform the rule to the amended subpoena rules. The proposal was sent

back to the Subcommittee for further consideration and a recommendation at the spring 2018 meeting.

At that meeting, the Subcommittee recommended that Rule 2004(c) be amended to incorporate the concept of proportionality, while giving bankruptcy judges flexibility in interpreting and imposing that requirement. The proposal was to require that a request for the production of documents or electronically stored information in connection with a Rule 2004 examination be "proportional to the needs of the case and of the party seeking production," but without specifying the factors that should be considered in making that determination. The Subcommittee suggested that such an approach would be consistent with the notion that Rule 2004 examinations are supposed to be broad ranging and relatively unconfined, while still providing a means of reining in requests for documents and ESI when the costs and efforts of complying are disproportionate to the needs of the case.

Again the Committee was closely divided about the proportionality proposal. Those opposing it did not think that the elimination of specific factors improved the amendment, and some members expressed concern that such a provision would lead to more litigation. After a full discussion, the Committee voted 7 to 6 not to proceed with a proportionality amendment.

The Advisory Committee unanimously approved seeking publication of amendments to Rule 2004(c) that would add a reference to electronically stored information to the title and first sentence of the subdivision. Doing so acknowledges the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004. The Committee also unanimously approved publication of the revised subpoena provisions of Rule 2004(c), which eliminate the reference to "the court in which the examination is to be held." This change conforms the rule to the current provisions of

Civil Rule 45 and Bankruptcy Rule 9016, under which a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it.

The proposed amendments to Rule 2004 were published in August 2018. The text of the rule as published follows this memo in the agenda book.

Comments

Three sets of comments were submitted in response. They stated as follows:

The Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan (BK-2018-0002-0008) – Proportionality should be a factor that a bankruptcy judge has the discretion to consider in ruling on a request for production of documents and ESI in connection with a Bankruptcy Rule 2004 examination. In the bankruptcy context, where resources are already limited in many cases, the impact of having to produce all ESI, without consideration of proportionality, could significantly impact the likely success of a case. If proportionality is not added as a delineated and specific discretionary consideration to be utilized by the courts in evaluating a request for an examination under Bankruptcy Rule 2004, a court may mistakenly believe that it does not have the authority or the right to consider proportionality as part of addressing a request for examination under Bankruptcy Rule 2004. The following language should be added to Rule 2004(c): "The court may consider proportionality considerations with respect to a request for production of documents or electronically stored information in connection with a Rule 2004 examination."

The National Association of Bankruptcy Trustee (BK-2018-0002-0010) – The NABT supports the amendment for the sake of clarity of scope to include electronic records and uniformity with Rule 45.

Federal Bar Association's Bankruptcy Section (BK-2018-0002-0011) – Supports the published changes to Rule 2004(c). It urges caution before imposing a proportionality requirement; doing so would likely increase litigation. The parties can adopt an ESI protocol without having the rule impose a proportionality standard.

Recommendation

Because a proposal close to the suggestion of the Michigan Bar committee has already been considered and rejected by the Advisory Committee, **the Subcommittee recommends final approval of the amendments to Rule 2004 as published.** It sees no reason to raise the proportionality issue with the Advisory Committee a third time.

Rule 2004. Examination

* * * * *

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court ~~for the district in which the examination is to be held~~ where the case is pending if the attorney is admitted to practice in that court ~~or in the court in which the case is pending~~.

* * * * *

Committee Note

Subdivision (c) is amended in two respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R. Civ. P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: CONFORMING AMENDMENT TO RULE 7007.1

DATE: MARCH 4, 2019

At the January 2019 Standing Committee meeting, the report of the Civil Rules Committee indicated that it will be proposing for publication an amendment to Rule 7.1 (Disclosure Statement) to conform to pending amendments that have been proposed for Appellate Rule 26.1 and Bankruptcy Rule 8012, which also govern disclosure statements for purposes of recusal. The appellate amendment is currently pending before the Supreme Court, and the bankruptcy amendment was published for comment last August.

The amendment to Civil Rule 7.1 would add a requirement for nongovernmental corporations that are seeking to intervene to file a disclosure statement. It would provide:

> (a) A nongovernmental corporate party and a nongovernmental corporation that seeks to intervene must file 2 copies of a disclosure statement that: * * *

That provision would parallel Appellate Rule 26.1(a) and Bankruptcy Rule 8012(a).

When the Advisory Committee proposed an amendment to Rule 8012, which applies to bankruptcy appeals, to conform to the proposed amendment to Appellate Rule 26.1, it did not propose a similar amendment to Rule 7007.1, which applies to adversary proceedings in the bankruptcy court. Now that its civil counterpart is being proposed for amendment, a similar amendment should be proposed for Rule 7007.1(a). Generally tracking the amendments to the related rules, the amendment proposed by the Subcommittee provides as follows:

Rule 7007.1. ~~Corporate Ownership~~ Disclosure Statement

(a) REQUIRED DISCLOSURE. Any nongovernmental corporation that is a party to an adversary proceeding, other than the debtor, ~~or a governmental unit,~~ shall file ~~two~~ 2 copies of a statement that identifies any parent corporation and any publicly held corporation~~, other than a governmental unit, that directly or indirectly~~ that owns 10% or more of ~~any class of the corporation's equity interests,~~ its stock or states that there ~~are no entities to report under this subdivision~~ is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. ~~A party shall file the~~ A Rule 7007.1 statement shall: ~~required under Rule 7007.1(a)~~

(1) be filed with ~~its~~ the corporation's first appearance, pleading, motion, response, or other request addressed to the court~~.~~; and

(2) be supplemented whenever the information required by Rule 7007.1 changes ~~A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose~~.

Committee Note

The rule is amended to conform to recent amendments to Fed. R. Bankr. P. 8012, Fed. R. App. P. 26.1., and Fed. R. Civ. P. 7.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene. Stylistic changes are made to subdivision (b) to reflect that some statements will be filed by nonparties seeking to intervene.

There are some minor stylistic and substantive differences among Bankruptcy Rule 8012, Appellate Rule 26.1., and Civil Rule 7.1. The proposed draft of a possible amendment to Rule 7007.1 follows the style of Rule 8012 and the content of the other trial-level rule, Civil Rule 7.1.

Although the amendment to Rule 7007.1 is just for the purpose of conforming to the parallel rules, **the Subcommittee recommends that it be published for public comment in August 2019.** Doing so would keep it on the same track as the proposed amendment to Civil Rule 7.1.

One member of the Subcommittee expressed the need for additional amendments to the disclosure statement rules to extend the requirements to a broader range of entities. The

Subcommittee, however, concluded that any such expansion should be undertaken in coordination with the other advisory committees and should not hold up amendments that are designed to conform to amendments to FRAP 26.1 that are expected to go into effect on December 1 of this year.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: 14-BK-E – SERVICE AND NOTICING

DATE: MAR. 1, 2019

Suggestion 14-BK-E from Richard Levin on behalf of the National Bankruptcy Conference (NBC) has been pending for some time. A copy of the suggestion is attached as Exhibit A. The problems it addresses are (1) the difficulties imposed by Rule 7004(h) requiring service on an insured depository institution in a contested matter or adversary proceeding be made by certified mail addressed to an officer of the institution (a provision implementing § 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106), and (2) service on corporations or partnerships that are not insured depository institutions pursuant to Rule 7004(b)(3) by first-class mail addressed to an "officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service." According to the NBC, changes in the consumer credit industry has made compliance with these provisions "more challenging and costly," full of uncertainties about whether proper service has been made.

The suggestion includes three proposals intended to ease the burden of service and noticing in individual debtor cases.

First, the NBC proposed an amendment to Rule 3001 to require that a creditor identify on the proof of claim form the name and address of the person responsible for receiving notices under the Code. If the creditor were a corporation, the claimant would be required to list the name and address of an officer or agent for purposes of Rule 7004(b)(3). Additional modifications were proposed for insured depository institutions.

The text of the proposed modifications to Rule 3001 follows:

Rule 3001. Proof of 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 or its authorized agent is a corporation, the proof of claim shall include the name and address of an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process on behalf of the corporation. If the holder of a claim is an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act), the proof of claim shall state whether the holder has waived its entitlement under Rule 7004(h) to service by certified mail in contested matters and adversary proceedings and, if such entitlement is not waived, the name and address of an officer to receive service by certified mail.
(E) 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.

When this proposal was first raised, the Subcommittee had hoped that parties could provide the appropriate information in connection with their registration for the court's electronic-filing system or the BNC, obviating the need to change the information required on the proof of claim form. See Memorandum to Advisory Committee on Bankruptcy Rules from Michelle Harner, Associate Reporter, dated Sept. 27, 2016. Since then we have received technological and BNC information indicating that information provided through the BNC is not available to private parties, and even if it were, those parties could not make service on a BNC party without additional consent.

Providing the information through the proof of claim form seems a relatively easy method, but there are several drawbacks. First, proof of claim forms are not required in most chapter 7 bankruptcies, because there are no assets to distribute, so the rule change would not provide the information it seeks to provide in many cases. Second, as we saw last year when we were contemplating changes to Rules 2002(g) and 9036, conflicting addresses might be on file for a single creditor and that creates priority issues. There are several provisions that allow a creditor to designate an address for notice and service:

Section 342(f) and (g) of the Bankruptcy Code allows a creditor to designate an address to be used in all bankruptcy courts or in specified ones and

> requires any notice from the court to be sent to that address unless the creditor has provided a different address for that particular chapter 7 or 13 case, as § 342(e) allows.
>
> Rule 2002(g)(1)(A) allows a creditor to designate on a proof of claim a mailing address to which all notices in a case shall be sent.
>
> Rule 2002(g)(4) provides that, notwithstanding Rule 2002(g)(1)-(3), an entity may specify the manner and address to which notices should be sent by a notice provider, and "[t]hat address is conclusively presumed to be the proper address for the notice[s]" sent by that notice provider.
>
> Rule 9036 (as recently amended) allows the clerk or other person designated by the court or rules to send any notice or serve any paper that would otherwise be sent or served by mail (other than under rule 7004) by filing it in the court's electronic-filing system, or by sending it by any other electronic means to which the recipient has consented.

It is not clear how to prioritize addresses filed pursuant to those Sections of the Code and any address that might be filed with the proof of claim.

Third, the proposal would not solve the problem it seeks to address. Judge Goldgar expressed the following view about the proposal:

> If the criticisms of the current rule are (a) that corporate entities change all the time, and (b) that creditors sometimes have multiple corporate names (Citibank is cited as an example), surely the first criticism is equally or even more true of the persons who work for creditors. Employees come and go. Sometimes, in fact, they come and go with alarming frequency. The risk of sending notice to "Susan Smith" at Citibank is that she may have been the right person to receive notice when the POC was filed but is no longer. So I don't believe the amendment to Rule 3001 would help matters.

Given these difficulties, the Subcommittee cannot recommend adopting the first proposal set forth in 14-BK-E. It is hoped that the ongoing electronic noticing project will address the concerns underlying this proposal.

The second proposal contained in 14-BK-E was a request that debtors' counsel have access to the BNC database, a suggestion that was rejected as discussed above, or alternatively an amendment to Rule 5003(e) that would allow creditors in those cases to file their addresses for providing notice under § 342(f) and the name and address of an officer to receive service of process. The register of addresses designated under § 342(f) would be kept by the clerk and be accessible by registered users of the court's electronic-filing system.

The registration system proposed by the suggestion is a voluntary one, would impose significant burdens on the clerks of court, and would create yet another potentially conflicting address for a creditor without resolving the priority dispute. The Subcommittee cannot recommend that Rule 5003(e) be amended as proposed.

The third proposal made in 14-BK-E was to amend Rule 9036 to require large creditors (those who have filed or anticipate filing in the aggregate 100 or more proofs of claim in bankruptcy courts within any 12-month period) to register for the electronic-filing system in all bankruptcy courts in which they file proofs of claim and use that system for filing all documents and receiving all notices and service of process rather than by mail (other than pursuant to Rule 7004).

The Subcommittee on Business Issues has this issue before it in the form of another proposal, 18-BK-D. Therefore, this Subcommittee did not address it.

Therefore, the Subcommittee recommends no rule changes in response to Suggestion 14-BK-E.

Appendix A

Rule 7004 and Service of Process Proposals

Bankruptcy Rule 7004(h) requires that service of process on an insured depository institution in a contested matter or adversary proceeding be made by certified mail addressed to an officer of the institution. If the party to be served is a corporation or partnership but not an insured depository institution, service must be made pursuant to Rule 7004(b)(3), which provides that first-class mail may be used and addressed to the attention of an "officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service …."

Changes in the consumer credit industry have made compliance with these rules more challenging and costly. Counsel who sincerely attempt to comply are often never certain that proper service has been made and fear that an order may be challenged at some later date. A judgment or order may be declared invalid for failure to comply with these requirements even if the affected party received actual notice.[1]

Although electronic service of process has reduced costs for litigants in civil litigation, service by mail on creditors is still common in bankruptcy cases. A cost-cutting measure under consideration by the judiciary is that the burden of mail process be shifted from the Bankruptcy Noticing Center (BNC) to debtors and their attorneys. More courts have already begun requiring debtor's counsel to serve chapter 13 plans and plan amendments on all creditors. As more service

[1] *See, e.g.*, Jacobo v. BAC Home Loans Servicing, LP, 477 B.R. 533 (D. N.J. 2012); PNC Mortgage v. Rhiel, 2011 WL 1043949 (S.D. Ohio Mar. 18, 2011) (notice in compliance with 7004(h) is required even where the bank actually received the summons and complaint); *In re* Jackson, 2007 WL 4893519 (Bankr. N.D. Ind. Dec. 6, 2007) (actual notice does not remedy inadequate service). *But see In re* Anderton, 2000 WL 33716970 (Bankr. D. Idaho Jan. 11, 2000) (motion to set aside default judgment denied where service was improper under Rule 7004(h), but bank actually received service and could not state how proper service would have made a difference).

requirements are placed on debtors, and postal fees and copying costs increase, mailings will continue to contribute to the increased cost of filing bankruptcy.

Determining if the Named Party is an Insured Depository Institution

There are several obstacles to getting proper service under Rule 7004. The first challenge is determining whether the creditor is an insured depository institution. Even the question of what is an insured depository institution for purposes of the rule is not without controversy. Unlike the definition of an insured depository institution found in the Bankruptcy Code, which includes an insured credit union,[2] Rule 7004(h) applies only to an insured depository institution "as defined in section 3 of the Federal Deposit Insurance Act."[3] Thus, the institution must have deposits that are insured by the FDIC under the Federal Deposit Insurance Act. Although the Rule's definition would thus appear to exclude credit unions, at least one court has concluded otherwise.[4][5]

To confirm whether a party is an insured depository institution under the Federal Deposit Insurance Act, the most reliable source is the BankFind program on the FDIC's website.[6] In most cases all that must be entered in the program is the name of the institution. However, creditors often have various corporate entities that change, and many financial institutions have subsidiary or affiliated corporations with similar names.

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[2] 11 U.S.C. § 101(35).

[3] Fed. R. Bankr. P. 7004(h).

[4] *Campare In re* Cornejo, 2010 WL 7892449 (Bankr. D. Alaska Aug. 2, 2010)(Rule

[5] (h) does not apply to a federal credit union) *with In re* Fisher, 2008 WL 4280388 (Bankr. N.D. Ala. Sep 12, 2008) (applying definition in 11 U.S.C. § 101(35)(B) and concluding that term "insured depository institution" for purposes of Rule 7004(h) includes an insured credit union).

[6] http://research.fdic.gov/bankfind/.

For example, entering simply "Citibank" in the FDIC BankFind program will provide 25 different insured depository institutions that use "Citibank" in some way in the corporate name. In some cases the entity that has been identified as the creditor may not be an insured depository institution even though there may be other similarly named, separate entities that are insured depository institutions. Faced with this uncertainty and the consequences of improper service, debtor's counsel often elect for the more costly, enhanced service under Rule 7004(h) on various parties even if it may not be required.

Obtaining the Name and Address of an Officer of the Institution

The more difficult task is obtaining a name and address for a current officer of the institution. Courts have wrestled with whether the requirement in Rule 7004(h) that service should be "addressed to an officer of the institution" means that a specific officer must be named, or that service can simply be sent in care of "Officer" or a specific office like "President." Some courts suggest that it is easy to find the names of bank officers through online searches and use that as a basis for requiring named officers for service of process.[7] Even courts that have acknowledged that finding names of officers may not be such an easy task generally conclude that service simply to an "officer" is not sufficient. For example, in *In re Eimers*,[8] despite an affidavit from the debtor's attorney that both he and his assistant had searched but were unable to find the names of officers, the court held that service addressed to "Bank Officer" at the proper address was inadequate because it should have been addressed to a specific office, such as "President."

[7] *See, e.g.*, *In re* Cornejo, 2010 WL 7892449 (Bankr. D. Alaska Aug. 2, 2010); *In re* McCumber, 2012 WL 893061 (Bankr. D. Alaska Mar. 7, 2012).
[8] 2013 WL 1739645 (Bankr. D. Alaska Apr. 23, 2013).

In construing the similar though arguably less stringent requirement in Rule 7004(b)(3), the Ninth Circuit B.A.P. in *In re Villar*[9] held that sending notice to a post office box number, without specifying either a person or an office, is not sufficient. Although the issue remains unsettled, many courts require that a specific officer of the institution be named in order to comply with Rule 7004(b)(3) and (h).[10][11] Courts have also held that while service upon a registered agent may satisfy the requirements of Rule 7004(b)(3) with respect to an entity, service upon a registered agent is not service upon an "officer of the institution" for purposes of Rule 7004(h).[12]

Unfortunately the FDIC BankFind search program does not provide the names of officers of insured depository institutions, and it sometimes lists addresses where officers are not located. Thus, various internet search tools and websites must be checked, such as the institution's corporate website, any annual reports that may be available on the

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[9] 317 B.R. 88 (B.A.P. 9th Cir. 2004).

[10] *See In re* Smith, 2012 WL 8436265 (Bankr. E.D. Cal. Aug. 17, 2012) (attempted service on a post office box is insufficient); *In re* Field, 2012 WL 1655602 (Bankr. D. Alaska May 10, 2012) (service not sent by certified mail and addressed only to "Manager or General Agent" was inadequate); *In re* Franchi, 451 B.R. 604, 607 (Bankr. S.D. Fla.

[11]) (addressing service "c/o Any Officer Authorized to Accept Service" is inadequate); *In re* Miller, 428 B.R. 791, 794-95 (Bankr. S.D. Ohio 2010) (service sent by regular mail, not addressed to any individual, officer or department, and to varying addresses, was inadequate); *In re* Stassi, 2009 WL 3785570 (Bankr. C.D. Ill. Nov. 12, 2009); *In re* Carlo, 392 B.R. 920, 921-22 (Bankr. S.D. Fla. 2008) (discussing split of authority on Rule 7007(b)(3) requirement and deciding that a named officer must be served); *In re*
Faulknor, 2005 WL 102970 (Bankr. N.D. Ga. Jan. 18, 2005) (addressing service to "Attn: President" is inadequate). *See also In re* Gambill, 477 B.R. 753, 761-62 (Bankr. E.D. Ark. 2012) (service was proper where it was addressed to a named CEO and sent by certified mail, even though the named individual was temporarily not serving as CEO, because the state public records still listed him as an officer).

[12] *E.g.,* Hamlett v. Amsouth Bank (*In re* Hamlett), 322 F.3d 342 (4th Cir. 2003); *In re* Teligent Inc., 485 B.R. 62 (Bankr. S.D.N.Y. 2013) ("[s]ervice on an authorized corporate agent without directing the mailing to an officer or appropriate individual agent is insufficient under Rule 7004(b)(3)"); *In re* Stewart, 408 B.R. 215, 217-18 (Bankr. N.D. Ind. 2009).

corporate website, filings made by the institution with the U.S. Securities and Exchange Commission using the EDGAR search engine,[13] and the search engine on the Bloomberg Businessweek website.[14] The problem, however, is that there is no one reliable place to obtain this information, and these various search tools and websites often provide conflicting information. Attempts to obtain service information by calling the larger financial institutions are often as time consuming (navigating the creditor's voicemail system to find an individual authorized to provide this information can be exasperating) and no more reliable than these other methods.

For example, assume the debtor had a 2009 car loan with GMAC Bank and needs to serve a motion to value the creditor's secured claim. Entering "GMAC Bank" on the FDIC website produces four entries: GMAC Automotive Bank, GMAC Bank, GMAC Bank, and GMAC Commercial Mortgage Bank.[15] As for the two "GMAC Bank" entries, one lists a headquarters at 1100 Virginia Drive, Fort Washington, PA, and indicates that the bank was closed on February 26, 2009. The other entry states that GMAC Bank has changed its legal name and is currently doing business as Ally Bank. For Ally Bank, the FDIC website lists the headquarters as 6985 Union Park Center Suite 435, Midvale, UT and a limited service administrative office in Fort Washington, Pennsylvania.[16] The corporate website for Ally Bank

[13] http://www.sec.gov/edgar.shtml.

[14] http://investing.businessweek.com/research/common/symbollookup/symbollookup.asp

[15] http://research.fdic.gov/bankfind/results.html?name=GMAC+BANK&fdic=&address=&city=&state=&zip=

[16] http://research.fdic.gov/bankfind/detail.html?bank=57803&name=Ally%20Bank&searchName=ALLY%20BANK&searchFdic=&city=&state=&zip=&address=&tabId=1#

directs "general banking correspondence" to a P.O. Box in Horsham, Pennsylvania.[17] Two Chief Executive Officers are listed on the corporate website, one for Ally Financial Inc. (Michael Carpenter) and one for Ally Bank (Barbara A. Yastine).[16] An annual report is provided on the corporate website for Ally Financial Inc. which indicates that Ally Bank is an indirect wholly owned subsidiary of Ally Financial Inc. The SEC website has no listing for Ally Bank but filings for Ally Financial Inc. provide "200 Renaissance Center, P.O. Box 200, Detroit, Michigan 48265-2000" as the "address of principal executive offices."[18] Bloomberg Businessweek lists Barbara A. Yastine as CEO of Ally Bank and indicates that the corporate headquarters are located at 717 Fifth Avenue, New York, New York 10022.[19] Should the debtor serve the motion on the CEO at the Utah headquarters listed on the FDIC website, the New York headquarters listed on the Bloomberg website, or one of the three other addresses? Faced with this uncertainty, many debtors' counsel will serve the motion by certified mail at all of these addresses and hope that at least one will comply with Rule 7004(h).

Legislative History for Rule 7004(h) Suggests that Its Purpose is No Longer Being Fulfilled

Rule 7004(h) is unusual in that it was not adopted under the Rules Enabling Act procedure. Rather, it was mandated by a federal statute enacted in 1994.[20] A sponsor of the bill that ultimately became Rule 7004(h), the late Senator Jesse Helms of North

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[17] *See* www.ally.com, under the link "contact us." [16] http://media.ally.com/index.php?s=20316.

[18] http://www.ally.com/about/investor/sec-filings/index.html for July 31, 2013.

[19] http://investing.businessweek.com/research/stocks/private/person.asp?personId=3573934&privcapId=39089461&previousCapId=8748185&previousTitle=SymphonyMetreo,%20Inc.

[20] *See* § 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

Carolina, stated that the existing process—sending a letter by first class mail to a managing agent—"automatically puts a bank at a disadvantage" because banks, especially those with multiple branches, receive a high volume of mail, and there is nothing to differentiate legal process from everyday correspondence.[21] According to Senator Helms, "the person at the bank to whom the letter is addressed often does not have sufficient authority to ensure a response within the time period required."[22]

Senator Helms introduced into the record a letter from a lawyer to a bank president, responding to a request for arguments supporting a different service of process for banks.[23] The lawyer expressed the concern "that such service of process … may not be addressed to a person of specific enough authority to insure a prompt response."[24] He proposed that service be made "to a specifically named officer" because "banks are inherently large institutions with" many employees and locations, and therefore "cannot be compared … [to] the typical corporation."[25] He stated that this complicated business model means that traditional service of process "contains a great potential of error,"[26] and the trend in bank organizational systems is for this to get even more complicated over time.[27]

In responding to a letter opposing the use of service by certified mail from Robert E. Keeton, Chairman of the Committee on Rules of Practice and Procedure of the Judicial

[21] 139 Cong. Rec. S708-10 (daily ed. Jan. 26, 1993).
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*. at S709.

Conference of the United States, to then Senator Joseph Biden (who was serving as Chair of the Committee on the Judiciary),[28] the same lawyer submitted another letter stating that "bank addresses and locations of business are well defined, highly visible, well known and virtually permanent," and argues that "a rather loose requirement that the summons be delivered by certified mail … to any officer of the bank can be easily accomplished at virtually any branch office and presents no impediment, delay or additional cost to the judicial process."[29]

The lawyer was correct on one point—the organizational structure of financial institutions has become more complicated over time. In fact, changes in the banking industry since 1994 have rendered much of Rule 7004(h) irrelevant and anachronistic. Much of the credit that consumer debtors obtain is from financial institutions that do not maintain branch offices in the consumer's state. In order to obtain a federal bank charter (and the benefits of federal preemption of state consumer laws), many larger financial institutions open only one branch office for deposits, such as in Utah, South Dakota, Virginia, or Delaware. For example, the credit card lender Discover Bank has only one full service brick and mortar office, located in Delaware. The large auto, mortgage and credit card lender, Capital One Bank, has only one full service office in the U.S., located in Virginia. Contrary to the opinion expressed in the letter of support for the bill that became Rule 7004(h), officers of large banks are no longer found in branch offices, and even branch offices do not exist in most states for the major providers of consumer credit.

Rules 7004(h) also no longer fulfills (if it ever did) its intended purpose of getting service to the individual at the institution responsible for responding to the legal process.

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[28] I*d*.

[29] I*d*. at S709.

Most consumer loans are no longer serviced by personnel located in local branch offices or corporate headquarters. Large lenders typically have centralized servicing and bankruptcy departments in one or more locations, or they outsource these functions to third-party vendors. These servicing and bankruptcy departments are often not located in the same building, state, or even nation as the corporate headquarters where the CEO or other officers of the financial institution are found. Service made in accordance with Rule 7004(h) will inevitably involve a re-routing of the process from the corporate headquarters to some other division or department within the institution. It would also seem unlikely that large financial institutions appreciate having staff in their corporate executive suites dealing with claim objections and lien stripping motions in bankruptcy cases. Rule 7004(h) was also enacted at a time when CM/ECF did not exist, which has bought efficiencies to creditors through the filing and receiving of court filings in an electronic format.

Proposals for Rule Amendments

Rule 7004(h) cannot be amended without Congressional action. However, the there are potential amendments to other Bankruptcy Rules that are consistent with Rule 7004(h) and that would address the problems described above. In addition to easing some of the burdens placed on parties by Rule 7004, these proposed changes could provide more effective service upon creditors and further the legislative goals of Rule 7004(h).

The following are several suggested proposals:

1) An amendment to Rule 3001 could require that a creditor identify on the proof of claim form (Official Form 10) the name and address of the person responsible for receiving notices under the Code. If the creditor is a corporation, the claimant would be required to list the name

and address of an officer or agent for purposes of Rule 7004(b)(3). If the creditor is an insured depository institution, the amended rule could also require a creditor to state on the proof of claim the name and address of an officer of the institution for service under Rule 7004. Alternatively, the creditor may indicate that it would prefer that service be made in some other manner that would more quickly and efficiently deliver the process to the responsible individual or department. This is permissible under Rule 7004(h)(3), which authorizes the waiving of an institution's entitlement to service upon an officer by certified mail.

There are several limitations to this approach. Creditors do not file claims in the vast majority of individual chapter 7 cases, because they are no-asset cases. However, such cases typically have far fewer contested matters and adversary proceedings brought by debtors than in chapter 13 cases. Some secured creditors also fail to file claims in chapter 13 cases. This may change in the future as a proposed amendment to Rule 3002 has been published for comment that would require secured creditors to file claims in chapter 13 cases. Finally, debtor's counsel will need to attempt to verify that the name and address listed on the claim is still current at the time service is made. Still, having reliable information as of the date the claim is filed would be extremely helpful.

The following is suggested language to amend Rule 3001(c)(2):

Rule 3001. Proof of Claim

*** * ***

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

(F) 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.

(G) 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.

(H) 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.

(I) If the holder of a claim or its authorized agent is a corporation, the proof of claim shall include the name and address of an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process on behalf of the corporation. If the holder of a claim is an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act), the proof of claim shall state whether the holder has waived its entitlement under Rule 7004(h) to service by certified mail in contested matters and adversary proceedings and, if such entitlement is not waived, the name and address of an officer to receive service by certified mail.

(J) 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.

2. Another proposal focuses on access to the database of preferred creditor addresses that is maintained by the BNC. A BAPCPA amendment found at 11 U.S.C. § 342(f) permits creditors to file with any bankruptcy court an address to be used by all or particular bankruptcy courts to provide notice to such creditors in chapter 7 and 13 cases. Creditors may provide their preferred addresses to the BNC's National Creditor Registration Service. These addresses are used by the BNC for the mailings it sends to creditors and are used to supplement and correct the addresses that are listed on the mailing matrix prepared by the debtor under Rule 1007(a)(1). If there is a match between the creditor name provided on the debtor's mailing matrix and a name contained on the National Creditor Registration Service database, and the address provided by the debtor is different from the address in the database, the mailing is redirected to the creditor's preferred address. However, the database of preferred addresses is not accessible by debtor's counsel. Having access to the preferred addresses would reduce the costs of preparing a mailing

matrix and ensure more reliable service to creditors. This change could be implemented administratively by the AOUSC by providing access to this information to registrants of the CM/ECF system.

Another proposal would require that when creditors provide their preferred addresses to the BNC's National Creditor Registration Service, they also provide the name and address of an officer of the institution for purposes of service under Rule 7004.

While some of these changes could be implemented without a rule amendment, the following is suggested language for amending Rule 5003: **Rule 5003. Records Kept By the Clerk**

* * *

(e) REGISTERS OF MAILING ADDRESSES OF FEDERAL AND STATE GOVERNMENTAL UNITS, ~~AND~~ CERTAIN TAXING AUTHORITIES AND CERTAIN OTHER ENTITIES. The United States, ~~or~~ the state or territory in which the court is located, and a creditor in a case in which the debtor is an individual may file a statement designating its mailing address. The United States, state, territory, or local governmental unit responsible for collecting taxes within the district in which the case is pending may also file a statement designating an address for service of requests under § 505(b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found. A creditor in a case in which the debtor is an individual may file a notice of address to be used to provide notice to such entity under § 342(f)(1) of the Code in all cases under chapter 7 and chapter 13 and the name and address of an officer of the creditor to receive service of process under Rule 7004. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes the mailing addresses designated under the first sentence of this subdivision, ~~and~~ a separate register of the addresses designated for the service of requests under § 505(b) of the Code, and a separate register of the addresses designated under § 342(f)(1) of the Code. The clerk is not required to include in any single register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory or for each creditor. If more than one address for a creditor or a department, agency, or instrumentality of the United States, or a state or territory is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year, and the information contained in the register shall be accessible by registered users of the court's electronic filing system. The mailing address in the register is conclusively presumed to be a proper address for the creditor or governmental unit,

but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

3. A change that would bring significant efficiencies to the bankruptcy system would be for large creditors to receive all notices and service, other than process under Rule 7004, by electronic transmission. The BNC permits creditors to register for Electronic Bankruptcy Noticing (EBN), which is described as a "service that allows court notices to be transmitted electronically, delivering them faster and more conveniently."[30] Creditors can receive notice data through EBN by email or as a data stream under an electronic noticing option. The EBN system is currently used only for notices sent by the BNC.

Electronic transmission of documents to be served in a matter or proceeding by the debtor is permitted under current rules only if the party to be served has appeared through its attorney in the particular matter or proceeding.[31] Another change that could be implemented administratively by the AOUSC would be for CM/ECF registrants to have access to the EBN system as a function within CM/ECF (and its successor, NextGen). This would permit users of CM/ECF to provide notice and serve documents electronically through EBN, other than documents served under Rule 7004, when the creditor has not appeared through an attorney.

This change would be most effective if all large creditors participate in EBN. Thus, if participation is not sufficient, another proposal would be to require large creditors to register for

[30] *See* http://ebn.uscourts.gov/.

[31] With respect to adversary proceedings, Rule 7005, which incorporates F.R.Civ. P. Rule 5(b)(2)(E), permits electronic transmission if the person consents in writing. Consent is generally provided as part of the registration for CM/ECF.

electronic noticing. Rule 9036 requires the recipient to request in writing electronic noticing services. This is consistent with Rule 7005 (incorporating F.R. Civ. P. Rule 5(b)(2)(E)) which permits electronic transmission in adversary proceedings if the person consents in writing. In addition to an amendment to Rule 7005, the following proposed amendment to Rule 9036 would compel large creditors to be served by electronic transmission, other than documents served under Rule 7004.

Rule 9036. Notice by Electronic Transmission

(a) Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing or in connection with the entity's registration for the court's electronic case filing system that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission.

(b) An entity or its authorized agent that has filed or expects to file, in the aggregate, 100 or more proofs of claim in one or more bankruptcy courts in the United States, within any 12-month period, shall register for the electronic filing system in all bankruptcy courts in which the entity or its authorized agent files proofs of claim. Such an entity or its authorized agent shall file all proofs of claim and other documents using the bankruptcy court's electronic filing system and shall receive all notices and service by electronic transmission, instead of notice or service by mail, except with respect to any notice or service of process for which service in accordance with Rule 7004 is required.

TAB 6B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: COMMENTS ON PROPOSED AMENDMENTS TO RULE 2002 (NOTICES)

DATE: MARCH 5, 2019

Last August the Standing Committee published a package of amendments to Rule 2002 that would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan. The text of the proposed amendments follows this memo in the agenda book. Three different subdivisions of the rule are affected.

Rule 2002(f). Rule 2002(f)(7) currently requires the clerk, or someone else designated by the clerk, to give notice to the debtor, all creditors, and indenture trustees of the "entry of an order confirming a chapter 9, 11, or 12 plan." Noticeably absent from the list is an order confirming a chapter 13 plan. The Committee received a suggestion (12-BK-B) from Matthew T. Loughney (Chair, Bankruptcy Noticing Working Group), that such notice also be given in chapter 13 cases. As he explained, "There is not a rule specifically addressing the notice of entry of an order confirming a chapter 13 plan, and no reason is identified in the Committee note for this omission." The Committee also found no reason for the omission and voted unanimously to publish a proposed amendment to Rule 2002(f) adding chapter 13 plans to its coverage.

Rule 2002(h). Rule 2002(h) provides an exception to the general noticing requirements set forth in Rule 2002(a). Rule 2002(a) generally requires the clerk (or some other party as

directed by the court) to give "the debtor, the trustee, all creditors and indenture trustees" at least 21 days' notice by mail of certain matters in bankruptcy cases. But Rule 2002(h) eliminates that requirement in chapter 7 cases with respect to creditors that fail to file a timely proof of claim. Bankruptcy Judge Scott W. Dales (W.D. Mich.) submitted a suggestion (12-BK-M) that this exception also be made applicable to chapter 13 cases. He noted the time and cost associated with providing extensive notice in chapter 13 cases and lawyers' desire to mitigate these expenses to the extent possible. The Committee concluded that the cost and time savings generated by limiting notices under Rule 2002(h) in both chapter 12 and chapter 13, as well as chapter 7, cases support an amendment. Because an amendment to Rule 3002 that became effective on December 1, 2017, changes the deadline for filing a proof of claim, the time provisions of Rule 2002(f)(7) would also be amended.

Rule 2002(k). Included in the package of amendments accompanying the chapter 13 plan form was an amendment to Rule 2002 that added a new subdivision (a)(9). The amendment went into effect on December 1, 2017, and it provides that at least 21 days' notice be given to the debtor, trustee, creditors, and indenture trustees of "the time fixed for filing objections to confirmation of a chapter 13 plan." Previously Rule 2002(b) had required that at least 28 days' notice of that deadline for filing objections be given. In making this change and relocating the provision from subdivision (b) to subdivision (a)(9), the need to amend Rule 2002(k) was overlooked. Subdivision (k) provides for transmitting notices under specified parts of Rule 2002 to the U.S. trustee. Included within this provision is the requirement to provide the U.S. trustee with notices under subdivision (b). Because the deadline for giving notice of the time for filing objections to confirmation of chapter 13 plans is now located in subdivision (a)(9), which is not specified in subdivision (k), the rule no longer requires that notice be transmitted to the U.S.

trustee. The Committee voted at the spring 2018 meeting to publish an amendment that would cure this oversight by amending the first sentence of Rule 2002(k) to include a reference to subdivision (a)(9).

Comments Submitted

Six sets of comments were submitted on one or more of these proposed amendments. Four of the comments (submitted by Danielle Young, Nancy Whaley, Ellie Bertwell of Aderant CompuLaw, and the National Association of Bankruptcy Trustees) included brief statements of support for the amendments.

Ryan Johnson, the clerk of the Bankruptcy Court for the Northern District of West Virginia, was generally supportive of the amendments, but he raised two additional points about Rule 2002(h). First, he said that in a chapter 13 case, the clerk's noticing responsibilities should extend beyond the 70-day proof-of-claim deadline as stated in Rule 3002(c). The applicable deadline, he said, should include the additional 30 days afforded to a debtor or trustee to file a claim on behalf of a creditor under Rule 3004. He also stated that with respect to notices required by Rule 2002(a)(2) and (a)(3), Rule 2002(h) should require notice to creditors that were entitled to service of the noticed motion even if those entitled to service did not file a proof of claim.

The Bankruptcy Section of the Federal Bar Association, while supporting the other Rule 2002 amendments, questioned the need for including the entry of an order confirming a chapter 13 plan within the notice requirement of Rule 2002(f)(7). It noted that in the Bankruptcy Court for the Western District of Texas, the clerk already is responsible for "publishing the order confirming the plan through its Bankruptcy Noticing Center . . . [, and] [s]ervice is accomplished by first class mail and, where applicable, electronic mail." As a result, the Section argued, "there

appears to be little benefit requiring a notice of an order confirming plan that has already been served on parties in interest."

Response to the Comments

Mr. Johnson raised the question whether in chapter 13 cases notices required by Rule 2002(a) should be given to creditors who did not file a timely proof of claim, but for whom the debtor or trustee might still file a proof of claim on their behalf. The Subcommittee noted that current Rule 2002(h), applicable only in chapter 7 cases, does not so provide; it allows the court to curtail notice to non-filing creditors after the filing deadline. The Subcommittee concluded that there is no reason to have a different rule for chapter 13. It also noted that the rule is permissive, so a court could decide to continue to provide notices to all creditors until the Rule 3004 time period expired.

As for Mr. Johnson's other point about Rule 2002(h), he believes that notice of the proposed use, sale, or lease of property of the estate and of the hearing on approval of a compromise or settlement be given to all creditors who were entitled to service of the motion, even if they did not file a proof of claim. He did not provide any reason for this suggestion, and the Subcommittee saw no reason to amend the current rule in this respect.

As for the Bankruptcy Section's comment that there is no need to include chapter 13 plans in Rule 2002(f)(7) because at least one court is already serving the order confirming chapter 13 plans, the Subcommittee concluded that that example did not undercut the need for a national rule ensuring that all courts provide notice of those orders.

The Subcommittee recommends that the Advisory Committee give final approval to the amendments to Rule 2002 as published.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief Is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(7) entry of an order confirming a chapter 9, 11, ~~or~~12, or 13 plan;

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. ~~In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code~~

(1) *Voluntary Case.* In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order converting the case to chapter 12 or chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor,
- the trustee,
- all indenture trustees,
- creditors that hold claims for which proofs of claim have been filed, and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(2) *Involuntary Case.* In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter, the court may direct that all

notices required by subdivision (a) of this rule be mailed only to:

- the debtor,
- the trustee,
- all indenture trustees,
- creditors that hold claims for which proofs of claim have been filed, and
- creditors, if any, that are still permitted to file claims ~~by reason of~~ because an extension was granted ~~pursuant to~~ under Rule 3002(c)(1) or (c)(2).

(3) *Insufficient Assets.* In a case where notice of insufficient assets to pay a dividend has been given to creditors ~~pursuant to~~ under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims ~~pursuant to~~ under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding

sentence.

* * * * *

(k) NOTICES TO UNITED STATES TRUSTEES. Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses.

* * * * *

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7).

Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

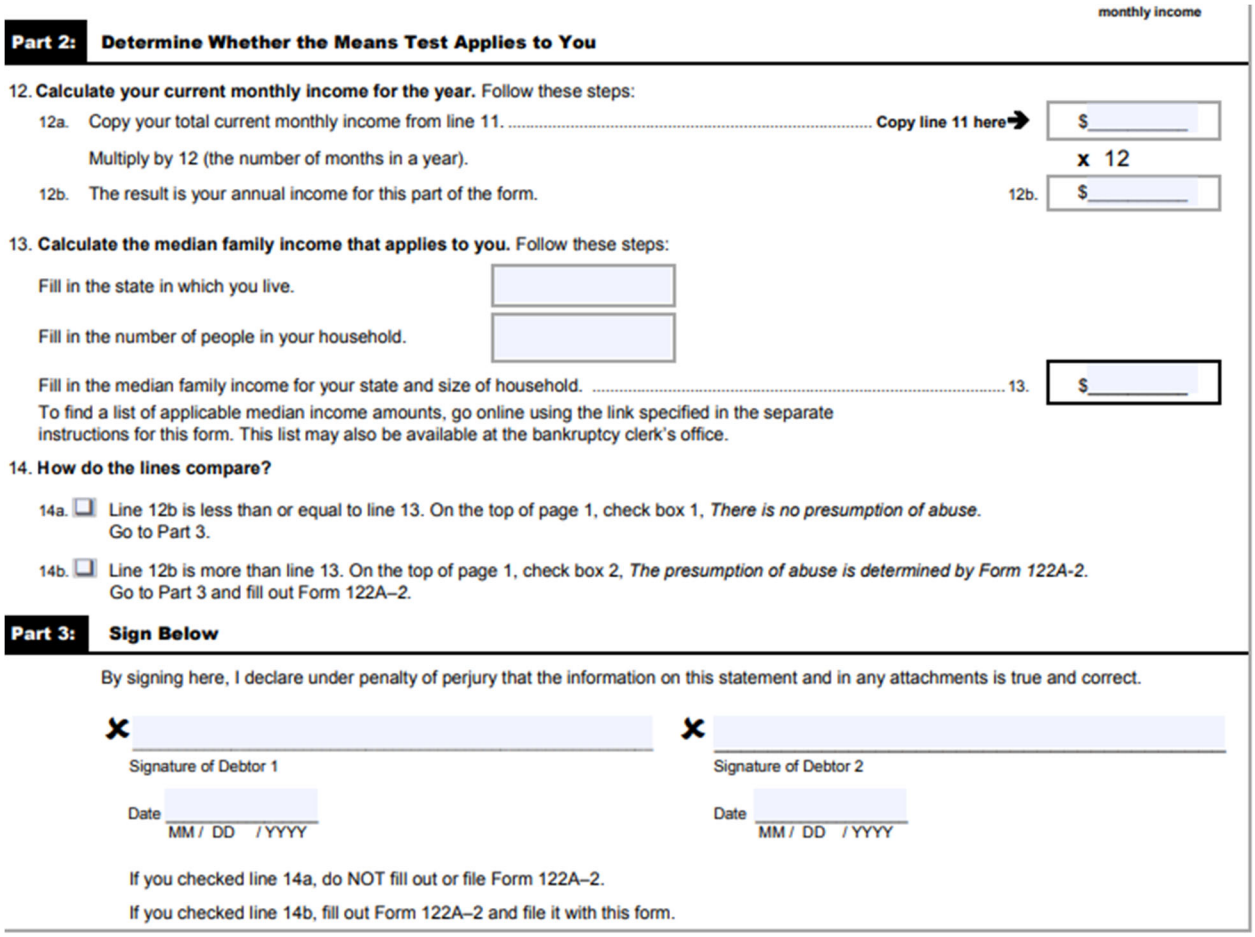
FROM: SUBCOMMITTEE ON FORMS

SUBJECT: SUGGESTION FOR AMENDMENT TO OFFICIAL FORM 122A-1

DATE: MARCH 4, 2019

Christian Cooper, a senior staff attorney who assists pro se debtors in the Bankruptcy Court for the Central District of California, submitted a suggestion (18-BK-F) regarding one of the means test forms—Official Form 122A-1 (*Chapter 7 Statement of Your Current Monthly Income*). Mr. Cooper suggests that the instruction not to file Official Form 122A-2 if the debtor's current monthly income multiplied by 12 is less than or equal to the applicable median family income should be repeated on the form. Currently, as shown below, that instruction appears after the signature and date lines. Mr. Christian suggests that it also be added to the end of line 14a. The Subcommittee recommends that this change be proposed.

The relevant portion of Form 122A-1 appears on the next page:



monthly income

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11. ..... **Copy line 11 here** ➔ $_____

Multiply by 12 (the number of months in a year). x 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live.

Fill in the number of people in your household.

Fill in the median family income for your state and size of household. ..... 13. $_____

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. **How do the lines compare?**

14a. ☐ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3.

14b. ☐ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 122A-2.* Go to Part 3 and fill out Form 122A–2.

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____

Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____

MM / DD / YYYY MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A–2.

If you checked line 14b, fill out Form 122A–2 and file it with this form.

Mr. Cooper says that many pro se debtors to whom line 14a applies fail to see the instruction under the signature and date and, as a result, unnecessarily spend time and effort completing Official Form 122A-2 (*Chapter 7 Means Test Calculation*). He suggests that the sentence "Do NOT fill out or file Form 122A-2" be added to the end of line 14a.

Recommendation

Mr. Cooper's suggestion is based on his actual experience with Form 122A-1, and the Subcommittee agreed with the suggestion. The current form was revised as part of the Forms Modernization Project and went into effect on December 1, 2015. One of the main purposes of the project was to make the forms easier to understand, including by pro se parties. If experience

shows that an important instruction is being overlooked frequently, a revision should be considered.

Amending line 14a as Mr. Cooper suggests would make that instruction parallel to the instruction on line 14b. Line 14b says to fill out Form 122A-2. The form also includes a similar statement after the signature and date. Likewise, the equivalent form for chapter 13—Official Form 122C-1 (*Chapter 13 Statement of Your Current Monthly and Calculation of Commitment Period*)—includes an instruction not to fill out Form 122C-2 both at line 17a and after the signature and date.

Adding to line 14a a statement not to fill out and file Form 122A-2 would add clarity to the form. **The Subcommittee recommends that the Advisory Committee propose such an amendment for final approval by the Standing Committee and Judicial Conference without publication.** The Subcommittee concluded that the change is sufficiently minor that publication is not needed. If amended, the instruction in line 14a of Official Form 122A-1 would then read as follows: "*There is no presumption of abuse.* Go to Part 3. Do NOT fill out or file Official Form 122A-2." The following Committee Note would explain the change.

Committee Note

> The instruction on line 14a is amended to remind a debtor for whom there is no presumption of abuse that Official Form 122A-2 (*Chapter 7 Means Test Calculation*) should not be filled out or filed.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: FORMS SUBCOMMITTEE

SUBJECT: 19-BK-B – APPLICATION FOR UNCLAIMED FUNDS

DATE: MAR. 4, 2019

The Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee") submitted a suggestion, 19-BK-B, that the Advisory Committee on Bankruptcy Rules adopt at Director's Form containing a standard application for withdrawal of unclaimed funds, together with instructions and a proposed order either granting or denying the application. The proposed form was developed by an Unclaimed Funds Task Force established by the Bankruptcy Committee, comprised of district and bankruptcy judges, clerks of court, and liaisons from the Bankruptcy Administrators program and the EOUST. A copy of the suggestion is attached as Exhibit A.

As noted in the suggestion, the Guide to Judiciary Policy, Vol. 13, ch. 10, provides guidance to the courts on the appropriate documentation required to support a request for withdrawal of unclaimed funds. The relevant sections read as follows:

§ 1020.50 Claims for Unclaimed Funds

(a) When a claimant contacts a court to request unclaimed funds, the claimant must submit a petition to the court requesting the release of the funds. **See also:** Guide, Vol 13, § 1020.70(a)(1) (Disbursement of Unclaimed Funds).

(b) To process the claim, the court must determine who is requesting the funds.

(1) Owners of Record: the persons shown in the court's records as the owner of the funds.

(2) Successor Claimants: successor businesses, decedent's estates, assignees, judgment creditors, etc., who now have direct claims to the funds but are not the owners of record.

(3) Claimant Representatives: typically funds locators who act on behalf of owners of record/successor claimants.

(c) Owners of Record

To verify the claimant's identity as owner of record, the claimant must provide to the court the following:

- A notarized signature of the claimant;
- The name, address and telephone number of the claimant;
- The social security or tax identification number of the claimant; and
- Any additional information that the court requires.

(d) Successor Claimants

(1) Successor Businesses

When a successor business claimant petitions the court for release of unclaimed funds, the claimant must provide to the court the following:

- Proof of identify of the owner of record;
- A notarized power of attorney signed by an officer of the successor business;
- A statement of the signing officer's authority; and

- Documentation establishing chain of ownership from the original business claimant.

(2) Transferred Claims

When a successor claimant holding a transferred claim petitions the court for release of unclaimed funds, the successor claimant must provide to the court the following:

- Proof of identify of the owner of record;
- Proof of identify of the successor claimant; and
- Documentation evidencing the transfer of claim.

(3) Decedent's Estate

When the owner of record is deceased and the decedent's estate (i.e., Administrator, Executor, Representative) petitions the court for release of unclaimed funds, the decedent's estate must provide to the court the following:

- Proof of identify of the owner of record;
- Proof of personal identity of the estate administrator; and
- Certified copies of probate documents establishing the representative's right to act on behalf of the decedent's estate.

(e) Claimant Representatives

When a representative of the owner of record or successor claimant petitions the court for release of unclaimed funds, the representative must provide to the court the following:

- Proof of identify of the owner of record, as required under subsection (c) above;
- A notarized, original power of attorney signed by the claimant on whose behalf the representative is acting;
- Proof of identify of the representative; and
- Documentation sufficient to establish the claimant's entitlement to the funds.

§ 1020.60 Claims by Funds Locators

(a) Funds locators are private enterprises that seek to identify unclaimed funds, locate entities that may have potential claims, make claim to the funds on the behalf of the entities and collect a percentage of the funds recovered as a fee.

(b) A court may be contacted by a funds locator firm that suggests it has information on parties entitled to unclaimed funds. They may have a "power of attorney" to collect on behalf of the owner of record that is not original or notarized or is otherwise unconvincing in appearance. All claims presented to a court by a funds locator must also be supported by appropriate documentation, as required in § 1020.50 (Claims for Unclaimed Funds).

(c) If a court is satisfied that a funds locator is entitled to receive unclaimed funds as the representative of the owner of the funds, and notice to the U.S. attorney has been given, the court may order that the funds be released under the authority of 28 U.S.C. § 2042.

(d) A court should consider adopting a policy prohibiting the issuance of a check payable solely to a funds locator, even if a power of attorney authorizes it. A court is encouraged to establish a policy of issuing one check in the name of the rightful owner of record only or jointly to the owner of record **and** the funds locator, if authorized by the power of attorney. The court does not make a separate payment to the funds locator to split out its fee or commission.

Although courts comply with the requirements of the Guide, each district tends to adopt its own form and instructions for such withdrawals. The lack of uniformity between districts increases costs, and creates a disincentive to creditors who operate in multiple jurisdictions to seeking withdrawal of unclaimed funds. The Bankruptcy Committee believes that standardizing these forms "would make it easier for claimants to withdraw

unclaimed funds, thereby helping to reduce the increasing unclaimed funds balance and improve bankruptcy courts' management of unclaimed funds."

There seems no compelling reason to encourage local autonomy over the form for seeking withdrawal of unclaimed funds. The Subcommittee agrees that a standard form would facilitate the payment of unclaimed funds. The Subcommittee did, however, have a number of comments on the forms that were attached to Suggestion 19-BK-B. Versions that include those suggested changes are attached as Exhibit B. The Subcommittee recommends to the Advisory Committee that the AO be directed to post a new Directors Form for the application for the payment of unclaimed funds in the form attached as Exhibit B, together with the instructions and forms of orders also included in that Exhibit.

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Exhibit A

19-BK-B

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

January 15, 2019

Honorable Dennis Dow
United States Bankruptcy Court
Charles Evans Whittaker
United States Courthouse
400 East Ninth Street, Room 6562
Kansas City, MO 64106

Dear Judge Dow:

I write on behalf of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) to request that the Advisory Committee on Bankruptcy Rules (Rules Committee) consider creating a Director's Bankruptcy Form for an application for withdrawal of unclaimed funds, instructions, and proposed order.

In December 2017, the Bankruptcy Committee established an Unclaimed Funds Task Force (Task Force) to explore options for improving the judiciary's management of unclaimed funds attributable to bankruptcy courts. The Task Force is comprised of district and bankruptcy judges, clerks of court, and liaisons from the Bankruptcy Administrators program and the Department of Justice Executive Office for United States Trustees. The Task Force developed several proposals and made recommendations to the Bankruptcy Committee at its December 2018 meeting, including the recommendation set forth herein.

Volume 13, Chapter 10 of the *Guide to Judiciary Policy* (*Guide*) provides guidance to courts regarding documentation needed to support the disbursement of unclaimed funds. *Guide*, Vol. 13, Ch. 10, §§ 1020.50, 60. While courts adhere to the policies set forth in the *Guide*, they have developed their own instructions and forms locally for the withdrawal of unclaimed funds. As a result, there are variations in

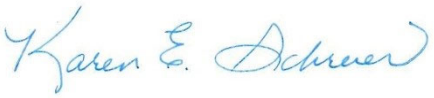
procedures among the courts. National creditors must comply with all variations in procedures, which serves as a disincentive for claiming their funds. A recent survey of the bankruptcy clerks and their staff found that 84 percent of respondents were supportive of achieving more standardization in instructions and forms nationally.

The Task Force developed a draft application for withdrawal of unclaimed funds, instructions, and proposed orders, that would standardize the process for claimants to seek to withdraw unclaimed funds and for bankruptcy courts to process and approve such applications. Implementing standardized forms would make it easier for claimants to withdraw unclaimed funds, thereby helping to reduce the increasing unclaimed funds balance and improve bankruptcy courts' management of unclaimed funds.

The Bankruptcy Committee recommends that the Rules Committee consider adopting the draft Director's Bankruptcy Form for the application, instructions, and proposed orders included in the attachments.

Chief Judge Mary P. Gorman (Bankr. C.D. Ill.), the Bankruptcy Committee liaison to the Rules Committee and a Task Force member, and I are both available should you have any questions or wish to discuss further.

Sincerely,



Karen E. Schreier, Chair

cc: Honorable David G. Campbell
Honorable Stuart M. Bernstein
Honorable Mary P. Gorman
Ms. Mary Louise Mitterhoff
Ms. Michele E. Reed
Ms. Rebecca Womeldorf
Ms. Bridget M. Healy
Ms. Meredith V. Mathis
Mr. Scott Myers

Attachments

UNITED STATES BANKRUPTCY COURT
FOR THE _____DISTRICT OF _____

Debtor 1:	Case No.:
Debtor 2 (if applicable):	Chapter:

APPLICATION FOR UNCLAIMED FUNDS

1. Claim Information

For the benefit of the Claimant(s)[1] named below, application is made for the disbursement of unclaimed funds on deposit with the court. I have no knowledge that any other party may be entitled to these funds, and I am not aware of any dispute regarding these funds.

Note: If there are joint Claimants, complete the fields below for both Claimants.

Amount:	
Claimant's Name:	
Claimant's Current Mailing Address, Telephone Number, and Email Address:	

2. Applicant Information

Applicant[2] represents that Claimant is entitled to receive the unclaimed funds based upon:
(*check the statements that apply*)

□ Claimant is the Owner of Record[3] entitled to the unclaimed funds appearing on the records of the court.

□ Claimant is entitled to the unclaimed funds by assignment, purchase, merger, acquisition, succession or by other means.

□ Applicant is Claimant's non-attorney representative (*e.g.,* unclaimed funds locator). □ Applicant is Claimant's attorney.

□ Applicant is a representative of the deceased Claimant's estate.

[1] The Claimant is the party entitled to the unclaimed funds.
[2] The Applicant is the party filing the application. The Applicant and Claimant may be the same.
[3] The Owner of Record is the original payee.

3. Supporting Documentation

☐ Applicant has read the court's instructions for filing an Application for Unclaimed Funds and is providing the required supporting documentation with this application.

4. Service on United States Attorney

Applicant understands that a copy of this application and supporting documentation must be sent to the United States Attorney, pursuant to 28 U.S.C. § 2042, at the following address:

Office of the United States Attorney
_____ District of _____
[Court enters address here]

5. Applicant Declaration

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: _____

_____
Signature of Applicant

_____
Printed Name of Applicant

_____
Address

Telephone: _____

Email: _____

5. Co-Applicant Declaration (if applicable)

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: _____

_____
Signature of Co-Applicant (if applicable)

_____
Printed Name of Co-Applicant (if applicable)

_____
Address

Telephone: _____

Email: _____

6. Notarization **STATE OF** _____ **COUNTY OF** _____ This Application for Unclaimed Funds, dated _____ was subscribed and sworn to before me this_____ day of _____, 20_____ by _____ who signed above and is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument. WITNESS my hand and official seal. (SEAL) Notary Public _____ My commission expires:	6. Notarization **STATE OF**_____ **COUNTY OF**_____ This Application for Unclaimed Funds, dated _____ was subscribed and sworn to before me this_____ day of _____, 20_____ by _____ who signed above and is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument. WITNESS my hand and official seal. (SEAL) Notary Public_____ My commission expires:

CERTIFICATE OF SERVICE

In accordance with 28 U.S.C. § 2042, the undersigned hereby certifies that on the date designated below, a true and correct copy of the foregoing application with all required documentation was mailed to:

United States Attorney
_____
_____
_____

Names and addresses of all other parties served:

Date: _____

Signature: _____
Name: _____
Address: _____
_____

Instructions for Filing Application for Unclaimed Funds

These template instructions can be modified by a bankruptcy court as needed.[2]

Unclaimed funds are held by the court for an individual or entity who is entitled to the money, but who has failed to claim ownership of it. The United States Courts, as custodians of such funds, have established policies and procedures for holding, safeguarding and accounting for the funds.

I. Searching Unclaimed Funds

To search unclaimed funds, use the Unclaimed Funds Locator. Select _____ (*name of court*) from the dropdown list and enter the applicable search criteria. If you need access to a computer to perform the search, you may use the court's public computer terminal(s) located at _____. Additionally, you may contact the Clerk's office at xxx-xxx-xxxx to verify unclaimed funds balances.

Note to court: If your court is not using the Unclaimed Funds Locator, please specify how your court is making unclaimed funds data accessible to the public.

II. Filing Requirements for Disbursement of Unclaimed Funds

a. Application for Unclaimed Funds

Any party who seeks the release of unclaimed funds must file an Application for Unclaimed Funds in substantial conformance with the court's standard application form and serve a copy of the application on the United States Attorney for the _____District of _____. For purposes of this procedure, the "Applicant" is the party filing the application, and the "Claimant" is the party entitled to the unclaimed funds. The Applicant and Claimant may be the same.

b. Supporting Documentation

1. Payee Information

Funds are payable to the Claimant. In conjunction with the Application for Unclaimed Funds, Claimant's tax identification number (TIN) must be provided to the court on a certification form signed by the Claimant to whom funds are being distributed.

[2] The notes to courts appearing in italics are for internal use only and are intended to be removed in a court's final version of the instructions.

A. Domestic Claimant

A Claimant within the United States may use the AO 213 or W-9 certification form. If a Claimant wants payment via Electronic Funds Transfer (EFT), then the AO 213 form must be used.

B. Foreign Claimant

A foreign Claimant may use a W-8 certification form accompanied by the AO-215 form.

If you have problems completing a form, please contact the Clerk's office at xxx-xxxxxxx.

Note to court: While making funds payable to the Claimant is included as the default language, specify above how funds are payable in your court, if different (e.g., payable jointly to the owner of record and funds locator if authorized by a power of attorney).

2. Additional Supporting Documentation

Requirements for additional supporting documentation vary depending on the type of Claimant and whether the Claimant is represented. Please read the instructions below to identify what must accompany your Application for Unclaimed Funds.

Sufficient documentation must be provided to the court to establish the Claimant's identity and entitlement to the funds. Proof of identify must be provided in unredacted form with a current address. If there are joint Claimants, then supporting documentation must be provided for both Claimants.

A. Owner of Record

The Owner of Record is the original payee entitled to the funds appearing on the records of the court. If the Claimant is the Owner of Record, the following additional documentation is required:

i. Owner of Record - Individual

a. Proof of identity of the Owner of Record (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address); and
b. A notarized signature of the Owner of Record (incorporated in application).

ii. Owner of Record - Business or Government Entity

a. Application must be signed by an authorized representative for and on behalf of the business or government entity;
b. A notarized statement of the signing representative's authority; and
c. Proof of identity of the signing representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address).

If the Owner of Record's name has changed since the funds have been deposited with the court, then proof of the name change must be provided.

B. Successor Claimant

A successor Claimant may be entitled to the unclaimed funds as a result of assignment, purchase, merger, acquisition, succession or by other means. If the Claimant is a successor to the original Owner of Record, the following documentation is required:

i. Successor Claimant - Individual

a. Proof of identity of the successor Claimant (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);
b. A notarized signature of the successor Claimant (incorporated in application); and
c. Documentation sufficient to establish chain of ownership or the transfer of claim from the original Owner of Record.

ii. Successor Claimant – Business or Government Entity

a. Application must be signed by an authorized representative for and on behalf of the successor entity;
b. A notarized statement of the signing representative's authority;
c. A notarized power of attorney signed by an authorized representative of the successor entity;
d. Proof of identity of the signing representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address); and
e. Documentation sufficient to establish chain of ownership or the transfer of claim from the original Owner of Record.

iii. Deceased Claimant's Estate

a. Proof of identity of the estate representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);
b. Certified copies of probate documents or other documents authorizing the representative to act on behalf of the decedent or decedent's estate in accordance with applicable state law (*e.g.,* small estate affidavit); and
c. Documentation sufficient to establish the deceased Claimant's identity and entitlement to the funds.

Note to court: Your court may choose to tailor these instructions based on the laws in your state.

C. Claimant Represented By Attorney or Funds Locator

If the Claimant is represented by an attorney or funds locator, the following documentation is required:

i. Attorney

a. Proof of identify of the attorney (*e.g.,* unredacted copy of driver's license, other

state-issued identification card, or U.S. passport that includes current address); and

b. Documentation sufficient to establish the Claimant's identity and entitlement to the funds, as set forth above.

ii. Funds Locator

a. Proof of identity of the funds locator (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);

b. A notarized power of attorney signed by the Claimant (or Claimant's authorized representative) on whose behalf the funds locator is acting; and

c. Documentation sufficient to establish the Claimant's identity and entitlement to the funds, as set forth above.

c. Certificate of Service

When filing an Application for Unclaimed Funds, the Applicant must include a certificate of service, reflecting service of a copy of the application and supporting documentation upon the U.S. Attorney for the _____ District of _____ at the following mailing address:

Office of the U.S. Attorney
[Court enters address here]

d. Proposed Order

Applicant must provide the court a proposed order in substantial conformance with the court's standard Order for Payment of Unclaimed Funds.

Note to court: This is an option for a court that requires a proposed order in conjunction with an application.

e. Filing the Application

The application, supporting documentation, certificate of service, and proposed order must be mailed to the court at the following address:

U.S. Bankruptcy Court
_____ District of _____ *[Court enters address here]*

Note to court: Please identify any alternative means for filing (e.g., electronic filing with documents containing personal identifiers restricted from public access).

III. Post-Filing Process

Insert your court's procedure for processing an application here.

Suggested Practice: Any party objecting to the Claimant's request in the application shall, within twenty-one (21) days after service thereof, serve upon the Applicant and other appropriate parties and file with the court an objection to the application. If no objection is filed with the court within twenty-one (21) days after the filing of the application, the application and accompanying documents may be considered by the court without hearing. If the application is deficient, the Clerk's office may contact the Applicant for additional proof of identity or entitlement to the funds.

Note to court: *The 21-day objection period is not required by statute or rule; however, various courts have implemented this negative notice practice by local procedure.*

IV. Links

Application for Unclaimed Funds

Order for Payment of Unclaimed Funds

AO 213

W-9

W-8

AO 215

UNITED STATES BANKRUPTCY COURT
_____ District of _____

In re:	)	Case No.
	)	
Debtor(s)	)	Chapter

ORDER FOR PAYMENT OF UNCLAIMED FUNDS

On _____, an application was filed for the Claimant(s), _____, to withdraw unclaimed funds deposited with the court, pursuant to 11 U.S.C. § 347(a). The application and supporting documentation establish that the Claimant(s) is/are entitled to the unclaimed funds; accordingly, it is hereby

ORDERED that, pursuant to 28 U.S.C. § 2042, the sum of $_____ held in unclaimed funds be made payable to _____ and be disbursed to the payee at the following address:

_____.

The Clerk will disburse these funds not earlier than 14 days after entry of this order.

UNITED STATES BANKRUPTCY COURT _____ District of _____

In re:	)	Case No.
	)	
Debtor(s)	)	Chapter

ORDER DENYING APPLICATION FOR PAYMENT OF UNCLAIMED FUNDS

On _____, an application was filed for the Claimant(s), _____, to withdraw unclaimed funds deposited with the court, pursuant to 11 U.S.C. § 347(a). Upon reviewing the application and supporting documentation, the court denies the application for the following reasons:

_____.

Exhibit B

Fill in this Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number:

Form 1340 (12/19)

APPLICATION FOR PAYMENT OF UNCLAIMED FUNDS

1. Claim Information

For the benefit of the Claimant(s)[1] named below, application is made for the payment of unclaimed funds on deposit with the court. I have no knowledge that any other party may be entitled to these funds, and I am not aware of any dispute regarding these funds.

Note: If there are joint Claimants, complete the fields below for both Claimants.

Amount:	
Claimant's Name:	
Claimant's Current Mailing Address, Telephone Number, and Email Address:	

2. Applicant Information

Applicant[2] represents that Claimant is entitled to receive the unclaimed funds because (*check the statements that apply*):

☐ Applicant is the Claimant and is the Owner of Record[3] entitled to the unclaimed funds appearing on the records of the court.

☐ Applicant is the Claimant and is entitled to the unclaimed funds by assignment, purchase, merger, acquisition, succession or by other means.

☐ Applicant is Claimant's representative (*e.g.,* attorney or unclaimed funds locator).

☐ Applicant is a representative of the deceased Claimant's estate.

3. Supporting Documentation

☐ Applicant has read the court's instructions for filing an Application for Unclaimed Funds and is providing the required supporting documentation with this application.

1 The Claimant is the party entitled to the unclaimed funds.
2 The Applicant is the party filing the application. The Applicant and Claimant may be the same.
3 The Owner of Record is the original payee.

4. Notice to United States Attorney

☐ Applicant has sent a copy of this application and supporting documentation to the United States Attorney, pursuant to 28 U.S.C. § 2042, at the following address:

Office of the United States Attorney
_____ District of _____
[Court enters address here]

5. Applicant Declaration
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: _____

_____
Signature of Applicant

_____
Printed Name of Applicant

Address:

Telephone: _____

Email: _____

5. Co-Applicant Declaration (if applicable)
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: _____

_____
Signature of Co-Applicant (if applicable)

_____
Printed Name of Co-Applicant (if applicable)

Address:

Telephone: _____

Email: _____

6. Notarization
STATE OF _____

COUNTY OF _____

This Application for Unclaimed Funds, dated _____ was subscribed and sworn to before me this_____day of_____, 20_____by

_____
who signed above and is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument. WITNESS my hand and official seal.

(SEAL) Notary Public _____

My commission expires:

6. Notarization
STATE OF_____

COUNTY OF_____

This Application for Unclaimed Funds, dated _____ was subscribed and sworn to before me this_____day of_____, 20_____by

_____
who signed above and is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument. WITNESS my hand and official seal.

(SEAL) Notary Public_____

My commission expires:

Instructions for Filing Application for Payment of Unclaimed Funds

These template instructions can be modified by a bankruptcy court as needed.[1]

Unclaimed funds are held by the court for an individual or entity who is entitled to the money but who has failed to claim ownership of it. The United States Courts, as custodians of such funds, have established policies and procedures for holding, safeguarding, and accounting for the funds.

I. Searching Unclaimed Funds

To search unclaimed funds, use the Unclaimed Funds Locator, https://ucf.uscourts.gov/. Select_____(*name of court*) from the dropdown list and enter the applicable search criteria. If you need access to a computer to perform the search, you may use the court's public computer terminal(s) located at_. Additionally, you may contact the Clerk's office at xxx-xxx-xxxx to verify unclaimed funds balances.

Note to court: If your court is not using the Unclaimed Funds Locator, please specify how your court is making unclaimed funds data accessible to the public.

II. Filing Requirements for Payment of Unclaimed Funds

a. Application for Payment of Unclaimed Funds

Any party who seeks the payment of unclaimed funds must file an Application for Payment of Unclaimed Funds in substantial conformance with the court's standard application form and serve a copy of the application on the United States Attorney for the District of _____. For purposes of this procedure, the "Applicant" is the party filing the application, and the "Claimant" is the party entitled to the unclaimed funds. The Applicant and Claimant may be the same.

b. Supporting Documentation

1. Payee Information

Funds are payable to the Claimant. In conjunction with the Application for Unclaimed Funds, Claimant's tax identification number (TIN) must be provided to the court on a certification form signed by the Claimant to whom funds are being distributed.

A. Domestic Claimant

A Claimant within the United States may use the AO 213 or W-9 certification form. If a Claimant wants payment via Electronic Funds Transfer (EFT), then the AO 213 form must be used.

[1] The notes to courts appearing in italics are for internal use only and are intended to be removed in a court's final version of the instructions.

B. Foreign Claimant

A foreign Claimant may use a W-8 certification form accompanied by the AO-215 form.

If you have problems completing a form, please contact the Clerk's office at xxx-xxx-xxxx.

Note to court: While making funds payable to the Claimant is included as the default language, specify above how funds are payable in your court, if different (e.g., payable jointly to the owner of record and funds locator if authorized by a power of attorney).

2. Additional Supporting Documentation

Requirements for additional supporting documentation vary depending on the type of Claimant and whether the Claimant is represented. Please read the instructions below to identify what must accompany your Application for Unclaimed Funds.

Sufficient documentation must be provided to the court to establish the Claimant's identity and entitlement to the funds. Proof of identify must be provided in unredacted form with a current address. If there are joint Claimants, then supporting documentation must be provided for both Claimants.

A. Owner of Record

The Owner of Record is the original payee entitled to the funds appearing on the records of the court. If the Claimant is the Owner of Record, the following additional documentation is required:

i. Owner of Record - Individual

a. Proof of identity of the Owner of Record (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address); and
b. A notarized signature of the Owner of Record (incorporated in application).

ii. Owner of Record - Business or Government Entity

a. Application must be signed by an authorized representative for and on behalf of the business or government entity;
b. A notarized statement of the signing representative's authority; and
c. Proof of identity of the signing representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address).

If the Owner of Record's name has changed since the funds have been deposited with the court, then proof of the name change must be provided.

B. Successor Claimant

A successor Claimant may be entitled to the unclaimed funds as a result of assignment, purchase, merger, acquisition, succession or by other means. If the Claimant is a successor to the original Owner of Record, the following documentation is required:

i. Successor Claimant - Individual

a. Proof of identity of the successor Claimant (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);
b. A notarized signature of the successor Claimant (incorporated in application); and
c. Documentation sufficient to establish chain of ownership or the transfer of claim from the original Owner of Record.

ii. Successor Claimant – Business or Government Entity

a. Application must be signed by an authorized representative for and on behalf of the successor entity;
b. A notarized statement of the signing representative's authority;
c. A notarized power of attorney signed by an authorized representative of the successor entity;
d. Proof of identity of the signing representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address); and
e. Documentation sufficient to establish chain of ownership or the transfer of claim from the original Owner of Record.

iii. Deceased Claimant's Estate

a. Proof of identity of the estate representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);
b. Certified copies of probate documents or other documents authorizing the representative to act on behalf of the decedent or decedent's estate in accordance with applicable state law (*e.g.,* small estate affidavit); and
c. Documentation sufficient to establish the deceased Claimant's identity and entitlement to the funds.

Note to court: Your court may choose to tailor these instructions based on the laws in your state.

C. Claimant Representative

If the Applicant is Claimant's attorney or other representative, the following documentation is required:

i. Proof of identity of the representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);

ii. A notarized power of attorney signed by the Claimant (or Claimant's authorized representative) on whose behalf the representative is acting; and
iii. Documentation sufficient to establish the Claimant's identity and entitlement to the funds, as set forth above.

c. Proposed Order

Applicant must provide the court a proposed order in substantial conformance with the court's standard Order for Payment of Unclaimed Funds.

Note to court: This is an option for a court that requires a proposed order in conjunction with an application.

d. Filing the Application

The application, supporting documentation, certificate of service, and proposed order must be mailed to the court at the following address:

U.S. Bankruptcy Court
_____ District of _____
[Court enters address here]

Note to court: Please identify any alternative means for filing (e.g., electronic filing with documents containing personal identifiers restricted from public access).

e. Post-Filing Process

Insert your court's procedure for processing an application here.

Suggested Practice: Any party objecting to the Claimant's request in the application shall, within twenty-one (21) days after service thereof, serve upon the Applicant and other appropriate parties and file with the court an objection to the application. If no objection is filed with the court within twenty-one (21) days after the filing of the application, the application and accompanying documents may be considered by the court without hearing. If the application is deficient, the Clerk's office may contact the Applicant for additional proof of identity or entitlement to the funds.

Note to court: *The 21-day objection period is not required by statute or rule; however, various courts have implemented this negative notice practice by local procedure.*

III. Links

Application for Unclaimed Funds

Order for Payment of Unclaimed Funds

AO 213

W-9

W-8

AO 215

UNITED STATES BANKRUPTCY COURT
_____ District of _____

In re:	)	Case No.
	)	
Debtor(s)	)	Chapter

ORDER DENYING APPLICATION FOR PAYMENT OF UNCLAIMED FUNDS

On_____, an application was filed for the Claimant(s), _____, for payment of unclaimed funds deposited with the court, pursuant to 11 U.S.C. § 347(a). The application and supporting documentation fail to establish that the Claimant(s) is/are entitled to the unclaimed funds; accordingly, it is hereby

ORDERED that the court denies the application for the following reasons:

_____.

UNITED STATES BANKRUPTCY COURT
_____ District of _____

In re:	)	Case No.
	)	
Debtor(s)	)	Chapter

ORDER GRANTING APPLICATION FOR PAYMENT OF UNCLAIMED FUNDS

On_____, an application was filed for the Claimant(s), _____, for payment of unclaimed funds deposited with the court, pursuant to 11 U.S.C. § 347(a). The application and supporting documentation establish that the Claimant(s) is/are entitled to the unclaimed funds; accordingly, it is hereby

ORDERED that, pursuant to 28 U.S.C. § 2042, the sum of $_____held in unclaimed funds be made payable to _____ and be disbursed to the payee at the following address:

_____.

The Clerk will disburse these funds not earlier than 14 days after entry of this order.

TAB 8

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TAB 8A

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MEMORANDUM

To: The Hon. Dennis R. Dow, U.S. Bankruptcy Judge
Chair, Advisory Committee on Rules of Bankruptcy Procedure
From: Abigail B. Willie, Supreme Court Fellow
Date: January 26, 2019
Re: Issues to consider in preparing for rules restyling

Pursuant to your request, I prepared this Memorandum on issues to consider in preparing for rules restyling. Please advise if you have questions or follow-up work. As always, it is a privilege to serve and I appreciate the opportunity. Thank you.

I. STATUTORY BASES FOR RESTYLING THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

A. Section 2072 of Title 28 of the United States Code: The Rules Enabling Act

Through the Rules Enabling Act (the "REA"), Congress has empowered the Supreme Court to prescribe[1] rules governing the practice and procedure of district courts and courts of appeals. The REA provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

[1] To track the REA's language, this Memorandum uses "prescribe" for the exercise of power by the Supreme Court pursuant to 28 U.S.C. § 2072(a). Other sources may use "promulgate" or "enact." "Enact" may be problematic because it means "to make law," a power vested in the Constitution to the Legislative Branch alone. Interestingly, given the supersession clause included in the REA and the force-of-law authority of the rules prescribed under, the powers granted to the Supreme Court under REA seem very close to being legislative, transferred to the Judicial Branch the auspices of deferring to the Supreme Court as the administrator of the federal courts. For an article raising issues of the constitutionality of the REA, *see* Richard D. Freer, 107 NORTHWESTERN UNIV. L. REV. 447 (2013).

> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.[2]

Pursuant to the REA, the Supreme Court prescribed the Federal Rules of Appellate Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence (each, a "FRE"), and the Federal Rules of Civil Procedure (each, a "FRCP").[3]

B. Section 2075 of Title 28 of the United States Code: The Bankruptcy Rules Enabling Act

Through the Bankruptcy Rules Enabling Act (the "BREA"), Congress has empowered the Supreme Court to prescribe, by general rules, practice and procedure "in cases under title 11."[4] The powers granted in the BREA are similar to, but not identical to,[5] to those granted in the REA. Specifically, the BREA provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and

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[2] 28 U.S.C. § 2072.

[3] For additional discussion on the role of the Judicial Conference and rules-making process, *see, e.g.*, Lisa Eichhorn, *Clarity and the Federal Rules of Civil Procedure: A Lesson from the Style Project*, 5 J. ASS'N LEGAL WRITING DIRECTORS 1, 2-6 (2008).

[4] The BREA grants the Supreme Court the power to prescribe rules and procedures "in cases *under* title 11"—that is, in cases commenced by the filing of a petition for relief under a chapter of title 11. However, 28 U.S.C. §§ 1334 and 157 (the bankruptcy jurisdiction and authority statutes) distinguish "cases under title 11" from other types of bankruptcy matters, "proceedings *arising under* title 11 or *arising in or related to* a case under title 11." The BREA makes no reference to these other types of proceedings. Nevertheless, the Bankruptcy Rules are understood to govern "cases under title 11," as well as "proceedings arising under title 11 or arising in or related to a case under title 11."

[5] The BREA is based on the REA. *See In re Tallerico*, 532 B.R. 774, 783 (Bankr. E.D. Cal 2015)(discussing the statutory history of BREA). However, the REA includes a "supersession clause," providing that "[a]ll laws in conflict with such rule shall be of no further force or effect after such will have taken effect." 28 U.S.C. § 2072(b). The BREA has no such clause; it was removed in 1978. *See* Bankruptcy Act of 1978, Pub. L. 95-598. As a result, "it is clear that a bankruptcy rule is not conclusive regarding the application of a bankruptcy statute. In contrast, a bankruptcy rule is expressly void to the extent it abridges, enlarges, or modifies a substantive right." *In re Layton*, 480 B.R. 392, 400 (Bankr. M.D. Fla. 2012).

> motions, and the practice and procedure in cases under title 11.
>
> Such rules shall not abridge, enlarge, or modify any substantive right.
>
> The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.
>
> The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement.[6]

Pursuant to BREA, the Supreme Court prescribed the Federal Rules of Bankruptcy Procedure (collectively, the "Bankruptcy Rules"; each, a "FRBP"). The Bankruptcy Rules, like the federal rules prescribed by Supreme Court pursuant to the REA, "are presumed to be within the guidelines of their enabling statute . . . [and] therefore, have the force and effect of law."[7]

C. Section 331 of Title 28 of the United States Code: Creation of the Judicial Conference

To provide the Supreme Court with a mechanism for meeting its rules-prescribing obligation, the Congress enacted 28 U.S.C. § 331, which establishes the Judicial Conference of the United States (the "Judicial Conference").[8] The Judicial Conference is obligated to "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law."[9]

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[6] 28 U.S.C. § 2075.

[7] *In re Ain*, 193 B.R. 41, 44 (D. Colo. 1996)(internal citations omitted).

[8] 28 U.S.C. § 331.

[9] *Id.*

D. Section 2073(b) of Title 28 of the United States Code: Creation of the Standing Committee

To provide the Judicial Conference with a mechanism for meeting its "continuous study" obligation, Congress enacted 28 U.S.C. § 2073(b), pursuant to which the Judicial Conference "shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence"[10] (as authorized, the Standing Committee on Rules of Practice and Procedure (the "Standing Committee")). The Standing Committee also has committees, such as the Advisory Committee on Rules of Bankruptcy Procedure (the "Bankruptcy Rules Committee").

II. THE STYLE PROJECT

As part of its "power to prescribe" under the REA and the BREA, the Supreme Court can amend, for substance or style, the rules it prescribes. In 1992, Judge Robert E. Keeton, the then-Standing Committee chair, called for the revision of all the federal rules, to make them "user-friendly" and "easy to read and understand."[11] The goal was to restyle the rules into "plain English," as advocated by the "plain language" movement to which the restylists subscribed.[12] Restyling amendments were to be stylistic only, and affect no substantive changes.

To accomplish restyling, Judge Keeton initiated the Style Project and created the Style Subcommittee, whose members included procedural scholar Charles Alan Wright and legal style expert Bryan A. Garner. Together, they produced the *Guidelines for Drafting and Editing Court Rules* (the "*Guidelines*"), which was used in the restyling of the Federal Rules of Appellate Procedure (in 1998), the Federal Rules of Criminal Procedure (in 2002), the Federal Rule of Civil Procedure (each, a "FRCP") (in 2007), and the Federal Rules of Evidence (in 2011). The Bankruptcy Rules Committee recently announced that it plans to undertake a restyling of the Bankruptcy Rules beginning this year.

III. A REVIEW OF LITIGATION RESULTING FROM THE RESTYLING OF OTHER FEDERAL RULES

This Memorandum was to present case law addressing the litigation of issues related to the effect of the restyling efforts of other federal rules. However, research

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[10] 28 U.S.C. § 2073(b).

[11] Bryan A. Gamer, *Guidelines for Drafting and Editing Court Rules*, at i (Admin. Office of the U.S. Courts 1996), preface by the Hon. Robert E. Keeton.

[12] There are numerous articles on the "plain language" movement, many of which are tedious in theory. For a manageable overview, *see, e.g.,* Eichhorn, at 6-14.

produced no published case law in which the effect of the restyling was presented as a legal issue, or in which it was argued that a restyling amendment substantively changed the subject rule. The contention that a restyling amendment affected substantive change is not an argument that appears to be being made. Most commonly, in a published case which mentions that a rule was restyled, the court goes out of its way to volunteer that a restyling amendment does not effect a substantive change, even though no party argues otherwise.[13] Courts have spent considerable effort crafting footnotes to specify which version (the old or revised) rules applied, and observing that, regardless, that the restyling made only stylistic changes. The fact that there does not appear to be disputes regarding the legal effect of restyling may not be surprising, as the restyling amendments clearly provide that they were intended to be stylistic only.[14]

It may be worth observing a few other points that courts have made in addressing various restyling amendments:

- In *U.S. v. Daniels*, the U.S. Court of Appeals for the Fifth Circuit observed that FRE 902(11) (the rule permitting the admission of certified domestic record of a regularly conducted activity) was restyled to provide that the party seeking to introduce the record provide "reasonable written notice" "before the trial or hearing."[15] This "reasonable written notice" was not included in the prior version of the rule. Noting that the restyling was intended to be stylistic only, the Fifth Circuit concluded that, thus, under the prior version of FRE 902(11), "the authenticity of business records may be established by written declaration of the custodian provided to opposing counsel a reasonable time before trial."[16] That is, the Fifth Circuit used the restyled rule to illuminate how the prior version of that rule operated.

- In *U.S. v. Irvin*, the U.S. Court of Appeals for the Tenth Circuit confirmed that because the restyling amendments are intended to be stylistic, the restyling changes of FRE 803(6) (the rule on the hearsay exception for records of regularly conducted activity) "do not displace any of this court's prior

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[13] *See, e.g., In re Camacho*, 489 B.R. 837, 843 (Bankr. E.D. Cal. 2013)(internal citations omitted).

[14] *See, e.g.*, Fed. R. Civ. P. 41, Adv. Comm. Note, 2007 Amend. (providing that "[t]he language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.").

[15] 723 F.3d 562, 579 (5th Cir. 2013).

[16] *Id.*

holdings on evidence admissibility."[17] In other words, case law interpreting the old rule remains precedential for interpreting the restyled rule.

- In *U.S. v. McGarity*, the U.S. Court of Appeals for the Eleventh Circuit applied the prior version of FRE 414 (which had been in effect at the time of the trial), noted that the rule was therafter amended for style, and observed that "the amendment does not change the result of this inquiry, even if it were considered retroactive."[18]

IV. OTHER CONSIDERATIONS FOR THE BANKRUPTCY RULES COMMITTEE IN ITS RESTYLING EFFORTS

The restyling efforts of other federal rules opened up various discussions, by academics and practitioners alike, regarding issues in restyling. The Bankruptcy Rules Committee may be interested in considering these. Accordingly, a number of these issues are discussed below.

Ambiguous Words and Phrases. A word or phrase is ambiguous if it can be reasonably understood in two or more senses. Because the restyling process cannot make substantive changes to the rules, restyling amendments cannot resolve or clarify any ambiguity in a rule. Any ambiguity must be preserved during the restyling process.[19] Unfortunately, the need to preserve ambiguity may undermine the restyling efforts, as the best way to preserve an ambiguous word or phrase would be to leave it alone, to hold it exactly as-is. Moreover, ambiguities can be difficult to recognize, especially if the members of the rules committee presume to understand what the ambiguous phrase "should" mean. Unchallenged presumptions about what a word or phrase "should" mean can obscure its ambiguous nature.

There likely are ambiguous words and phrases in the Bankruptcy Rules. For example, consider FRBP 9019(a), which provides: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Some commentators have argued that the phrase "by the trustee" makes the rule

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[17] 682 F.3d 1254, 1265 n.8 (2012).

[18] 669 F.3d 1218, 1124 n.30 (11th Cir. 2012); *see also U.S. v. Woods*, 684 F.2d 1045, 1064 n.24 (2012)(same observation about retroactivity).

[19] Symposium, *The Restyled Federal Rules of Evidence, Appendix A: Restyling Choices and a Mistake*, 53 WM. & MARY L. REV. 1517, 1517 (2012)("[T]he meaning of some words found in the Rules is more ambiguous than one would suppose upon first reading, and when two individuals can read a rule to mean different things, however small the difference, a problem arises for restylers.").

ambiguous as to whether the trustee has exclusive standing to file such a FRBP 9019 motion.[20] Commentators also have suggested that FRBP 9019(a)'s "may," a permissive auxiliary verb, creates ambiguity as to whether the filing of a motion is mandatory (as some courts have held) or permissive (as other courts have held).[21]

To avoid changing the substantive meaning of a rule by "clarifying" an ambiguity via restyling, the Bankruptcy Rules Committee might consider seeking to identify possible ambiguities in the Bankruptcy Rules, so that those possible ambiguities are on the committee's radar during the restyling process.

Auxiliary Verbs. The *Guidelines* disfavors the word "shall" on several bases, including that it is no longer a part of the common vernacular.[22] Much ink has been spilt by academics over the "shall" controversy and over which word ("must," or "should," or "will" or something else entirely) is the proper replacement. And, the wholesale rejection of "shall" has not gone smoothly in all contexts—most notably, in the "shall-to-should" restyling of Federal Rule of Civil Procedure 56, which lasted only three years before being reversed.[23] The restylists' rejection of "shall" is likely

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[20] Christopher Fong, *Creditors and Rule 9019(a): Casting Doubt on the Trustee's Sole Authority to Settle Claims of the Estate*, 82 AM. BANKR. L.J. 591 (2008).

[21] Linhadley Eljach, *No Seal No Deal: Amending Federal Rule of Bankruptcy Procedure 9019 to Require Judicial Approval of Settlement Agreements*, 32 EMORY BANKR. DEV. J. 433, 437-38 (2016)(discussing the court splits on the issue of whether Rule 9019 is mandatory or permissive); Reynaldo Anaya Valencia*, The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019*, 78 OR. L. REV. 425, 444 (1999)(discussing minority view that Bankruptcy Rule 9019 is not mandatory).

[22] The vehemence with which "shall" was rejected by the restylists has drawn some occasional colorful commentary. "Shall" has been called "that great troublemaker," Symposium, *The Restyled Federal Rules of Evidence,* 53 WM. & MARY L. REV. 1435, 1450 (2012), and was perceived as being "treat[ed by the restylists] with such abhorrence that perhaps it shold be added to Rule 7(c) as a banned word in federal civil procedure," sending it the way of "demurrer," Edward Harnett*, Against Mere Restyling*, 82 NOTRE DAME L. REV. 155, 160 (2006).

[23] Since its adoption in 1938, FRCP 56 had provided that summary judgment "shall be rendered . . ." However, when the Federal Rules of Civil Procedure were restyled in 2007, "shall" was disfavored under the *Guidelines* and FRCP 56 was modified to provide that summary judgment "should be rendered . . ." That restyling effort lasted only three years, before that "shall" in FRCP 56 was restored in 2010. *See* Steven S. Gensler, *Must, Should Shall*, 43 AKRON L. REV. 1139, 1157-67 (2010).

not a minor matter for the restyling of the Bankruptcy Rules, which includes the word "shall" more than forty times—in first the ten rules alone.[24] In addition, the *Guidelines* disfavor "must," which also appears in the Bankruptcy Rules. The Bankruptcy Rules Committee might consider reviewing the use of "shall" throughout the Bankruptcy Rules and the "shall/should/must" debates that arose in connection with the restylings of other federal rules, to be prepared to accept or reject auxiliary verb changes proposed by the restylists.[25]

Intensifiers. "Intensifiers" are "expressions that 'might seem to add emphasis but should be avoided because: 1) they state the obvious; 2) have no practical value; or 3) create negative implications for other rules."[26] For example, the phrase "in its discretion" following the phrase "the court may" is an intensifier, because if the court may act in a certain way, the court necessarily has discretion to so act.[27] Similarly, the phrase "if the court deems it advisable" preceding the phrase "the court may" is an intensifier, because a court would not act in a way that is not advisable.[28] An example of an intensifier in the Bankruptcy Rules might be the word "applicable" in FRBP 9015(b)'s phrase "within any applicable time limits specified by local rule." If a party must act within a time limit, then the time limit is applicable. The Bankruptcy Rules Committee might consider reviewing the Bankruptcy Rules for words or phrases that the restylists might identify as "intensifiers," to ensure that they are truly without value in the bankruptcy context.

Redundant Phrases. Similar to the concept of intensifiers is that of redundancy—or, superfluous repetition. An example of redundancy in the Bankruptcy Rules may be the use of the phrase "of the Code" following a section citation to the Bankruptcy Code. This addition of "of the Code" after section citations occurs throughout the Bankruptcy Rules and generally appears unnecessary, as it is obvious that the reference is to a section of the Bankruptcy

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[24] Fed. R. Bankr. P. 1001-1008.

[25] *See, e.g.,* Gensler, at 1150; Bryan A. Garner, Dictionary of Modern Legal Usage 952 (3d ed. 2011) (describing shades of meaning for "shall"); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2009). Kimble, a law professor and legal writing expert, contributed to the redrafting of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

[26] Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 2)*, 84 MICH. B.J. 52, 52 (2005).

[27] *Id.*

[28] *Id.*

Code. Moreover, the addition of "of the Code" appears random: sometimes it is used, sometimes it is not, and sometimes it is not applied consistently even within a single rule. It may be that the restylists can fix the issue by removing the "of the Code" phrases, and adding a provision at the beginning of the Bankruptcy Rules, specifying that "section" or "§" refers to the indicated section of the Bankruptcy Code, unless otherwise noted. To any degree, the Bankruptcy Rules Committee should be prepared to consider redundancies within the Bankruptcy Rules.

Sacred Phrases and Terms of Art. Certain phrases are protected from tinkering in the restyling process—principally, the so-called "sacred phrases" and "terms of art." "Sacred phrases" are phrases that "are so familiar as to be unalterable, even if the phrases might otherwise be in need of restyling."[29] For example, in the restyling of the Federal Rules of Civil Procedure, the phrase "the failure to state a claim upon which relief may be granted" was deemed to be a sacred phrase, and was left untouched. In the context of the Bankruptcy Rules, an example of a likely sacred phrase would be "property of the estate." The restylists, applying the *Guidelines* standard, might seek to restyle the phrase to "estate property," thereby making it more concise by eliminating a preposition and a definite article. However, there might be riots in the bankruptcy streets, so to metaphorically speak, if that enshrined phrase were cast aside.

"Terms of art," by contrast, are "typically are confined to a given field, consist of one or two words that are difficult to replace with one or two other words, and convey a fairly precise and settled meaning."[30] Sacred phrases do not meet the criteria for terms of art, as sacred phrases often could be replaced with other or fewer words (such as reducing "property of the estate" to "estate property"). In the context of bankruptcy law, an example of a term of art might be "indubitable equivalent," which—aside from being statutory—is established bankruptcy terminology, cannot easily be replaced with one or two other words, and has a very settled meaning.

The Bankruptcy Rules Committee has already observed the need to create a list of sacred phrases and terms of art, and the Memorandum author is in the process of compiling such a list.

Transactional Costs. As one commentator observed: "Rule-making projects occasionally beget other projects."[31] The "transactional costs" of a proposed restyling

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[29] *Id.* at 55.

[30] *Id.*

[31] Gensler, at 1150.

amendment should be identified, and those costs weighed against the benefit. Consider, for example, the transactional costs of breaking apart a rule into two separate rules. While this may make the rule more "user-friendly" (a goal of the Style Project), the resulting re-numbering may impose a considerable transaction cost, by making it more difficult to research the rule. Re-numbering also may result in courts and practitioners needing to "drop a footnote" when citing the re-numbered rule, to explain its history or clarify the reference. (Cumbersome footnotes are not necessarily a nominal transactional cost, including to the courts. In cases following the restyling of other federal rules, courts often felt compelled to add detailed footnotes when simply referring to a restyled rule, to observe the fact of the restyling and its non-substantive effect.) Another transactional cost of restyling is the need to update the Official Forms and the local bankruptcy rules and forms in the ninety-four district courts, to ensure that they utilize the newly restyled language. The Bankruptcy Rules Committee might consider identifying acceptable and unacceptable transaction costs before evaluating proposed restylings.

Old Rule/Restyled Rule Continuity. Academics worried that "when arguable conflicts between the meaning of old and restyled language arise, some judges will ignore the advisory committee note that the changes are 'stylistic only' and instead implement the apparent plain meaning of the restyled text . . .."[32] However, as it turned out, there was not a problem with courts ignoring the Advisory Committee Note and interpreting substantive meaning from the restyling.

However, a separate interpretation problem may exist. Where the parties are not asking the court to consider the old rule versus the restyled one, the court may look only at the plain language of restyled rule. In theory, this should not present a problem: if the restyling made no substantive changes, then the courts should not understand or apply the new rule any differently than the old.[33] However, in reality, the result may be different.

Consider the situation where "shall" is restyled as "should," as happened with the FRCP 56. If that restyling occurred in FRBP 3001(a), the current language of "[a] proof of claim shall conform substantially to the appropriate Official Form,"

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[32] Eichhorn, at 38 (citing to Harnett, at 169).

[33] As one court explained: "[T]he analysis should not be different under the new 2011 restyling of the rules. Because the advisory committee's purpose for the 2011 restyling was to make the rules 'more easily understood and to make style and terminology consistent through the rules,' and there was no 'intent to change any result in any ruling on evidence admissibility,' the analysis applied before 2011 should still be useful for cases after the restyling." *Skyline Potato Co. v. Hi-Land Potato Co.*, 2013 WL 311846, at *14 (D.N.M. Jan. 18, 2013).

would be changed to "[a] proof of claim should conform substantially to the appropriate Official Form." A "should" directive (commonly indicating a guideline for what one *ought* to do) sounds more like a litigation ideal, rather than a legal imperative commanded by "shall" (commonly dictating what one *must* do). It would be easy to see how a judge—without reviewing the old rule—might interpret the restyled rule to be more forgiving that it would have been with "shall."

As one commentator has observed, the risk is: "to the extent that judges rely on the plain meaning of the restyled language and reach outcomes different than they might have under the old language, the restyling will have effectively changed the meaning of the rules, even though the restyling amendments were reviewed and approved as mere stylistic changes and not as substantive ones."[34] To avoid this, the Bankruptcy Rules Committee might consider mechanisms for educating bankruptcy judges and their law clerks about the specific restyling changes. For example, providing a version of the restyled Federal Rules of Bankruptcy Procedure, red-lined against the prior version, might be very helpful.[35]

The Reality that the Complex May Not Be Able to Be Expressed Through the Simple. As a broader philosophical consideration, the notion that the law can be expressed in "plain language" should not be conflated with the misconceived idea that the complex can be made simple and still retain its fullness. While the law does not need to be burdened by "legalese" and "verbal elephantitis,"[36] plain language does not simplify concepts. Although readability of the Bankruptcy Rules can be improved, the complexity of the law cannot be reduced. As the Bankruptcy Rules Committee wrestles with balancing the goal of plain language with the need to retain meaning, it may need to bear in mind a certain truth: sometimes simple words and sentence structure cannot precisely and accurately capture the complexity of the law.

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[34] Eichhorn, at 28 (citing Harnett, at 170).

[35] AWHFY ("Are We Having Fun Yet?") Publishing publishes popular mini-federal codes and rules, including the Bankruptcy Code and the FRBP. The company can be contacted at 877-412-2633 or www.awhfy.com.

[36] Bryan Garner, THE ELEMENTS OF LEGAL STYLE 185 (Oxford Univ. P. 1991).

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TAB 10

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TAB 10A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: SUGGESTIONS 18-BK-G AND 18-BK-H REGARDING PROPOSED AMENDMENTS TO RULE 3002.1 (NOTICE RELATING TO CLAIMS SECURED BY SECURITY INTEREST IN THE DEBTOR'S PRINCIPAL RESIDENCE)

DATE: MARCH 6, 2019

Two organizations have submitted similar, but not identical, suggestions for amending Rule 3002.1 in response to perceived problems with the operation of the current rule. The first suggestion (18-BK-G) was submitted by the National Association of Chapter Thirteen Trustees ("NACTT") based upon the work of its Mortgage Committee. The other suggestion (18-BK-H) was submitted by the American Bankruptcy Institute's Commission on Consumer Bankruptcy ("Commission"). Although the Commission has not yet released a final report detailing its recommendations for improving the consumer bankruptcy system, it voted to go ahead and submit to the Advisory Committee its suggestions for amending Rule 3002.1 so that they could be considered along with the NACTT'S suggestions. After a brief review of the history of Rule 3002.1 below, the two sets of suggestions are summarized, and the Subcommittee's plan for considering the suggestions is discussed.

Background of Rule 3002.1

Rule 3002.1 was adopted as a new rule on December 1, 2011, along with related amendments to Rule 3001(c)(2)(C) and new Official Forms. Rule 3002.1 was promulgated to assist 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. The rule is based on the view that in order for debtors to emerge from chapter 13 with their mortgage payments up to date, they and the trustees need to know what amounts are required to be paid while the case is pending.

Subdivision (a) specifies the scope of the rule. Subdivision (b) requires the holder of a claim secured by the chapter 13 debtor's principal residence to provide at least 21 days' notice to the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. Subdivision (c) requires 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. Subdivision (d) requires the information under subdivisions (b) and (c) to be submitted on the appropriate Official Form, and (e) provides a procedure for objecting to a claimed fee, expense, or charge. Subdivisions (f)-(h) establish 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. And Subdivision (i) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide any of the information required by the rule.

The Advisory Committee put much thought into devising a scheme that would assist chapter 13 debtors in bringing their mortgages up to date without imposing any requirements that might be viewed as impermissible modifications of the mortgages. It consulted with interested constituencies in devising the rule, including a group of bankruptcy judges that had been assembled to draft a model local rule to deal with mortgage charges in chapter 13 cases and a NACTT group of chapter 13 trustees, mortgage servicers, and attorneys that had drafted a best practices document regarding home mortgages in chapter 13. Following the rule's promulgation,

the Advisory Committee held a mini-conference in September 2012 to solicit feedback on the operation of the new mortgage rules and Official Forms.

Two sets of amendments have been made to Rule 3002.1 since it went into effect. In 2016 subdivision (a) was amended to clarify that the rule applies whenever a chapter 13 plan provides for the maintenance of home mortgage payments, whether or not the debtor had defaulted prior to bankruptcy and regardless of whether ongoing mortgage payments are to be made by the debtor or the trustee. It also was amended to provide that, unless a court orders otherwise, the rule's requirements cease to apply if relief from the automatic stay is granted with respect to the home mortgage. In 2018 subdivisions (b) and (e) were amended to do three things: (i) provide the court flexibility regarding a notice of payment change for home equity lines of credit; (ii) create a procedure for objecting to a notice of payment change; and (iii) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.

The NACTT and Commission Suggestions

The following table summarizes the contents of the suggestions for amending Rule 3002.1 that have been submitted.

Subdivision of R. 3002.1	**NACTT Suggestion**	**Commission Suggestion**
(b)	Clarify the consequences of a payment change notice ("PCN") that doesn't comply with 21-day notice requirement.	Same
	Provide a new process for filing and serving PCNs for home equity lines of credit.	Same
	Add to committee note a statement that a PCN is not required for a loan modification until it becomes permanent and has been approved by the court.	

Subdivision of R. 3002.1	NACTT Suggestion	Commission Suggestion
(a), (c)-(i)		Clarify that reverse mortgages are subject to the rule's requirements other than (b).
(f)	Add a mid-case status review.	Same
	Change the current notice procedure to a motion practice.	Same
	Require motions to include a warning that the creditor may be sanctioned for failing to respond.	Same
(g)	Indicate clearly that the creditor's response is mandatory and must include (i) the principal balance owed; (ii) the date when the next installment payment is due; (iii) the amount of the next installment (separately identifying the amount due for principal, interest, mortgage insurance and escrow); and (iv) the amount held in suspense account, unapplied funds account, or similar amount.	Same
	Add a procedure for the debtor or trustee to object to the creditor's response and request a hearing.	Same
	Provide that an objection to the creditor's response commences a contested matter.	Same
(h)	Provide for the court to enter an order determining the status of the mortgage claim and including the information proposed under (g).	Same
(i)	Add a provision allowing the debtor or trustee to file a motion to compel the creditor's response and for appropriate sanctions.	Same

The Subcommittee's Plan for Consideration of the Suggestions

These suggestions come from knowledgeable groups that have put a lot of thought into them, including the submission of suggested language to implement their suggestions, so the

Subcommittee wants to carefully consider them. Because of the time constraints of preparing the agenda book for the spring Advisory Committee meeting, the Subcommittee decided that it will undertake a study of the proposed amendments to Rule 3002.1 this summer. The Subcommittee chair has appointed a working group to study the suggestions and make recommendations to the Subcommittee. The Subcommittee hopes to be able to present a recommendation to the Advisory Committee at the fall meeting.

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CONSENT TAB 1A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: 18-BK-I – PROPOSAL REGARDING STATEMENT OF INTENT

DATE: MAR. 1, 2019

We received a suggestion, 18-BK-I, from Sandra R. Milburn, a legal assistant to Lafayette, Ayers & Whitlock, PLC, in Glen Allen, Virginia. Ms. Milburn stated:

> Working in this field since 1996, I have notice that a lot of secured creditors are unaware of the debtor(s) statement of intention. It would be helpful if there was a requirement that counsel mail a copy of the statement of intention to all creditors listed therein.

It is difficult to understand the suggestion, because Fed. R. Bank. P. 1007(b)(2) seems to address the concern. It states:

> (2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(a) of the code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

There are two possible interpretations of the suggestion. First, Ms. Milburn may be concerned that there is rampant noncompliance with the requirement set forth in Rule 1007(b)(2). This may be a valid concern, but it is not one that the Advisory Committee can address. Official Bankruptcy Form 108, Statement of Intention for Individuals Filing Under Chapter 7, makes clear in its instructions that "You must file this form with the court within 30 days after you file you bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also send copies to the creditors and lessors you list on the form." Perhaps the form could be modified to change the font of the final phrase, all caps and bold, to emphasize the notice requirement, but the obligation is clearly stated both in Rule 1007(b)(2) and in the Official Form.

The second possible interpretation of the suggestion may be that Ms. Milburn wishes to impose a duty on counsel for the chapter 7 debtor to make sure that the requirements of Rule 1007(b)(2) are satisfied. But Rule 1007(b)(2) is already phrased in the passive voice ("A copy of the statement of intention shall be served ...") rather than imposing an obligation on the debtor, and counsel would undoubtedly be serving all documents in connection with the bankruptcy case. This passive formulation of service obligations is the general pattern in the Federal Rules of Bankruptcy Procedure. *See, e.g.*, Rules 1004, 1004.2(b), 1010(a), 1011(b), 1017(e)(2),

1020(d), 1021(b), 2007(e), 2015.1(a) and (b), 2015.3(b), 3007(a)(1) and (2)(A), 3019(b), 3017(a) and (c)(2), 3015(f) and (h), 3020(b)(1), 4001(a)(1) and (b)(1)(C) and (d)(1)C), 5009(d), 5011(b), 6004(b) and (c) and (d) and (g), 9006(d). Although there are rules that impose service obligations on named parties (U.S. trustee in Rules 1017(c) and 3002.1(f), the debtor in Rule 3015(d), party in interest in Rule 6007(a) and (b), holder of a claim in Rule 3002.1(b) and (c) and (g), appellant or appellee or cross-appellee in Part 8, moving party in Rule 9013, party in Rule 9033(b)), in no rule is there an obligation imposed on counsel for any party to send notices and serve other parties.

The Subcommittee suggests no change to the rules or the Official Forms in response to suggestion 18-BK-I.

CONSENT TAB 1B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: PROPOSAL REGARDING RULE 2005(c)

DATE: MAR. 5, 2019

Judge Brian Fenimore of the Western District of Missouri brought to the attention of Judge Dennis R. Dow that Federal Rules of Bankruptcy Procedure 2005(c) contains references to repealed provisions of the Criminal Code. Rule 2005(c) currently reads as follows:

> (c) CONDITIONS OF RELEASE. In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18 U.S.C. § 3146(a) and (b).

Section 3146 was enacted in the Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 214, and clauses (a) and (b) read as follows:

> § 3146. Release in noncapital cases prior to trial
>
> (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:
>
> (1) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
>
> (3) require the execution of an appearance bond in a specified

amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours,

(b) In determining which conditions of release wall reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

Sections 3141 through 3151 of the Title 18 were repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, § 203(a), 98 Stat. 1979 (1984), and replaced by new provisions dealing with bail. The current version of 18 U.S.C. § 3146 deals not with conditions to assure attendance or appearance, but with penalties for failure to appear. The topic of conditions is in 18 U.S.C. § 3142, which reads as follows:

18 U.S. Code § 3142. Release or detention of a defendant pending trial

(a) In General.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) Release on Personal Recognizance or Unsecured Appearance Bond.—

The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a),[1] unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on Conditions.—

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—
(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); 1 and
(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—
(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;
(ii) maintain employment, or, if unemployed, actively seek employment;
(iii) maintain or commence an educational program;
(iv) abide by specified restrictions on personal associations, place of abode, or travel;
(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;
(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;
(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;
(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;
(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;
(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and
(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion.—If the judicial officer determines that—

(1) such person—
(A) is, and was at the time the offense was committed, on—
(i) release pending trial for a felony under Federal, State, or local law;
(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or
(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.—

(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—
(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and
(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—
(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(B) an offense under section 924(c), 956(a), or 2332b of this title;
(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;
(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or
(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(f) Detention Hearing.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—
(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
(B) an offense for which the maximum sentence is life imprisonment or death;
(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—
(A) a serious risk that such person will flee; or
(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) Factors To Be Considered.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—
(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of Release Order.—In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—
(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and
(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of Detention Order.—In a detention order issued under subsection (e) of this section, the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of Innocence.—
Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Although much of Section 3142 is completely inapplicable to the subject of Federal Rule of Bankruptcy Procedure 2005(c) (conditions designed to assure attendance for examination or appearance before the court), the easiest technical fix is that suggested by Judge Fenimore, which is simply replacing the reference to "§ 3146(a) and (b)" in rule 2005(c) with a reference to "§ 3142." As amended, Rule 2005(c) would read as follows:

(c) CONDITIONS OF RELEASE. In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18, U.S.C., ~~§ 3146(a) and (b)~~ § 3142.

Committee Note

The rule is amended to replace the reference to 18 U.S.C. § 3146(a) and (b) with a reference to 18 U.S.C. § 3142. Sections 3141 through 3151 of the Title 18 were repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, § 203(a), 98 Stat. 1979 (1984), and replaced by new provisions dealing with bail. The

current version of 18 U.S.C. § 3146 deals not with conditions to assure attendance or appearance, but with penalties for failure to appear. The topic of conditions is in 18 U.S.C. § 3142.

The Subcommittee recommends that the Advisory Committee recommend that this amendment be approved without publication.

TAB 9

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Dear Advisory Committee on Bankruptcy Rules,

My name is Elizabeth Jones and I am the 2018-19 U.S. Supreme Court Fellow assigned to the Federal Judicial Center. During my fellowship, I am required to produce a publishable-quality work of scholarship. My research project is independent from work at the FJC, and does not reflect the views of the FJC or the U.S. Supreme Court.

I am doing a study of the interplay between Federal Rule of Bankruptcy Procedure 3002.1 and Bankruptcy Code Section 1322(b)(5). My particular emphasis is on Rule 3002.1(f)-(h), as I'm interested in how "cure and maintain" payments are affecting a debtor's discharge. My research covers the history of Rule 3002.1 and Section 1322(b)(5), and explains the current case law holdings with respect to "cure and maintain" payments in direct and conduit districts. The final section of my project discusses possible solutions to some of the issues Rule 3002.1 created and exposed.

The following draft is a work in progress outlining the research I have completed thus far. The footnotes are not in final form and certain parts of the research are blocked out but not yet completed. Incomplete research or thoughts are typically set off by brackets - [ ]. The final research project is due in August 2019 when I complete my fellowship.

By the time of the meeting on April 4, 2019, I likely will have completed additional research that I intend to include in my presentation. Particularly, I am hoping to have some responses to the questionnaire attached as Appendix B so that I can share with you the initial responses from the chief bankruptcy judges.

Please feel free to contact me either before or after the presentation with any thoughts or comments you might have. I can be reached at ejones@fjc.gov or (202)-502-4075.

Sincerely,

Elizabeth Jones

Attempting to "Cure and Maintain" Under Bankruptcy Code Section 1322(b)(5) and Losing the Discharge: The Unintended Consequences of Federal Rule of Bankruptcy Procedure 3002.1[1]

by
Elizabeth Jones[2]

Every year, hundreds of thousands of debtors file for Chapter 13 bankruptcy.[3] The goal of Chapter 13 is rehabilitative, promising debtors protection from creditors and a discharge of their debts in exchange for consistent monthly payments over three to five years.[4] The journey from filing to discharge is difficult and many debtors never complete their Chapter 13 plan or achieve a discharge.[5]

One of the main reasons debtors choose to file for Chapter 13 bankruptcy is to prevent foreclosure on their homes.[6] Roughly $1.5 billion of Chapter 13 plan receipts is spent on mortgage payments each year.[7] Courts, Chapter 13 trustees, and debtors all understand the importance of making these payments over the life of a debtor's bankruptcy case. And national and local bankruptcy rules and Chapter 13 plans direct debtors on how to make these payments. New rules are proposed, enacted, and revised to aid debtors and mortgagees in tracking these payments. Yet despite all these safeguards in place, a recent trend of case law is showing that a subset of debtors are reaching the end of their Chapter 13 plans to find that not only have they not prevented a foreclosure on their home, but they have also not achieved a discharge.[8]

This recent trend started shortly after Federal Rule of Bankruptcy Procedure 3002.1 ("Rule 3002.1") was enacted in 2011. The goal of Rule 3002.1 was "to provide a uniform, national procedure in chapter 13 cases for the disclosure of postpetition mortgage fees, expenses, and charges and other amounts required to be paid to cure arrearages and maintain mortgage

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[1] The title is a work in progress.

[2] 2018-19 Supreme Court Fellow, Federal Judicial Center. This research is independent from work at the FJC, and does not reflect the views of the FJC or the U.S. Supreme Court. The footnotes in this draft are not in final bluebook form. Because the draft will continue to be edited and rearranged, some of the footnotes are duplicated in their original form as a way to keep track of where the information came from.

[3] For the one year period ending September 30, 2018, there were 288,550 Chapter 13 bankruptcies commenced. Table F-2. U.S. Bankruptcy Courts--Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2018, available at https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0930.2018.pdf.

[4] *See* 11 U.S.C. Chapter 13 - Adjustment of Debts of an Individual with Regular Income.

[5] In 2017, 75,803 Chapter 13 cases were dismissed before a plan was even confirmed, and 75,338 Chapter 13 cases were dismissed post plan confirmation. FY-2017 Chapter 13 Trustee Audited Annual Reports, available at https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics.

[6] *See* 11 U.S.C. § 1322(b)(5). *See also* 11 U.S.C. § 1301.

[7] In 2017, of the national totals of Chapter 13 plan funds, $500,510,890 was distributed to mortgage creditors for arrears payments and $991,062,364 was distributed to mortgage creditors for current postpetition payments. This is based on the assumption that the number given represents the exact dollar amount. FY-2017 Chapter 13 Trustee Audited Annual Reports, available at https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics.

[8] *See* 11 U.S.C. § 1328.

payments pursuant to § 1322(b)(5)."[9] Unfortunately, in some circumstances Rule 3002.1 is operating contrary to its purpose. This is because it unintentionally exposed debtors who were not current on their postpetition mortgage payments. Now, bankruptcy courts are attempting to reconcile the requirements of Rule 3002.1 with past practices and equitable results. This is creating serious inconsistencies in bankruptcy courts across the country and putting debtors' discharges as risk.[10]

Three cases from three different districts across the country illustrate the severity of the inconsistences. For five years, the Hanleys in New York made payments to the Chapter 13 trustee pursuant to their plan, but they failed to stay current on their direct postpetition mortgage payments.[11] The court held that because of that failure the Hanleys could not receive a discharge, and because the plan term was expired, the Hanleys were left with no options to remedy their failure.[12] At the end of their Chapter 13 bankruptcy case, the court dismissed their case without entry of a discharge.[13] Similarly, the Gonzales in Colorado made their payments to the Chapter 13 trustee for five years, but fell behind on their postpetition mortgage payments.[14] At the end of their Chapter 13 bankruptcy case, they certified that they had completed all payments under the plan because they did not know that their postpetition mortgage payments were plan payments.[15] And the Chapter 13 trustee requested entry of a discharge.[16] The discharge was then entered, but later revoked once the court realized that the debtors had failed to remain current on their post-petition mortgage payments.[17] In comparison, the Gibsons in Illinois received a discharge in their Chapter 13 bankruptcy case despite never making a direct postpetition mortgage payment on their second mortgage.[18]

These inconsistent results are not only in direct conflict with the purpose of Rule 3002.1 but also with the purpose of a uniform bankruptcy system. [This paragraph and the introduction will be further expanded.]

This Article will examine the interplay between Bankruptcy Code Section 1322(b)(5) and Federal Rule of Bankruptcy Procedure 3002.1 in the treatment of "cure and maintain" payments as they relate to the discharge. Part I explains the history of Section 1322(b)(5) and the purpose behind adopting Rule 3002.1. Part II explains how the bankruptcy system has attempted to deal with Section 1322(b)(5) and Rule 3002.1, and identifies the problems with and exposed by Rule 3002.1. And Part III offers legislative and procedural suggestions on how to resolve some of those problems.

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[9] Memo, Aug. 27, 2008, at *1.
[10] *See In re Gibson*, 582 B.R. 15 (C.D. Ill. 2018) ("What is at stake, however, is the entitlement to a discharge, the single most important benefit of bankruptcy for individual debtors.")
[11] *In re Hanley*, 575 B.R. 207 (Bankr. E.D.N.Y. 2017)
[12] *In re Hanley*, 575 B.R. 207 (Bankr. E.D.N.Y. 2017)
[13] *In re Hanley*, 575 B.R. 207 (Bankr. E.D.N.Y. 2017)
[14] *In re Gonzales*, 532 B.R. 828 (D. Col. 2015)
[15] *In re Gonzales*, 532 B.R. 828 (D. Col. 2015)
[16] *In re Gonzales*, 532 B.R. 828 (D. Col. 2015)
[17] *In re Gonzales*, 532 B.R. 828 (D. Col. 2015)
[18] *In re Gibson*, 582 B.R. 15 (C.D. Ill. 2018)

I. History of Bankruptcy Code Section 1322(b)(5) and the Federal Rule of Bankruptcy Procedure 3002.1

A Chapter 13 debtor is eligible for a discharge "as soon as practicable after completion by the debtor of all payments under the plan."[19] Bankruptcy Code Section 1322 describes the types of payments that bankruptcy plans must provide for and may provide for.[20] At the heart of many Chapter 13 bankruptcy plans is a "may" payment described in Bankruptcy Code Section 1322(b)(5). More than thirty years after Section 1322(b)(5) was enacted, Federal Rule of Bankruptcy Procedure 3002.1 ("Rule 3002.1") was created to help with its implementation.

Part I explains the history of Section 1322(b)(5) and the purpose behind adopting Rule 3002.1.

[Consider if this is a Section 1322(b)(5) and Rule 3002.1 problem, or if this is a Section 1322(b)(5) and Section 1326(c) problem. There is a final section to this paper that looks at how Rule 3002.1 is an example of the inconsistencies that Section 1326(c) creates. Depending on how that research turns out, I might discuss at the outset that Rule 3002.1 is creating problems because it is operating in a complex structure.]

A. Bankruptcy Code Section 1322(b)(5)

1. History

Enacted as a part of the Bankruptcy Reform Act of 1978, Bankruptcy Code Section 1322(b)(5) was created specifically to deal with claims secured by a debtor's principal residence.[21] There was no previous version of Section 1322(b)(5) codified in the Bankruptcy Act of 1898.[22] And prior to the Bankruptcy Reform Act of 1978, "secured creditors were not required to participate in a Chapter XIII plan unless they consented to it. . . . [And] real estate mortgages were not considered claims" under the plan.[23] With a lifespan of only 40 years, Section 1322(b)(5) is still a relatively young code provision.

Bankruptcy Code Section 1322(b)(5) states that "the 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."[24] Commonly referred to as the "cure and maintain" provision, under Section 1322(b)(5)

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[19] 11 U.S.C. § 1328(a).
[20] *See* 11 U.S.C. § 1322.
[21] Bankruptcy Reform Act of 1978, Public Law 95-598 – Nov. 6, 1978; and Uniform Law on Bankruptcies – House concurred in Senate Amendment with an amendment. Congressional Record-House, September 28, 1978, Document 58, p. 108 "It is intended that a claim secured by the debtor's principal residence may be treated with under section 1322(b)(5) of the House amendment."
[22] Miller, *supra* note [x], at 112 ("Section 1322(b)(5), however, has no predecessor in Chapter XIII of the 1898 Act.").
[23] Miller, *supra* not [x], at 112 (citing Bankruptcy Act of 1898, § 652 (repealed 1978, previously codified at 11 U.S.C. § 1052) and Thompson v. Great Lakes Fed. Sav. & Loan Ass'n, 17 Bankr. 748, 751 (Bankr. W.D. Mich. 1982).
[24] 11 U.S.C. § 1322(b)(5) (emphasis added).

debtors can benefit from a contractual repayment period that exceeds the typical three to five year Chapter 13 plan.[25] This affords debtors the opportunity to save their homes and avoid having to pay an accelerated mortgage in a short period of time at the expense of other creditors. Mortgagees are also protected under this provision because "cure and maintain" claims are exempt from discharge.[26]

Section 1322(b)(5) does not grant debtors the right to modify their mortgages. Rather, it is a clarification on the restriction the Bankruptcy Code places on modifying secured claims on principal residences in Chapter 13. Section 1322(b)(2) states that "the plan 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 principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."[27] Section 1322(b)(5), read in tandem with Section 1322(b)(2), informs debtors that "curing and maintaining" is separate from modification.[28] This ensures that both debtors and mortgagees are clear that the debtor is expected to repay its entire mortgage debt even if the debt extends beyond the life of the Chapter 13 plan.[29]

There is little legislative history detailing the purpose behind Section 1322(b)(5). It is thought to be based off of a judicial principle articulated in *Hallenbeck v. Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963).[30] In *Hallenbeck*, the Fourth Circuit held that a bankruptcy court may use its injunctive relief powers to prevent a mortgagee from foreclosing on a debtor's primary residence.[31] The debtors in *Hallenbeck* included an early form of a "cure and maintain" provision in their Chapter 13 plan in an attempt to prevent foreclosure on their home.[32] This was before secured mortgages were considered claims to be provided for in a bankruptcy plan, and were therefore not affected by a bankruptcy filing.[33] The Referee in the case issued an

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[25] 8 Collier on Bankruptcy P 1322.09 (16th 2018).

[26] 8 Collier on Bankruptcy P 1322.09 (16th 2018). *See* 11 U.S.C. § 1328(a)(1) ("the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt – (1) provided for under section 1322(b)(5)")

[27] 11 U.S.C. § 1322(b)(2) (emphasis added).

[28] 11 U.S.C. § 1322(b)(5) ("notwithstanding paragraph (2) of this subsection").

[29] *See* Ann B. Miller, Chapter 13 Bankruptcy: When May a Mortgage Debtor Cure the Accelerated Mortgage Debt Using Section 1322(b)(5), 8 U. Dayton L. Rev. 109, 114 (1982) ("The Senate in S. 2266 adopted a prohibition against modification of a claim secured by mortgages on real property. . . . The final working of Section 1322(b)(5) reflected this compromise agreement between the House and Senate by including the preface "notwithstanding paragraph (2) of this subsection."

[30] Miller, *supra* note [x], at 112.

[31] *Hallenbeck v. Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963). The debtors proposed to make monthly payments of $150 to the Referee from which $75 would be paid to the mortgage holder's agent. *Id.* at 567-68. The debtors also proposed that for the first few months of their Chapter 13 plan the entire $150 should be paid to the mortgage holder's agent to cure the default on their mortgage. *Id.* at 568. After the default was cured, the Referee would continue to make the monthly contractual mortgage payments of $74-$75. *Id.* The mortgage holder did not accept the plan and intended to proceed with foreclosure. *Id.*

[32] *Hallenback*, 323 F.2d at 568.

[33] Miller, *supra* note [x], at 112 (citing Bankruptcy Act of 1898, § 652 (repealed 1978, previously codified at 11 U.S.C. § 1052) and Thompson v. Great Lakes Fed. Sav. & Loan Ass'n, 17 Bankr. 748, 751 (Bankr. W.D. Mich. 1982).

injunction on the foreclosure pending further order of the court and conditioned the order on the debtors' substantial compliance "with the confirmed wage earner's plan."[34] On appeal, the Fourth Circuit upheld the Referee's use of injunctive power, but clarified that the Referee's decision was subject to review for abuse of discretion.[35]

The Fourth Circuit informed the lower courts that three conditions should be met before the injunctive power should be used. First, the injunction "must be necessary to preserve the debtor's estate or to carry out the Chapter XIII plan."[36] Second, the injunction cannot impair the security of the lien.[37] And lastly, the mortgagee "must not be required to accept less than the full periodic payments specified in his contract."[38] The Fourth Circuit found that these conditions may be met when a Chapter 13 plan proposed to pay arrears and continue making regular postpetition mortgage payments, and also held that the injunctive power may be used to prevent foreclosure during the pending Chapter 13 bankruptcy.[39]

In the initial Report of the Commission on the Bankruptcy Laws of the United States leading up to the Bankruptcy Reform Act, the Commission referenced the principles discussed in the *Hallenbeck* decision.[40] The Commission stated that it was important for the new bankruptcy laws to include a provision that allowed debtors to pay secured claims on primary residences while curing defaults in a reasonable time.[41] The House adopted the Commission's recommendation and added little additional analysis behind the adoption of Section 1322(b)(5).[42]

[Additional legislative history may be added from the Report of the Commission on the Bankruptcy laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess., pts. I & II (1973)).]

[I may also add a discussion on the progression of Section 1322(b)(5) in the case law over the last 40 years. There are certain historical points that may be important to note, such as BABCPA and the 2008 housing crisis.]

The language of Section 1322(b)(5) has remained unchanged over the last 40 years and, today, Section 1322(b)(5) still deals mostly with secured mortgage claims. [43]

2. Conduit, Direct, and Case-by-Case Districts

Payments made pursuant to Section 1322(b)(5) are unique because they are partially used to pay prepetition debts and partially used to pay current, ongoing postpetition expenses. Bankruptcy districts vary on how they expect Section 1322(b)(5) "cure and maintain" payments

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[34] *Hallenback*, 323 F.2d at 568. A wager earner's plan is the equivalent to a Chapter 13 plan.
[35] *Hallenback*, 323 F.2d at 573-74.
[36] *Hallenback*, 323 F.2d at 572.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 572-74.
[40] Miller, *supra* note [x], at 113 (citing Report of the Commission on the Bankruptcy laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess., pts. I & II (1973).
[41] *Id.*
[42] *Id.*
[43] 8 Collier on Bankruptcy P 1322.09 (16th 2018). Section 1322(b)(5) also deals with other long-term debt, such as land installment agreements, student loan debt, and tax claims. *Id.*

to be made. In many districts, the prepetition debt is paid by the Chapter 13 trustee from the bankruptcy estate and the ongoing postpetition expenses are paid by the debtors. The decision to use two different disbursing agents likely stems from how other prepetition debts and postpetition expenses are paid.[44]

As a secured, prepetition debt, the arrears on a mortgage are typically required to be paid in full "to the extent of the value of such creditor's interest in the estate's interest in such property"[45] during a debtor's Chapter 13 bankruptcy. These arrearage payments, or "cure" payments, are almost always included in the plan payments that the debtor makes to the Chapter 13 trustee.[46] The Chapter 13 trustee then disburses these payments to the mortgagee every month.[47] By the end of a Chapter 13 plan, the arrearage payments must equal the total amount necessary to "cure" the prepetition mortgage default.[48]

The postpetition mortgage payments, or the "maintenance" payments, are made differently depending on the bankruptcy district. There are three different types of bankruptcy districts: conduit districts, direct districts, and case-by-case districts.[49] A conduit district is one where debtors pay the Chapter 13 trustee their regular postpetition mortgage payments as a part of their plan payments, and the Chapter 13 trustee disburses the maintenance payments to the mortgagees along with the cure payments.[50] A direct district is one where debtors "directly" pay mortgagees their mortgage payment each month.[51] The Chapter 13 trustee does not monitor those payments nor are those payments used to calculate the Chapter 13 trustee's percentage fee.[52] Lastly, a case-by-case district is one where the district does not state a preference for how postpetition mortgage payments should be made, which means this determination is done on a case-by-case basis.[53] The person responsible for making the postpetition mortgage payment is often called the disbursing agent.[54]

Bankruptcy districts do not always clearly inform parties-in-interest how they expect postpetition mortgage payments to be made. Most districts explain how postpetition mortgage payments should be made in local rules, local Chapter 13 plan forms, or standing/administrative/general orders.[55] In some districts, the standing Chapter 13 trustee's

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[44] Here, I will explain how prepetition debts are paid through the Chapter 13 plan based on claims filed by creditors and pospetition expenses are paid by the debtor based on amounts listed on Schedule J.
[45] *See* 11 U.S.C. § 506(a)(1). *See also* Chapter 13-Bankruptcy Basics, available at https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics ("Payments to certain secured creditors (i.e., the home mortgage lender), may be made over the original loan repayment schedule (which may be longer than the plan) so long as any arrearage is made up during the plan.").
[46] *See* Appendix A.
[47] 11 U.S.C. § 1302(b)(3).
[48] *See* discussion *supra* Note 42.
[49] *See* Appendix A.
[50] *See* Appendix A; *See also* Gordon Bermant and Jean Braucher, Making Post-Petition Mortgage Payments inside Chapter 13 Plans: Facts, Law, Policy, 80 Am. Bankr. L.J. 261 (2006) ("Distributions of regular post-petition mortgage payments by trustees will be called 'conduit payments.'").
[51] *See* Appendix A; [CITE]
[52] *See* Appendix A; [CITE]
[53] Section 1326(c) is the code provision that allows for these differences to occur. 11 U.S.C. § 1326(c).
[54] [CITE]
[55] *See* Appendix A.

website explains the typical practice for its bankruptcy district.[56] But, in a few districts, there is no clear direction on who should be disbursing postpetition mortgage payments.[57]

[There needs to be a note/discussion that it is problematic that this information is kept in multiple different places and not consistent across districts. This information is hard to find, even if the district clearly articulates how the payments should be made.]

A large portion of bankruptcy districts are case-by-case districts.[58] Out of the 94 districts, 42 are case-by-case districts.[59] The remaining districts are split evenly between conduit and direct: 26 conduit districts and 26 direct districts.[60] Appendix A groups the districts by category and contains the relevant information used to classify each district. For reference, Appendix A has been organized in table form below.

[56] *See* Appendix A.

[57] *See* Appendix A. These include the following: Delaware, Florida Northern, Florida Southern, Indiana Northern, Iowa Northern, Iowa Southern, Kentucky Western, Michigan Western, Montana, Northern Mariana Islands, New York Western, Tennessee Western, and Wisconsin Western.

[58] I have included the unclear districts in the case-by-case group.

[59] This includes the thirteen unclear districts. This number will likely change as the unclear districts are clarified and sorted into the appropriate group.

[60] *See* Appendix A. The numbers for each district are based off of my own independent research.

Type of District *Indicates that a bankruptcy administrator monitors the district rather than the U.S. Trustee. [x]Indicates a district court that deals directly with bankruptcy cases. An underlined district illustrates an "unclear" district.			
Conduit N = 26	**Direct** N = 26	**Case-by-Case / Unclear** N = 42	
Arizona	Alabama Southern*	Alabama Middle*	Missouri Eastern
California Eastern	California Southern	Alabama Northern*	Montana
Florida Middle	Colorado	Alaska	New York Northern
Georgia Middle	Connecticut	Arkansas Eastern	New York Western
Illinois Southern	District of Columbia	Arkansas Western	N. Mariana Islands[x]
Indiana Southern	Georgia Northern	California Central	Oklahoma Eastern
Kansas	Guam	California Northern	Oklahoma Northern
Missouri Western	Hawaii	Delaware	Oregon
Nevada	Louisiana Middle	Florida Northern	Penn. Middle
N. Carolina Eastern*	Maryland	Florida Southern	Puerto Rico
N. Carolina Middle*	Massachusetts	Georgia Southern	Tennessee Eastern
N. Carolina Western*	Minnesota	Idaho	Tennessee Western
Ohio Northern	Nebraska	Illinois Central	Texas Eastern
Ohio Southern	New Hampshire	Illinois Northern	Virginia Western
Oklahoma Western	New Jersey	Indiana Northern	Washington Eastern
Penn. Western	New Mexico	Iowa Northern	Wisconsin Western
South Carolina	New York Eastern	Iowa Southern	
Tennessee Middle	New York Southern	Kentucky Eastern	
Texas Northern	North Dakota	Kentucky Western	
Texas Southern	Penn. Eastern	Louisiana Eastern	
Texas Western	Rhode Island	Louisiana Western	
Vermont	South Dakota	Maine	
Virgin Islands[x]	Utah	Michigan Eastern	
Washington Western	Virginia Eastern	Michigan Western	
W. Virginia Northern	Wisconsin Eastern	Mississippi Northern	
W. Virginia Southern	Wyoming	Mississippi Southern	

[Also, there needs to be a discussion about how different districts in the same state have different rules. Once again, this makes it complicated and confusing for debtors to navigate the system. California is a prime example of how one state can treat claims under Section 1322(b)(5) differently in every district. The Eastern District of California is a conduit district, the Southern District of California is a direct district, and both the Central and Northern Districts of California are case-by-case districts.[61] But, the Northern District of California has strict guidelines for debtors opting to pay their mortgages directly.[62]]

The differences in payment terms stem from Bankruptcy Code Section 1326(c): "Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make

[61] *See* Appendix A.
[62] *See* Appendix A.

payments to creditors under the plan."[63] The language "as otherwise provided in the plan or in the order confirming the plan" is the authority that allows debtors to act as disbursing agents for certain payments.[64] And as noted above, many districts rely on the standard provision in Section 1326(c) and determine conduit or direct payments on a case-by-case basis.[65]

Section 1326(c) was first enacted as a part of the Bankruptcy Reform Act of 1978.[66] [Legislative history to be added.]

It is likely that Congress did not intend for Section 1326(c) to create a division of districts.[67] And there is some support to indicate that when Congress passed the Bankruptcy Reform Act in 1978 it intended for the majority of payments to be made through the Chapter 13 trustee. In a memorandum from Mr. Claude L. Rice, he notes that "the legislative history indicates that '1326(b) makes it clear that the Chapter 13 trustee is normally to make distribution to creditors of the payments under the plan by the debtor.'"[68] [There was a suggestion that this provision allowed for plan payments from trusts]. The preference for the Chapter 13 trustee to make payments is also supported by the original trustee fee structure.

The original Chapter 13 trustee structure was outlined in Section 1302 of the Bankruptcy Reform Act of 1978.[69] Section 1302(e)(1) gave the bankruptcy court the authority to fix the standing trustee fee, and Section 1302(e)(2) stated that the fee would be collected "from all payments under plans in the cases under this chapter for which such individual serves as standing trustee."[70] In an early interpretation of Section 1322(b)(5) and Section 1302(e)(2), the Fifth Circuit held that maintenance payments disbursed by the debtor were payments under the plan and that the Chapter 13 trustee was entitled to a fee based on a percentage of those payments.[71] Because Chapter 13 trustees were entitled to a fee even if they were not the disbursing agent, it was more practical for Chapter 13 trustees to make all the payments.[72] [The court also suggested that bankruptcy courts could establish a lower fee for these types of payments not disbursed by the trustee.]

This fee structure was only in place for a few years until the U.S. Trustee system was established. In 1986, Congress passed [NAME OF THE ACT]. It abrogated 11 U.S.C. §

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[63] 11 U.S.C. § 1326(c).
[64] Cite *In re Coughlin.*
[65] Appendix A.
[66] Bankruptcy Reform Act of 1978
[67] This is an assumption based on the limited legislative history that I have been able to find.
[68] Bankruptcy Reform Act of 1978: hearings before the Subcommittee on Courts of the Committee on the Judiciary, United States Senate, 97 Congress, first session, on the Bankruptcy Reform Act of 1978, April 3 and 6, 1981. (49) Serial No. J-97-11, Part 2.
[69] Bankruptcy Reform Act of 1978, 11 U.S.C. § 1302(e)(2); see also *Matter of Foster*, 670 F.2d 478, 491 (1982). [I don't think this exists anymore.]
[70] *Matter of Foster*, 670 F.2d 478, 491 (1982) (quoting 11 U.S.C. § 1302(e)(2)).
[71] *Matter of Foster*, 670 F.2d 478, 491 (1982).
[72] *See* Bankruptcy Reform Act of 1978: hearings before the Subcommittee on Courts of the Committee on the Judiciary, United States Senate, 97 Congress, first session, on the Bankruptcy Reform Act of 1978, April 3 and 6, 1981 (noting that there was "no purpose in not having the trustee make all of the payments").

1302(e) and created a U.S. Trustee program would control the Chapter 13 trustee system.[73] The new Chapter 13 trustee fee structure permitted the Chapter 13 trustee to collect a "percentage fee from all payments *received* by such individual under plans."[74] The Eastern District of Texas found that 28 U.S.C. § 586(e)(2) removed "a Chapter 13 Trustee's ability to surcharge payments disbursed directly from the debtor to a creditor . . . [which] had the effect of statutorily overruling this portion of the *Foster* opinion."[75]

[There needs to be a look at the statutory history of 28 U.S.C. §586(e)(2) here. Was there a recognition of what was happening when the fee structure was based on "received" payments by the trustee versus all payments under the plan?]

[Courts across the country agreed with the Eastern District of Texas' interpretation.[76] And following the enactment of 28 U.S.C. § 586 Chapter 13 trustees were no longer able to collect fees on payments they did not disburse. *As a result, multiple districts, using the authority granted to them in Section 1326(c), became direct districts to allow debtors to directly disburse maintenance payments and to avoid paying trustee fees on those payments.*[77]

In this section I plan to find more information and background on how the development of different districts occurred. There is a wide variety of applications of Section 1326(c). I would also like to find out why mortgage payments in general became one of the only types of payments to be disbursed directly by debtors.]

[The following questions/results from the questionnaire[78] will be discussed here: Q1 – In the district as a whole, if the **Chapter 13 trustee** is responsible for disbursing postpetition mortgage payments pursuant to Section 1322(b)(5), how does your district inform parties-in-interest? (Select all that apply.); Q2 – In the district as a whole, if the **debtor** is responsible for disbursing postpetition mortgage payments pursuant to Section 1322(b)(5), how does your district inform parties-in-interest? (Select all that apply.); Q3 – Is your district considered a conduit district, direct district, or a case-by-case district with respect to postpetition mortgage payments pursuant to Section 1322(b)(5)?; Q4 – When the debtor has pre-petition arrears and is attempting to "cure and maintain" pursuant to Section 1322(b)(5), in approximately what percentage of your Chapter 13 cases do the following entities disburse postpetition mortgage payments? Q5 – To the best of your knowledge, is your answer to Question 4 representative of your district as a whole?]

B. Federal Rule of Bankruptcy Procedure 3002.1

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[73] *In re Gregory*, 143 B.R. 424, 427 n.2 (Bankr. E.D. Tex. 1992); The U.S. Trustee was operating on a pilot basis in a few districts under the Bankruptcy Reform Act. 132 Cong. Rec. H5978-04, 1986 WL 783583.
[74] 28 U.S.C. § 586(e)(2) (emphasis added).
[75] *In re Gregory*, 143 B.R. 424, 427 n.2 (Bankr. E.D. Tex. 1992).
[76] *See e.g.*, Notes of Decisions on 28 U.S.C. § 586.
[77] *See* Notes of Decisions on 28 U.S.C. § 586.
[78] *See* Appendix B.

In 2011, the Federal Rule of Bankruptcy Procedure 3002.1 was adopted to "aid in the implementation of Section 1322(b)(5)."[79] The rule applies to "cure and maintain" mortgage payments in both conduit and direct districts.[80]

Titled "Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence," Rule 3002.1 performs two important functions. First, Rule 3002.1 sets out guidelines and requirements for mortgage claim holders during the Chapter 13 plan term. Mortgage claim holders are required to file and serve notice on the debtor, debtor's counsel, and trustee of payments changes, and fees, expenses, and changes incurred in connection with the claim after the bankruptcy case was filed.[81] Rule 3002.1 also sets out the guidelines and requirements for objections to fee amounts and for determining the amount of fees, expenses, or charges after notice is filed.[82]

Second, Rule 3002.1 sets out guidelines and requirements for trustees, debtors, and mortgage claim holders at the end of a Chapter 13 plan. Following completion of "all payments under the plan," the trustee has 30 days to file and serve a notice on the mortgage claim holder, debtor, and debtor's counsel stating that the debtor has fully cured her mortgage arrears.[83] Next, the mortgage claim holder has 21 days to file and serve a response on the trustee, debtor, and debtor's counsel.[84] The response must state "(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."[85]

Following a Rule 3002.1(g) response, or a mortgagee's failure to respond, is when bankruptcy courts get involved. If the mortgage claim holder responds, the debtor or the trustee can move for the court to determine whether the debtor has cured and maintained all her mortgage payments.[86] If the mortgage claim holder fails to respond, the court, after notice and hearing, may preclude the mortgagee from presenting any omitted information or may afford other relief.[87]

The notice requirements of Rule 3002.1 benefit both the debtors and creditors over the life of a Chapter 13 bankruptcy. When debtors are notified of a change in their postpetition payment obligations, they are able to take affirmative action before the end of their Chapter 13 bankruptcy to either challenge the change or adjust their plan payments.[88] And because Rule 3002.1 requires creditors to send notices to debtors of any mortgage payment changes, creditors are protected from automatic stay violations in communicating those changes.[89]

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[79] Fed. R. Bankr. P. 3002.1, Advisory Committee Notes.
[80] Fed. R. Bankr. P. 3002.1(a) (stating that Rule 3002.1 applies "in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments").
[81] Fed. R. Bankr. P. 3002.1(b)(1),(c).
[82] Fed. R. Bankr. P. 3002.1(b)(2), (e).
[83] Fed. R. Bankr. P. 3002.1(f). If the trustee does not file this notice, the debtor may file it.
[84] Fed. R. Bankr. P. 3002.1(g).
[85] Fed. R. Bankr. P. 3002.1(g).
[86] Fed. R. Bankr. P. 3002.1(h).
[87] Fed. R. Bankr. P. 3002.1(i).
[88] Advisory Committee Notes, 2011 Adoption to Rule 3002.1.
[89] Advisory Committee Notes, 2011 Adoption to Rule 3002.1.

1. History

The concept for Rule 3002.1 began in 2008 when a subcommittee of the Advisory Committee on Bankruptcy Rules (the "Subcommittee") submitted a memorandum in support of an amendment to Federal Rule of Bankruptcy Procedure 3001(c) and a new Federal Rule of Bankruptcy Procedure 3002.1.[90] The Subcommittee recommended the amendment and new rule "to provide a uniform, national procedure in chapter 13 cases for the disclosure of postpetition mortgage fees, expenses, and charges and other amounts required to be paid to cure arrearages and maintain mortgage payments pursuant to § 1322(b)(5)."[91]

Prior to the addition of Rule 3002.1, creditors were not required to notify the Chapter 13 trustees and debtors of changes in postpetition mortgage fees. The Subcommittee identified this lack of notice as the central cause of a problem articulated by Judge Magner in *In re Jones*:

> A debtor that completes his plan by paying off his lender's entire arrearage and postpetition installments may find himself in foreclosure the day after a discharge is granted, based on unpaid and undisclosed post confirmation charges and fees. This result is clearly at odds with the notion of providing a successful debtor a fresh start.[92]

The Subcommittee also noted that a lack of notice deprives debtors of challenging the legitimacy of the mortgage changes during the bankruptcy and leaves them unable to modify their plans following completion of their payments.[93]

The Subcommittee looked at a variety of ways to solve the notice problem before ultimately settling on a national bankruptcy rule. In support of its proposition, the Subcommittee stated that uniformity was necessary to alleviate some of the difficulties for national lenders and to provide a more equal protection to debtors around the country.[94] The Subcommittee also stated that debtors "and the trustees must know throughout the case the amount that is in default and the current amount of the payments that are being maintained" in order to take full advantage of Section 1322(b)(5).[95]

[This paragraph preserves the timeline in the drafting stage, but will likely be edited out of the final paper.] At the conclusion of its memorandum, the Subcommittee provided a proposed amendment to Rule 3001(c) and a proposed Rule 3002.1.[96] The original Rule 3002.1 is similar to the current Rule 3002.1.[97] It contained provisions for notice of payment changes, form

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[90] Memorandum from subcommittee on consumer issues to advisory committee on bankruptcy rules, re: mortgage payments in chapter 13 cases, August 27, 2008, at *1, available at http://www.uscourts.gov/sites/default/files/fr_import/BK2008-10.pdf.
[91] Memo, Aug. 27, 2008, at *1.
[92] Memo, Aug. 27, 2018, at *1-2; see also Jones v. Wells Fargo Home Mortgage (In re Jones), 366 B.R. 584, 596 (Bankr. E.D. La. 2007).
[93] Memo, Aug. 27, 2018, at 2.
[94] Memo, Aug. 27, 2018, at 15.
[95] Memo, Aug. 27, 2018, at 15.
[96] Memo, Aug. 27, 2018, at *16-24.
[97] Compare Fed. R. Bankr. P. 3002.1 with Memo, Aug. 27, 2018, at *19-24.

and content, notice of fees, expenses, and charges, notice of final cure payment, response to notice of final cure payment, and failure to notify.[98]

Early in the notice and comment stage, the Subcommittee expressed its desire to make sure Rule 3002.1 would operate consistently in both conduit and direct districts. For example, one initial concern raised by a group of judges was that the notice process following the final cure payment was overly complex.[99] They opposed the rule requirement that mortgagees must file their own response to the trustees' notices of final cure.[100] Instead, they suggested that mortgagees should only be required to object to the trustees' notices if there were any issues.[101] The Subcommittee rejected that suggestion by stating that in districts where debtors disbursed payments directly to mortgagees the trustees would not be able to certify that debtors had successfully cured and maintained their mortgages.[102]

The proposed rules were published for comment in the summer of 2009.[103] Multiple comments were raised with respect to the timing of the notice provision in Rule 3002.1(d).[104] The first draft of Rule 3002.1(d) required the trustee to file a notice within "30 days of making the final payment of *any* cure amount."[105] A few standing Chapter 13 trustees were concerned that this triggering event would create issues if a relatively small mortgage default was cured early in a Chapter 13 plan.[106] The concern was linked to a mortgagee's inability to certify that a debtor was otherwise current on all mortgage payments at such an early stage in the Chapter 13 plan.[107]

The Subcommittee agreed to revise Rule 3002.1(d) in response to these comments. It reiterated that the notice and response process was intended to occur at the end of a Chapter 13 plan and recommended that the triggering event in Rule 3002.1(d) be changed from "making of the final cure payment" to "making of the final plan payment."[108] The Subcommittee also

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[98] Memo, Aug. 27, 2018, at *19-22.

[99] Memorandum from subcommittee on consumer issues to advisory committee on bankruptcy rules, re: feedback on proposed amendments to rule 3001(c) and new Rule 3002.1, and recommended modification of Rule 3002.1, February 19, 2019, at *3, available at http://www.uscourts.gov/sites/default/files/fr_import/BK2009-03.pdf.

[100] Memo, Feb. 19, 2018, at *3.

[101] Memo, Feb. 19, 2018, at *3-4.

[102] Memo, Feb. 19, 2018, at *4.

[103] Memorandum from subcommittee on consumer issues to advisory committee on bankruptcy rules, re: recommendation for chapter 13 mortgage payment forms, April 6, 2010, at *3, available at http://www.uscourts.gov/sites/default/files/fr_import/BK2009-10.pdf

[104] Following changes to Rule 3002.1 and before final publication, what was originally drafted as Rule 3002.1(d) is the current Rule 3002.1(f). Memorandum from subcommittee on consumer issues to advisory committee on bankruptcy rules, re: Home mortgage claims: comments on proposed amendments to Rule 3001(c) and proposed new rule 3002.1, April 7, 2010, at *23, available at https://www.uscourts.gov/sites/default/files/fr_import/BK2010-04.pdf.

[105] Memo, Aug. 27, 2008, at *21 (emphasis added).

[106] Memo, Apr. 7, 2010, at *22-23.

[107] Memo, Apr. 7, 2010, at *22-23. For example, if an arrearage amount was cured by month 12 of a 36 month plan, then the creditor would not be able to certify that the debtor was otherwise current on all 36 months of postpetition payments.

[108] Memorandum from subcommittee on consumer issues to advisory committee on bankruptcy rules, re: Home mortgage claims: comments on proposed amendments to Rule 3001(c) and proposed new rule

recommended that Rule 3002.1(d) contain a provision informing the mortgagee of its need to respond under Rule 3002.1(e)[109].[110] This addition was to help mortgagees avoid sanctions under Rule 3002.1(g)[111] for failing to provide a response.[112]

Additional comments raised the concern that Rule 3002.1 would only work in conduit districts. In response, the Subcommittee added to the Committee Note that Rule 3002.1 would apply in all districts.[113] In one of the final memorandums, the Subcommittee noted that there was substantial empirical and anecdotal support for the amended and additional rules. It specifically stated that there was strong support for the proposed rule changes because many "[debtors] successfully emerge from chapter 13, believing that they [are] current on their mortgage payments, only to be immediately confronted with a notice of delinquency."[114] Following review of this memo and the surrounding discussions, the Advisory Committee on Bankruptcy Rules voted to recommend final approval of Rule 3002.1.[115]

In June of 2010, the Committee on Rules of Practice and Procedure voted to approve Rule 3002.1 for approval by the Judicial Conference.[116] Rule 3002.1 took effect on December 1, 2011, along with three official forms to aid in the implementation of Rule 3002.1(b)-(c).[117]

The importance of Rule 3002.1 is frequently recognized. One court noted that "it is universally recognized that the Rule was intended to benefit debtors by better ensuring the fresh start to a Chapter 13 debtor who completes a plan, by providing a mechanism for review and a forum for resolving disputes over whether the debtor's obligations to the mortgage holder are current at the conclusion of the bankruptcy case."[118] And the advisory committee notes to Rule 3002.1 explain that because "a debtor and trustee must be informed of the exact amount needed to cure any prepetition arrearage . . . and the amount of the postpetition payment obligations" it is imperative to have a notice framework in place.[119]

Since its enactment in 2011, Rule 3002.1 has helped many Chapter 13 debtors achieve positive outcomes. But, unfortunately, because Rule 3002.1(f) and Rule 3002.1(g) identify the final status of postpetition mortgage payments in a way that was previously not done before 2011, there have also been some additional unintended consequences. Those consequences are more severe in direct districts, and often impact a debtor's discharge.

3002.1, April 7, 2010, at *23, available at https://www.uscourts.gov/sites/default/files/fr_import/BK2010-04.pdf.

[109] The response provision is now Rule 3002.1(g).

[110] Memo, Apr. 7, 2010, at *23-24.

[111] The sanctions provision is now Rule 3002.1(i).

[112] Memo, Apr. 7, 2010, at *24.

[113] Memo, Apr. 7, 2010, at *24-25.

[114] Memo, Apr. 7, 2010, at 26.

[115] Advisory Committee on Bankruptcy Rules, Meeting of April 29 – 30, 2010, New Orleans, Louisiana Draft Minutes at 13, available at http://www.uscourts.gov/sites/default/files/fr_import/BK2010-09.pdf.

[116] Committee on Rules of Practice and Procedure, Meeting of June 14-15, 2010, Washington, DC Draft Minutes *at 15, available at http://www.uscourts.gov/sites/default/files/fr_import/BK2010-09.pdf.

[117] http://www.uscourts.gov/sites/default/files/fr_import/BK2011-09.pdf at 10.

[118] *In re Gibson*, 582 B.R. at 19.

[119] Advisory Committee Notes, 2011 Adoption to Rule 3002.1.

[I will add an additional paragraph or two here describing the issues that have started to appear between Rule 3002.1 and Section 1322(b)(5). I will also discuss how the majority of these issues appear in direct and case-by-case districts.]

[Part I is still a work in progress and will be further developed as more legislative history is researched. I will also clarify that the focus of this research is on the second part of Rule 3002.1 because of its effect on the discharge.]

Part II explains how the bankruptcy system has attempted to deal with Section 1322(b)(5) and Rule 3002.1 and identifies the problems with Rule 3002.1 and created by Rule 3002.1. The case law summarized in this part demonstrates a variety of inconsistent conclusions reached by bankruptcy courts across the country. Both Part II and Part III focus mainly on the notice and response process outline in the second part of Rule 3002.1 and its direct influence on the discharge.

II. The Interplay Between Bankruptcy Code Section 1322(b)(5) and Federal Rule of Bankruptcy Procedure 3002.1

At the conclusion of a Chapter 13 plan, the Chapter 13 trustee files a Rule 3002.1(f) notice which prompts a Rule 3002.1(g) response from the creditor.[120] Over the last seven years, multiple Rule 3002.1(g) responses have shown that debtors are not current on their postpetition mortgage payments at the end of their Chapter 13 plan. This has left courts with the task of figuring out what implication, if any, that has on the discharge.

The first question the courts are faced with is whether postpetition payments disbursed by debtors are considered "payments under the plan" as referenced in Section 1328(a). [A sentence or two will be added here explaining that most payments disbursed by debtors are not considered payments under the plan because they are for expenses incurred postpetition.] Section 1328(a) explains the requirements that must be fulfilled before debtors receive a discharge:

> Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title[.][121]

[Here, I will explain the impact of each result: i.e., if payments under the plan, then must be completed to receive a discharge; if not payments under the plan, failure to be current does not affect the discharge.] Once the courts resolve that threshold question, they must next determine what effect a default on those mortgage payments will have on a debtor's discharge.

Part II explains how the bankruptcy system is attempting to deal with the tension created by Section 1322(b)(5) and Rule 3002.1. Part II.A summarizes the case law that deals with whether direct postpetition mortgage payments are considered payments under the plan and describes how judges are reaching their holdings. Part II.B summarizes the outcomes bankruptcy judges make after resolving the threshold question in Part II.A. And Part III.C explains the issues with Rule 3002.1 and created by Rule 3002.1 that were exposed as bankruptcy judges made their determinations.

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[120] *See infra* Part III.

[121] 11 U.S.C. § 1328(a).

[The following questions/results from the questionnaire[122] will be discussed here: Q6 – In approximately what percentage of your Chapter 13 cases do you receive a Rule 3002.1(g) response at the end of the case stating that the debtor is NOT current on the debtor's postpetition mortgage payments?; Q7 – To the best of your knowledge, is your answer to Question 6 representative of your district as a whole?; Q8 – Do you consider postpetition mortgage payments disbursed by the debtor to be payments under the Chapter 13 Plan?; Q9 – To the best of your knowledge, is your answer to Question 8 representative of your district as a whole?; Q10 – If a debtor is not current on postpetition mortgage payments at the end of the debtor's Chapter 13 Plan should the debtor be denied a discharge?; Q11 – Would your answer to Question 10 change if the debtor had a second mortgage lien on the debtor's residence that was going to be stripped and classified as a nonpriority unsecured claim upon the issuance of a discharge?; Q12 – At the end of the debtor's Chapter 13 bankruptcy, if the debtor is not current on the debtor's postpetition mortgage payments, what options, other than a denial of discharge, should the debtor have?; Q19 – Were you appointed to the bankruptcy bench before or after 2011?]

A. Whether Direct Postpetition Payments are Payments under the Plan

1. Payments under the Plan

[The majority of the case law supports the proposition that postpetition payments disbursed by debtors to mortgagees are payments under the plan. The cases in this section are not an exhaustive list, but rather, serve as representations of the major arguments courts use in finding these direct payments as payments under the plan.[123]]

Prior to the adoption of Rule 3002.1, the Fifth Circuit held that postpetition mortgage payments disbursed directly by debtors were payments under the plan. In the *Matter of Foster*, 670 F.2d 478 (1982), the Fifth Circuit was reviewing on appeal whether postpetition mortgage payments disbursed directly by the debtors were payments "outside the plan."[124] It began its discussion of the issue by addressing the two opposing interpretations of "outside the plan" presented:

> In this opinion, we will address both interpretations of the phrase "outside the plan" – the interpretation currently advanced by the Fosters to the effect that the phrase simply provided for the debtors to act as disbursing agent for the current mortgage payments and the interpretation adopted by the bankruptcy court to the effect that the phrase was intended to cause the current mortgage payments to be considered as "not dealt with by the terms of the plan."[125]

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[122] *See* Appendix B.

[123] This case list was compiled by doing a Westlaw search of bankruptcy code 1322(b)(5) AND Rule 3002.1 There are roughly 30-40 relevant cases. This search will be replicated in Lexis and cross-referenced with the Westlaw list.

[124] *Matter of Foster*, 670 F.2d 478, 485-86 (5th Cir. 1982).

[125] *Matter of Foster*, 670 F.2d 478, 485-86 (5th Cir. 1982).

The Fifth Circuit concluded that the Fosters had the correct interpretation.[126] It held that pursuant to Section 1326(c) the Fosters could act as the disbursing agents of the postpetition mortgage payment.[127] And that "a plan may not provide for the making of the current payment on a mortgage claim outside the plan while curing the arrearage on that claim under the plan pursuant to s [sic] 1322(b)(5)."[128]

The Fifth Circuit relied heavily on the statutory language of Section 1322(b)(5) in reaching its conclusion. Citing to Section 1322(b)(5) it held that "Section 1322(b)(5) provides for the curing of any default, then, only when the plan also provides for the maintenance of the current mortgage payments while the case is pending."[129] This holding disputed the lower court's position that because the debtors were the disbursing agents the current mortgage payments were not payments under the plan.

More than thirty years later, and in the wake of [list all the bankruptcy amendments], courts are still relying on the text of Section 1322(b)(5) and Section 1326(c) to hold that direct postpetition mortgage payments are payments under a Chapter 13 plan. The Fifth Circuit has maintained its position and courts in the Eastern District of New York, Eastern District of Wisconsin, South Carolina, Eastern District of Virginia, Colorado, and Western District of Texas have joined it: holding that postpetition mortgage payments disbursed directly by debtors to mortgagees are payments under the Chapter 13 plan.[130] [The courts reached this holding through statutory construction and a holistic reading of the bankruptcy requirements.]

[I might add an additional paragraph discussing the gap between *Matter of Foster* and the recent group of case law that appeared following Rule 3002.1.]

In 2016, a few years after Rule 3002.1 was enacted, the Fifth Circuit relied on its holding in *Matter of Foster*. In *Matter of Kessler*, it affirmed the district court's decision to deny the debtors a discharge for failing to make postpetition mortgage payments.[131] The Fifth Circuit stated that in *Foster* it "held that post-petition payments of § 1322(b)(5) debts fall under the plan when pre-petition defaults are also provided for in the plan. Here, the Kesslers plainly included terms in their Chapter 13 plan for maintaining their post-petition mortgage payments; therefore, their post-petition payments are payments under the plan as required by *Foster*."[132]

A year later, the Eastern District of New York, like the Fifth Circuit, held that based on statutory construction and a holistic reading of Chapter 13 "direct post-petition mortgage

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[126] *Matter of Foster*, 670 F.2d 478, 485-86 (5th Cir. 1982).
[127] *See Matter of Foster*, at 486 (The case cites to Section 1326(b), which is now codified as Section 1326(c). *See also* 11 U.S.C. § 1326(c) ("Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.").
[128] *Matter of Foster*, at 489.
[129] *Matter of Foster*, at 489. *See also* 11 U.S.C. § 1322(b)(5) ("the plan may . . . 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"). [I need to explore if this was the start of debtors acting as the disbursing agents for postpetition mortgage payments.]
[130] This list will be expanded as more cases are analyzed and added to this section.
[131] *Matter of Kessler*, 655 Fed. Appx. 242 (5th Cir. 2016).
[132] *Matter of Kessler*, 655 Fed. Appx. 242, 244 (5th Cir. 2016).

payments are payments under the plan for purposes of § 1328(a)."[133] It also agreed with the Fifth Circuit that Section 1326(c) permits a debtor to be a disbursing agent. The court stated that it had "chosen not to require debtors to make their post-petition mortgage payments through the chapter 13 trustee, but rather allow such payments to be made directly to the secured creditor in accordance with § 1326(c)."[134] [More will be added from *In re Coughlin.*]

Similarly, the bankruptcy court in the Eastern District of Wisconsin held that direct postpetition mortgage payments are payments under the plan.[135] The court relied on the statutory interpretation articulated in *In re Coughlin* in reaching its holding.[136] It also compared Section 1228(a) and Section 1328(a) and found additional support for its conclusion.[137]

[This paragraph will be clarified.] The court noted that Section 1228(a) and Section 1328(a) are similar, but not identical. Under Section 1228(a), a debtor is entitled to a discharge "after completion by the debtor of all payments under the plan . . . other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title."[138] Section 1222(b)(5) is the "cure and maintain" provision for Chapter 12 debtors and is similar to Section 1322(b)(5).[139] The court reasoned that if the Chapter 12 "cure and maintain" payments were not considered payments under the plan then the Bankruptcy Code would not need to explicitly state that a Chapter 12 debtor does not need to make those payments to receive a discharge.[140] The court explained that to exclude maintenance payments from payments under the plan in Chapter 12 would render the clause "other than" superfluous.[141]

The court then applied the statutory interpretation theory of "equivalence" to Section 1322(b)(5).[142] It reasoned that "all payments under the plan" should be interpreted the same in Chapter 12 and in Chapter 13.[143] Therefore, direct postpetition maintenance payments in Chapter 13 are also payments under the plan. [This needs to be further clarified.]

[The rest of Part II.A. will summarize the case law that holds direct postpetition payments are payments under the plan. The results of some of the questionnaire questions will be summarized here as well.[144]

Some additional arguments in support of this position include: "Further, the computation of disposable income to pay unsecured creditors under § 1325(b) takes into account the promised direct payments for housing, including Debtors' § 1322(b)(5) maintenance payments. Failure to

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[133] *In re Coughlin*, 568 B.R. at 474.
[134] *In re Coughlin*, 568 B.R. 461, 468 (2017).
[135] *In re Bethe*, No. 11-25388-GMH, 2017 WL 3994813, at *2 (Bankr. E.D. Wis. Sept. 8, 2017)
[136] *In re Bethe*, at *2.
[137] *In re Bethe*, at *2.
[138] 11 U.S.C. § 1228(a). *See also In re Bethe*, at *2.
[139] Compare 11 U.S.C. § 1222(b)(5) with 11 U.S.C. § 1322(b)(5). Chapter 12 debtors are family farmers or fisherman.
[140] *In re Bethe*, at *2-3. This is because a debtor's failure to make payments that come due postpetition typically does not affect the debtor's discharge.
[141] *In re Bethe*, at *3.
[142] *In re Bethe*, at *3.
[143] *In re Bethe*, at *3 ("identical words and phrases within the same statute should normally be given the same meaning") (internal citations omitted).
[144] *See* Appendix B.

pay these housing payments may be a grounds to require a higher dividend to unsecured creditors."[145]

In re Dowey, 580 B.R. 168, 173 (2017) (holding "that § 1322(b)(5) maintenance payments are 'payments under the plan' for purposes of discharge") – look at list of cases here.

"In short, the Court finds no authority—nor have the parties cited the Court to any—to suggest a cogent argument that payments to be made directly to a creditor, pursuant to the terms of a confirmed plan, are not 'payments under the plan' as that term is used in 11 U.S.C. § 1328(a). A standard discharge under § 1328(a) requires completion of 'all payments under the plan' and that language plainly embraces payments that a plan provides will be made directly by the debtor to a creditor."[146]

Add the case law (holistic interpretation): *In re Hanley*, 575 B.R. 207 (Bankr. E.D.N.Y. 2017); *In re Coughlin*, 568 B.R. 461 (Bankr. E.D.N.Y. 2017); *In re Bethe*, No. 11-25388-GMH, 2017 WL 3994813 (Bankr. E.D. Wis. Sept. 8, 2017); *In re Dowey*, 580 B.R. 168 (Bankr. D.S.C. 2017); *Evans v. Stackhouse*, 564 B.R. 513 (Bankr. E.D. Vir. 2017); *In re Diggins*, 561 B.R. 782 (Bankr. D. Colo. 2016); *In re Evans*, 543 B.R. 213 (Bankr. E.D. Vir. 2016); *In re Payer*, No. 10-33656 HRT, 2016 WL 5390116 (Bankr. D. Colo. May 5, 2016); *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2015); *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014); *In re Daggs*, No. 10-16518 HRT (Bankr. D. Colo. January 6, 2014)]

2. Not Payments under the Plan

There are two types of direct payments that some courts conclude are not payments under the plan. The first type of payments are direct payments to the mortgagee disbursed by the debtor to maintain the mortgage while the trustee is disbursing payments to the mortgagee to cure the arrears.[147] This position is supported by a recent case from the Central District of Illinois. The second type of payments are direct payments to the mortgagee disbursed by the debtor to maintain the mortgage when there is no cure amount because the debtor was current on her mortgage at the time she filed. [This position is likely supported by the majority of courts that have addressed this issue.]

a. Maintenance Payments that are Not Payments under the Plan

[Maybe an introduction here. I might link it back to *Matter of Foster*. There was this holding, but then the general practice after that case and before Rule 3002.1 was to not include "maintenance payments" disbursed by debtors as payments under the plan.]

In *In re Gibson*, the Central District of Illinois recently held that a "debtor's direct payments on a nonmodifiable, nondischargeable residential mortgage loan were not 'payments under the plan' that had to be completed in order for debtor to be entitled to discharge."[148] The debtors in this case failed to make direct payments to the second mortgage holder during the

[145] *In re Dowey*, 580 B.R. at 174.
[146] *In re Gonzales*, 532 B.R. at 832.
[147] These are the same payments discussed in Part II.A.
[148] *In re Gibson*, 582 B.R. 15 (Bankr. C.D. Ill. 2018).

entirety of their Chapter 13 plan.[149] At the end of their Chapter 13 plan, the trustee filed his Rule 3002.1(f) notices stating that the debtors had successfully cured the arrears on both their first and second mortgage.[150] In its Rule 3002.1(g) response, the second mortgage holder confirmed that the arrears were cured through the plan but also certified that the debtors were $18,809.56 behind on their postpetition payments.[151] As a result, the Chapter 13 trustee moved for dismissal of the case and a denial of the debtors' discharge.[152]

The court denied the trustee's motion and articulated multiple reasons why it found that direct maintenance payments disbursed by debtors are not "payments under the plan." It began its analysis by noting that the second mortgage was exempt from discharge under Section 1328(a)(1).[153] [Add another sentence or two on why this matters].

The court then turned to the language of Section 1328(a) and noted that "in seventeen years on the bench, [this court] has never dismissed a chapter 13 case without discharge, where the required payments to the trustee were completed, for the reasons that the debtor failed to make all the direct mortgage payments."[154] It explained that only since the enactment of Rule 3002.1 have courts began to interpret "payments under the plan" to include direct payments disbursed by the debtor.[155] And it stated that this interpretation was in direct conflict with the intended purpose of Rule 3002.1.[156]

Turning to the language of Section 1328(a), the court outlined the two types of discharges available to Chapter 13 debtors. The first, a full compliance discharge, is available to debtors who have completed all payments under the plan.[157] And the second, a hardship discharge, is available to debtors who have not completed all payments under the plan but satisfy certain conditions.[158] The court reasoned that perhaps part of the purpose for determining which debtors have completed all payments under the plan is to distinguish between which debtors are eligible for a full compliance discharge over a hardship discharge.[159]

Digging deeper into the meaning of "all payments under the plan," the court concluded that this phrase merely defines when completion of payments occurs.[160] It is the phrase

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[149] *In re Gibson*, 582 B.R. at 16.
[150] *In re Gibson*, 582 B.R. at 16-17.
[151] *In re Gibson*, 582 B.R. at 16-17.
[152] *In re Gibson*, 582 B.R. at 17.
[153] *See In re Gibson*, 582 B.R. at 17. *See also* 11 U.S.C. § 1328(a)(1) ("as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—(1) provided for under section 1322(b)(5)").
[154] *In re Gibson*, 582 B.R. at 18.
[155] *In re Gibson*, 582 B.R. at 18.
[156] *In re Gibson*, 582 B.R. at 19 ("it is universally recognized that the Rule was intended to benefit debtors by better ensuring the fresh start to a Chapter 13 debtor who completes a plan, by providing a mechanism for review and a forum for resolving disputes over whether the debtor's obligations to the mortgage holder are current at the conclusion of the bankruptcy case").
[157] *In re Gibson*, 582 B.R. at 19. *See also* 11 U.S.C. § 1328(a).
[158] *In re Gibson*, 582 B.R. at 19. *See also* 11 U.S.C. § 1328(b). [Put in a note explaining these conditions.]
[159] *In re Gibson*, 582 B.R. at 19. [I need to check and verify that I have drawn the right conclusion here.]
[160] *In re Gibson*, 582 B.R. at 19.

"provided for by the plan" used later in Section 1328(a) that actually determines the scope of the discharge.[161] The court claimed that the difference in terminology implied an "intended distinction."[162]

Specifically, the court viewed "the alternative phrase 'under the plan' . . . to have a narrower effect, allowing for the possibility that not all creditors holding debts *provided for by the plan* are receiving payments *under the plan*."[163] It explained that the "most logical line of demarcation is between payments made by the trustee from funds received from the debtor versus payments made by the debtor direct to a creditor."[164] Therefore, the court concluded that the phrase "all payments under the plan" referred to all the payments made by the debtor to the trustee.[165] And that direct payments made by a debtor to a creditor were payments "provided for by the plan" but not "payments under the plan."[166]

Next, the court explained that Section 1328 creates a statutory entitlement in favor of the debtor. Section 1328(a) directs the court to grant the debtor a discharge once she has completed all payments under the plan.[167] Because courts in the past have interpreted "completion" to mean once all payments are made to the trustee, the statutory entitlement arises once the debtor has completed those payments.[168] The court concluded that Rule 3002.1 could not interfere with that statutory entitlement.[169]

The court also supported its interpretation of "all payments under the plan" by relying on the way other provisions have been construed. For example, under Bankruptcy Code Section 1329, a plan can only be modified "before the completion of payments under such plan."[170] The court pointed out that in this context completion of payments occurs when the debtor makes all scheduled payments to the trustee.[171]

Another provision the court relied on was the five year maximum time limit set on a Chapter 13 plan. Section 1322(d)(2) prohibits a plan from extending beyond five years.[172] The court reasoned that because most direct mortgage payments go beyond this five-year time limit they cannot be considered payments under the plan.[173]

The court also looked at the funds used to pay postpetition mortgages and the claims process. First, the court noted that mortgage payments disbursed by the debtor are not funded by the bankruptcy estate.[174] And second, the court noted that creditors holding secured mortgage

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[161] *In re Gibson*, 582 B.R. at 19.
[162] *In re Gibson*, 582 B.R. at 19.
[163] *In re Gibson*, 582 B.R. at 19.
[164] *In re Gibson*, 582 B.R. at 19.
[165] *In re Gibson*, 582 B.R. at 19.
[166] *See In re Gibson*, 582 B.R. at 19.
[167] *In re Gibson*, 582 B.R. at 19. *See also* 11 U.S.C. § 1328(a).
[168] *In re Gibson*, 582 B.R. at 19-20.
[169] *In re Gibson*, 582 B.R. at 19-20.
[170] 11 U.S.C. § 1329(a). *See also In re Gibson*, 582 B.R. at 20.
[171] *In re Gibson*, 582 B.R. at 20.
[172] *In re Gibson*, 582 B.R. at 20.
[173] *In re Gibson*, 582 B.R. at 20.
[174] Under Section 1322(b)(5), debtors are authorized to "cure and maintain" mortgage payments. The court clarified that when utilizing this provision the debtor is essentially splitting its mortgage into two separate claims: the underlying debt and the arrearages. In the Central District of Illinois, regular

debt not in default at the time of the filing are not required to file a claim.[175] A creditor files a claim only when it seeks to receive funds from the bankruptcy estate.[176] The court concluded that the combination of these two factors "weigh in favor of a determination that those direct payments are not 'payments under the plan.'"[177]

Finally, the court articulated a few additional theories in support of its interpretation. It noted that the trustee was under no statutory duty to monitor these direct payments.[178] It also stated that when Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 it did not require a certification by debtors that they were current on direct payments at the end of their plans.[179] And lastly, the court articulated a desire to maintain fair and consistent results.[180] It stated that debtors in the past had received a discharge without inspection into their direct payments and that current debtors should be treated the same.[181] It also stated that because there is no way to monitor other direct payments, similarly situated debtors might achieve different outcomes based on which direct payment is not being made.[182]

[As of now, no other bankruptcy court has joined the *In re Gibson* court's interpretation of payments under the plan. But, there is also no circuit opinion or Supreme Court opinion striking it down. The thorough analysis of the issue leaves the door open for other courts to join in this interpretation. In addition, Montana uses language in its plan that suggests mortgage payments disbursed by the debtor are not payments under the plan.[183]]

b. Direct payments

[In this section, I will add findings and dicta, if any, from cases discussing the payment of fully secured claims "outside the plan." The original theory that these are not payments under the plan comes from *Matter of Foster*. The Fifth Circuit agreed "with those courts which have concluded that fully secured claims may in some instances be dealt with outside a Chapter 13 plan."[184] This finding makes sense because Section 1322(b)(5) is only for "curing and maintaining" secured mortgages, and Section 1322(b)(2) is for modifying a secured claim other than a secured mortgage. Additionally, Rule 3002.1 only deals with claims provided for under

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postpetition mortgage payments are typically disbursed by the debtor and arrearages are disbursed by the trustee through the funds collected from the debtor. Because only funds paid to the trustee are funds of the bankruptcy estate, the mortgage payments disbursed by the debtor are not made from bankruptcy estate funds.

[175] *In re Gibson*, 582 B.R. at 20-21.
[176] *In re Gibson*, 582 B.R. at 21.
[177] *In re Gibson*, 582 B.R. at 21.
[178] *In re Gibson*, 582 B.R. at 21.
[179] *In re Gibson*, 582 B.R. at 22. Congress does require a debtor to certify that she is current on her domestic support obligations at the conclusion of her bankruptcy case.
[180] *In re Gibson*, 582 B.R. at 22.
[181] *In re Gibson*, 582 B.R. at 22.
[182] *In re Gibson*, 582 B.R. at 22. Other direct payments are not being made pursuant to Section 1322(b)(5).
[183] *See* Appendix A, Case-by-Case / Unclear – Montana.
[184] *Matter of Foster*, 670 F.2d at 488.

Section 1322(b)(5). If a mortgage claim is not being cured, it is not provided for under Section 1322(b)(5).]

B. Inconsistent Outcomes

The second question the courts face is what is the appropriate outcome for debtors once the threshold question is resolved. While the majority of courts might agree that direct postpetition payments are "payments under the plan," the case law shows that they do not agree on how defaulting on those payments affects the discharge. For example, some courts, after finding direct payments to be payments under the plan, have revoked a debtor's discharge while others have let the discharge stand. And other courts have allowed debtors to attempt to cure their defaults through conversion, plan modification, or a loan modification.

The inconsistent outcomes also permeate into each category of outcomes. For example, even if the courts agree a debtor can cure a default and save her discharge through a loan modification, they might disagree on the process a debtor must follow to successfully achieve that loan modification. Part II.B explains the variety of inconsistent outcomes reached by bankruptcy courts across the country, as well as the inconsistencies within each category. The categories are arranged from the harshest outcome, revocation of discharge, to the most lenient outcome, entry of discharge.

1. Revocation of Discharge

In a few cases, a debtor received a discharge before the notice and response procedure outlined in Rule 3002.1 was completed.[185] When a court receives a Rule 3002.1(g) response stating that a debtor is not current on her postpetition mortgage payments, and after it has already granted the debtor a discharge, it is faced with a difficult decision: whether to revoke the debtor's discharge. A court is faced with this decision only if it finds that postpetition mortgage payments disbursed by debtors are payments under the plan, but, as discussed above, many courts have reached that conclusion.

Revoking a discharge is an "extraordinary remedy,"[186] and a discharge is typically revoked for only one of two reasons. First, a discharge may be revoked if it is obtained by fraud. Section 1328(e) explains that:

> On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if—(1) such discharge was obtained by the debtor through fraud; and (2) the requesting party did not know of such fraud until after such discharge was granted.[187]

Fraud is defined as [fraud will be defined as it is commonly used in bankruptcy case law].

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[185] *See infra* Part II.C.1 for a discussion on timing issues with Rule 3002.1 that leads to an entry of discharge before a determination on whether direct postpetition mortgage payments were payments under the plan.

[186] *See In re Coughlin*, 568 B.R. at 467.

[187] 11 U.S.C. § 1328(e).

Second, a discharge may be revoked if it is obtained by mistake as described by the Federal Rules of Bankruptcy Procedure. Federal Rule of Civil Procedure 60(b) as applied to the bankruptcy rules through Federal Rules of Bankruptcy Procedure 9024 states that:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.][188]

The "mistake theory" is the most common argument discussed in the case law. [The "mistake theory" will be further explained and summarized – *Coughlin* at 478]

[Here, I will summarize and discuss the case law where the court has revoked a debtor's discharge. I will also compare courts that have chosen to revoke the discharge with courts who have chosen not to revoke the discharge.

The discharge was revoked in *In re Gonzales* based on false certifications *compare with In re Finley*, 2018 WL4172599, which revoked discharge under 1328(e) and also discussed similar certifications given in *In re Gonzales*.

In both *In re Coughlin* and *In re Bethe*, the courts considered revoking the debtors' discharges under Rule 60(b). The court in *In re Coughlin* recognized the mistake it made in prematurely granting Coughlin a discharge, but ultimately decided not to revoke the discharge.[189] The court reasoned that because it entered the discharge as it routinely had and because there was no prior contrary precedent it did not think that Rule 60(b) was satisfied.[190]

Similarly, the court in *In re Bethe* also recognized its mistake in prematurely granting the discharge but found that a revocation of the discharge was not warranted. The court cited to *United Student Aid funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) for support that it was within its discretion whether to vacate the discharge.[191] It concluded that it would not revoke the debtors' discharge because the debtors' effectively cured their default through a loan modification.[192]

The other cases that discuss revocation will be listed here.]

2. Dismissal and Denial of Discharge

In the instances where courts were able to determine the threshold question before entering a discharge, some have concluded that a default on postpetition mortgage payments, like a default on any other type of plan payment, means that a debtor is no longer eligible for a discharge. The Eastern District of New York, in *In re Hanely*, denied the debtors a discharge for failing to maintain their postpetition mortgage payments.[193] The court reached its conclusion after careful consideration of the debtors' arguments and review of the relevant case law.

The facts of *In re Hanley* are typical to the facts of the other cases dealing with this issue. At the end of the Hanleys' bankruptcy, the mortgagee filed its Rule 3002.1(g) response stating that the debtors were in default on postpetition mortgage payments. The Chapter 13 trustee then

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[188] Fed. R. Civ. P. 60(b)(1).
[189] *In re Coughlin*, 568 B.R. at 478.
[190] *In re Coughlin*, 568 B.R. at 478.
[191] *In re Bethe*, at *4.
[192] *In re Bethe*, at *4.
[193] *In re Hanley*, 575 B.R. at 210.

filed a motion to dismiss.[194] The debtors opposed the motion on two grounds. [The debtors tried to argue that they had successfully entered into a last minute loan modification.] First, the debtors argued that "they should be able to enter into a loan modification after the 60 months have expired and still be eligible for a discharge because the loan modification cures the plan default."[195] Or, in the alternative, "the loan modification was entered into before the expiration of the 60 months (which cured the Plan default) and can be approved *nunc pro tunc*."[196] For reasons explained more in depth below, the court held that because the loan modification was not consensual or approved by the court before the plan term ended it could not cure the default.[197] The court granted the trustee's motion and dismissed the Hanleys' bankruptcy without entry of discharge.[198]

[Some courts have found a dismissal to be warranted under Section 1307(c)(6) – material default.[199] *In re Dowey*, 580 B.R. at 174.

This section will continue to be researched and developed. *In re Diggins*, 561 B.R. 782, 784.]

3. Option to Cure or Preserve a Discharge

Many courts have looked for an alternative to denying debtors a discharge for defaulting on their postpetition mortgage payments. Some courts have found that debtors may cure their defaults through a loan modification or plan modification. While other courts have offered debtors the opportunity to convert to Chapter 7 bankruptcy to preserve their discharge.

a. Loan Modification

One option available to debtors as a way to cure their defaults is a last minute loan modification. [Maybe a sentence or two here is needed to explain that process in a little more detail: proposing to take the postpetition arrears and capitalize them into a new loan at the last minute as a "cure."]. In *In re Bethe*, as discussed above, the court held that "payments under the plan" included direct postpetition payments made by the debtors, and that the debtors had defaulted on those payments.[200] The court did not, however, deny the debtors a discharge. Instead, it found that they had successfully cured the default by entering into a loan modification shortly after the mortgagee filed its Rule 3002.1(g) response.[201] The court did not discuss

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[194] *In re Hanley*, 575 B.R. at 210.
[195] *In re Hanley*, 575 B.R. at 213.
[196] *In re Hanley*, 575 B.R. at 213.
[197] *In re Hanley*, 575 B.R. at 219.
[198] [CITE]
[199] "Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—(6) material default by the debtor with respect to a term of a confirmed plan."
[200] *In re Bethe*, No. 11-25388-GMH, 2017 WL 3994813 (Bankr. E.D. Wis. Sept. 8, 2017).
[201] *In re Bethe*, at *1-2; 4. U.S. Bank filed the Rule 3002.1(g) response on December 6, 2016. *Id.* at *1. Select Portfolio, the servicer, offered to modify the loan in November 2016 and the parties entered into a loan modification agreement in February 2017. *Id.* at *2.

whether it was aware of the loan modification or approved the loan modification prior to making this final decision.[202]

The court in *In re Hanley* also discussed the possibility of a loan modification as a cure to default. The court found that a "post-confirmation loan modification that wraps up a debtor's post-confirmation mortgage arrearages into the modified loan may be approved by the Court and cure the plan default."[203] In reaching its conclusion, the court emphasized that two important conditions must be met for a loan modification to successfully cure postpetition defaults. First, the loan modification must be consensual.[204] And second, the loan modification must be entered into and approved by the court before the termination of the 60-month plan term.[205]

[Explain the *In re Hanley* outcome: The court denied the Hanleys' request for a loan modification on grounds that they did not satisfy the two conditions outlined above.]

[Here, the two courts agreed that a loan modification could cure postpetition mortgage defaults, but disagreed on the standard. The court in *In re Bethe* appears to not have cared when the loan modification was entered into or whether it was approved by the court.[206] In comparison, the court in *In re Hanley* explicitly stated that it would only approve a consensual loan modification entered into before the termination of the 60-month plan term.[207] If the Bethes had filed for bankruptcy in the Eastern District of New York, it is likely that their outcome would have been much worse.

I will continue to research and explain plan modification as a cure to default. *See, In re Diggins*, 561 B.R. 782, 784-85 (2016).]

b. Plan modification

An additional option available to debtors to cure postpetition mortgage defaults is plan modification. Modification of a confirmed plan is governed by Section 1329. Section 1329(a) states that the trustee, debtor, or holder of an allowed unsecured claim may seek to modify a plan "[a]t any time after confirmation of the plan but before the completion of payments under such plan."[208] If plan payments have been completed, this option is no longer available to debtors. [I might explain Sections 1322(a)(b), 1323(c), and 1325(a) and their connection to plan modification.]

The Eastern District of New York recently discussed plan modification as a cure in two separate cases. The first, *In re Coughlin*, dealt with a couple, the Sangamayas, who sought to modify their plan in the final week of their 60 month term by surrendering their property to cure their postpetition mortgage default.[209] The second, *In re Hanley*, issued about two months later dealt with a couple who sought approval for a non-consensual loan modification after their 60

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[202] *In re Bethe*, at *1-2; 4.
[203] *In re Hanley*, 575 B.R. at 213.
[204] *In re Hanley*, 575 B.R. at 213-14.
[205] *In re Hanley*, 575 B.R. at 219.
[206] *In re Bethe*, at *1-2; 4. U.S. Bank filed the Rule 3002.1(g) response on December 6, 2016. *Id.* at *1. Select Portfolio, the servicer, offered to modify the loan in November 2016 and the parties entered into a loan modification agreement in February 2017. *Id.* at *2.
[207] *In re Hanley*, 575 B.R. at 213-19.
[208] 11 U.S.C. § 1329(a).
[209] *In re Coughlin*, 568 B.R. at 466-67.

month plan term.[210] The Hanleys did not ask for a plan modification but the court discussed the possibility of a plan modification as a way for the debtors to cure their default.

Citing to Section 1329 and Section 1325, the court in *In re Coughlin* found that a plan modification may only be sought prior to plan completion.[211] Because the Sangamayas moved for a modification before the completion of their plan, the court concluded that it could review their motion.[212] The court ultimately granted the modification motion on grounds that there was no statutory bar and no opposition to the motion.[213] It also noted that the plan modification complied with the requirements set out in Sections 1322(a), (b), 1323(c), and 1325(a).[214]

In comparison, the court in *In re Hanley* discussed the possibility of a plan modification as a cure but not in response to a request by the debtors. The court held that "a debtor who has post-petition mortgage arrears, and therefore is in default of their plan, *may* seek to cure that default through a modified chapter 13 plan *as long as all payments under the modified plan are complete before the expiration of the plan term*."[215] In reaching its holding, however, the court explained that a debtor might not be able to surrender the property as a part of the plan modification because it could change the rights of the secured creditor.[216] A plan modification is acceptable only if it changes the timing of payment and not the treatment of the claim.[217]

[Once again, these two courts reached the same conclusion but applied different standards. This difference is even more surprising because these cases come from the same district and were decided only a few months apart. If the Sangamayas had been assigned a different judge, it is possible that their plan modification motion would have been denied and they would have lost their discharge.

This issue will continue to be researched and explained.]

c. Conversion

[*See In re Daggs*, No. 10-16518 HRT (Bankr. D. Colo. Jan. 6, 2014): Postpetition mortgage payments were payments under the plan. Granted debtor's request to convert to Chapter 7 and save the discharge.]

4. Entry of discharge

In a few cases where courts have found direct postpetition payments to be payments under the plan, those courts still have allowed the debtor to receive a full discharge or a hardship discharge even if the debtor defaulted on those payments. In *In re Gibson*, the court found direct postpetition payments to not be payments under the plan and entered the discharge accordingly.

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[210] *In re Hanley*, 575 B.R. at 213-14.
[211] *In re Coughlin*, 568 B.R. at 478-79. *See also* 11 U.S.C. § 1325(b)(1)(B) and 1329(a).
[212] *In re Coughlin*, 568 B.R. at 479. [Moved within a week or so of the deadline.]
[213] *In re Coughlin*, 568 B.R. at 479-80.
[214] *In re Coughlin*, 568 B.R. at 480.
[215] *In re Hanley*, 575 B.R. at 214 (emphasis in the original).
[216] *In re Hanley*, 575 B.R. at 214-15.
[217] *See In re Hanley*, 575 B.R. at 215.

[In this section, I will discuss the case law that reaches the two outcomes explained above. Rule 60(b) theory[218]: In both *In re Coughlin* and *In re Bethe*, the courts considered revoking the debtors' discharges under Rule 60(b). The court in *In re Coughlin* recognized the mistake it made in prematurely granting Coughlin a discharge, but ultimately decided not to revoke the discharge.[219] The court reasoned that because it entered the discharge as it routinely had and because there was no prior contrary precedent it did not think that Rule 60(b) was satisfied.[220]

Similarly, the court in *In re Bethe* also recognized its mistake in prematurely granting the discharge but found that a revocation of the discharge was not warranted. The court cited to *United Student Aid funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) for support that it was within its discretion whether to vacate the discharge.[221] It concluded that it would not revoke the debtors' discharge because the debtors' effectively cured their default through a loan modification.[222]

Hardship discharge theory: *In re Bethe; In re Coughlin; In re Gibson* (discussed at the end); *In re Dowey*, at 170-7.

"Not payments under the plan" theory: "This Court disagrees with the absolutist view that section 1328(a) should be construed in a way that would make every uncured default on a direct payment grounds for dismissing the case without a discharge. At most, whether a Chapter 13 debtor's failure to make direct payments warrants denial or revocation of a discharge should be determined on a case-by-case basis, under other sections of the Bankruptcy Code, taking into account the debtor's state of mind and the effect on creditors. Where, as here, a debtor's conduct was truly innocent and unsecured creditors were not harmed, denial of discharge is not an appropriate remedy. The punishment does not fit the crime."[223]]

C. Issues with Rule 3002.1 and Exposed by Rule 3002.1

The bankruptcy judges' analysis of the threshold question, whether direct postpetition mortgage payments are payments under the plan, illuminated a variety of issues related to Rule 3002.1. [Add a sentence about the inconsistent outcomes discussed above.] Some of the issues are with the way the rule is written, such as the lack of clarity on timing and use of certain language. The other issues are those created or exposed by the rule, such as who is responsible for monitoring postpetition mortgage payments.

1. Timing

One of the most notable issues with by Rule 3002.1 is the timing of filing the notice under Rule 3002.1(f) by the Chapter 13 trustee in relation to the certification of completed plan.

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[218] This theory is currently discussed in two different places. I will resolve the duplicate discussions as each theory is further explained.
[219] *In re Coughlin*, 568 B.R. at 478.
[220] *In re Coughlin*, 568 B.R. at 478.
[221] *In re Bethe*, at *4.
[222] *In re Bethe*, at *4.
[223] *In re Gibson*, 582 B.R. at 23.

Pursuant to Rule 3002.1(f), at the conclusion of a Chapter 13 plan, the Chapter 13 trustee has 30 days to file a notice stating the status of a "cure and maintain" claim.[224] Rule 3002.1(f) states:

> Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the hold of the claim, 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. 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.[225]

The triggering language in this provision is "after the debtor completes all payments under the plan." And after the debtor completes all payments under the plan is also typically when a Chapter 13 trustee files a certification of completed plan.[226] Neither Rule 3002.1 nor any other Federal Rule of Bankruptcy Procedure directs whether the notice or certification should be filed first.[227]

The practice in many districts is that Chapter 13 trustees file the certification shortly after receiving the final payment from the debtor.[228] This results in many certifications being filed before, or simultaneously with, the notice required by Rule 3002.1(f), which means it is often filed before the Rule 3002.1 response. For example, in *In re Coughlin*, the Chapter 13 trustee filed her "Certification of Completed Plan" in the Coughlin case[229] on July 15, 2016, and her "Notice of Final Cure Payment and Completion of Payments under the Plan as required by Bankruptcy Rule 3002.1(f)" (the "Coughlin 3002.1 Notice") on August 15, 2016, thirty days later.[230] Shortly after, the secured creditor filed a response pursuant to Rule 3002.1(g) stating that the debtor was not current on postpetition mortgage payments.[231]

Filing a certification of completed plan before a Rule 3002.1(f) notice and Rule 3002.1(g) response has created some confusion in courts as illustrated by *In re Coughlin*. After reviewing the Rule 3002.1(g) response, the Chapter 13 trustee filed her final report stating that she had not paid any of the defaulted direct postpetition mortgage payments.[232] A month later, the servicer for the secured creditor filed a lift stay motion because the Coughlin debtor was still in default on

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[224] Fed. R. Bankr. P. 3002.1(f).
[225] Fed. R. Bankr. P. 3002.1(f).
[226] *See In re Coughlin*, at 464. [FIND THE RULE]
[227] *See* Fed. R. Bankr. P. 3002.1.
[228] *See* [cases and parentheticals].
[229] *In re Coughlin* discusses two unrelated bankruptcy cases dealing with same issue, Coughlin and Sangamayas. A discharge was only entered in Coughlin's case. *In re Coughlin*, 568 B.R. at 464-65.
[230] *In re Coughlin*, at 464.
[231] *In re Coughlin*, at 464 ("On September 2, 2016,[Deutsche], filed a response . . . assert[ing] that Coughlin paid in full the amount required to cure the pre-petition default on Deutsche's claim, but that as of March 1, 2016, he was delinquent on direct post-petition mortgage payments totaling $17,441.25.").
[232] *In re Coughlin*, 568 B.R. at 464.

his postpetition mortgage payments.[233] The court, before resolving the Rule 3002.1(g) response or the lift stay motion, granted the debtor a discharge on December 14, 2016.[234]

The court explained why it entered the discharge before resolving the issues outlined above. It stated that:

> the Trustee filed her Certification of Completed Plan, the Coughlin 3002.1 Notice, and her Final Report and Account before the Coughlin Stay Relief Motion had been filed, and no motion to dismiss was pending. As the Trustee concedes, the documents customarily filed before issuance of a discharge in this district had been filed: In this District, the Court enters an eligible debtor's discharge upon the filing of three documents: 1) Trustee's Certification of Completed Plan; 2) Certificate of Debtor Education; and 3) Debtor's Certifications Regarding Domestic Support Obligations and Section 522(a) (hereinafter the "Three Documents"). (footnote omitted) [11-76202; dkt item 48] No party-in-interest filed a request that the Court defer issuing the discharge pending the outcome of the Coughlin Lift Stay Motion, and the movant in that motion, JPMorgan, does not oppose Coughlin retaining his discharge.[235]

Because the discharge was entered before the underlying issue was resolved, the court was faced with the additional burden of determining whether to revoke the debtor's discharge.[236]

The timing issue also occurs in *In re Bethe*. On November 21, 2016, the Chapter 13 trustee filed a "Notice of Completion of Plan."[237] Relying on that notice, the court entered an order granting the debtors a discharge on that same day.[238] About a week later, the Chapter 13 trustee filed her Rule 3002.1(f) notice and the mortgagee timely filed its Rule 3002.1(g) response.[239] The mortgagee stated that the debtors were not current on postpetition payments, but neither the debtors nor the trustee moved for a determination under Rule 3002.1(h).[240] It would be another six months, after the trustee filed her final report and account, before the court would realize the issue and seek to address it.[241]

[This paragraph needs to be cleaned up and explained better.] The court referred to the trustee's counsel's reasoning in its decision. Counsel "explained that the trustee's practice has been to file a notice of completion when the debtor makes the final payment to the trustee."[242] Counsel stated that in cases where the debtor makes direct postpetition payments to the

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[233] *In re Coughlin*, 568 B.R. at 464.
[234] *In re Coughlin*, 568 B.R. at 464.
[235] *In re Coughlin*, 568 B.R. at 476-77.
[236] *See supra* Part II.B. for a discussion on the severity of revoking a discharge.
[237] *In re Bethe*, at *1.
[238] *In re Bethe*, at *1.
[239] *In re Bethe*, at *1.
[240] *In re Bethe*, at *1.
[241] *In re Bethe*, at *1-2.
[242] *In re Bethe*, at *2.

mortgagee the trustee does not know whether she is current at the time she files her notice of completion.[243]

[This issue will continue to be explained as the case law is summarized and analyzed. The timing issue is usually what prompts a case law decision. *In re Gibson*, 582 B.R. 16-17; *In re Gibson*, 582 B.R. at 18-19 "'The usual practice is that the Chapter 13 trustee signals completion of payments when the trustee has received all that the plan requires the trustee to disburse to creditors. Discharges are routinely entered in Chapter 13 cases without regard to whether the debtor has completed payments directly to creditors.'"; *In re Gonzales*, 532 B.R. 828, 830 (2015) – debtor filed request for discharge before Rule 3002.1(g) response; *In re Finley]*

2. Use of "payment under the plan" Language

Another issue with Rule 3002.1 is the use of the language "after the debtor completes all payments under the plan" in Rule 3002.1(f).[244] This issue is closely related to the timing issue, but illustrates more of the confusion this rule creates in operation rather than when the notice should be filed. [This is an issue that is not discussed in the case law, but is illuminated by the recent case law discussion on this issue. Because cases are not in agreement on what "payment under the plan" means, continued use of this language could be problematic.]

[Here, I will dive deeper into the "triggering language" in Rule 3002.1. I will reiterate the explanation behind the choice of these words that is discussed in Part 1.

Next, I will tie this to the discussion of the threshold question above. Based on statutory construction, Rule 3002.1 should mirror the way the courts interpret "payment under the plan."

Finally, I will explain why the language "after the debtor completes all payments under the plan" might no longer be appropriate to use in Rule 3002.1. Because the majority of courts are including direct postpetition payments in the meaning of "payments under the plan," it would make it impossible for the trustee in a direct district to know when the debtor completes (or whether the debtor has completed) all payments under the plan.

I may also discuss how the language "payments under the plan" has created issues in other contexts, such as whether the trustee should receive a fee based on direct postpetition payments.[245] But, I think I can successfully address that issue in other parts of this paper.]

3. Monitoring

Perhaps the greatest issue Rule 3002.1 has exposed, or maybe even created, is that there is insufficient monitoring of postpetition mortgage payments. The monitoring issue is more prevalent in direct districts or case-by-case districts. [I will add a sentence that states how many of the cases summarized above come from these districts using the information gathered in Appendix A.]

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[243] *In re Bethe*, at *2.

[244] Fed. R. Bankr. P. 3002.1(f).

[245] *Matter of Foster*, at 490 – end; Colliers on fees not through the Trustee 8 Collier on Bankruptcy P 1302.05 (16th 2018).

[This section will address the monitoring issue. The reason why most of these issues that I have been describing pop-up at the end of a Chapter 13 bankruptcy case is because no one was monitoring the postpetition payments during the bankruptcy. In a direct district, Chapter 13 trustees are not tracking payments a debtor is making directly to a mortgagee.[246] The mortgagee, while likely monitoring the direct postpetition payments, is not obligated to file a motion to lift the stay for lack of adequate protection.[247] And a debtor is not likely to bring to the court's attention that she is failing to pay her monthly mortgage.

One common theme in many of the cases is that the debtor was unaware that direct postpetition mortgage payments were payments under the plan that could affect their discharge. *In re Gibson*, 582 B.R. at 17 "In response, the Debtors, maintaining that they are entitled to a Chapter 13 discharge, assert that their failure to make the 2nd mortgage payments was due to their mistaken belief that those payments were to be made by the Trustee, that their failure is excusable and they should not be punished for an innocent mistake. They also blame PNC for not filing a stay relief motion as to the 2nd mortgage during the term of the plan that would have brought the error to their attention and to the attention of the Trustee at an earlier state of the case when it could possibly have been rectified without jeopardizing their discharge." *In re Gibson*, 582 B.R. at 18 "No provision of the Bankruptcy Code or Rules requires a debtor to report a default on direct payments."

"The Bankruptcy Code does not now and never has required a debtor to certify that he paid all other direct payments that came due during the course of the case. The absence of such a certification requirement is inconsistent with the view that section 1328(a) imposes an absolute condition to discharge that the debtor has made all direct mortgage payments as well as any other direct payments such as long-term car loan payments. Congress could have required that a debtor certify, as a precondition to discharge, that he made all direct payments. Instead, Congress elected to impose a certification requirement only with respect to domestic support payments."[248]

Some courts placed the monitoring burden on the mortgagee: "Secured creditors who receive direct payments from the debtor are expected to protect themselves."[249]

Other courts note that the trustee is not responsible for monitoring direct payments. *In re Gibson* stated that "[n]othing in the Bankruptcy Code imposes an affirmative duty on the trustee to confirm that all direct payments are being made to creditors during the term of the plan."[250]

In re Gonzales at 832-33: certifications by the trustee and the debtor that plan payments were complete.]

4. Lien Stripping of Second Mortgage [This may be better suited in Part II.B as an explanation for why courts reach certain outcomes. But it might be appropriate to discuss it here as an issue that Rule 3002.1 exposed: does lien stripping a second mortgage influence the

[246] There might be a few exceptions [Appendix A].
[247] This process will be explained in more detail. *See* 11 U.S.C. § 362.
[248] *In re Gibson*, 582 B.R. at 22.
[249] *In re Gibson*, 582 B.R. at 21.
[250] *In re Gibson*, 582 B.R. at 21.

"payments under the plan" determination? For now, I'm leaving it in the issues section until it is fleshed out in more detail.]

[Some courts have expressed concern in entering a discharge when a second lien is stripped and the debtor fails to make postpetition mortgage payments. "The Debtors commenced an adversary proceeding in September of 2011, and default judgement was subsequently entered against Bank of America Home Loans deeming the second mortgage claim to be allowed as a non-priority general unsecured claim, and providing that the second mortgage lien would be voided upon the issuance of a chapter 13 discharge."[251] "Of particular concern in this case is the § 506 valuation motion to strip off a second mortgage that the Court approved."[252] *In re Gonzales*, 532 B.R. at 830.]

Part III: Legislative and Procedural Changes

[A discussion on the prevalence of the problem will occur here based on the questionnaire results: if the problem is rare, an FJC educational program might be appropriate; if the problem is more common, a modification to the notice provisions or change to the rules or statute might be appropriate.]

The purpose of Rule 3002.1 was to "to provide a uniform, national procedure in chapter 13 cases for the disclosure of postpetition mortgage fees, expenses, and charges and other amounts required to be paid to cure arrearages and maintain mortgage payments pursuant to § 1322(b)(5)."[253] But, the issues described *supra* Part II demonstrate how the bankruptcy system's inability to effectively monitor postpetition mortgage payments has led to inconsistent handling by the courts and a loss of debtors' discharges. In many ways, Rule 3002.1 has created a bigger version of the very problem it was enacted to solve.

For example, one of the ultimate goals of Rule 3002.1 was to prevent a debtor's home from being foreclosed on immediately following bankruptcy because the debtor was unaware that she was in default.[254] Now, Rule 3002.1 is creating a penalty much more severe than the one it was attempting to remedy. [While the problem might not be happening in every court around the country, it is still an issue because of the massive inconsistencies it is creating. There is also differing authority on the issue, but no circuit split or Supreme Court opinion that looks like it might address the issue. Furthermore, losing the discharge is a severe penalty.]

Part III looks at possible ways to remedy the issues with Rule 3002.1 and created by Rule 3002.1 as explained in Part II.C. First, Part III.A identifies and evaluates who might be in the best position to monitor postpetition mortgage payments. Second, Part III.B suggests some rule amendments and systematic changes based on who is in the best position to monitor those payments.

A. Monitoring Agents

[251] *In re Hanley*, 575 B.R. 207, 211 (2017).
[252] *In re Gonzales*, 532 B.R. at 833.
[253] Memo, Aug. 27, 2008, at *1.
[254] [CITE]

There are four entities that could potentially monitor postpetition mortgage payments: Chapter 13 trustees, debtors, mortgagees, and the court. Because some of the roles and responsibilities of these four entities depend on whether a Chapter 13 trustee or a debtor is the disbursing agent, the arguments articulated in this section are meant to apply across the spectrum of districts.[255] Part III.B separately discusses conduit districts as a form of monitoring postpetition mortgage payments.

[The following questions/results from the questionnaire[256] will be discussed here: Q17 – Who do you think should be monitoring postpetition mortgage payments disbursed by a debtor?]

1. Chapter 13 Trustees

Chapter 13 trustees may seem the most logical or likely monitoring agents. And in conduit districts, the courts have clarified in the local rules or by a standing order that it is the Chapter 13 trustees' duty to monitor these payments.[257] But, in direct and case-by-case districts it is harder to argue that Chapter 13 trustees should be responsible for monitoring these payments because the money does not flow through their offices.

A statutory argument can be made in favor of placing the burden on Chapter 13 trustees to monitor all postpetition mortgage payments. Section 1302 outlines the duties of a Chapter 13 trustee, and those duties are also reiterated in the Handbook for Chapter 13 Standing Trustees published by the U.S. Trustee.[258] Section 1302(b)(5) states that the "trustee shall—ensure that the debtor commences making timely payments under section 1326 of this title."[259]

Section 1326 describes the payments made under the plan and how those payments are made. This includes payments disbursed by the debtor, or other payments not disbursed by the trustee but "provided for in the plan or in the order confirming the plan."[260] As stated above, the language of Section 1302(b)(5) instructs the trustee to "ensure that the debtor commences making timely payments" under Section 1326 and does not limit this instruction to only payments that are disbursed by the trustee.[261] In addition, the Handbook articulates that the "standing trustee is more than a mere disbursing agent."[262] Therefore, Section 1302(b)(5) could be read to mean that Chapter 13 trustees are responsible for monitoring all payments under the plan and not only the payments they disburse.

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[255] It is important to remember that consistent monitoring is difficult in a system that allows for such variety of practice.
[256] *See* Appendix B.
[257] [CITE].
[258] 11 U.S.C. § 1302(b)(5); https://www.justice.gov/sites/default/files/ust/legacy/2015/05/05/Handbook_Ch13_Standing_Trustees_2012.pdf at p. 1-2-3.
[259] 11 U.S.C. § 1302(b)(5).
[260] "Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan." 11 U.S.C. § 1326(c).
[261] *See* 11 U.S.C. § 1302(b)(5)
[262] https://www.justice.gov/sites/default/files/ust/legacy/2015/05/05/Handbook_Ch13_Standing_Trustees_2012.pdf at p. 1-2.

The other side of this argument is that this places a nearly impossible burden on Chapter 13 trustees. In direct districts, the postpetition mortgage payments do not pass through the Chapter 13 trustees' offices. Without monthly communication from debtors or mortgagees that these payments are being made, Chapter 13 trustees have virtually no information with respect to whether debtors are fulfilling their obligations. [I might discuss how some districts are attempting to bridge that gap through local rules requirements.]

Chapter 13 trustees also do not take a percentage fee from any payments disbursed by debtors, including direct postpetition mortgage payments. The percentage fee is calculated "from all payments received."[263] If Chapter 13 trustees are not being paid a percentage fee of the direct postpetition mortgage payments, it is fair to conclude that they should not responsible for monitoring those fees. Furthermore, the court in *In re Gibson* pointed out that "[n]othing in the Bankruptcy Code imposes an affirmative duty on the trustee to confirm that all direct payments are being made to creditors during the term of the plan."[264]

While bankruptcy courts have not interpreted Section 1302(b)(5) as broadly as above, some courts have found that a Chapter 13 trustee has a duty to inform the court if she becomes aware of a postpetition mortgage payment default. The court in *In re Gonzales* stated that it did not expect "a chapter 13 trustee to determine the status of [direct postpetition mortgage] payments before making a request for discharge in a chapter 13 case."[265] It did, however, expect the trustee to inform the court if the trustee had information of an alleged default.[266] Similarly, the court in *In re Finley*, held that "[b]ecause the Trustee had notice of the Debtors' failure to make post-petition mortgage payments in ample time to file an objection to their Motion for Discharge" the Chapter 13 trustee was barred from seeking a revocation of the debtors' discharge under Section 1328(e)(2).[267]

[There are more general reasons why Chapter 13 trustees would be good monitoring agents. They are in frequent communication with both the mortgagees and debtors, they keep excellent business records, and they review the debtors' yearly financial information. But, it is still difficult to conclude that chapter 13 trustees are in the best position to monitor postpetition mortgage payments.

Section 1326(c) leaves open the possibility of two different types of districts.[268] The difference between direct and conduit districts is tied directly to the disbursement of postpetition mortgage payments. Placing the burden to monitor on Chapter 13 trustees, while still allowing debtors to disburse payments pursuant to Section 1326(c) and avoid paying the trustee fee, creates a perverse incentive. This also places a burden on Chapter 13 trustees to monitor postpetition payments in direct districts that far outweighs the benefits. Discussion on how Chapter 13 trustee fees are calculated.

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[263] 28 U.S.C. § 586(e)(2).
[264] *In re Gibson*, 582 B.R. at 21.
[265] *In re Gonzales*, 532 B.R. 828, 833 (2015).
[266] *In re Gonzales*, 532 B.R. 828, 833 (2015).
[267] *In re Finley*, 2018 WL 4172599, at *3 (Bankr. S.D. Ill. August 28, 2018).
[268] *See* 11 U.S.C. § 1322(b)(5).

This section is not complete, but gives a few examples of why Chapter 13 trustees should or should not be the monitoring agents. I will likely add a discussion about Chapter 13 trustees as a subset of the UST, and a function of the UST is to monitor.]

2. Debtors

The other most logical monitoring agents are the debtors. In every district, debtors are responsible for making postpetition mortgage payments.[269] The only difference is who is on the receiving end of that payment: the Chapter 13 trustee or the mortgagee. And the debtors have the most to gain by making all their postpetition mortgage payments or the most to lose by defaulting on their postpetition mortgage payments.

[Here, I will discuss the arguments in favor and against requiring the debtor to be the monitoring agent. One of the main arguments in support of debtors as monitoring agents is that bankruptcy is also a rehabilitative tool.[270] A debtor is learning to manage money effectively, and one of the ways for her to do that is to be responsible for directly paying her mortgage each month. *See* credit counseling requirements and other debt counseling requirements.

At the start of each Chapter 13 bankruptcy case, the debtor proposes a plan and agrees to abide by the payment terms for the life of the plan.[271] Next, the bankruptcy court confirms the Chapter 13 plan once it determines that "the debtor will be able to make all payments under the plan and [] comply with the plan" and that "the filing of the petition was in good faith."[272] After confirmation, a debtor may risk dismissal of her case if she materially defaults on her plan.[273]

As discussed *supra* Part II, failure to make postpetition mortgage payments may be seen as a material default under Section 1307.

Some courts have hinted that debtors should be more active in monitoring postpetition mortgage payments. The *In re Coughlin* court noted that "[i]t would certainly have been better for the Sangamayas' counsel to have been proactive and diligent in bringing these issues to the Court's attention much sooner and with greater clarity."[274]

Additional arguments in support of debtors as monitoring agents: with respect to domestic support payments they are already functioning as monitoring agents; the debtor should be keeping records and have the knowledge on whether in default; debtor is responsible in some circuits for moving for discharge; *Matter of Foster*, at 486-87: talk about benefits of debtors as disbursing agent (before Rule 3002.1 was enacted); debtor's motivation to accurately monitor these payments is tied directly to her discharge and saving her home.

Arguments against debtors as monitoring agents: *In re Gibson*, 582 B.R. at 18 "No provision of the Bankruptcy Code or Rules requires a debtor to report a default on direct payments."; "The Bankruptcy Code does not now and never has required a debtor to certify that he paid all other direct payments that came due during the course of the case. The absence of

[269] *See* 11 U.S.C. § 1326.
[270] Bermant and Braucher, at 273.
[271] *See* 11 U.S.C. § 1321.
[272] 11 U.S.C. § 1325(a)(6)-(7).
[273] 11 U.S.C. § 1307(c)(6).
[274] *In re Coughlin*, 568 B.R. at 480.

such a certification requirement is inconsistent with the view that section 1328(a) imposes an absolute condition to discharge that the debtor has made all direct mortgage payments as well as any other direct payments such as long-term car loan payments. Congress could have required that a debtor certify, as a precondition to discharge, that he made all direct payments. Instead, Congress elected to impose a certification requirement only with respect to domestic support payments."[275]; poor money management skills that lead to bankruptcy.

One reason why debtors may not be the best monitoring agents is the difficulty in record keeping, particularly with respect to mortgage servicers. Debtors that directly pay their postpetition mortgage are not likely to keep detailed records with respect to fees and escrow amounts.[276] Furthermore, mortgages are frequently sold, repackaged, and sold again, making it even more difficult for debtors to keep detailed records of their payments.[277]

In 2006, the Southern District of Texas, in *In re Perez*, explained the difficulties debtors face in keeping their own records with respect to direct postpetition mortgage payments.[278] The court stated that a "detrimental consequence" of mortgages changes servicers frequently is the "loss of payment records by mortgagees and servicing agents."[279] This "poor record keeping" then leads to "an increasing number of motions to lift stay that contain incorrect allegations about whether the debtor is in default, and if so, by how many payments."[280] The court explained that this was the reason behind the local rule that required debtors to make postpetition mortgage payments through the trustee.[281]

It is important to note that *In re Perez* was decided before the enactment of Rule 3002.1. But, many of the frustrations articulated by that court with respect to mortgage services are still present.[282]

Burden on attorneys to help monitor could increase the cost of hiring an attorney and could lead to more pro se debtors.]

3. Mortgagees

[In this section I will discuss the arguments in support and against requiring mortgagees to monitor postpetition mortgage payments. I will also discuss the mortgage servicer issue. My initial research has pointed to the arguments listed below.

Arguments in support: "Secured creditors who receive direct payments from the debtor are expected to protect themselves."[283]; "Further, a creditor holding a mortgage is usually quite capable of looking after its own interests. It is the experience of this Court that if a debtor

[275] *In re Gibson*, 582 B.R. at 22.
[276] Bermant and Braucher, at 265.
[277] *See In re Perez*, 339 B.R. 385, 415 (Bankr. S.D. Tex. 2006).
[278] *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006).
[279] *In re Perez*, 339 B.R. at 415.
[280] *In re Perez*, 339 B.R. at 415.
[281] *In re Perez*, 339 B.R. at 415.
[282] I am continuing to search for an article that further explains the practices of mortgage servicers.
[283] *In re Gibson*, 582 B.R. at 21.

defaults on a mortgage, the creditor is usually ready and capable of taking care of himself."[284]; purpose of Rule 3002.1 was to place a greater monitoring burden on the mortgagees.

Arguments against: Mortgagees are not obligated to file a lift stay (the reason why we are having this issue to begin with); mortgage servicer issues; debt is not dischargeable, so not worried about the discharge, and does not need to bring a lift stay to actually protect its interest; *In re Gonzales* 833 BAC to dismiss or lift stay.]

[Southern District of Indiana Bankruptcy Court has a local rule that requires the mortgagee to notify the Court, debtor, and the trustee if the mortgage servicer has changed. This is a big issue for a lot of parties and might be worth considering for the bankruptcy rules – see below as an additional amendment to Rule 3002.1.

B-3002.1-1. ADDITIONAL NOTICE REQUIREMENTS FOR MORTGAGE LENDERS IN CHAPTER 13 (c) Notice of Change in Servicer

If the mortgage servicer changes while the bankruptcy is pending, the mortgage holder shall file with the Court and serve upon the Debtor and the trustee a notice providing the name of the servicer, the payment address, a contact phone number, and a contact email address.[285]

Some judges in the Northern District of Ohio do this too, in the Canton and Cleveland courthouse: (7) Change of Address or Servicer. As soon as practicable before a change of the Real Property Creditor payee or the address to which payments should be made, the Real Property Creditor shall file with the Court a document that substantially conforms to the most current version of local forms—"Notice of Transfer of Servicing" and "Notice of Transfer of Claim"—and serve it on the Trustee, the Debtor, and the Debtor's attorney. The versions of these two local forms in effect as of December 1, 2017, are attached as Exhibits A and B.[286]]

4. Courts

[This option will likely be removed because it is not the court's duty to monitor, but it is being used as a place holder.]

There is little support to place the monitoring burden on the bankruptcy courts. Leading up to the Bankruptcy Reform Act of 1978, the "Report of the Commission on the Bankruptcy Laws of the United States" expressed a need to separate the bankruptcy court from administrative duties.[287]

As noted above, there are legitimate reasons and concerns with respect to each monitoring agent. The possible solutions to the issues with Section 1322(b)(5) and Rule 3002.1 discussed below attempt to split the burden of monitoring among the different monitoring agents.

B. Legislative and Procedural Changes

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[284] *Matter of Foster*, 670 F.2d 478, 487 (1982).

[285] https://www.insb.uscourts.gov/content/b-30021-1-additional-notice-requirements-mortgage-lenders-chapter-13

[286] Administrative Order 17-04 available at https://www.ohnb.uscourts.gov/sites/default/files/administrative_orders/admin-order-17-4-conduit-payments-electronic-signatures.pdf.

[287] 93d Congress, 1st Session House Document No. 93-137, Part I, p. 103.

The suggested changes in this section are aimed at offering debtors the best chance at a discharge and creditors the greatest opportunity to have a fully performing asset.

[Introduction]

There are a few ways Rule 3002.1 could be amended that would alleviate some of the problems described above. The amendments range from language edits to adding certifications by the debtor and the mortgagee.

[Here, I will go further in depth on the questionnaire results so that I can note whether this is a small issue or a large issue. If it is a small issue, perhaps a few simple changes will address the problematic cases. If it is a large issue, it is likely that significant changes will need to be made, which includes considering conduit districts as the most viable form of monitoring.]

1. Amendments to Rule 3002.1(f)

One solution to the timing and language issues explained *supra* Part II.C is an amendment to Rule 3002.1(f). Amending the rule to include a timeframe for Chapter 13 trustees to file their notice with respect to the certification of completed plan will likely prevent the entry of a premature discharge. Additionally, altering the "all payments under the plan" language will likely reduce confusion among Chapter 13 trustees, debtors, and courts.

Currently, Rule 3002.1 does not instruct whether Chapter 13 trustees should file a Rule 3002.1(f) notice before or after the certification of completed plan. Chapter 13 trustees in the Eastern District of New York, the Eastern District of Wisconsin, [etc.][288] learned by trial and error that filing a certification of completed plan before or concurrently with a Rule 3002.1(f) notice interfered with the issuance of the discharge. In each of those cases, the Chapter 13 trustee followed the 30 days requirement established by Rule 3002.1(f), but did not always wait until a Rule 3002.1(g) response was filed to certify that the plan was complete.[289] And, the courts, relying only on the Chapter 13 trustees statements, also did not wait for the Rule 3002.1(g) response before entering a discharge.[290]

The districts above that have dealt with this issue are mostly direct and case-by-case districts.[291] This is because Chapter 13 trustees in conduit districts are usually aware of the mortgage claim status before filing a Rule 3002.1(f) notice.[292] Chapter 13 trustees typically will not file a certification of completion of plan if they are still waiting on payments from debtors to distribute to secured creditors.[293]

The response and notice procedure outlined in Rule 3002.1 needs to be amended so that the process is consistent in all districts.[294] One way to prevent timing issues is to amend Rule

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[288] *In re Coughlin, In re Bethe, In re Gibson, In re Gonzales, In re Finley*

[289] *See, e.g., [CASE LAW]*. *See also* discussion *supra* Part II.C for why those trustees did not always wait.

[290] *See, e.g., [CASE LAW]*.

[291] CHECK/VERIFY THIS IS ACCURATE. There may be conduit districts that struggle with the timing issue that did not publish any cases addressing the issue.

[292] [SOURCE]. Chapter 13 trustees in conduit districts disburse both the arrearage payments and the current payments to mortgage claim holders.

[293] [FIND A SOURCE]. 11 U.S.C. §§ 704(a)(9), 1302(b)(3).

[294] See discussion *supra* Part I.B.1. The Subcommittee intended for Rule 3002.1 to apply in all districts, which means the rule needs to be written in a way that accounts for the differences in practices.

3002.1(f) so that a Rule 3002.1(f) notice must be filed before a certification of completed plan. This ensures that Chapter 13 trustees and courts have the opportunity to review the Rule 3002.1(f) notice and Rule 3002.1(g) response before a certification of completed plan is filed.[295] A united practice across districts also would provide more consistency to creditors with liens on property across the country.[296]

[Benefits of this amendment include less use of judicial resources to review a premature discharge; clarity for Chapter 13 trustees, but also all parties.]

Another way to promote consistency and prevent additional "clarification" issues is to amend the "all payments under the plan" language in Rule 3002.1(f). Rule 3002.1(f) directs the Chapter 13 trustee, or in some cases the debtor, to file a notice of final cure payment on the claim holder "[w]ithin 30 days after the debtor completes all payments under the plan."[297] The phrase "all payments under the plan" is unclear.[298] In some districts this phrase includes direct payments made pursuant to Section 1322(b)(5), and in others, it does not.

The majority of direct and case-by-case districts interpret "all payments under the plan" to include postpetition mortgage payments disbursed directly by the debtor.[299] In these districts, the Chapter 13 trustees likely do not know if the debtor has completed "all payments under the plan" before filing a Rule 3002.1(f) notice.[300] Leaving this language in Rule 3002.1(f) may lead to more confusion and inconsistencies as courts continue to interpret what "payments under the plan" mean. For example, once a Chapter 13 trustee files a Rule 3002.1(f) notice, it creates the presumption that all payments under the plan have been completed.[301] Debtors who are not current on their direct postpetition mortgage payments may use the filing of a Rule 3002.1(f) notice to argue that those payments are not payments under the plan.

In order to be clear, the language of Rule 3002.1(f) does not need to articulate whether postpetition mortgage payments disbursed directly by the debtor are payments under the plan. When drafting the triggering language for Rule 3002.1(f), the Subcommittee stated that the notice and response process was intended to occur at the end of a Chapter 13 plan.[302] The end of a Chapter 13 plan typically coincides with a debtor's final payment to the Chapter 13 trustee, even if the debtor also is making direct payments on certain claims.[303] So, one way to ensure the

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[295] This would hopefully prevent the entry of a premature discharge that lead to many of the difficult decisions and unfortunate outcomes described *supra* Part II.

[296] Creditors would not have to worry that a discharge would be entered before they had a chance to inform the bankruptcy court of the mortgage status.

[297] Fed. R. Bankr. P. Rule 3002.1(f).

[298] *See supra* Part II.

[299] *See* [CASE LAW AND FOOTNOTES]. [In conduit districts, this issue is not litigated because postpetition mortgage payments disbursed by the Chapter 13 trustee are understood to be payments under the plan.]

[300] [Definitions for direct and case-by-case district. In conduit districts, the Chapter 13 trustee will most likely know.]

[301] [CITE]

[302] Memorandum from subcommittee on consumer issues to advisory committee on bankruptcy rules, re: Home mortgage claims: comments on proposed amendments to Rule 3001(c) and proposed new rule 3002.1, April 7, 2010, at *23, available at https://www.uscourts.gov/sites/default/files/fr_import/BK2010-04.pdf.

[303] [There should be a code section?]. *In re Gibson*; *See* discussion on timing *supra* Part II.C.

notice and response procedure still occurs at the end of a Chapter 13 plan while also resolving the "payments under the plan" language issue is to change the triggering event to "after the debtor completes all payments to the trustee." This amendment prevents the rule from determining whether direct postpetition mortgage payments are payments under the plan, but still guarantees that Rule 3002.1(f) is operating consistently across districts.

Debtors may file a Rule 3002.1(f) notice if the Chapter 13 trustee does not. A phrase similar to "payments under the plan" is used as the triggering language here as well: "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."[304] It is unclear whether continued use of "all plan payments" here would create the same issues as explained above.[305] But for consistency purposes, this language also should be amended to "all plan payments to the trustee have been completed." [This thought needs to be further fleshed out: Another benefit to this amendment is that it makes clear that Rule 3002.1(f) deals specifically with the "cure" part of Section 1322(b)(5). Removing the phrase "all payments under the plan" reinforces that understanding.]

Amending Rule 3002.1(f) to incorporate the suggestions above only requires a few small changes to the current rule. Rule 3002.1(f) is currently written as follows:

> (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 the 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.[306]

A revised version of Rule 3002.1(f) would be written as follows:

> (f) Notice of Final Cure Payment. Within 30 days after the debtor completes all payments ~~under the plan~~ *to the trustee, and before the trustee files a certification of completed plan*, the trustee shall file and serve on the holder of the claim, 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. The notice shall also

[304] Fed. R. Bankr. P. Rule 3002.1(f) (emphasis added).

[305] The term "all plan payments" is still unclear in direct and case-by-case districts. A debtor in either of those districts may file a Rule 3002.1(f) notice despite not being current on direct postpetition mortgage payments. If the court holds these payments to be payments under the plan, the debtor may still attempt to argue that based on the language of Rule 3002.1(f) that the direct payments were not payments under the plan. This would be a less convincing argument than if the Chapter 13 trustee filed the Rule 3002.1(f) notice, and might not be made at all. But, leaving the language as is still leaves open the possibility for argument.

[306] Fed. R. Bankr. P. 3002.1(f).

> 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 *to the trustee* 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.[307]

These relatively small amendments could resolve most of the timing and "payments under the plan" language issues. [This also might be an appropriate place for the thought discussed above that it is important to clarify that this rule provision is only certifying that the "cure" payments are complete. It signals to courts that the other half of the claim, the "maintenance" payments, might not be complete. Both parts of the claim need to be complete for a discharge to be entered (in most districts).]

[No changes need to be made to Rule 3002.1(g), (h). I might add a discussion of Rule 3002.1(h) here, and discuss whether the mortgage claim holder should be able to move for a status determination.]

[I will also discuss/note that these amendments don't create problems for other types of "cure and maintain" debt. These edits will not create a new problem while solving an old one.]

These amendments to Rule 3002.1(f) are a helpful solution to the issues explained *supra* Part II.C, but they do not resolve the notice issue created by insufficient monitoring. There is still the problem of debtors being unaware that they might lose their discharge because they are in default on their postpetition mortgage payments. This is particularly troublesome if the plan term has already expired.[308]

[This section is still a work-in-progress. The response to Question 18 of the questionnaire will be discussed here: "At what time should a debtor's discharge be entered?"]

[Note, which also might fit better at the beginning in describing Rule 3002.1: Rule 3002.1(f), (g) were likely added to prevent foreclosure in instances where there were small discrepancies or missed payments that could be remedied quickly. The process was supposed to prevent debtors from losing their homes based on such small amounts. The Subcommittee could not have foreseen that this process would lead to so many issues and losses of discharges. Before Rule 3002.1 was enacted, there was no monitoring process for direct postpetition mortgage payments. Bankruptcy wasn't dealing with this failure by the debtors. By attempting to fix a problem, the Subcommittee accidentally uncovered a much larger issue.]

2. Amendments to Official Form 410S1, Official Form 410S2, and Official Form 4100N

[This next suggestion is aimed at addressing the notice issue. The suggested amendments to the official forms attempt to inform Chapter 13 trustees, debtors, and courts of a default on a mortgage claim earlier in the bankruptcy case.

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[307] Fed. R. Bankr. P. 3002.1(f) with revisions identified in italics.

[308] Debtors are not able to modify a plan after the term expires, unless the original plan was less than five years. [CODE PROVISION].

Currently, there is no requirement for mortgage claim holder to notify bankruptcy courts of a postpetition mortgage payment default until the conclusion of a Chapter 13 plan.[309] Mortgage claim holders, or mortgagees, may file a motion to lift the automatic stay for lack of adequate protection based on a default, which would notify the court, but they are not required to do so to protect their asset.[310] If no such motion is filed, then there is the potential for a default to remain unaddressed until the end of a Chapter 13 plan.]

There are four official forms used to implement the notice procedures outlined in Rule 3002.1. Rule 3002.1(d) instructs holders of claims to use both Official Form 410S1 and Official Form 410S2 to notify parties in interest of mortgage payment changes, fees, expenses, and charges during the Chapter 13 bankruptcy.[311] Official Form 410S1, Notice of Mortgage Payment Change ("Form 410S1"), is used to implement notice under Rule 3002.1(b).[312] Form 410S1 instructs the claim holder to list the date of payment change and the total new payment.[313] Form 410S1 also asks about an escrow account payment adjustment, a mortgage payment adjustment, and any other payment change.[314] The purpose of Form 410S1 is "to allow the debtor and the trustee to see in a clear format the amount of and reason for a payment change in advance of its effective date and to have access to the supporting documentation."[315]

Official Form 410S2, Notice of Postpetition Mortgage Fees, Expenses, and Charges ("Form 410S2"), is used to implement notice under Rule 3002.1(c).[316] Form 410S2 instructs the holder of a claim to "[i]temize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed."[317] At the end of Form 410S2, there is a statement warning the claim holder that "[t]he debtor or trustee may challenge whether the fees, expenses, and charges [the mortgagee] listed are required to be paid."[318] The original purpose behind this statement was to "provide[] notice to the mortgagee of the possibility of a challenge and a reminder to the debtor and the trustee of their right to seek such determination."[319]

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[309] There is no formal requirement in the Bankruptcy Code or Federal Rules of Bankruptcy Procedure. There are some districts that require notice through a local rule. *See* Appendix A.

[310] A discussion of 11 U.S.C. § 362 is relevant here.

[311] "(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)." Fed. R. Bank. P. 3002.1(d).

[312] *See* Official Form 410S1 available at . "(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." Fed. R. Bankr. P. 3002.1(b).

[313] Official Form 410S1.

[314] Official Form 410S1, Part 1, Part 2, and Part 3.

[315] Memo, April 6, 2010, at *4.

[316] Official Form 410S2 available at . "(c) Notice of Fees, Expenses, And Charges. The holder of a 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." Fed. R. Bankr. P. 3002.1(c).

[317] Official Form 410S2, Part 1.

[318] Official Form 410S2.

[319] Memo, April 6, 2010, at *5.

The second set of forms, Official Form 4100N and Official Form 4100R, are used to implement the notice and response process outlined in Rule 3002.1(f), (g). Official Form 4100N, Notice of Final Cure Payment ("Form 4100N"), is used to implement notice under Rule 3002.1(f).[320] Included in Form 4100N are the mortgage information, the total cure disbursements made by the trustee, and the identity of the disbursing agent.[321] Form 4100N also includes a reminder to the mortgagee to respond within 21 days of receiving this notice.[322]

Official Form 4100R, Response to Notice of Final Cure ("Form 4100R"), is used to implement the mortgagee's response under Rule 3002.1(g).[323] Form 4100R is similar to Form 4100N and includes the mortgage information and status of the cure and maintain payments. It asks the mortgage claim holder whether it agrees with the trustee's accounting of the arrearage payments and also if the debtor has successfully maintained the mortgage payments.[324] If the mortgage claim holder certifies that either the arrears or the post-petition mortgage payments are not complete, it must also attach an itemized payment history.[325]

[Rule 3002.1(g) instructs mortgagee to file a response to the Rule 3002.1(f) notice. Adding something similar to Part 3 and Part 4 of Form 4100R to Form 410S1 and Form 410S2 would create the opportunity for parties to address a default while the case is still pending. It will not catch every default because in some cases a Form 410S1 or Form 410S2 will not be filed, but a default might occur. However, amending these forms increases the opportunity for earlier notice. It also places part of the monitoring burden on the mortgagees without forcing them to file a motion to lift stay or file a complete separate notice.[326]

The amended official form would also provide notice to parties that might otherwise not know about a default: Chapter 13 trustee in direct, debtor's attorney, the court, and clerk's office. With more parties aware of a default, there is more opportunity for the default to be addressed before the termination of the Chapter 13 plan. There is a possibility that the rules might need to be amended to enforce this notice requirement. But, Rule 3002.1(d) requires mortgage claim holders to use the official forms, so an amendment to the official form might be all that is necessary.

Images below of Part 3 and Part 4 are from Official Form 4100R: Response to Notice of Final Cure Payment.

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[320] Official Form 4100N ("According to Bankruptcy Rule 3002.1(f), the trustee gives notice that the amount required to cure the prepetition default in the claim below has been paid in full and the debtor(s) have completed all payments under the plan.").

[321] Official Form 4100N, Part 1-3. The disbursing agent is responsible for paying postpetition mortgage payments.

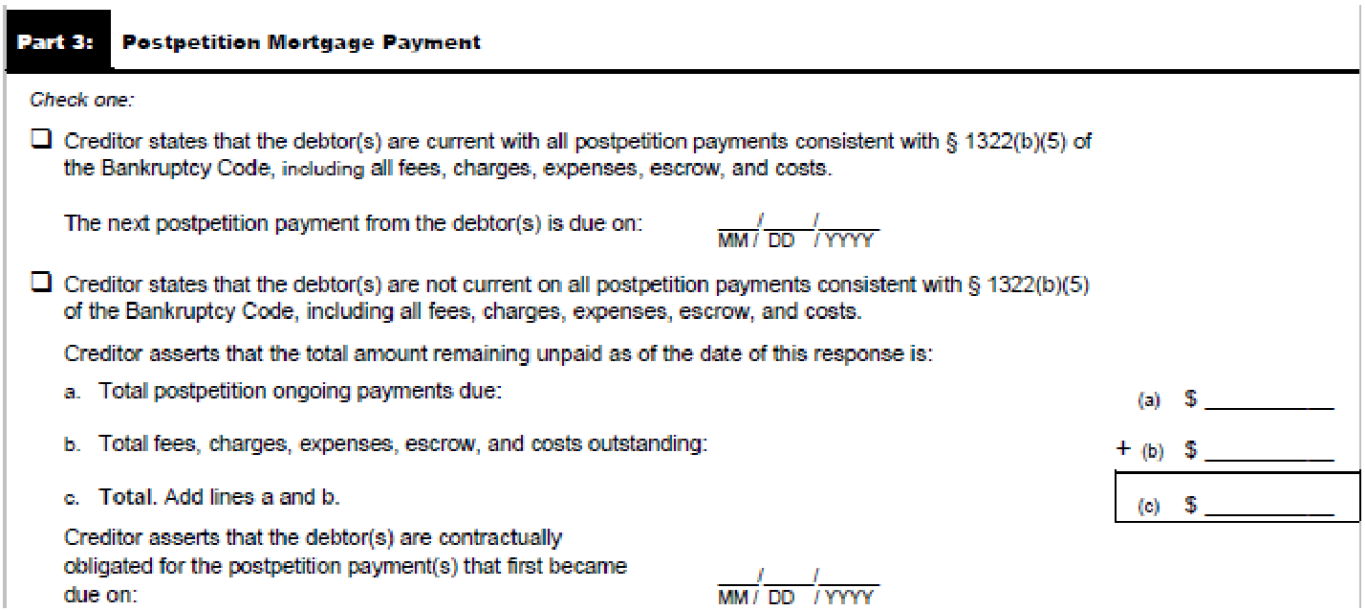
[322] Official Form 4100N, Part 4.

[323] Official Form 4100R ("According to Bankruptcy Rule 3002.1(g), the creditor responds to the trustee's notice of final cure payment.")

[324] Official Form 4100R, Part 2-3.

[325] Official Form 4100N, Part 4.

[326] [It also prevents the creditor from having to prematurely foreclose on an asset to protect it. The bankruptcy system is also for the creditors. This type of claim is exempt from discharge so creditors won't jump through hoops to protect it.]



Part 3: Postpetition Mortgage Payment

Check one:

☐ Creditor states that the debtor(s) are current with all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

The next postpetition payment from the debtor(s) is due on: ___/___/___ MM / DD / YYYY

☐ Creditor states that the debtor(s) are not current on all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

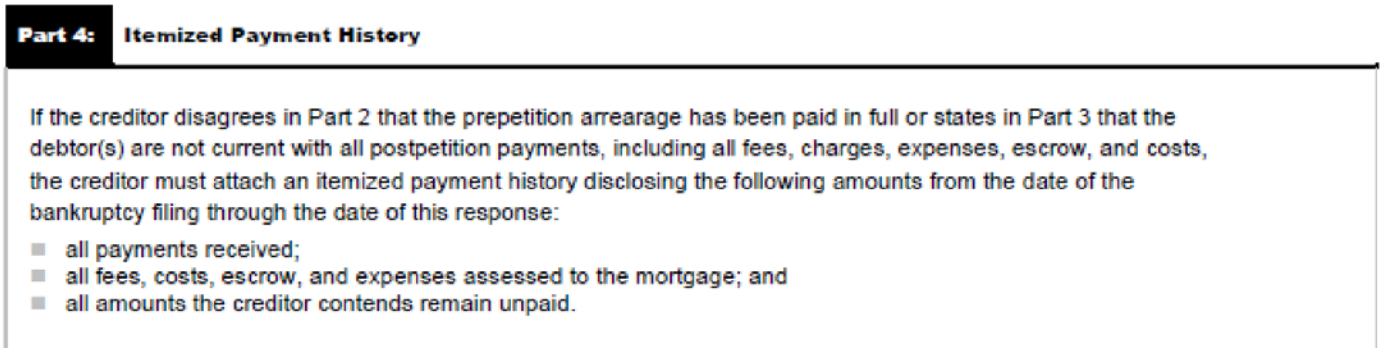
Creditor asserts that the total amount remaining unpaid as of the date of this response is:

a. Total postpetition ongoing payments due: (a) $ _____

b. Total fees, charges, expenses, escrow, and costs outstanding: + (b) $ _____

c. Total. Add lines a and b. (c) $ _____

Creditor asserts that the debtor(s) are contractually obligated for the postpetition payment(s) that first became due on: ___/___/___ MM / DD / YYYY



Part 4: Itemized Payment History

If the creditor disagrees in Part 2 that the prepetition arrearage has been paid in full or states in Part 3 that the debtor(s) are not current with all postpetition payments, including all fees, charges, expenses, escrow, and costs, the creditor must attach an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:

- all payments received;
- all fees, costs, escrow, and expenses assessed to the mortgage; and
- all amounts the creditor contends remain unpaid.

There needs to be a discussion about what will happen if amended Form 410S1 or amended Form 410S2 informs parties-in-interest of a default.

Official Form 4100N also needs to be revised. This will be explained in further detail, but the revisions are small and include altering the "payment under the plan" language and clarifying that the mortgage payment is being "disbursed" by either the Chapter 13 trustee or the debtor.

This section will also include a discussion of mortgage services that ties back to the mortgagees as monitoring agents. Mortgagees track arrearage payments and current payments differently, amending these forms forces them to review both types of payments throughout the life of the Chapter 13 bankruptcy.

Note: If we're going to continue to have a system that allows for such diversity of practice on grounds that it benefits all parties, all parties need to shoulder some of the monitoring responsibilities.]

3. Additional Requirements to Federal Rule of Bankruptcy Procedure 3002.1

Amending Form 410S1 and Form 410S2 is a small-scale solution to the notice issue created by insufficient monitoring. A more comprehensive solution would be to add a notice and response procedure to Rule 3002.1 that occurs over the life of the Chapter 13 plan. It is important that the notice and response requirement work effectively in all districts.

Two case-by-case districts, the Northern District of California ("NDC") and the Northern District of Texas ("NDT"), have a separate notice and response structure in place for monitoring mortgage payments disbursed directly by the debtor during Chapter 13 bankruptcy.[327] In the "Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California," the NDC explains that debtors may elect to "make their post-petition, monthly payments directly to the secured creditor."[328] The NDC makes it clear that direct postpetition payments are payments under the plan and that it is important for the Chapter 13 trustee and other parties-in-interest to monitor these payments to prevent a default.[329] If debtors elect to pay postpetition mortgage payments directly, they list those payments in the "non-standard provisions" section of their Chapter 13 plan.[330]

Debtors in the NDC who elect to make postpetition mortgage payments directly are subject to certain requirements. First, prior to every meeting of secured creditors, those debtors must file a "Declaration of Direct Payment" stating that they are current on all postpetition mortgage payments.[331] The NDC bankruptcy court will not confirm Chapter 13 plans of debtors who are not current.[332] Next, during their Chapter 13 bankruptcy, debtors are required to file quarterly declarations with the bankruptcy court stating that they are current on their postpetition mortgage payments.[333] They must also provide documentary evidence to support their

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[327] *See* Appendix A, Case-by-case: California Northern and Texas Northern.

[328] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 7, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf.

[329] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 7, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf.

[330] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 7, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf; *see also* [CHAPTER 13 PLAN INFO]

[331] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 7-8, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf.

[332] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 8, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf.

[333] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 7, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf.

declarations.[334] In addition to the requirements above, the bankruptcy court may impose additional requirements or certifications to ensure that these payments are being made.[335]

There are many benefits to the requirements the NDC mandates for direct postpetition mortgage payments. Debtors are the monitoring agents, which is important because debtors are in the best position to know if these payments are being made and have the most to lose for failing to make these payments. The declarations are frequent enough to provide for consistent monitoring, but not so frequent that they are burdensome.[336] In addition, debtors can choose how to make postpetition mortgage payments based on what makes the most sense for their specific Chapter 13 plan.[337] But most importantly, the NDC makes it clear that it considers direct postpetition mortgage payments to be payments under the plan and that debtors are the main monitoring agents of these direct payments.

There are some downsides to these requirements. The cost of hiring an attorney for Chapter 13 bankruptcy in the NDC is higher than average. One reason for this might be because debtors who elect to make direct payments must also file quarterly declarations.[338] In the NDC, for cases filed on or after January 1, 2019, a presumptively reasonable fee for an attorney to seek in a basic Chapter 13 case with only one secured claim on a piece of real property is approximately $6,000.[339] In comparison, in the Southern District of California ("SDC"), a direct district, for cases filed on or after July 24, 2012, a presumptively reasonable fee for an attorney to seek in a consumer Chapter 13 case is approximately $3,600.[340] [Not sure how I want to

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[334] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 7, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf.

[335] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 8, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf ("Depending on circumstances, the court may (1) require non-conduit plans to be set for a confirmation hearings, i.e., not confirmed by consent or as part of an uncontested confirmation calendar; (2) require additional reporting regarding monthly payments being made directly to creditors, and (3) require, in connection with the issuance of a discharge, proof that all direct payments have been made in accordance with the plan; and (4) require such other and further proof of compliance with these non-conduit provisions as it deems appropriate.")

[336] [Over the course of five-year plans, debtors will make approximately 20 declarations.]

[337] [For some debtors, the ease of including postpetition mortgage payments in their monthly payments to the Chapter 13 trustee might outweigh the cost of the Chapter 13 trustee fee taken on those payments. For other debtors, the option to make monthly declarations, and avoid being charged a percentage fee on those mortgage payments, might be the only way they can propose a confirmable Chapter 13 plan.]

[338] There are likely other reasons that contribute to this higher cost.

[339] The fee for a basic case is $4,500 and the additional fee for real property with secured claims is $1,500. Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, III. Guideline Fees, p. 3-4 http://www.canb.uscourts.gov/sites/default/files/judge/procedures/Rights-and-Responsibilities-of-Chapter-13-Jan-2019-update-2.pdf

[340] Bankruptcy General Order No. 173-A, July 24, 2012, available at https://www.casb.uscourts.gov/sites/casb/files/documents/general-orders/GO173A.pdf. [I was unable to find a more recent order showing attorney fees.]

address the additional monitoring burden placed on the court and/or the Chapter 13 trustee to review the quarterly declarations.[341]]

Instead of requiring debtor declarations like the NDC, the NDT implemented a mid-case audit procedure in its local bankruptcy rules for claims pursuant to Section 1322(b)(5). The rule is in addition to the requirements of Federal Rule of Bankruptcy Procedure 3002.1 and it does not apply to conduit cases, although Chapter 13 trustees may choose to comply with it.[342] The NDT local bankruptcy rule 3002.1-1 (the "Mid-Case Audit Rule") requires the following:

> For all [non-conduit] cases filed on or after December 1, 2011, the Chapter 13 Trustee shall (during the periods month 18 to month 22, and month 42 to month 46 of the case) file and serve on the holder of the claim and its counsel and the debtor and debtor's counsel a "Notice to Deem Mortgage Current," or alternatively, a "Notice of Amount Deemed Necessary to Cure," ("Mortgage Notice") stating whether or not, to the trustee's knowledge, the debtor is current on his plan and mortgage, and if not, the amount believed necessary to cure any default on the plan and mortgage claim. The Mortgage Notice shall also contain negative notice language.[343]

Following the Mortgage Notice, the mortgage note holder has 60 days to respond with documentation itemizing any prepetition arrearages or postpetition amounts that are currently due.[344] The debtor has 90 days to reply to the Mortgage Notice.[345]

Based on a mortgage claim holder's response and a debtor's reply, or the lack therefore, the court, after notice and hearing, determines the status of the Section 1322(b)(5) payments.[346] The court issues an order (the "Mortgage Notice Order") solidifying its determination.[347] The Mortgage Notice Order precludes the mortgage holder and the debtor from further contesting the stated amounts unless the court finds that a failure to respond or reply was substantially justified or harmless.[348] The NDT makes it clear that the Mid-Case Audit Rule is not intended to interfere

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[341] Instructions for Chapter 13 Form Plan (NDC-1) Required in the Northern District of California, "Approved Non-Standard Provisions: Non-Conduit payment provision," p. 7, available at http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf ("The Chapter 13 Trustee shall not make any such post-petition monthly payments under § 5.02 of the Plan to the above named secured creditors.") and [INSERT LANGUAGE AND CODE PROVISION THAT CHAPTER 13 TRUSTEE ONLY TAKES FEE OFF OF MONEY RECEIVED]

[342] Local Bankruptcy Rule 3002.1-1(a),(b) Mid-Case Audit Procedures with Regard to Claims Secured by Security Interest in the Debtor's Principal Residence, available at https://www.txnb.uscourts.gov/sites/txnb/files/local_rules/TXNBLocal%20RulesFinalRevised12.1.2017.pdf

[343] Local Bankruptcy Rule 3002.1-1(b).

[344] Local Bankruptcy Rule 3002.1-1(c).

[345] Local Bankruptcy Rule 3002.1-1(c).

[346] Local Bankruptcy Rule 3002.1-1(d).

[347] Local Bankruptcy Rule 3002.1-1(d). The court may make this determination by default.

[348] Local Bankruptcy Rule 3002.1-1(e) ("Any order issued on a Mortgage Notice, (whether by default or after a response, and/or reply) shall preclude the holder and the debtor from contesting the amounts set forth in the order in any contested matter or adversary proceeding in this case, or in any other matter,

or replace Rule 3002.1.[349] Rather, the Mid-Case Audit Rule "is intended to provide an additional mechanism for parties to identify and resolve dispute regarding postpetition mortgage arrearages . . . at different checkpoints during a Chapter 13 case."[350]

[Here, I will include a discussion of the benefits and downsides to the Mid-Case Audit Rule.

Ultimately, a declaration by debtors and a mid-case audit process should be added to Rule 3002.1. Below are preliminary drafts of what those additions would look like based on the guidelines given in Rule 3002.1, and the requirements of NDC and NDT. I might remove the declaration provision, but I think that it is important for debtors to be current before plan confirmation and to be aware that these direct payments may be considered payments under the plan.

After current Rule 3002.1(a), I suggest adding the following:

> **(b) Declaration of Direct Payments.** If the plan provides for the debtor to make contractual installment payments on claims secured by a security interest in the debtor's principal residence, then the debtor shall file a declaration of direct payments stating the debtor is current on postpetition mortgage payments before plan confirmation.

There may need to be an official form created for debtors to comply with this declaration. It would be helpful if this form included language along the lines of "Failure to make these payments while in Chapter 13 bankruptcy may result in a denial of discharge."

After current Rule 3002.1(e), I suggest adding the following:

> **(f) Notice of Mid-Case Cure Payment.** During the periods covering month 18 to month 22, and month 42 to month 46 of the plan if it is a 60 month plan, the trustee shall file and serve on the holder of the claim, the debtor, and the debtor's counsel a notice stating that the debtor is current on its payments 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 it is current on its payments to cure any default on the claim, 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 Mid-Case Cure Payment.** Within 60 days after service 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 is current on its payments to cure any 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) Reply.** Within 30 days after service under subdivision (g) of this rule, the debtor or the trustee may file a reply statement indicating whether it agrees with the holder of the claim.

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manner, or forum after a discharge in this case, unless the court determines, after notice and a hearing, that the failure to respond and/or reply was substantially justified or is harmless.").

[349] Local Bankruptcy Rule 3002.1-1(f).

[350] Local Bankruptcy Rule 3002.1-1(f).

(i) Determination of Mid-Case Notice. On motion of the trustee, debtor, or holder of the claim, the court shall, after notice and hearing, determine whether the debtor is current on its payments to cure any default and on all required postpetition amounts. If the holder of a claim fails to respond and/or the debtor fails to reply, the court may make this determination by default.

Current Rule 3002.1(j) should also be amended to include the new subjections.

These suggestions are very much a work-in-progress. But, it is important that when adding to this rule it is drafted so that it functions appropriately in all districts.

Also add the mortgage servicer requirement discussed above. If the mortgage servicer changes, the mortgagee/new servicer, is required to send that information. This should also be added to Rule 3002.1.]

4. Conduit Districts

[The final suggestion, and perhaps the most difficult to implement, is to encourage more districts to operate as conduit districts. There is a question as to whether this is a viable form of monitoring in all districts.

Some case law discusses the benefits of conduit districts: *Matter of Foster*, at 486-87 talks about benefits of trustee as disbursing agent (this was before Rule 3002.1 was enacted); *In re Coughlin*: "In a conduit district, the chapter 13 trustee would know fairly quickly if the debtor had stopped paying the mortgage and could seek an appropriate remedy, such as dismissal, if the debtor did not seek to modify his plan. In a direct-pay district, unless the mortgage company moves for stay relief or dismissal, the debtor would know he stopped paying his mortgage, but the trustee, the court and other creditors would not know, certainly not until the trustee files her notice of final cure payment, triggering the mortgage holder's obligation to comply with Rule 3002.1."[351]

The statutory right for different districts comes from Section 1326(c), and the broadest, most equal solution would be to remove this or alter it, see broader inconsistencies discussion.[352]

The focus of discussing conduit districts is to show how it alleviates the strain on the bankruptcy system as a whole. It is not only about increasing the chance that debtors receive a discharge. It is about decreasing the amount of court resources needed to effectively manage a Chapter 13 case and get the debtor to discharge.

A discussion on the payment of Chapter 13 trustees is necessary to inform how the percentage fee is calculated and how that changes based on the amount of receipts a Chapter 13 trustee receives: fee based on a percentage of total payments coming in, increase in Chapter 13 trustee fee actually leads to less money for unsecured creditors, not an additional fee charged to the debtor. The concern that it would cost the debtor "more" is not a legitimate concern. (Look at the Chapter 13 handbook online). Chapter 13 trustees also don't get a huge profit boost. The UST adjusts the percentage fee to prevent that.

I plan to research the following: the percentage of success rates; trustees in conduit districts deal with Rule 3002.1; UST data online; the mortgage servicer issues (would be worth

[351] *In re Coughlin*, 568 B.R. 461, 474 (2017).

[352] This discussion might be saved for a different paper.

looking at the California conduit district or talking with the Chapter 13 trustee there); wage order plans (won't work in districts with a lot of self-employed debtors (SDNY))].

[There is a discussion that needs to be had here that brings in the data from Appendix A. Talk about the number of cases that came from conduit districts and those from direct. Look at when amendments were made and general orders added to show if the courts might have changed their practices after these cases became a problem. There needs to be more data about conduit districts in this section.

Try to find the correlations between conduit districts and wage orders, etc.]

[The following questions/results from the questionnaire[353] will be discussed here: Q3 – Is your district considered a conduit district, direct district, or a case-by-case district with respect to postpetition mortgage payments pursuant to Section 1322(b)(5)?; Q4 – When the debtor has pre-petition arrears and is attempting to "cure and maintain" pursuant to Section 1322(b)(5), in approximately what percentage of your Chapter 13 cases do the following entities disburse postpetition mortgage payments? Q5 – To the best of your knowledge, is your answer to Question 4 representative of your district as a whole?; Q13 – Approximately, what percentage of your Chapter 13 cases provide the following distribution to unsecured creditors?; Q14 – To the best of your knowledge, is your answer to Question 13 representative of your district as a whole?; Q15 – Approximately, what percentage of your Chapter 13 cases use wage deduction orders to make monthly payments to the Chapter 13 trustee? Q16 – To the best of your knowledge, is your answer to Question 15 representative of your district as a whole?; Q17 – Who do you think should be monitoring postpetition mortgage payments disbursed by a debtor?]

[Potential Part IV: Broader Inconsistencies]

[In this section, I would discuss the information I uncovered in my research to compile Appendix A. Rule 3002.1 might not be the best solution to the problem of inconsistent outcomes. It looks like the inconsistencies stem from local legal culture, i.e., differing local rules and judicial practices.

The default code provision gives broad discretion to courts, judges, and Chapter 13 trustees. There is a fairness aspect to be discussed. It is also difficult to find where the information with respect to conduit and direct payments is located. Some districts include it in the local rules, others in standing orders, others in the local Chapter 13 plan form, and some do not directly comment on it at all. Small, seemingly insignificant differences between districts are having massive impacts on the ultimate outcome of debtors' cases.

"Chief among bankruptcy courts' concerns is that the rules that apply to bankruptcy cases are fairly and consistently applied. Similarly situated debtors deserve equal treatment under the applicable provisions of Chapter 13 of the bankruptcy code."[354]

In support of its proposition, the Subcommittee stated that uniformity was necessary to alleviate some of the difficulties for national lenders and to provide a more equal protection to debtors around the country.[355]]

[353] *See* Appendix B.
[354] *In re Gibson*, 582 B.R. at 22.
[355] Memo, Aug. 27, 2018, at 15.

Conclusion

[Focus on what can be done now. Summarize why it matters to amend this rule even if it is not happening in every case. Some small changes to the rules and forms could provide a lot of clarity.]

Appendix A

This appendix includes a list of conduit, direct, and case-by-case districts. The list was compiled by reviewing the local rules, standing/administrative orders, and local Chapter 13 plan forms of each bankruptcy district. It also identifies districts that use language similar to the Official Form 113 language,[356] which mirrors Bankruptcy Code Section 1326(c). In some districts, none of those sources clearly articulated how the district dealt with Section 1322(b)(5) payments. This information will be gathered by making phone calls to the local Chapter 13 trustee offices and clerks of the court.[357]

A district was classified as a conduit district if the stated preference was for debtors to pay the Chapter 13 trustee their regular postpetition mortgage payments as a part of their plan payments, and for the Chapter 13 trustee to disburse the maintenance payments to the mortgagees. A district was classified as a direct district if the stated preference was for debtors to "directly" pay mortgagees their mortgage payments each month. The Chapter 13 trustee does not monitor those payments nor are those payments used to calculate the Chapter 13 trustee's percentage fee. A district was classified as a case-by-case districted if there was no stated preference and debtors had the option to make those payments either directly or through the Chapter 13 trustee. In some circumstances, a district could be classified as more than one type and a judgment call was made.

Out of the 94 districts, 26 districts are conduit districts, 26 districts are direct districts, and 42 districts case-by-case districts.[358]

Conduit Districts: 26

Arizona[359]

- Rule 2084-4: (b) Defaulted Residential Real Property Mortgage Payments. This subsection applies to all plans filed in this District when the debtor is in default under the terms of the mortgage as of the petition date or is in default after the petition date. (1) Conduit Payments. Conduit payments must be made by the debtor to the trustee through the plan. A debtor may be excused from making conduit payments only by a Court order. If the debtor cures the arrearage, the debtor may seek to be excused from conduit payments by: (A) Obtaining a Court order after notice to the trustee and all creditors; and (B) Filing an amended or modified plan to eliminate future conduit payments.
- Conduit defined Rule 2084-1

California Eastern[360]

- EDC 3-080, Chapter 13 Plan: Section 3.07[361] (a) Cure of defaults. All arrears on Class 1 claims shall be paid in full by Trustee. The equal monthly installment specified in the

[356] This is the form for the uniform Chapter 13 plan.
[357] As of 3/19/2019, those calls have not yet been made and those "unclear" districts are identified in the case-by-case category.
[358] The case-by-case districts include 13 unclear districts. These numbers will change as more information is uncovered.
[359] http://www.azb.uscourts.gov/local-rules;
http://www.azb.uscourts.gov/sites/default/files/Local_Rules_Aug_1_2018.pdf
[360] http://www.caeb.uscourts.gov/documents/Forms/LocalRules/September2017LocalRules.pdf
[361] http://www.caeb.uscourts.gov/documents/Forms/GeneralOrders/GO%2017-03.pdf

table below as the "arrearage dividend" shall pay the arrears in full. (1) Unless otherwise specified below, interest will accrue at the rate of 0%. (2) The arrearage dividend must be applied by the Class I creditor to the arrears. If this plan provides for interest on the arrears, the arrearage dividend shall be applied first to such interest, then to the arrears. (b) Maintaining payments. Trustee shall maintain all post-petition monthly payments to the holder of each Class 1 claim whether or not this plan is confirmed or a proof of claim is filed.

Florida Middle[362]

- Administrative Order[363]: FLMB-2018-2, 4. Plan Payments. Payments under the Plan shall be made through the Trustee's office and shall include all payments to secured creditors that will come due after filing the petition (and will serve as adequate protection to such creditors) as follows:
    - The Plan may provide for Debtor to make postpetition payments directly to secured creditors or lessors only on claims that are not in default, for which no arrearages are being cured through the Plan, and that the Plan does not modify. Debtor shall make direct payments via automatic debit/draft from a bank account and provide documentation to the Trustee upon request. The establishment of an automatic/debit draft at Debtor's request is not a violation of the automatic stay. IF THE PLAN PROVIDES FOR DEBTOR TO MAKE DIRECT PAYMENTS TO A SECURED CREDITOR OR LESSOR, THE AUTOMATIC STAY IS TERMINATED, IN REM, AS TO THAT CREDITOR.

Georgia Middle[364]

- LBR 3015-1. (c) Long-Term Debt Paid Through Plan. All Chapter 13 plans shall provide that when a prepetition arrearage exists for claims treated pursuant to § 1322(b)(5) as of the date of the bankruptcy filing and such arrearage is four monthly payments or more under the terms of the applicable note or contract, the payments which come due after the filing of the bankruptcy shall be maintained during the plan and shall be paid by the Chapter 13 Trustee unless otherwise ordered by the Court. The Chapter 13 Trustee is authorized to disburse to the holder of such claim the payment amounts under the applicable note or contract which come due after the filing of the bankruptcy but before the confirmation of the plan. The Chapter 13 Trustee is authorized to collect the percentage fee in effect at the time of the disbursement on all payments made pursuant to this Rule. Such disbursements shall be made within a reasonable time after receipt of payment from the debtor unless otherwise ordered by the Court. Such disbursements shall be made to the creditor's address as listed in the debtor's schedules if no proof of claim has been filed by the creditor.

Illinois Southern[365]

[362] http://www.flmb.uscourts.gov/localrules/
[363] http://pacer.flmb.uscourts.gov/administrativeorders/search.asp; http://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=76
[364] http://www.gamb.uscourts.gov/USCourts/sites/default/files/local_rules/Local_Rules_Apr_2018.pdf
[365] http://www.ilsb.uscourts.gov/sites/default/files/LocalRules-BkSoDistrict_12-01-15.pdf

- Local Chapter 13 Plan[366]: 3) Real Estate - Curing Defaults and Maintaining Payments A) Payment of Ongoing Mortgage Payments by the Trustee and Calculation of Pre-petition Mortgage Arrearage Post-petition payments shall be made by the Trustee if (i) a pre-petition default exists, (ii) a postpetition, pre-confirmation default occurs, or (iii) a post-confirmation default arises that cannot be cured by the Debtor within six months. Otherwise, post-petition payments may be made directly by the Debtor to the creditor. Where the Trustee is disbursing the ongoing payments, the first mortgage payment to be disbursed will be that which becomes due in the second month after the month in which the petition is filed. In this situation, a mortgage holder should file a "pre-petition" claim that includes both the pre-petition arrearage and all post-petition contractual payments not disbursed by the Trustee as set forth above. Similarly, the Debtor must include the amount of any such payment in the pre-petition arrearage calculation.

Indiana Southern[367]

- Local Rule B-3015-1. Filing and Distribution of Chapter 13 Plans[368]: (d) Payment of Pre-Petition Arrearage through Trustee
    - The Debtor shall pay a pre-petition arrearage claim on a mortgage secured by the Debtor's residential real estate, along with the post-petition mortgage installments, through the Chapter 13 Trustee. These disbursements shall be subject to the trustee's percentage fee.
- Local Chapter 13 Bankruptcy Plan[369]: 7. PAYMENT OF SECURED CLAIMS RELATING SOLELY TO THE DEBTOR'S PRINCIPAL RESIDENCE:
    - NONE
    - As required by Local Rule B-3015-1(a), if there is a pre-petition arrearage claim on a mortgage secured by the Debtor's principal residence, then both the pre-petition arrearage and the postpetition mortgage installments shall be made through the Trustee. Initial post-petition payment arrears shall be paid with secured creditors. If there are no arrears, the Debtor may pay the secured creditor directly. Before confirmation, the payment to the mortgage lender shall be the regular monthly mortgage payment unless otherwise ordered by the Court or modified pursuant to an agreement with the mortgage lender. After confirmation, payment shall be as set forth below. Equal Monthly Amount and Estimated Arrears listed below shall be adjusted based on the filed claim and/or notice. Delinquent real estate taxes and homeowners' association or similar dues should be treated under this paragraph.

Kansas[370]

- LBR 3015(b).2: LBR 3015(b).2 CONDUIT MORTGAGE PAYMENTS IN CHAPTER 13 CASES (a) Scope of Rule. This rule applies to all Chapter 13 cases filed on or after September 15, 2017. (b) Required Conduit Payments. Regular payments owed by a Debtor to a Creditor holding a claim secured by the Debtor's principal residence shall be

[366] http://www.ilsb.uscourts.gov/sites/default/files/forms/13PlanInstruct_04-2017.pdf
[367] http://www.insb.uscourts.gov/content/local-rules
[368] https://www.insb.uscourts.gov/content/b-3015-1-filing-and-distribution-chapter-13-plans
[369] https://www.insb.uscourts.gov/sites/insb/files/ch-13-plan-model1217.pdf
[370] http://www.ksb.uscourts.gov/sites/ksb/files/LBRMarch2018.pdf

made by the Debtor to the Trustee for 48 payment through the Chapter 13 plan if the Debtor (i) is delinquent as of the petition date or (ii) becomes delinquent after the petition date. Such payments are referred to herein as "conduit payments."

Missouri Western[371]

- Rule 3070-1. Chapter 13 Direct Payments All payments to claimants shall be through the Chapter 13 trustee unless the Court orders or the trustee agrees otherwise, except debtors may pay directly: 1) unmodified payments on a note secured by real property when the debtor has no past due payments or charges due to the mortgagee other than the regular payment due in the month of filing or conversion; 2) ongoing support obligations pursuant to a court decree; and 3) payments under a lease which the debtor has assumed or intends to assume; and 4) payments under a contract for deed which the debtor has assumed or intends to assume.

Nevada[372]

- Administrative Order 2017-04 [Amending LR 3015][373]: LR 3015. Chapter 13 Plan and Confirmation (g) Conduit payments on secured claims in chapter 13 cases. (1) For all chapter 13 cases filed on or after October 1, 2013, if there is a pre-petition arrearage on a claim secured by real property or a vehicle of the debtor, or if the debtor becomes more than one month delinquent on any post-petition installment payments to such a creditor, then all post-petition installment payments to the creditor shall be made through the chapter 13 trustee as conduit payments. A debtor may be excused from this mandatory conduit payment requirement upon a showing of good cause. An increase in trustee's fees as a result of the conduit payment requirement shall not constitute good cause.

North Carolina Eastern[374] [Bankruptcy Administrator]

- Local Rule 3070-2: (b) DISBURSEMENT OF REQUIRED CONDUIT PAYMENTS. (1) Chapter 13 Debtors shall remit all Mortgage Payments owed by them to the Chapter 13 Trustee for disbursement to the Real Property Creditor. (2) A debtor may be excused from the requirement of subparagraph (b)(1) in the discretion of the chapter 13 trustee or by order of the court. Confirmation of a plan providing for direct payments to a mortgage creditor excuses the debtor from the requirements of subparagraph (b)(1), in which case the provisions of paragraph (c) shall not apply.
    - Local Rule 3070-2(a): (2) "Conduit Payment" means a Mortgage Payment that is paid by a Debtor through the Chapter 13 Trustee. The amount of a Conduit Payment shall be equal to the amount of the petition-date monthly contractual Mortgage Payment due pursuant to the note or contract subject to any subsequent change in such Mortgage Payment effectuated in compliance with this rule.

[371]http://www.mow.uscourts.gov/sites/mow/files/2016LR.pdf
[372] https://www.nvb.uscourts.gov/rules-forms/rules/local-rules/
[373] https://www.nvb.uscourts.gov/downloads/rules/admin-order-2017-04.pdf
[374] https://www.nceb.uscourts.gov/sites/nceb/files/localrules12117.pdf

North Carolina Middle[375] [Bankruptcy Administrator]

- Local Chapter 13 Plan[376]: Section 4.1 Real Property - Claims Secured Solely by Debtor's Principal Residence. b. Maintenance of Payments and Cure of Default. Installment payments on the claims listed below will be maintained and any arrearage will be paid in full. Proofs of claim should reflect arrearage amounts through the petition date. For accounts that are in default, the Trustee will commence disbursements of installment payments the month after confirmation. Any filed arrearage claim will be adjusted to include post-petition installment payments through the month of confirmation.

North Carolina Western[377] [Bankruptcy Administrator]

- Local Rule 3003-1 (a): (2) "Conduit Creditor" is the entity holding or owning an allowed secured claim by virtue of a mortgage, deed of trust, or other consensual lien on the real property of the Debtor that is the principal residence of the Debtor but does not include a loan that is also secured by other property in addition to the principal residence, a loan upon which the final contractual payment shall become due before the stated completion date for the Chapter 13 plan, or a loan that is classified as a home equity line of credit with variable monthly payments of principal and interest. (3) "Conduit Mortgage Payments" are those mortgage payments that are paid by the Debtor to the Conduit Creditor through the Chapter 13 Trustee. Conduit Mortgage Payments shall be equal to the post-petition monthly contractual payments due pursuant to the note or contract. (4) "Pre-petition Arrearage" is the total amount past due on the Conduit Creditor's claim as of the date the case was filed.
- Local Rule 3003-1(b): (b) Disbursement of Required Conduit Mortgage Payments. All Conduit Mortgage Payments owed by a Debtor to a Conduit Creditor as defined in this Local Rule shall be made by the Debtor to the Chapter 13 Trustee for disbursement to the Conduit Creditor by the Chapter 13 Trustee as Conduit Mortgage Payments unless the Court orders otherwise.
- Local Rule 3003-1(c): (c) Duties of the Debtor. (1) The Debtor may be excused from complying with any of the provisions of this Local Rule only upon the showing of good cause and extraordinary circumstances sufficient to warrant such an exception and the entry of an order of the Court allowing the same. The burden of proof shall be on the Debtor to establish such good cause and extraordinary circumstances. The Debtor must file a motion and notice of hearing, with service on all parties in interest, within 7 days after the petition is filed. The § 341 meeting of creditors shall be continued if an order allowing or disallowing the motion has not been entered by the first scheduled § 341 meeting date. The additional cost associated with the Chapter 13 Trustee's statutory commission charged for disbursing the Conduit Mortgage Payments shall not, by itself, constitute good cause and extraordinary circumstances for seeking an exception from the mandatory Conduit Mortgage Payment rules.

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375 http://www.ncmb.uscourts.gov/sites/default/files/Local%20Rules%20Final%20%208%2013%202018%20.pdf

376 http://www.ncmb.uscourts.gov/forms/all-forms?field_form_cat_value%5B%5D=co_chap_13&items_per_page=12

377 https://www.ncwb.uscourts.gov/sites/ncwb/files/LR_web_revised.pdf

Ohio Northern[378]

[UNCLEAR-Youngstown Court]

- Uniform Chapter 13 Plan, Form 113
- Akron Court, Judge Alan M. Koschik, Administrative Order 16-01[379]: 2. Unless the respective Mortgage Loan is excused from this Administrative Order as set forth below, all Mortgage Payments shall be made by the Debtor to the Trustee for disbursement by the Trustee as Conduit Payments and all applicable Chapter 13 Plans shall so provide prior to confirmation. A Mortgage Loan on the Debtor's primary residence may be excused from the provisions of this Administrative Order and the requirement of Conduit Payments if the Debtor is less than two (2) months delinquent on the respective Mortgage Loan and files with the Court a declaration under penalty of perjury as to those facts. Other Mortgage Loans may be excuses from the provisions of this Administrative Order and the requirement of Conduit Payments for good cause shown upon a motion filed with the Court, after notice and a hearing, including notice to the Real Property Creditor and the Trustee. The plan payment to be paid by the Debtor to the Trustee shall include the Conduit Payment(s), inclusive of Trustee's fees. Nothing in this Administrative Order shall automatically require the portion of the plan payment attributable to Mortgage Payments for the Debtor's commercial or rental real property to be paid to the Trustee via the Debtor's wage order, it being understood that those properties may generate income separate from the Debtor's wage income from employers that may be the Debtor's preferred source for that portion of his/her plan payments. Regardless of the source of the Debtor's plan payments, or portions thereof, the Trustee shall process Conduit Payments in accordance with the provisions of this Administrative Order.
- Canton and Cleveland Courts, Chief Judge Russ Kendig, Judge Arthur I. Harris, and Judge Jessica E. Price Smith, Administrative Order 17-04[380]: (b) Conduit Payments—When Required. Unless the Court orders otherwise for good cause (including but not limited to the absence of a prepetition mortgage delinquency), all Mortgage Payments shall be made by the Debtor to the Trustee for the disbursement by the Trustee as Conduit Payments. The plan payment to be paid by the Debtor to the Trustee shall include the Conduit Payment, inclusive of Trustee's fees.
- Youngstown Court (?), Judge Kay Woods, UNCLEAR – Administrative Order 18-03[381] shows cases reassigned, so it might mean that there is no separate administrative order for the Youngstown Court.

Ohio Southern[382]

- Local Rule 3015-1: (e) Treatment of Real Estate Mortgages. (1) Method of Payment. Unless otherwise ordered by the court, regular monthly payments on a real estate mortgage pursuant to § 1322(b)(5) of the Code shall be disbursed by the trustee if the

[378] https://www.ohnb.uscourts.gov/sites/default/files/file-list/local-bankruptcy-rules.pdf
[379] https://www.ohnb.uscourts.gov/sites/default/files/administrative_orders/jamk-ao-16-01-governing-conduit-mtg-pmts-021716.pdf
[380] https://www.ohnb.uscourts.gov/sites/default/files/administrative_orders/admin-order-17-4-conduit-payments-electronic-signatures.pdf
[381] https://www.ohnb.uscourts.gov/sites/default/files/administrative_orders/ao-18-03-youngstown-cases.pdf
[382] https://www.ohsb.uscourts.gov/pdffiles/FINAL%20OHSB%20LBRs_2016%20(TOC%20update).pdf

obligation is in arrears as of the petition filing date. (2) Regular Monthly Payments to Mortgage Creditor. If regular monthly payments to a mortgage creditor are to be disbursed by the trustee, the plan shall specify the month in which the trustee's regular monthly disbursement to the mortgage creditor shall begin.
    - (g) Exclusive Payment Through Plan. Unless otherwise ordered by the court, a debtor shall not pay directly a debt which the plan provides shall be paid by the trustee.
- Also clarified in Chapter 13 Plan 5.1[383]

Oklahoma Western[384]

- Local Rules, Appendix C, Chapter 13 Guidelines: V. Mortgages A. All mortgages which are subject to modification are to be paid through the Chapter 13 plan and in full during the term of the plan. Additionally, all mortgages extending beyond the plan under which the debtor(s) are not current at the time the Chapter 13 petition is filed shall be paid through the Chapter 13 plan. B. With respect to long-term mortgages paid under the terms of 11 U.S.C. §1322(b)(5), the first ongoing mortgage payment that comes due before the first plan payment is required to be paid shall be set up by the Trustee as an additional arrearage claim, and shall be paid at the same rate of interest as is paid on the pre-petition arrearage claim pursuant to the confirmation order.

Pennsylvania Western[385]

- Local Rule 3021-1 Distribution Under Chapter 9, 11, and 13 Plans: (c) Following confirmation of a plan, the Chapter 13 trustee shall make distribution to secured and priority creditors in accordance with the terms of the plan. Claims identified in the plan or proofs of claim filed shall be treated for distribution purposes as follows: (1) after the filing of a plan and prior to confirmation of such plan, the Chapter 13 trustee is authorized to make distribution of the designated monthly payments as provided in the plan on secured nontax claims, attorney's fees, and utility accounts; (2) the debtor or debtor's attorney, if represented, shall review the proofs of claim filed and shall file objections to any disputed claims within ninety (90) days after the claims bar date or, for late filed or amended claims, within ninety (90) days after they are filed and served. Absent an objection, the proof of claim will govern as to the classification and amount of the claim. Objections filed after the ninety (90) days specified herein shall be deemed untimely.
- Local Form 10, Chapter 13 Plan, Part 3[386]: 3.1 Maintenance of payments and cure of default, if any, on Long-Term Continuing Debts. Check one. None. If "None" is checked, the rest of Section 3.1 need not be completed or reproduced. The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed by the trustee. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, without interest. If relief from the automatic stay is ordered as to any item of collateral listed in

[383] https://www.ohsb.uscourts.gov/pdffiles/District%20Mandatory%20Form%20Plan.pdf
[384] https://www.okwb.uscourts.gov/sites/okwb/files/Local_Rules.pdf
[385] http://www.pawb.uscourts.gov/sites/default/files/lrules2017/LocalRules2017.pdf
[386] http://www.pawb.uscourts.gov/sites/default/files/lforms2013/LocalForm10s.pdf

this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

South Carolina[387]

- Local Chapter 13 Plan[388]: 3.1(b) The debtor is in default and will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. The arrearage payments will be disbursed by the trustee, with interest, if any, at the rate stated. The trustee shall pay the arrearage as stated in the creditor's allowed claim or as otherwise ordered by the Court.
- 3.1(c) The debtor elects to make post-petition mortgage payments to the trustee for payment through the Chapter 13 Plan in accordance with the Operating Order of the Judge assigned to this case and as provided in Section 8.1. In the event of a conflict between this document and the Operating Order, the terms of the Operating Order control.
- Standing Orders[389]:
    - Operating Order 1803 for Judge John E. Waites and Chief Judge David R. Duncan[390] I. Requirement for the Debtor to make Mortgage Payments to the Trustee. Post-Petition Mortgage Payments made on claims secured by a security interest in the Debtor's principal residence (including real property and/or manufactured homes) shall be made by the Debtor to the Chapter 13 Trustee ("Trustee") for payment through the Chapter 13 Plan ("Conduit Mortgage Payments").
    - Operating Order 16-03[391]: I. Scope. The following procedures are binding upon all parties and counsel appearing in Chapter 13 cases assigned to Judge Helen Elizabeth Burris in the Columbia and Spartanburg divisions: II. Mortgage Payments paid to the Trustee. Post-petition Mortgage Payments made on claims secured by liens on real property and/or mobile homes may be made by the Debtor to the Chapter 13 Trustee ("Trustee") for payment through the Chapter 13 Plan ("Conduit Mortgage Payments") under the following conditions: A. When, as of the Petition Date, or the Conversion Date, 3 the Debtor is delinquent in Mortgage Payments owed to a Mortgage Creditor; 4 or B. As part of a 11 U.S.C. § 3625 Settlement Order involving a Mortgage Payment delinquency that proposes a cure of a post-petition default in Mortgage Payments; or C. If requested by the Debtor and without objection from or with the agreement of the Mortgage Creditor and Trustee; or D. As otherwise ordered by the Court.

[387] http://www.scb.uscourts.gov/pdf/Local_Rules/complete_lr/lr_2018.pdf
[388] http://www.scb.uscourts.gov/lrforms/Plan(ch13).pdf
[389] http://www.scb.uscourts.gov/op-adm-orders
[390] http://www.scb.uscourts.gov/pdf/oporder/opor18-03.pdf
[391] http://www.scb.uscourts.gov/pdf/oporder/amd_oporder16-03_12012017.pdf

Tennessee Middle[392]

- Appendix D, Chapter 13 Plan[393]: 3.1 Maintenance of payments and cure of default. Installment payments on the secured claims listed below will be maintained, and any arrearage through the month of confirmation will be paid in full as stated below. Both the installment payments and the amounts to cure the arrearage will be disbursed by the trustee. Amounts stated on a proof of claim filed in accordance with the Bankruptcy Rules control over any contrary amounts listed below as to the current installment payment and arrearage. After confirmation of the plan, the trustee shall adjust the installment payments below in accordance with any such proof of claim and any Notice of Mortgage Payment Change filed under Rule 3002.1. The trustee shall adjust the plan payment in Part 2 in accordance with any adjustment to an installment payment and shall file a notice of the adjustment and deliver a copy to the debtor, the debtor's attorney, the creditor, and the U.S. Trustee, but if an adjustment is less than $25 per month, the trustee shall have the discretion to adjust only the installment payment without adjusting the payments under Part 2. The trustee is further authorized to pay any postpetition fee, expense, or charge, notice of which is filed under Bankruptcy Rule 3002.1 and as to which no objection is raised, at the same disbursement level as the arrearage. Confirmation of this Plan imposes on any claimholder listed below the obligation to: Apply arrearage payments received from the trustee only to such arrearages. Treat the obligation as current at confirmation such that future payments, if made pursuant to the plan, shall not be subject to late fees, penalties, or other charges. If relief from the automatic stay is ordered as to any collateral listed below, all payments under this section to creditors secured by that collateral will cease.

Texas Northern[394]

- General Order 2017-01[395] 14. WHO IS REQUIRED TO BE A CONDUIT DEBTOR. Unless otherwise ordered by the Court following a motion by a party in interest in a specific Case, any Debtor meeting the following criteria is required to participate in the Conduit Program and is designated as a Conduit Debtor: (a) Any Debtor that is the monetary equivalent of two full months or more in arrears to a Mortgage Lender as of the Petition Date or Conversion Date; (b) Any Debtor that defaults on payments to a Mortgage Lender during the pendency of the Case such that the Debtor is the monetary equivalent of two full months or more in arrears on Current Post-Petition Mortgage Payments to the Mortgage Lender, except that in a Case within twelve months of completion, the Trustee may elect not to require the Debtor to participate in the Conduit Program; or (c) Any Debtor who elects to participate in the Conduit Program by including the Current Post-Petition Mortgage Payment in the Plan Payments and the Base

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392 http://www.tnmb.uscourts.gov/documents/Local_Rules/LOCAL_RULES_OF_COURT_Amendments_Form_C_11-28-2017.pdf

393 http://www.tnmb.uscourts.gov/documents/local_Forms/CH13_Plan_Clean_version-fillable.pdf

394 https://www.txnb.uscourts.gov/sites/txnb/files/local_rules/TXNBLocal%20RulesFinalRevised12.1.2017.pdf

395 https://www.txnb.uscourts.gov/sites/txnb/files/general-ordes/GeneralOrder2017.01StandingOrderConcerningAllChapter13Cases.pdf

Amount and (1) Section I, D.(2) of the Plan or (2) in a Plan Modification. Once designated as a Conduit Debtor, the Debtor shall remain a Conduit Debtor until the payment in full of the Base Amount (even if the Mortgage Loan is modified), or until the Case is converted or dismissed, unless otherwise ordered by the Court.

- L.B.R. 3002.1-1 Mid-Case Audit Procedures with Regard to Claims Secured by Security Interest in the Debtor's Principal Residence: (b) Mid-Case Notice by Chapter 13 Trustee. The Mid-Case Notice described in this paragraph will not be required in any conduit case, but may be filed in the Trustee's sole discretion. For all other cases filed on or after December 1, Revised 12/1/17 18 2011, the Chapter 13 Trustee shall (during the periods month 18 to month 22, and month 42 to month 46 of the case) file and serve on the holder of the claim and its counsel and the debtor and debtor's counsel a "Notice to Deem Mortgage Current," or alternatively, a "Notice of Amount Deemed Necessary to Cure," ("Mortgage Notice") stating whether or not, to the trustee's knowledge, the debtor is current on his plan and mortgage, and, if not, the amount believed necessary to cure any default on the plan and mortgage claim. The Mortgage Notice shall also contain negative notice language.

Texas Southern[396]

- Local Rule 3015-1. Confirmation of Chapter 13 plans and Rule 3015.1 Opt-Out: (b) Mortgage Payments Through the Chapter 13 Trustee. Home mortgage payments will be made through the chapter 13 trustee, in accordance with Chapter 13 Trustee Procedures for Administration of Home Mortgage Payments ("Home Mortgage Payment Procedures"). The Home Mortgage Payment Procedures adopted by the Court are posted on the Court's website.
- Chapter 13 Trustee Procedures for Administration of Home Mortgage Payments Adopted by the Court on September 29, 2005 (Last Amended Effective December 1, 2017)[397]: Uniform Plans must provide for the payment through the chapter 13 trustee of Ongoing Mortgage Payments if the Ongoing Mortgage was in default on (i) the petition date, (ii) the date of plan confirmation, or (iii) the date of the filing of a plan modification pursuant to the terms of 11 U.S.C. § 1322(b)(5). This paragraph does not preclude the use of paragraph 8(B) of the Uniform Plan.

Texas Western[398]

- Consolidated Standing Order Adopting District Form Chapter 13 Plan and Chapter 13 Plan - Effective for Cases Filed on and after November 1, 2017 in all Divisions[399] 7.6 Mortgage Creditors: Ongoing Mortgage Payments & Direct Mortgage Payments on Debtor's Principal Residence. Unless the Debtor is current on the mortgage on the petition date, or otherwise provided for under PLAN PROVISIONS 8. Nonstandard Plan Provisions, the Trustee shall pay all postpetition monthly mortgage payments to the mortgagee. Ongoing mortgage payments will be in the amount stated in the allowed proof

[396] https://www.txs.uscourts.gov/sites/txs/files/LocalRulesFINAL1112018.pdf
[397] https://www.txs.uscourts.gov/sites/txs/files/Clean%20Home%20Mortgage%20Procedures%20-%2011-29-17%20FINAL.pdf
[398] https://www.txwb.uscourts.gov/sites/txwb/files/2016-11-10%20Edited%20Local%20Rules_0.pdf
[399] https://www.txwb.uscourts.gov/sites/txwb/files/2017-11-01_Combined_Consolidated_Standing_Order_Adopting_Chapter_13%20Plan.pdf

of claim or pursuant to a Court Order. If Debtor makes a Plan payment that is insufficient for the Trustee to disburse all ongoing mortgage payments required below, the Trustee shall hold plan payments until a sufficient amount is received to make a full ongoing mortgage payment. Debtor shall provide to the Trustee all notices received from Mortgage Creditors including, statements, escrow notices, default notifications, and notices concerning changes of the interest rate if a variable rate mortgage. The automatic stay is modified to permit Mortgage Creditors to issue such notices.

- STANDING ORDER FOR CHAPTER 13 CASE ADMINISTRATION IN THE EL PASO DIVISION EFFECTIVE IN ALL CASES FILED ON OR AFTER NOVEMBER 1, 2017[400] 18. ONGOING MORTGAGE PAYMENTS IN CHAPTER 13 CASES, B. Ongoing Mortgage Payments (1) If a Debtor owes an Arrearage claim to a Mortgage Creditor, all post-petition mortgage payments to the Mortgage Creditor during the term of the Chapter 13 Plan shall be made through the Trustee as part of the Chapter 13 Plan payment. (2) If the Debtor is current on the mortgage on the Petition Date, the Debtor may make the post-petition mortgage payments directly to the Mortgage Creditor. (a) If the Debtor is current on the mortgage on the Petition Date, the Debtor shall complete Exhibit #3 and provide that document to the Trustee (not the Court) within 5 days of the Petition Date. (b) If a Debtor is current on the mortgage on the Petition Date, nevertheless decides to pay the post-petition payments to the Mortgage Creditor through the Trustee as part of the Plan payment, the terms of this Standing Order apply.
- STANDING ORDER FOR CHAPTER 13 CASE ADMINISTRATION FOR THE AUSTIN DIVISION EFFECTIVE IN ALL CASES FILED ON AND AFTER NOVEMBER 1, 2017[401] : 21. Procedures Relating to Ongoing Mortgage Payments, B. Ongoing Mortgage Payments 1. If a debtor owes an Arrearage claim to a Mortgage Creditor, all post-petition mortgage payments to the Mortgage Creditor during the term of the chapter 13 plan shall be made through the Trustee as part of the chapter 13 plan payment. 2. If a debtor is current on the mortgage on the Petition Date, the Debtor may make the post-petition mortgage payments directly to the Mortgage Creditor. a) If a debtor who is current on the mortgage on the Petition Date makes the post-petition mortgage payments directly to the Mortgage Creditor, Debtor shall complete Exhibit #1 and provide that document to the Trustee (not the Court) within 5 days of the Petition Date. b) If a debtor who is current on the mortgage on the Petition Date nevertheless decides to pay the post-petition payments to the Mortgage Creditor through the Trustee as part of the plan payment, the terms of this Standing Order apply.
- STANDING ORDER FOR CHAPTER 13 CASE ADMINISTRATION FOR THE MIDLAND-ODESSA DIVISION EFFECTIVE IN ALL CASES FILED ON AND AFTER NOVEMBER 1, 2017[402]: 19. Procedures Relating to Ongoing Mortgage Payments, B. Ongoing Mortgage Payments 1. If a debtor owes an arrearage claim to a Mortgage Creditor, all post-petition mortgage payments to the Mortgage Creditor during the term of the chapter 13 plan shall be made through the Trustee as part of the chapter 13 plan payment. 2. If a debtor is current on the mortgage on the Petition Date, the Debtor may make the post-petition mortgage payments directly to the Mortgage Creditor. a) If a debtor who is current on the mortgage on the Petition Date makes the post-petition

[400] https://www.txwb.uscourts.gov/sites/txwb/files/2017-10-17_El_Paso_Standing_Order_Chapter_13.pdf
[401] https://www.txwb.uscourts.gov/sites/txwb/files/10-24-2017-Austin_Chapter_13_Standing_Order.pdf
[402] https://www.txwb.uscourts.gov/sites/txwb/files/10-27-2017-Midland_Chapter_13_Standing_Order.pdf

mortgage payments directly to the Mortgage Creditor, Debtor shall complete Exhibit #1 and provide that document to the Trustee (not the Court) within 5 days of the Petition Date. b) If a debtor who is current on the mortgage on the Petition Date nevertheless decides to pay the post-petition payments to the Mortgage Creditor through the Trustee as part of the plan payment, the terms of this Standing Order apply.

- STANDING ORDER FOR CHAPTER 13 CASE ADMINISTRATION FOR THE WACO DIVISION EFFECTIVE IN ALL CASES FILED ON AND AFTER NOVEMBER 1, 2017[403]: 8. MORTGAGE CREDITORS: ONGOING MORTGAGE PAYMENTS & DIRECT MORTGAGE PAYMENTS ON DEBTOR'S PRINCIPAL RESIDENCE: Unless the Debtor is current on the mortgage on the petition date, or otherwise provided for under PLAN PROVISIONS 8. Nonstandard Plan Provisions, the Trustee shall pay all postpetition monthly mortgage payments to the mortgagee. Further, specific provisions regarding treatment of mortgage payments through the Plan are set out in the Consolidated Standing Order for the Adoption of a District Wide Form Chapter 13 Plan and the Chapter 13 Plan.
- San Antonio does not have the same standing order as the other divisions.

Vermont[404]

- VT. LBR 3015-6. CONDUIT MORTGAGE PAYMENT PLANS IN CHAPTER 13: (b) Post-Petition Mortgage Payments. (1) When the Debtor is Not Delinquent. A debtor who is not Delinquent is not required to make Conduit Mortgage Payments, but may elect to do so. (2) When the Debtor is Delinquent. A debtor who is Delinquent is required to make Conduit Mortgage Payments unless the debtor obtains a Waiver Order.

District Court for the Virgin Islands[405]

- Local Bankruptcy Rule 3015-2 Distribution under Chapter 13 Plans: B. Payments to Secured Creditor or Lessor. On motion by the debtor, for cause shown, the Court may allow the debtor to make direct payments to any lessor and/or secured creditor.
- E. Late Fees. The chapter 13 trustee shall not be liable for, nor pay, any late fees that may accrue during the term of the plan. The debtor shall assure that the chapter 13 plan provides for payments to the chapter 13 trustee in sufficient time to assure that payments to the mortgagee or vehicle lender are timely. If the plan becomes underfunded, the debtor or his counsel, if any, 26 shall file an amended plan curing the default and proposing a new plan payment sufficient to avoid any late fees or underfunding.

Washington Western[406]

- **Rule 3015-1: (j) Direct Plan Payments.** Unless the court orders otherwise after the debtor justifies an exception, all payments to creditors, including pre-confirmation adequate protection payments made pursuant to 11 U.S.C. § 1326(a)(1)(C), shall be

[403] https://www.txwb.uscourts.gov/sites/txwb/files/11-2-2017-Standing_Order_Chapter_13_Waco_Division.pdf

[404] https://www.vtb.uscourts.gov/sites/vtb/files/USBC.FINAL%20FORM%20LOCAL%20RULES%20updated%2011.21.17.pdf

[405] https://www.vid.uscourts.gov/sites/vid/files/local_rules/NewBK_RulesDec2017.pdf

[406] http://www.wawb.uscourts.gov/local-rules

disbursed by the trustee, provided, however, that the debtor may make direct payments on the following obligations: domestic support obligation payments made by an assignment from a debtor's wages, leases of real and personal property, and deeds of trust/mortgages that are in a current status as of the date of the petition. The trustee shall commence pre-confirmation adequate protection payments on claims secured by personal property provided in Section IV.C.3. of the plan after the creditor files a proof of claim.

West Virginia Northern[407]

- Local Chapter 13 Plan[408]: Part 3. Treatment of Secured Claims: 3.2 Cure of Arrearage and Maintenance of Payments. Any existing arrearage will be paid in full by the Trustee at 0% interest unless otherwise indicated. The Trustee will maintain the contractual installment payments, with any change required by the applicable contract that is noticed in conformity with any applicable rule. The amount of the arrearage and on-going payment listed in a creditor's timely filed and allowed claim controls over the amount listed below and such a creditor need not object to confirmation on the basis that this proposed plan does not accurately reflect the creditor's proof of claim.
- 3.1 Direct Payments Made by the Debtor on Secured Debts. The Debtor is not in arrears on the secured debts listed below and will directly maintain the current contractual installment payments, with any change required by the applicable contract that is noticed in conformity with any applicable rule.

West Virginia Southern[409]

- Local Chapter 13 Plan[410]: Part 3. Treatment of Secured Claims: 3.2 Cure of Arrearage and Maintenance of Payments. Any existing arrearage will be paid in full by the Trustee at 0% interest unless otherwise indicated. The Trustee will maintain the contractual installment payments, with any change required by the applicable contract that is noticed in conformity with any applicable rule. The amount of the arrearage and on-going payment listed in a creditor's timely filed and allowed claim controls over the amount listed below and such a creditor need not object to confirmation on the basis that this proposed plan does not accurately reflect the creditor's proof of claim.
- 3.1 Direct Payments Made by the Debtor on Secured Debts. The Debtor is not in arrears on the secured debts listed below and will directly maintain the current contractual installment payments, with any change required by the applicable contract that is noticed in conformity with any applicable rule.

Direct Districts: 26

Alabama Southern[411] [Bankruptcy Administrator System]

[407] https://www.wvnb.uscourts.gov/sites/wvnb/files/local_rules/Local%20Rules.pdf
[408] https://www.wvnb.uscourts.gov/sites/wvnb/files/forms/Chapter%2013%20Model%20Plan%2012-2017.pdf
[409] https://www.wvsb.uscourts.gov/sites/wvsb/files/localrules.pdf
[410] https://www.wvsb.uscourts.gov/sites/wvsb/files/forms/chapter13plan.pdf
[411] http://www.alsb.uscourts.gov/sites/alsb/files/LocalRules_0.pdf

- Rule 3015-1: (a) Chapter 13 plans providing for payments to be made "outside the plan" or "direct" shall be construed by the Court to mean the described payments are within the plan but are to be made directly by the debtor to the specified creditors.
- Chapter 13 Plan (for cases filed 3/1/2018 and later), Section 7: Curing Defaults and Maintaining Payments[412]: Debtor *shall maintain the following monthly payments and pay them directly to creditor*. Trustee shall pay the allowed claims for arrearages at 100% pro-rata through this Plan after payments set forth in Sections 5 and 6.

California Southern[413]

- Guidelines to Chapter 13 Plan, Part 3 - Treatment of Secured Claims, Section 3.1[414]: Section 3.1 is used when debtors intend to keep the property securing the claim, cure any pre-petition default over the plan term, and make all post-petition payments as they come due outside the bankruptcy, so that the loan is reinstated according to its original terms when the plan is completed. The trustee will only make the cure payments, but will not make either the ongoing payments to the creditor or adequate protection payments to them. The trustee will begin disbursements only after the plan is confirmed. Debtors should therefore continue to make both the regular payments and any required adequate protection payments immediately after the case is filed. A common objection to confirmation arises when there is a discrepancy between the estimated arrears identified by debtors and the arrears in the creditor's filed proof of claim. The third sentence of section 3.1 makes clear that a timely filed proof of claim controls over the amounts listed in the plan with respect to the arrearage. If this discrepancy is significant, however, the monthly plan payment on the arrearage may have to increase accordingly. In that event, a plan modification would need to be sought so that debtors' monthly payments are sufficient to cure the entire arrearage by the end of the plan. Debtors and their counsel should monitor the proofs of claim as they are filed to ensure the plan can be performed in accordance with its original terms. They should also carefully consider the effect of a loan modification if the arrearage amount changes after the plan is confirmed.

Colorado[415]

[UNCLEAR – Based on the Chapter 13 plan and information from the Chapter 13 trustee's website, I am leaning towards classifying this as direct.]

- Local Chapter 13 Plan Form, 3015-1.1[416]: 6.2 Class Two A [if none, indicate]: Claims set forth below are secured only by an interest in real property that is the debtor's principal residence located at [street address, city, state, zip code]. Defaults shall be cured and regular payments shall be made: □ None OR
    - Creditor; Total default amount to be cured; Interest rate; Total amount to cure arrearage; No. of months to cure; *Regular monthly payment to be made directly to creditor;*[417] Date of first payment

[412] Chapter 13 Plan (for cases filed 3/1/2018 and later), Section 7: Curing Defaults and Maintaining Payments, http://www.alsb.uscourts.gov/sites/alsb/files/CHP13Plan%20032018.pdf
[413] http://www.casb.uscourts.gov/sites/casb/files/documents/local-rules/Lrules_Proceds.pdf
[414] http://www.casb.uscourts.gov/sites/casb/files/documents/forms/CSD1300a_0.pdf
[415] http://www.cob.uscourts.gov/sites/default/files/misc/LBRFinal.pdf
[416] https://www.cob.uscourts.gov/sites/default/files/forms/3015-1.1.pdf
[417] Emphasis added.

- From the standing Chapter 13 trustee's website[418]: MORTGAGE PAYMENTS
    - Payments to real estate mortgage creditors that come due after your case is filed must be made directly to those creditors, unless your Chapter 13 plan provides otherwise. Please make certain you keep written copies as proof of these payments. If a serious problem prevents you from making such a payment, you should contact your attorney. You may not be eligible to receive a discharge if you do not maintain your principal residential mortgage payments throughout the entirety of your plan.

Connecticut[419]

- Section III of the Plan, Section 3.1[420]: Secured Claims "Arrears payments (Cure) will be disbursed by the Chapter 13 Standing Trustee and regular payments (Maintain) will be disbursed by the Debtor, as specified below."

District of Columbia[421]

- Local Form Plan (Local Official Form No. 14)[422]: Section 4.B. Cure of Default and Maintenance of Payments on Claims Secured by the Debtor's Principal Residence. Arrears on such claims that were owed as of the petition date will be paid through the Plan in equal monthly amounts. The Debtor will directly pay outside of the plan payments that come due after filing of the petition beginning with the first payment due after filing the petition. The portion of the claim to be paid directly by the Debtor outside the Plan will be governed by Section 4(B)(vii) below.

Georgia Northern[423]

- Local Chapter 13 Plan[424]: Part 3: Treatment of Secured Claims § 3.1 Maintenance of payments and cure of default, if any.
    - Check one.
    - None. If "None" is checked, the rest of § 3.1 need not be completed or reproduced.
    - Beginning with the first payment that is due after the date of the order for relief under Chapter 13, the debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed directly by the debtor(s). Any existing arrearage on a

[418] http://ch13colorado.net/information-for-debtors/. It is interesting to note that this language is the inverse of the Section 1326(c) language: "Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."
[419] http://www.ctb.uscourts.gov/sites/ctb/files/Local%20Rules%20Effective%209.4.18_0.pdf
[420] http://www.ctb.uscourts.gov/sites/ctb/files/ctb_ch13plan.127.ForPrint.pdf
[421] http://www.dcb.uscourts.gov/sites/dcb/files/Combined_Order_DC_Local_Bankruptcy_Rules_2018-09-07.pdf
[422] http://www.dcb.uscourts.gov/sites/dcb/files/Combined_Order_DC_Local_Bankruptcy_Rules_2018-09-07.pdf
[423] http://www.ganb.uscourts.gov/local-rules-and-orders; http://www.ganb.uscourts.gov/sites/default/files/general-ordes/general_order_no_21-2017.pdf
[424] http://www.ganb.uscourts.gov/sites/default/files/chap_13_plan_1.3_re.pdf

listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated below. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless the Bankruptcy Court orders otherwise, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

Guam[425]

- LBR 3070-2 (b) Arrearage Portion of Secured Claim. Notwithstanding FRBP 3002(a), the holder of a secured claim must file a timely proof of claim in accordance with FRBP 3002(c) in order to receive plan distributions for a prepetition arrearage or default. If the plan provides for payment of an "arrearage," the trustee shall make a distribution according to the amount stated on the proof of claim as "Amount of arrearage and other charges at time case filed included in secured claim," unless the court orders otherwise. The trustee will make no distribution on the secured portion of a claim that states the amount of the arrearage is $0.00, none, or the like, or if the arrearage amount is left blank.
- GUB 113[426] : 4.3 Class 1: Secured claims where (a) the debtor was in default on the petition date and (b) the claimant's rights are not modified by the plan, except for the curing of the default.
- Class 1 claims will be treated as follows.
    - Retention of lien and claimholder's rights. A holder of a Class 1 claim will retain its lien until the underlying debt is paid in full under nonbankruptcy law. This plan does not modify the holder's rights other than by curing the default by paying the prepetition arrearage, i.e. the regular installments of principal, accrued and unpaid interest and other charges, such as attorney fees and collection costs, that became due before the petition date without regard for any acceleration.
    - Claim amount. Unless the court orders otherwise, the amounts of the current installment payment and arrearage listed on a timely filed proof of claim control over any contrary amounts listed below.
    - Cure payments by trustee. Unless a Class 1 creditor agrees to different treatment, the trustee will make distributions to cure the prepetition arrearage. The trustee will make monthly payments on each Class 1 claim that include interest on the arrearage at the standard interest rate described in § 11.3, unless a different rate is stated below. Each Class 1 creditor shall apply these payments only to the prepetition arrearage. The amount of the arrearage is the amount stated in the creditor's proof of claim, unless the court orders otherwise. The trustee shall make no payment to a creditor if there is no timely filed proof of claim, or whose proof of claim states that the arrearage is $0.00, none, or the like, or if the arrearage amount is left blank.
    - Postpetition maintenance payments. Unless specifically noted otherwise in the box below, the debtor, and not the trustee, shall pay directly to each Class 1 creditor or its agent each payment first becoming due without acceleration after

[425] http://www.gud.uscourts.gov/sites/default/files/orders/general_order_17-0007_adoption_of_updated_local_bankruptcy_rules.pdf
[426] http://www.gud.uscourts.gov/sites/default/files/forms/gub_113_ch_13_plan_0.pdf

the petition date ("postpetition installments"), as and when due under the applicable agreement and applicable law, but the amount of the postpetition installments shall be determined as if the claim was not in default on the petition date. Each Class 1 creditor must apply the postpetition installments only to the debtor's postpetition obligations.

Hawaii[427]

- Local Form H113[428]: .3 Class 1: Secured claims where (a) the debtor was in default on the petition date and (b) the claimant's rights are not modified by the plan, except for the curing of the default.
- Class 1 claims will be treated as follows.
    - Retention of lien and claimholder's rights. A holder of a Class 1 claim will retain its lien until the underlying debt is paid in full under nonbankruptcy law. This plan does not modify the holder's rights other than by curing the default by paying the prepetition arrearage, i.e. the regular installments of principal, accrued and unpaid interest and other charges, such as attorney fees and collection costs, that became due before the petition date without regard for any acceleration.
    - Claim amount. Unless the court orders otherwise, the amounts of the current installment payment and arrearage listed on a timely filed proof of claim control over any contrary amounts listed below.
    - Cure payments by trustee. Unless a Class 1 creditor agrees to different treatment, the trustee will make distributions to cure the prepetition arrearage. The trustee will make monthly payments on each Class 1 claim that include interest on the arrearage at the standard interest rate described in § 11.3, unless a different rate is stated below. Each Class 1 creditor shall apply these payments only to the prepetition arrearage. The amount of the arrearage is the amount stated in the creditor's proof of claim, unless the court orders otherwise. The trustee shall make no payment to a creditor if there is no timely filed proof of claim, or whose proof of claim states that the arrearage is $0.00, none, or the like, or if the arrearage amount is left blank.
    - Postpetition maintenance payments. Unless specifically noted otherwise in the box below, the debtor, and not the trustee, shall pay directly to each Class 1 creditor or its agent each payment first becoming due without acceleration after the petition date ("postpetition installments"), as and when due under the applicable agreement and applicable law, but the amount of the postpetition installments shall be determined as if the claim was not in default on the petition date. Each Class 1 creditor must apply the postpetition installments only to the debtor's postpetition obligations.

Louisiana Middle[429]

- Chapter 13 Bankruptcy Plan[430]: (5) Secured Claims A. PRINCIPAL RESIDENCE 1. Current Payments Except as otherwise provided in this plan or by court order, and

[427] http://www.hib.uscourts.gov/localrules/LBRs.pdf
[428] http://www.hib.uscourts.gov/forms/individuals/Ch13_Set.pdf
[429] http://www.lamb.uscourts.gov/local-rules
[430] http://www.lamb.uscourts.gov/sites/lamb/files/forms/Chapter%2013%20plan_0.pdf

pursuant to 11 U.S.C. §1322(b)(5) and (c), after the date of the petition and throughout this chapter 13 case, the Debtor shall timely make all usual and regular payments required by the debt instruments secured by non-voidable liens on real property (i.e., immovable property) that is the Debtor's principal residence, directly to each of the following lien creditors:

Maryland[431]

- Local Bankruptcy Form M: 4.6.2. Pre-petition Arrears on Secured Claims. Pre-petition arrears on secured claims will be paid through the Plan in equal monthly amounts while the Debtor directly pays post-petition payments beginning with the first payment due after filing the petition for: None χ or the Claims Listed Below χ (mark one box only). The claims listed below include: Claims Secured by the Debtor's Principal Residence χ and/or Other Property χ. Monthly No. of. Lienholder Collateral Arrears Payment Months.

Massachusetts[432]

- Section 3.A[433] Cure of Default and Maintenance of Payments: (1) PREPETITION ARREARS TO BE PAID THROUGH THIS PLAN: Prepetition arrearage amounts are to be paid through this Plan and disbursed by the Trustee. Unless the Court orders otherwise, the amount(s) of prepetition arrears listed in an allowed Proof of Claim controls over any contrary amount(s) listed below. Unless the Court orders otherwise, if relief from the automatic stay is granted as to any collateral listed in this paragraph, all payments paid through this Plan as to that collateral will cease upon entry of the order granting relief from stay.
- (2) MAINTENANCE OF CONTRACTUAL INSTALLMENT PAYMENTS (TO BE PAID DIRECTLY TO CREDITORS): Contractual installment payments are to be paid directly by the Debtor(s) to the creditor(s). The Debtor(s) will maintain the contractual installment payments as they arise postpetition on the secured claims listed below with any changes required by the applicable contract and noticed in conformity with any applicable rules.

Minnesota[434]

- Rule 3021-1. Adequate Protection Payments in Chapter 13 Cases (a) PAYMENTS THROUGH THE TRUSTEE. In a chapter 13 case, adequate protection payments shall be paid through the trustee, unless the plan provides that such payments shall be paid by the debtor directly to the creditor.
- Local Chapter 13 Plan:[435] Part 7. HOME MORTGAGES IN DEFAULT (§§ 1322(b)(5) AND 1322(e)): The trustee will cure payment defaults on the following claims secured only by a security interest in real property that is the debtor's principal residence. The debtor will pay directly to creditors all payments that come due after the date the petition

[431] https://ecf.mdb.uscourts.gov/localrules.pdf
[432] http://www.mab.uscourts.gov/mab/massachusetts-local-bankruptcy-rules; http://www.mab.uscourts.gov/pdfdocuments/localrules/appendix/2016_Appendix1.pdf
[433] http://www.mab.uscourts.gov/pdfdocuments/Chapter_13_Plan_2017.pdf
[434] http://www.mnb.uscourts.gov/local-rules-complete-full-document
[435] Local Form 3015-1; http://www.mnb.uscourts.gov/local-forms

was filed. The creditors will retain liens. All following entries are estimates. The trustee will pay the actual amounts of default.

Nebraska[436]

- Chapter 13 Uniform Plan: PART 6. SECURED CLAIMS.[437] A. Home Mortgage Claims (including claims secured by real property which the Debtor intends to retain): 1. ¨ None. If "None" is checked, the rest of § 6(A) need not be completed or reproduced. 2. Unless otherwise provided in this plan, Debtor shall pay all post-petition mortgage payments directly to each mortgage creditor as those payments ordinarily come due beginning with the first due date after the case is filed and such creditor shall retain any lien securing its claim. Any pre-petition arrearage shall be paid through this Chapter 13 plan with interest as provided below. The amount of pre-petition arrears is determined by the proof of claim, subject to the right of the Debtor to object to the amount set forth in the claim.

New Hampshire[438]

- LBR 3015-1 Chapter 13 – Plan: (c) Plan Payments. All arrearage payments on priority and secured claims shall be payable through the plan.
- LBF 3015-1A[439]: 6. SECURED CLAIMS (OTHER) Current regular payments are to be made directly by the debtor(s). Prepetition arrearage amounts, if any, are to be paid through the plan:

New Jersey[440]

- Part 4: Secured Claims a. Curing Default and Maintaining Payments on Principal Residence[441]: None [OR] The Debtor will pay to the Trustee (as part of the Plan) allowed claims for arrearages on monthly obligations and the debtor shall pay directly to the creditor (outside the Plan) monthly obligations due after the bankruptcy filing as follows:

New Mexico[442]

- Chapter 13 Plan[443]: 3.1 Treatment of Claims. The treatment of each secured claim listed on Official Form 106D ("Schedule D") is specified below. Unless the Court orders otherwise, the claim amount stated in a timely filed proof of claim or amended proof of claim controls over any contrary amount listed below. a. *Direct* ("DIR"). Debtor will make direct payments under the terms of the original agreement between Debtor and the creditor on amounts due from the petition date forward. Trustee will pay the allowed pre-petition arrearage in full pursuant to §1322(b)(5), with interest as set forth above.

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[436] https://www.neb.uscourts.gov/Robohelp_Manuals/Local_Rules/index.htm#t=Seal.htm
[437] https://www.neb.uscourts.gov/pdf/forms/ch13comp.pdf
[438] http://www.nhb.uscourts.gov/sites/nhb/files/PDFs/NHB%20Local%20Rules%20effective%2012-1-2017.pdf
[439] https://www.nhb.uscourts.gov/local-bankruptcy-forms
[440] http://www.njb.uscourts.gov/sites/default/files/local_rules/Local_Rules_Package_8-1-18_FINAL.pdf
[441] http://www.njb.uscourts.gov/sites/default/files/forms/Chapter%2013%20Plan%20and%20Motions%209-1-18_1.pdf
[442] http://www.nmb.uscourts.gov/sites/default/files/local_rules/lr111514_120117.pdf
[443] http://www.nmb.uscourts.gov/forms/3015-2

New York Eastern[444]

- Chapter 13 Form Plan, Part 3: Treatment of Secured Claims[445]: PART 3: TREATMENT OF SECURED CLAIMS 3.1: Maintenance of payments (including the debtor(s)'s principal residence). Check one. θ None. If "None" is checked, the rest of §3.1 need not be completed. θ Debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed directly by the debtor(s). 3.2: Cure of default (including the debtor(s)'s principal residence). Check one. θ None. If "None" is checked, the rest of §3.2 need not be completed. θ Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated below. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below. In the absence of a contrary timely filed proof of claim, the amounts listed below are controlling.

New York Southern[446]

- Chapter 13 Plan, Section 3.2[447]: The Debtor will maintain the current contractual installment payments on the secured claims listed below with any changes required by the applicable contract and noticed in conformity with applicable rules. These payments will be disbursed directly by the Debtor. The Debtor shall keep a complete record of all Debtor's payments under the Plan. However, any existing Prepetition arrearage on a timely filed secured claim will be paid in full through disbursements by the Trustee, with interest, if any, at the rate stated below. Confirmation of this Plan shall impose an affirmative duty on the Secured Creditor and Debtor to do all the following as ordered:

North Dakota[448]

- Local Chapter 13 Plan[449]: Part 7. HOME MORTGAGES IN DEFAULT (§§ 1322(b)(5) AND 1322(e)): The Trustee will cure defaults on the following claims secured only by a security interest in real property that is Debtor's principal residence. Debtor will pay the installment payments that come due after the petition date directly to the creditors. The creditors will retain liens. Unless otherwise ordered by the Court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below. In the absence of a contrary timely filed proof of claim, the amounts listed below are controlling.

[444] http://www.nyeb.uscourts.gov/usbc-edny-local-bankruptcy-rules
[445] http://www.nyeb.uscourts.gov/sites/nyeb/files/forms/Chapter13-Plan.pdf
[446] http://www.nysb.uscourts.gov/court-info/local-rules-and-orders/local-rules; http://www.nysb.uscourts.gov/court-info/local-rules-and-orders/general-orders
[447] http://www.nysb.uscourts.gov/sites/default/files/m518.pdf
[448]http://www.ndb.uscourts.gov/sites/default/files/nd_local_rules/ND_Local_Rules.htm
[449] http://www.ndb.uscourts.gov/sites/default/files/forms/Chapter_13_Plan_Fillable_final.pdf

Pennsylvania Eastern[450]

- Local Chapter 13 Plan Form[451]: § 4(a) Curing Default and Maintaining Payments None. If "None" is checked, the rest of § 4(a) need not be complete. The Trustee shall distribute an amount sufficient to pay allowed claims for prepetition arrearages; and, Debtor shall pay directly to creditor monthly obligations falling due after the bankruptcy filing.

Rhode Island[452]

- Local Form 3015-1.1, Chapter 13 Plan[453] Part 3: (2) MAINTENANCE OF CONTRACTUAL PAYMENTS (TO BE PAID DIRECTLY BY DEBTOR TO CREDITORS) Regular payments are to be paid directly by the Debtor(s) to creditors. The Debtor(s) will maintain the current contractual installment payments on the secured claims listed below with any changes required by the applicable contract and noticed in conformity with any applicable rules.
- Attorney Agreement, Local Form 2083-1.1[454], Attorney agreement:
    - Explain what payments will be made through the plan, and what payments will be made directly by the debtor for mortgage and vehicle loan payments, as well as which claims accrue interest.
    - Explain to the debtor how, when, and where to make the Chapter 13 plan payments, as well as the debtor's obligation to continue making mortgage payments, without interruption, and the likely consequences for failure to do so.

South Dakota[455]

- Appendix 3A, Chapter 13 Plan: Part 5.1, Claims secured only by Debtor's(s') principal residence. Any arrearage on the claim(s) listed below will be paid in full during the plan term through disbursements by the trustee, with interest, if any, at the rate stated. If there is no arrearage, "none" is inserted. Debtor(s) will make the current installment payments to the creditor(s) during the plan term and thereafter, as may be necessary. Unless otherwise stated, the balance owed and Debtor's(s') current installment payments, as to the amount, the rate of interest, and the length of the repayment term, will be consistent with the written agreement between Debtor(s) and the creditor and may occasionally change pursuant to the agreement's terms.

Utah[456]

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[450] https://www.paeb.uscourts.gov/sites/paeb/files/Local%20Bankruptcy%20Rules%20%2011-21-17_mod.pdf

[451] https://www.paeb.uscourts.gov/sites/paeb/files/Local%20Bankruptcy%20Forms%20-L.B.F.%203015.1-1.pdf

[452] http://www.rib.uscourts.gov/newhome/rulesinfo/html5/default.htm#2000/2083-1.htm#kanchor31

[453] http://www.rib.uscourts.gov/sites/default/files/Forms/lbr_forms/rib_13plan_final.pdf

[454] http://www.rib.uscourts.gov/local-form

[455] https://www.sdb.uscourts.gov/sites/sdb/files/local_rules/Local%20Rules%20and%20Appendices%20effective%20December%201%2C%202017_3.pdf

[456] https://www.utb.uscourts.gov/local-rules-2018

- RULE 2083-2 PROVISIONS REGARDING USE OF OFFICIAL CHAPTER 13 PLAN FORM (THE "PLAN"): (c) Disbursements on Secured Claims. (1) The trustee shall make disbursements on a secured claim only if all the following conditions are met: (A) The Plan specifically provides that the trustee shall disburse on the secured claim; (B) The secured claim is allowed under §§ 502(a) and 506(a), meaning a secured proof of claim has been timely filed, or the claim has been allowed by court order; and (C) There is no pending objection or motion with respect to such proof of claim under Fed. R. Bankr. P. 3007 (objection to claim) or 3012 (motion to value collateral). (2) All disbursements are subject to the trustee having received from the debtor sufficient payments under the Plan to enable the trustee to make such disbursements.
- (g) Part 3.1: Maintenance of post-petition payments and cure of default, if any. (1) The trustee shall make disbursements on allowed arrearage claims listed in Part 3.1 of the Plan. The trustee will pay the amount of the arrearage stated in the proof of claim, unless modified by an amended claim or court order. (2) Unless otherwise ordered by the court, the debtor shall maintain current contractual installment payments directly to the creditors listed in Part 3.1 of the Plan in accordance with the terms of the contract, beginning with the first payment due after the petition date.

Virginia Eastern[457]

- Local Chapter 13 Plan: 6. Mortgage Loans Secured by Real Property Constituting the Debtor(s)' Principal Residence; Other Long Term Payment Obligations, whether secured or unsecured, to be continued upon existing contract terms; Curing of any existing default under 11 U.S.C. § 1322(b)(5). A. Debtor(s) to make regular contract payments; arrears, if any, to be paid by Trustee. The creditors listed below will be paid by the debtor(s) pursuant to the contract without modification, except that arrearages, if any, will be paid by the Trustee either pro rata with other secured claims or on a fixed monthly basis as indicated below, without interest unless an interest rate is designated below for interest to be paid on the arrearage claim and such interest is provided for in the loan agreement. A default on the regular contract payments on the debtor(s) principal residence is a default under the terms of the plan.

Wisconsin Eastern[458]

- Local Chapter 13 Plan[459]: Section 3.1 Maintenance of payments and cure of default, if any. The debtor(s) will maintain payments during the case on the secured claims listed below by paying the claimant directly. For allowed secured claims provided for in the plan, the trustee will disburse payments on any arrearage sufficient to pay the arrearage in full, with interest, if any, at the stated rate. If the Interest rate on arrearage column is left blank, no interest will be paid. The trustee will disburse payment on any arrearage listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) or 3004, and amounts so listed control over any contrary amounts stated below as to the current installment payment and arrearage. The trustee will disburse amounts listed in the Monthly plan payment on arrearage column each month. If no amount is listed in the Monthly plan payment on arrearage column, the trustee will disburse payments to the

[457] https://www.vaeb.uscourts.gov/wordpress/?wpfb_dl=753
[458] https://www.wieb.uscourts.gov/sites/default/files/forms/Local%20Rules%2011.1.17.pdf
[459] https://www.wieb.uscourts.gov/sites/default/files/forms/Model%20Plan10.13.17.pdf

creditors listed in this Part pro rata with other secured creditors that do not receive equal monthly payments. If a secured creditor obtains relief from the automatic stay as to collateral listed in this section, the trustee will cease payments to that creditor, and the plan will be deemed not to provide for secured claims based on that collateral. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Wyoming[460]

- General Order 17-01[461]: Part 3.a. This District is not a conduit mortgage district. Debtor is responsible for the direct payment of all post-petition payments coming due on secured debts of debtor's interest in real property.
- Part 3.c. Section 3.1 Maintenance of Payments and Cure of Default, if any. Debtor is responsible for disbursement of secured contractual installment payments of real property.

Case-by-Case or Unclear: 42

Alabama Middle[462] **[Bankruptcy Administrator System]**

- Local Rule 3002.1-1:
  - (a) In chapter 13 cases, the following applies to the holder of a mortgage secured by residential real property: (1) The creditor does not need to file a proof of claim for the contractual monthly payments (i.e. those payments which have not come due as of the date of the petition) in those instances where the debtor's plan proposes to make those payments directly to the mortgage holder. (2) The creditor shall file a proof of claim for the contractual monthly payments when the debtor's plan proposes to maintain those payments through payments to the chapter 13 trustee. The proof of claim shall include the amount of the contractual monthly payment and the escrow amount.
- Local Rule 4002-1:
  - (b) In chapter 13 cases, debtors shall do the following: (1) retain proof of all payments made to the chapter 13 trustee and proof of all payments made directly to creditors under the terms of the chapter 13 plan.
- ALMB 3, Local Chapter 13 Plan[463]:
  - 8. CURING DEFAULTS. Pursuant to 11 U.S.C. § 1322(b)(5), the debtor shall cure defaults with respect to the creditors indicated below. The trustee shall pay through this plan the allowed claims for arrearages at 100%. Unless otherwise ordered by the court, the amount of default to be cured under this provision shall be the amount of the allowed claim filed by the creditor. The amount of arrearage listed herein is an estimate, and in no way shall this estimate limit what the trustee shall distribute to said creditor under this plan to cure the default.
  - 9. DIRECT PAYMENTS. The following secured creditors or holders of long-term debt will be paid directly by the debtor to the creditor. The debtor shall make all 11 U.S.C. § 1326 pre-confirmation adequate protection payments directly to

[460] https://www.wyb.uscourts.gov/court-info/local-rules-and-orders
[461] https://www.wyb.uscourts.gov/sites/wyb/files/General%20Order%2017-01_0.pdf
[462] http://www.almb.uscourts.gov/sites/almb/files/Local_Rules_Dec_1_%202017.pdf
[463] https://www.almb.uscourts.gov/sites/almb/files/ALMB%20Ch13%20Plan%2812-18-17%29.pdf

the following creditors pursuant to the terms of the contract with the creditor. The debtor shall continue to make all payments to the creditor directly pursuant to the terms of the contract following the confirmation of the debtor's plan.

- 10. LONG-TERM DEBTS MAINTAINED THROUGH PLAN. The debtor proposes that the trustee maintain the following long-term debts through the plan. Prior to confirmation of this plan, the trustee shall make adequate protection payments to all of the following long term creditors indicated below. The trustee shall commence making such payments to creditors holding allowed secured claims consistent with the trustee's distribution process and only after the timely filing of proofs of claim by such creditors. The trustee shall receive the percentage fee fixed under 28 U.S.C. § 586(e) on all payments. Upon confirmation of this plan, said long term creditors will receive payments as set out below along with the payment of the debtor's attorney's fees. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Rule 3002(c), Federal Rules of Bankruptcy Procedure, or any notice of payment change filed under Rule 3002.1(b), Federal Rules of Bankruptcy Procedure, control over any contrary amounts listed below as to the current installment payment. In the absence of a contrary claim timely filed, the amounts stated below are controlling.

Alabama Northern[464] [Bankruptcy Administrator System]

- Rule 4072-1:
  - (a) Information to Creditor. A secured creditor in a chapter 13 case, without leave of court, may take the following actions: (2) Make reasonable contact with the debtor as to payments that a proposed or a confirmed plan provides are to be paid directly to the creditor by the debtor, including the issuance of monthly bills, statements for post-petition payments, and a written notice of a post-petition delinquency (but a copy shall be mailed to any attorney of record for the debtor).
- Local Chapter 13 Plan[465]: 3.1 Maintenance of payments and cure of defaults, if any, on long-term secured debts. Debtor(s) or trustee will maintain the current contractual installment payments on the secured claims listed below. These payments will be disbursed either by the trustee or paid directly by Debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee. Unless otherwise ordered, the amounts listed on a proof of claim, amended proof of claim, or notice of payment change control over any contrary amounts listed below as to the estimated amount of the creditor's total claim, current installment payment, and arrearage.

Alaska[466]

- Rule 3015-4: Reporting Requirements for Payments Made Directly to Creditors. (1) As a separate attachment to the plan, the debtor must provide a written schedule of all existing payment obligations as defined in § 1326(a)(1) (B) or (C) of the Code and all domestic

[464] http://www.alnb.uscourts.gov/sites/alnb/files/Local%20Rules%2012.01.17%20Dec%205%20edition.pdf

[465] https://www.alnb.uscourts.gov/sites/alnb/files/forms/ALNBCh13Plan-Rev122618v2.pdf

[466] http://www.akb.uscourts.gov/sites/akb/files/Dec%201%202017%20Local%20Rules.pdf

support payments coming due after the date the petition was filed. (2) On or before the third business day of each month, the debtor must provide the trustee with a certification of payments made directly by the debtor(s) during the preceding month: [A] in the form substantially similar to AK LBF 5B; and [B] having attached a copy of the receipt received from the creditor or, if no receipt was received, a photocopy of the check or other instrument used to make the payment.

- LBF05, Local Chapter 13 Plan[467] : Part 3. Trustee's Distributions to Creditors (d) *Cure of Arrearage on Secured Claims That Are Not Modified*: Arrearage on secured creditor's claims that are duly filed and allowed, and are not modified, estimated as follows: (i) *Residential Mortgage*:
- (f) *Secured Claims Not Modified*: Distributions to secured creditors whose claims are duly filed and allowed, but are not modified and not paid directly by debtor under Part 4, in accordance with the contract terms as follows:
- Part 4. Secured Claims Not Modified and not Administered by Trustee, or Collateral Surrendered. 4.1 *Secured Claims Not Modified:* The following creditors' claims are fully secured, are not modified, will be paid directly by the debtor(s) outside the Plan under the original contract terms, and will receive no distributions under Paragraph 3 (except distributions set out in paragraph 3(d) above): (a) *Residential Mortgage*:

Arkansas Eastern[468]

- Local Form 13-1, Ch. 13 Plan[469], Section 3.2: The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, including any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. The debtor(s) will resume payments to the creditors upon completion of the plan, pursuant to the terms of the respective agreements. Any existing arrearage will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated.

Arkansas Western[470]

- Local Form 13-1, Ch. 13 Plan[471], Section 3.2: The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, including any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. The debtor(s) will resume payments to the creditors upon completion of the plan, pursuant to the terms of the respective agreements. Any existing arrearage will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated.

California Central[472]

[467] http://www.akb.uscourts.gov/forms/all-forms?page=1
[468] http://www.areb.uscourts.gov/sites/arb/files/LocalRules.pdf
[469] http://www.areb.uscourts.gov/sites/arb/files/Chapter13_Plan_Arkansas.pdf
[470] http://www.areb.uscourts.gov/sites/arb/files/LocalRules.pdf
[471] http://www.areb.uscourts.gov/sites/arb/files/Chapter13_Plan_Arkansas.pdf
[472] http://www.cacb.uscourts.gov/local-rules

- Rule 3015-1(m): (2) Postpetition Payment Procedure. Except for plans in which the debtor elects to make postpetition mortgage payments through the plan, until a plan is confirmed, a debtor must pay in a timely manner directly to each secured creditor all payments that fall due postpetition on debt secured by Real Property, as defined above, and must provide evidence of such payments on court-mandated form F 3015-1.4.DEC.PRECONF.PYMTS in the manner set forth below. The plan may provide that postpetition mortgage payments will be made directly to the creditor. All such direct payments must be made as they come due postpetition. *If there are arrearages or the plan changes the amount of payment, duration, or interest rate for any reason, including the fact that a portion of the claim is deemed unsecured, then all payments so provided in the plan must be paid through the chapter 13 trustee.*[473] If the debtor elects to pay postpetition mortgage payments through the chapter 13 trustee, then the amount of the mortgage payment must be included in each monthly plan payment tendered to the chapter 13 trustee for the term of the plan.

California Northern[474]

- Chapter 13 Plan, Section 3.07 and Section 3.07(b) Instructions[475]: 4. Approved non-standard provisions. A Debtor who has pre-petition arrears on debt secured by real property may propose in his/her Chapter 13 Plan to make their post-petition, monthly payments directly to the secured creditor. Such post-petition payments are Plan payments. It is therefore important for the Chapter 13 Trustee and all other interested parties to monitor such post-petition payments to ensure that the Debtor does not default on his/her Plan payments. Accordingly, a Debtor who proposes to directly pay such post-petition payments shall include the following provisions in § 7 of his/her Plan: "Section 3.07(b) is replaced with the following provision: a. Debtor shall make the following post-petition payments to [name of secured creditor] in accordance with the applicable terms of the underlying promissory note or other obligation. b. The Chapter 13 Trustee shall not make any such post-petition monthly payments under § 5.02 of the Plan to the above named secured creditors. c. After the Plan is confirmed, Debtor shall file with the bankruptcy court quarterly declarations under penalty of perjury stating that Debtor has made his postpetition payments to [name of creditor], and attach to each declaration proper documentary evidence of the payment(s) made. The quarterly declaration for January - March payments shall be filed by April 20th, the quarterly declaration for April - June payments shall be filed by July 20th, the quarterly declaration for July - September payments shall be filed by October 20th, and the quarterly declaration for October - December shall be filed by the following January 20th." In addition, Debtor shall file with the bankruptcy court (no later than five days before the original and all continued meeting of creditors) a "Declaration of Direct Payment" (Note: To file use specified ECF event code Declaration of Direct Payment) stating whether Debtor is current on such

[473] This might be better classified as a conduit district.

[474] http://www.canb.uscourts.gov/sites/default/files/attchments/BLR%20Effective%20December%201%2C%202017_0.pdf

[475] http://www.canb.uscourts.gov/sites/default/files/forms/Instructions%20for%20Chapter%2013%20Form%20Plan%20%5BJan%2031%202018%5D.pdf

post-petition payments. If the bankruptcy court conducts a contested confirmation hearing on Debtor's Plan, Debtor shall also file such a declaration no later than five days before the hearing date. The bankruptcy court will not confirm a Chapter 13 plan (and may dismiss the Chapter 13 case) if the Debtor is not current on these post-petition payments. Depending on circumstances, the court may (1) require non-conduit plans to be set for a confirmation hearings, i.e., not confirmed by consent or as part of an uncontested confirmation calendar; (2) require additional reporting regarding monthly payments being made directly to creditors, and (3) require, in connection with the issuance of a discharge, proof that all direct payments have been made in accordance with the plan; and (4) require such other and further proof of compliance with these non-conduit provisions as it deems appropriate.

Delaware[476]

[UNCLEAR – Seems to be case-by-case because there is no preference stated.]

- Local Rule 3023-1: (a) Section 1326 Payments. (i) The debtor shall, after commencing timely payments as required by 11 U.S.C. § 1326(a)(1), continue to make subsequent payments to the trustee in accordance with the proposed plan until the trustee or Court directs otherwise. (ii) If the proposed plan provides for payment of secured debt through the plan and the debtor is making timely pre-confirmation payments to the trustee, the debtor need not continue to make regular payments directly on such secured debt. If the proposed plan provides for direct payments to a secured creditor or if no proposed plan is filed on the petition date, the debtor shall continue to make regular payments to such secured creditor(s) as and when due.
- Local Chapter 13 Plan Form 103[477]: 2. **Secured Claims**–(boxes must be checked)
    - ☐(A) Long term or mortgage debt -PRE-PETITION ARREARAGE ONLY, to be paid to (mortgagee creditor) $_____ (total amount of pre-petition arrears for the real property (collateral identified)).
    - ☐ Debtor shall continue to make regular post-payments directly to (mortgagee creditor) This Section of the Plan specifically incorporates all of the provisions affecting mortgage claims as set forth in Del. Bankr. L.R. 3023-1(b) and the parties shall be so governed.

Florida Northern[478]

[UNCLEAR - Plan is unclear and need to talk to Chapter 13 trustee.]

- Form 13-33[479] Motion to Deem Mortgage Current uses language that suggests district is Non-Conduit
- Form 13-21 Chapter 13[480] Plan contains language that suggests debtor may directly pay certain secured interests:
    - 3.5 **Direct Payments to Creditors**
        - None

[476] http://www.deb.uscourts.gov/local-rules-effect-february-1-2019
[477] http://www.deb.uscourts.gov/content/local-forms; last updated 2/1/2017
[478] http://www.flnb.uscourts.gov/sites/default/files/local_rules/local_rules_12_1_2011a.pdf
[479] http://www.flnb.uscourts.gov/forms
[480] http://www.flnb.uscourts.gov/forms

- The debtor shall make regular payments directly to the following creditors:

Name	Amount of Claim	Monthly Payment	Interest Rate (if specified)

[Add additional lines, if necessary]

Upon entry of the Order Confirming Plan, the automatic stay shall be terminated as to the *in rem* rights of the creditors whose secured claims are being paid direct by the debtor in § 3.5, above.

Florida Southern[481]

[UNCLEAR – The local rules make it look like it leans more towards direct.]

- Local Rule 3070-1, Chapter 13 Payments[482]: (B) Post Confirmation Payment Changes or Charges. [**Comment**: In this district, payments on mortgages and other voluntary liens on real property are often cured and maintained under Section 1322(b)(5) by payments through the trustee under the plan. Bankruptcy Rule 3002.1 by its terms requires the filing of payment change and certain other notices only to security interests in the debtor's primary residence, and only where the plan payments are for cure and maintenance under Section 1322(b)(5). The local rule now extends that filing requirement from claims secured by primary residences to claims secured by any real properties, and from cure-and-maintenance treatment under Section 1322(b)(5) to all treatment of such claims where the payments through the trustee are subject to change. However, the trustee does not care to receive, and the secured creditor must not file, notices of payment change where the plan payments to that creditor are not through the trustee or are not going to change under the loan documents.]
- The Chapter 13 plan looks direct, but it's also unclear.[483]
- From Chapter 13 Trustee's website[484]: Further, the plan must clearly state the arrearage amount claimed by the creditor and include any costs and attorneys' fees incurred as a result of state court or other proceedings, along with the proposed arrearage payment schedule. It is strongly suggested that the debtor's attorney contact secured creditors, prior to filing, to determine the total amount due. The plan must provide for the continuation of all monthly payments, including all regular mortgage payments, taxes and insurance. If a regular payment is not included in the plan, the debtor must be current and specifically list it as being paid "direct" and is expected to keep current on that debt. If the debtor does not intend to continue making payments on a secured debt, the debtor must specifically list it as being "surrendered" on the plan. If the plan does not provide

[481] http://www.flsb.uscourts.gov/local-rules
[482] https://www.flsb.uscourts.gov/local-rule/chapter-13-payments
[483] https://www.flsb.uscourts.gov/sites/flsb/files/documents/forms/Chapter_13_Plan_%28LF-31%29_0.pdf
[484] https://www.ch13miami.com/wp-content/uploads/2014/10/Nancy-Neidich-Suggestions-revised_04-13.pdf

for payments to a secured creditor, such creditor is granted in rem stay relief pursuant to the confirmation order to pursue available state court remedies against any property which secures the creditor's claim, whether the claim is listed as direct or surrendered.

Georgia Southern[485]

- GASB – Form 113, Chapter 13 Plan Section 3.[486] Long-Term Debt Payments. (a) Maintenance of Current Installment Payments. The Debtor(s) will make monthly payments in the manner specified as follows in the following long-term debts pursuant to 11 U.S.C. § 1322(b)(5). These postpetition payments will be disbursed be either the Trustee or directly by the Debtor(s), as specified below. Postpetition payments are to be applied to postpetition amounts owed for principal, interest, authorized postpetition late charges and escrow, if applicable. Conduit payments that are to be made by the Trustee which become due after the filing of the petition but before the month of the first payment designated here will be added to the prepetition arrearage claim.
- (b) Cure of Arrearage on Long-Term Debt. Pursuant to 11 U.S.C. § 1322(b)(5), prepetition arrearage claims will be paid in full through disbursements by the Trustee, with interest (if any) at the rate stated below. Prepetition arrearage payments are to be applied to prepetition amounts owed as evidenced by the allowed claim.

Idaho[487]

- Idaho Form Chapter 13 Plan[488]: Part 3: Treatment of Secured Claims. 3.1. Maintenance of payments and cure of default, if any. The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated in equal monthly installments over the term of the plan. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

Illinois Central[489]

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[485] http://www.gasb.uscourts.gov/local-rules

[486] http://www.gasb.uscourts.gov/local-forms

[487] http://www.id.uscourts.gov/content_fetcher/print_pdf_packet.cfml?Court_Unit=Bankruptcy&Content_Type=Rule

[488] http://www.id.uscourts.gov/Content_Fetcher/index.cfml/Chapter_13_Plan_112019_3153.pdf?Content_ID=3153

[489] No local bankruptcy rules: http://www.ilcb.uscourts.gov/local-rules-procedures-and-standing-orders

- Local Chapter 13 Plan Form[490]: 5. Secured Claims: A. Maintenance of Payments: i. The Debtor shall pay post-petition payments directly to the following creditors: [Option to select None]. ii. The Trustee shall pay post-petition payments through this Plan to the following creditors: [Option to select None]. B. Curing Default: [Option to select None]. With respect to the following creditors, the Trustee shall pay allowed claims for arrearages through this Plan, regardless of who is maintaining payments under Paragraph A of Part 5.

Illinois Northern[491]

- Official Form 113[492]: Part 3: Treatment of Secured Claims. 3.1 Maintenance of payments and cure of default, if any. The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Indiana Northern[493]

[UNCLEAR]

- Uses Uniform Chapter 13 Plan, Form 113

Iowa Northern[494]

[UNCLEAR]

- Uses Uniform Chapter 13 Plan, Form 113

Iowa Southern[495]

[UNCLEAR]

- No local rules, and I think it uses Uniform Chapter 13 Plan, Form 113.

[490] https://www.ilcb.uscourts.gov/sites/ilcb/files/ILCB_Ch13_Model_Plan_eff_12_01_2017.pdf
[491] https://www.ilnb.uscourts.gov/sites/default/files/local_rules/Local-Rules-4-16-2018.pdf
[492] https://www.ilnb.uscourts.gov/forms/all-forms/chapter_13_forms; https://www.ilnb.uscourts.gov/sites/default/files/forms/Form13-6.pdf
[493] http://www.innb.uscourts.gov/pdfs/LocalRules.pdf#pagemode=bookmarks&page=1&updated=3-23-18
[494] http://www.ianb.uscourts.gov/publicweb/?q=court-info/local-rules-and-orders/local-rules
[495] http://www.iasb.uscourts.gov/bankruptcy-rules NO LOCAL RULES

Kentucky Eastern[496]

- Rights and Responsibilities: 9) If the plan calls for payments to be made by the debtor directly to any creditor, make all payments in a timely manner[497]
- Local Form 3015-1(a)[498]: Section 3.1 - The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Kentucky Western[499]

[UNCLEAR]

- Uniform Chapter 13 Plan, Form 113

Louisiana Eastern[500]

- RULE 3015-4 Contents of Chapter 12 or 13 Plans of Reorganization: 5. Payment of Claims. The manner in which every secured claim and class of claims is to be satisfied or paid, including monthly payment amounts, and whether the debtor or the trustee will make payments to the creditor. The plan must provide for payment of the present value of all priority and secured claims as set forth on all proofs of claim of record unless an objection to the proof of claim has been filed and sustained;
- Chapter 13 Plan, Local Form[501]: 7.3 Unless otherwise ordered by the Court, all payments received by the Allowed Secured Creditor from Trustee shall be applied to reduce the amounts reflected on the creditor's proof of claim for sums due and payable prepetition. All amounts paid directly by Debtor to the Allowed Secured Creditor will be applied to outstanding interest, Debtor's escrow account or principal accrued and payable since the filing date, allowed before costs or fees.

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496 http://www.kyeb.uscourts.gov/sites/kyeb/files/KYEB%20Local%20Rules%202017%20final%20with%20TOC%2012.1.2017.pdf

497 http://www.kyeb.uscourts.gov/sites/kyeb/files/Local%20Form%202016-2%28a%29%28i%29%20Rights%20and%20Responsibilities%20of%20Chapter%2013%20Debtors%20and%20Their%20Attorneys.pdf

498 http://www.kyeb.uscourts.gov/sites/kyeb/files/1589_Local%20Form%203015-1%28a%29%20-%20Chapter%2013%20Plan.pdf

499 http://www.kywb.uscourts.gov/fpweb/local_rules_online.htm#Chapter%2013%20-%20Payments

500 http://www.laeb.uscourts.gov/sites/laeb/files/local_rules/LocalRules050113.pdf

501 http://www.laeb.uscourts.gov/sites/laeb/files/forms/ModelPlan120117.pdf

Louisiana Western[502]

- Section 3.1 of the Chapter 13 Plan[503]: The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor, as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

Maine[504]

- "Maine Bankruptcy Form 2" Section 3.1 of Ch. 13 Plan[505]: The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or by the debtor(s) directly, as specified below. If the debtor(s) will disburse the current contractual installment payments directly, then all such payments will be made beginning with the first such payment due after the petition date, and the debtor(s) will make the current contractual installment payments prior to the filing of a proof of claim by the creditor.
    - Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated.

Michigan Eastern[506]

- Rule 3070-1 Claims to be Paid by the Chapter 13 Trustee In a chapter 13 case, all claims must be paid by and through the chapter 13 trustee unless the debtor's plan establishes cause for remitting payments on a claim directly to the creditor. Any timely objection to such a plan provision will be heard at the confirmation hearing.
- Local Form 10-24-17 V1 (Chapter 13 Plan)[507]: D. CLASS FOUR - SECURED CLAIMS ON WHICH THE LAST CONTRACTUAL PAYMENT IS DUE BEYOND THE LENGTH OF THE PLAN. 11 USC §1322(b)(5). Class 4.1 Continuing Payments on a claim secured by the debtor's principal residence that come due on and after the date of the Order for Relief. (See Paragraph P, Paragraph L and Paragraph EE of the Additional Terms, Conditions and Provisions for additional information). "Direct or Via Trustee"

[502] http://www.lawb.uscourts.gov/sites/lawb/files/court/LocalRules02052010.pdf
[503] http://www.lawb.uscourts.gov/forms/all-forms?page=1
[504] http://www.meb.uscourts.gov/meb/rules/Local_Rules_WEB_POSTED_0618.pdf
[505] http://www.meb.uscourts.gov/meb/rules/Ch13_pln_v1.pdf
[506] http://www.mieb.uscourts.gov/sites/default/files/courtinfo/LocalRules.pdf
[507] http://www.mieb.uscourts.gov/sites/default/files/forms/Chapter_13_Model_Plan_0.pdf

Michigan Western[508]

[UNCLEAR – It looks like the default might be for conduit, and a payroll order is required, but there is also a section in the plan for direct payments by the debtor.][509]

- LBR 3015: (c) Payroll Deduction Orders in Chapter 13 Cases. A payroll deduction order must be entered in every Chapter 13 case unless it would be impossible or impractical. Exception from the payroll deduction order requirement may be permitted by the Chapter 13 trustee based upon information provided, as well as a debtor's testimony, at the First Meeting of Creditors held pursuant to § 341. If the Chapter 13 trustee will not agree that Chapter 13 plan payments may be made by a method other than a payroll deduction order, the debtor may seek relief from the requirement by filing a motion showing good cause why a payroll order should not be entered. (The Payroll Order form is appended to these Rules as Exhibit 7.)
- Local Chapter 13 Plan[510]: C. SECURED CLAIMS. 1. Real Property: a. Mortgage Payments: Unless otherwise stated, the Trustee shall commence paying the first post-petition mortgage payment on the first day of the month following the month of the petition date. b. Principal Residence Post-Petition Mortgage Payments and Prepetition Arrears: The following is the street address and the tax ID parcel no. for the principal residence of the Debtor(s): Property No. 1_____ Property No. 2_____ _ ____
- E. DIRECT PAYMENT BY THE DEBTOR(S) OF THE FOLLOWING DEBTS. All claims shall be paid by the Trustee unless listed herein:

Mississippi Northern[511]

- Mississippi Chapter 13 Plan[512]: 3.1(a) Principal Residence Mortgages: All long term secured debt which is to be maintained and cured under the plan pursuant to 11 U.S.C. § 1322(b)(5) shall be scheduled below. Absent an objection by a party in interest, the plan will be amended consistent with the proof of claim filed by the mortgage creditor, subject to the start date for the continuing monthly mortgage payment proposed herein.
    - Option to select "Direct" or "Plan" for postpetition payments

Mississippi Southern[513]

- Mississippi Chapter 13 Plan[514]: 3.1(a) Principal Residence Mortgages: All long term secured debt which is to be maintained and cured under the plan pursuant to 11 U.S.C. § 1322(b)(5) shall be scheduled below. Absent an objection by a party in interest, the plan

[508] http://www.miwb.uscourts.gov/sites/miwb/files/local_rules/revised-LBR-2013-10-31b.pdf

[509] https://www.miwb.uscourts.gov/sites/miwb/files/local_rules/2019_%20LBR_%28clean%20without%20index%29_final.pdf

[510] https://www.miwb.uscourts.gov/sites/miwb/files/forms/Ch%2013%20Plan%20%28Model%20Plan%29_08212017.pdf

[511] http://www.msnb.uscourts.gov/sites/msnb/files/Clean%20Amended%20Local%20Rules%206-1-2018_1.pdf

[512] https://www.msnb.uscourts.gov/sites/msnb/files/Chap13PlanForm.pdf

[513] http://www.msnb.uscourts.gov/sites/msnb/files/Clean%20Amended%20Local%20Rules%206-1-2018_1.pdf

[514] https://www.msnb.uscourts.gov/sites/msnb/files/Chap13PlanForm.pdf

will be amended consistent with the proof of claim filed by the mortgage creditor, subject to the start date for the continuing monthly mortgage payment proposed herein.
    - Option to select "Direct" or "Plan" for postpetition payments

Missouri Eastern[515]

- L.R. 3015-2 – Chapter 13 Plans – Plan Contents. D. Payments through the Plan. The plan shall provide for all claims to be paid by the Trustee through the plan except as noted herein or as permitted by the Court. The following may be paid outside of the plan: 1. Claims on the home in which the debtor resides, if the claim is for: a. post-petition mortgage payments; b. post-petition mobile home payments; c. post-petition rent payments; and 2. Claims for child support arrearage if the arrearage was being paid pursuant to a prepetition agreement and the child support creditor consents to continuation of the payment arrangement post-petition. Consent of the creditor shall be in writing, filed with the Court and served on the Trustee prior to the hearing on confirmation of the plan.

Montana[516]

[UNCLEAR- The Chapter 13 plan appears to signal "direct" payments, but the local rules do mention the occasional plan that includes conduit districts.]

- Mont. LBF 19 Chapter 13 Plan[517]
    - **Unimpaired Secured Claims.** The following secured creditors, whose claims will be left unimpaired by this Plan, are not provided for by this Plan and shall receive no payments through the Trustee except with regard to those arrearages specified below, if any: [Name of Creditor; Claim No.; Description of Collateral]
        - Concurrently with the payments on impaired secured claims specified above, the following arrearages on unimpaired secured claims, if any, shall be paid through the Trustee on a pro rata basis until the same have been paid in full: [Name of Creditor; Claim No.; Amount of Arrearage]
        - Upon completion of the Plan, all prepetition arrearages provided for by this Plan shall be deemed current.
- Rule 4001-3. Scope and Content of Account Information and Statements Secured Creditors May Provide to Debtors Post-petition.[518]
    - (b) Debts Secured by a Mortgage on Real Property.
        - (2) Except as provided in paragraph (3) below, the Mortgage Creditor may provide monthly statements to all Chapter 12 and Chapter 13 debtors who have indicated an intent to retain the Mortgage Creditor's collateral in their plan, and to all Chapter 7 debtors who have indicated an intent to retain the Mortgage Creditor's collateral in their statement of intention which has been served on the Mortgage Creditor. Monthly statements shall contain at least the following information concerning post-petition mortgage payments to be made directly to the mortgagee ("outside the plan"):

[515] http://www.moeb.uscourts.gov/sites/moeb/files/2017_Local_Rules.pdf
[516] http://www.mtb.uscourts.gov/sites/mtb/files/%281%29%202017%20LBR.pdf
[517] http://www.mtb.uscourts.gov/local-forms
[518] https://www.mtb.uscourts.gov/sites/mtb/files/%281%29%202017%20LBR.pdf

- (3) No monthly statement shall be required in a Chapter 12 or Chapter 13 where postpetition mortgage payments are to be made to the trustee ("through the plan"). If a Mortgage Creditor sends a monthly statement to a debtor in such a case which complies with subsection (d)(2) below, the Mortgage Creditor is entitled to the protections of subsection (d)(2).

New York Northern[519]

- Chapter 13 Plan[520]: 3.1 Maintenance of payments and cure of default, if any, for claims secured by real or personal property. *Check one.*
  - None.
  - The Debtor will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the Trustee or directly by the Debtor, as specified below. Creditors being paid directly by the Debtor under the plan shall continue to send customary payment coupons, statements, and notices to the Debtor. Such actions by the creditor shall not constitute or form the basis for finding a violation of the automatic stay. Any existing arrearage on a listed claim will be paid in full through disbursements by the Trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claims filed before the filing deadline under Fed R. Bankr. P. 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below shall control. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

New York Western[521]

[UNCLEAR]

- Uniform Chapter 13 Plan, Form 113

District Court for the Northern Mariana Islands[522]

[UNCLEAR]

Oklahoma Eastern[523]

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519 http://www.nynb.uscourts.gov/sites/default/files/LBR_GenOrders/Amended%20Local%20Rules%2012-1-2017.pdf

520 http://www.nynb.uscourts.gov/sites/default/files/forms/LocalFormPlan_0.pdf

521 https://www.uscourts.gov/sites/default/files/b_113_1217_0.pdf; https://www.nywb.uscourts.gov/sites/nywb/files/Local%20Rules.pdf

522 http://www.nmid.uscourts.gov/localrules.php

523 http://www.okeb.uscourts.gov/sites/default/files/LocalRules12_1_17.pdf

- Local Chapter 13 Plan[524]: 3.1 Maintenance of payments on claims secured only by principal residence of Debtor(s) and cure of default, if any. Check one.
    - None. If "None" is checked, the rest of § 3.1 need not be completed or reproduced.
    - Debtor(s) will maintain the current ongoing postpetition installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. The current ongoing monthly payments will be disbursed either by the Trustee or directly by the Debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the Trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the Court, the amounts stated on a timely filed proof of claim under Federal Rule of Bankruptcy Procedure 3002(c) shall control over any contrary amounts stated below with respect to the current installment payment and the total amount of arrearage. If relief from the automatic stay is ordered as to the principal residence listed in this paragraph, then, unless otherwise specifically ordered by the Court, all payments under this paragraph as to that collateral or principal residence including arrearage payments will cease, and all secured claims based on that collateral will no longer be treated by the Plan. The final column includes only payments disbursed by the Trustee rather than by the Debtor(s).
- Section 2.1: If the Trustee is paying current ongoing postpetition mortgage payments under Section 3.1 of this Plan, upon the filing of a Notice of Payment Change by the mortgage servicer under Federal Rule of Bankruptcy Procedure 3002.1(b), or a Notice of Fees, Expenses and Charges under Federal Rule of Bankruptcy Procedure 3002.1(c), the Trustee is authorized (but not required) to increase the Debtor(s)' Plan payments to accommodate any increases stated in the notice(s) without necessity of formal modification of the Plan. In the event that the Plan payment is increased by the Trustee under this provision, the Debtor(s) and Debtor(s)' Attorney will be given seven (7) days' notice and opportunity to object to such increase.

Oklahoma Northern[525]

- RULE 3070-1. CHAPTER 13 – PAYMENTS A. Chapter 13 plans shall state a total amount per month to be paid to the Chapter 13 trustee and shall state the length of the plan in months. D. Unless otherwise agreed by the Chapter 13 trustee, Chapter 13 plan payments shall be made to the trustee under a wage deduction order or other payment order directed to an entity from whom the debtor receives income. The debtor shall submit a wage deduction order or payment order on Local Form 3070-1D to the trustee for approval and submission to the Court.
- Local Chapter 13 Plan[526]: Part 3 - Debtor(s) will maintain the current ongoing postpetition installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules.

[524] http://www.okeb.uscourts.gov/sites/default/files/Local_Form_3015-1%28B%29_Chapter_13_Plan_0-3.pdf
[525] http://www.oknb.uscourts.gov/sites/default/files/Local%20Rules.pdf
[526] http://www.oknb.uscourts.gov/sites/default/files/forms/ch13plan2018%20FlatFillable.pdf

The current ongoing monthly payments will be disbursed either by the Trustee or directly by the Debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the Trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the Court, the amounts stated on a timely filed proof of claim under Federal Rule of Bankruptcy Procedure 3002(c) shall control over any contrary amounts stated below with respect to the current installment payment and the total amount of arrearage. If relief from the automatic stay is ordered as to the principal residence listed in this paragraph, then, unless otherwise specifically ordered by the Court, all payments under this paragraph as to that collateral or principal residence including arrearage payments will cease, and all secured claims based on that collateral will no longer be treated by the Plan. The final column includes only payments disbursed by the Trustee rather than by the Debtor(s).

Oregon[527]

- Local Rule 3015-1(b): (7) Payment of Certain Claims Secured by Real Property. If a debtor and the trustee agree, the debtor may pay mortgage arrearages and other claims secured by real property upon a sale or refinance of the property directly to the creditor. The trustee may, upon demand, be paid the trustee's authorized fee based upon those payments either by the debtor or the escrow agent.
- Chapter 13 Plan[528]: 4. Trustee Disbursements and Treatment of Claims. The trustee must commence prepetition disbursements required by paragraph 4(b)(3); upon confirmation of this plan, the trustee must commence disbursements in accordance with this plan. The trustee must not make any disbursement under this paragraph except on account of an allowed claim or allowed administrative expense. Should the trustee not have sufficient funds in trust to pay fully the disbursements listed below, disbursements of available funds must be made pro rata. The trustee must disburse all funds in the following amounts and order: (a) Trustee's Fee and Expenses. First, to the trustee's percentage fee and expenses. (b) Treatment of Secured Claims. Second, to secured creditors as provided in (1) and (2) below. The terms of debtor's prepetition agreement with each secured creditor will continue to apply, except as otherwise provided in this plan or in the confirmation order. The value of collateral for secured claims is fixed at the values stated in (1) and (2) only if there is a check in the box "Includes" in paragraph 1 for "Motion to Value Collateral" and the plan is served on the secured creditor as required under FRBP 7004 or the allowed amount of the secured claim is fixed by consent of the secured creditor. Secured creditors' liens shall be treated in accordance with § 1325(a)(5)(B)(i) and must be released when retention ends under that section. (1) Cure of Default and Claim Modification. Debtor must cure the default and maintain the contractual installment payments (as provided in paragraph 7) on a secured claim listed below in the "Estimated Arrearage if Curing" column. The amount listed in that column is an estimate; the creditor's allowed claim will control. A claim listed in the "Collateral Value if Not Paying in Full" column is an allowed secured claim only to the extent of the value listed, and pursuant to § 506(a), debtor MOVES the court for an order fixing the value of the collateral in the listed amount. The value of the creditor's interest in the collateral is limited to the amount listed below, and that amount will be paid under the plan with post

[527] https://www.orb.uscourts.gov/sites/orb/files/documents/local_rules/LBR.120118%20clean.pdf
[528] https://www.orb.uscourts.gov/sites/orb/files/documents/forms/1300.17.pdf

confirmation interest at the rate stated below. The holder of a claim listed in the "Estimated Secured Claim if Paying in Full" column will receive the total amount of the claim as set forth in the creditor's proof of claim. For all creditors provided for under this subparagraph (1), if the creditor's claim will not be paid in full, the portion of the creditor's claim that exceeds the amount of the allowed secured claim will be treated as an unsecured claim under paragraph 4(f) (if the claim identifies the priority position of the claim) and 4(g) below.

- 7. Direct Payments. Debtor must pay directly to each of the following creditors the regular payment that comes due after the petition date (state creditor name followed by collateral description):

Pennsylvania Middle[529]

- Local Chapter 13 Plan Form 3015-1[530]:
  - 1. PLAN FUNDING AND LENGTH OF PLAN. A. Plan Payments From Future Income
    - 1. To date, the Debtor paid $_____ (enter $0 if no payments have been made to the Trustee to date). Debtor shall pay to the Trustee for the remaining term of the plan the following payments. If applicable, in addition to monthly plan payments, Debtor shall make conduit payments through the Trustee as set forth below. The total base plan is $_____, plus other payments and property stated in § 1B below:
    - 2. If the plan provides for conduit mortgage payments, and the mortgagee notifies the Trustee that a different payment is due, the Trustee shall notify the Debtor and any attorney for the Debtor, in writing, to adjust the conduit payments and the plan funding. Debtor must pay all post-petition mortgage payments that come due before the initiation of conduit mortgage payments.
  - 2. SECURED CLAIMS.
    - B. Mortgages (Including Claims Secured by Debtor's Principal Residence) and Other Direct Payments by Debtor. Check one. None. If "None" is checked, the rest of § 2.B need not be completed or reproduced. Payments will be made by the Debtor directly to the creditor according to the original contract terms, and without modification of those terms unless otherwise agreed to by the contracting parties. All liens survive the plan if not avoided or paid in full under the plan.
    - C. Arrears (Including, but not limited to, claims secured by Debtor's principal residence). Check one. None. If "None" is checked, the rest of § 2.C need not be completed or reproduced. The Trustee shall distribute to each creditor set forth below the amount of arrearages in the allowed claim. If post-petition arrears are not itemized in an allowed claim, they shall be paid in the amount stated below. Unless otherwise ordered, if relief from the automatic stay is granted as to any collateral listed in this

529 http://www.pamb.uscourts.gov/sites/default/files/LocalRulesandForms/USBC_PAMB_Local_Rules.pdf

530 http://www.pamb.uscourts.gov/sites/default/files/forms/USBC_PAMB_LBF_3015-1.pdf

section, all payments to the creditor as to that collateral shall cease, and the claim will no longer be provided for under § 1322(b)(5) of the Bankruptcy Code:

- D. Other secured claims (conduit payments and claims for which a § 506 valuation is not applicable, etc.) None. If "None" is checked, the rest of § 2.D need not be completed or reproduced. The claims below are secured claims for which a § 506 valuation is not applicable, and can include: (1) claims that were either (a) incurred within 910 days of the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the Debtor, or (b) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value; (2) conduit payments; or (3) secured claims not provided for elsewhere.

Puerto Rico[531]

- Puerto Rico Local Form LBF-G, Chapter 13 Plan Part 3: 3.1 Maintenance of payments and cure of default, if any: The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated, pro-rated unless a specific amount is provided below. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Tennessee Eastern[532]

- Local Chapter 13 Form Plan 3015.1[533]: 3.1 Maintenance of Payments and Cure of Default, If Any (Complete if applicable.) Installment payments on the secured claims listed in this section, which will extend beyond the life of the plan, will be maintained during the plan, with payments disbursed by the trustee unless "Yes" is listed under "Direct Pay by Debtor(s)?" The holders of the secured claims will retain their liens following the completion of payments under the plan, and any unpaid balance of the claims is not subject to discharge. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated. Any

[531] http://www.prb.uscourts.gov/sites/default/files/local_rules/PRLBRs-2013_Complete.pdf

[532] http://www.tneb.uscourts.gov/sites/default/files/Local%20Rules%20Amended%20Effective%20December%201%202018.pdf

[533] http://www.tneb.uscourts.gov/forms-local

postpetition installment payment changes and fees, expenses, and charges noticed in conformity with Federal Rule of Bankruptcy Procedure 3002.1 will be paid without plan modification by the party designated below to make the installment payment unless otherwise ordered by the court. The installment payment and amount of arrearage stated in an allowed claim, proof of which is filed, control over any contrary amounts listed below. If relief from the automatic stay is ordered as to any collateral described below, all payments under this section to creditors secured solely by that collateral will cease unless otherwise ordered by the court.

Tennessee Western[534]

[UNCLEAR]

- I was not able to find a Chapter 13 Plan form that was revised in light of the December 1, 2017, rules amendments.

Texas Eastern[535]

- Local Form Plan 3015-a[536]: 3.2 Curing Defaults and Maintenance of Direct Payment Obligations. [Check one] None. If "None" is checked, the remainder of § 3.2 need not be completed. Cure Claims. On the Petition Date, the Debtor was delinquent on payments to satisfy certain secured claims or upon obligations arising under an executory contract or an unexpired lease that the Debtor has elected to assume under § 6.1 of this Plan. While remaining current on all direct payment obligations (future installment payments) as each comes due under the applicable contractual documents during the plan term (a "DPO"), the Debtor shall cure all such delinquencies through the Plan as listed below (a "Cure Claim"). Each listed claim constitutes a separate class. The total amount of each allowed Cure Claim will be paid in full by the Trustee. The Trustee is authorized to initiate monthly payments on an interim basis based upon the projected amount of each Cure Claim listed below until such time as the allowed amount of each Cure Claim is established by the filing of a proof of claim in accordance with the Bankruptcy Rules. The amount listed in that proof of claim, or the final determination by the Court of any objection thereto, shall control over any projected Cure Claim amount listed below. No interest will be paid on any Cure Claim in the absence of documentary proof that the applicable contractual documents entitle the claimant to receive interest on unpaid interest. If the automatic stay is terminated as to the property for which a Cure Claim exists at any time during the Plan Term, the next distribution by the Trustee on such Cure Claim shall be escrowed pending any possible reconsideration of the stay termination. If the stay termination is reversed by agreement or by court order, then the single escrowed distribution shall be released to the holder of the Cure Claim and regular distributions on that Cure Claim shall be reinstituted. In the event that the stay termination remains in effect on the second distribution date after the stay termination, the escrowed funds shall be released for distribution to other classes under this Plan and the Cure Claim shall thereafter be addressed solely under applicable state law procedures and will no longer be

[534] http://www.tnwb.uscourts.gov/PDFs/BK/LocalRules.4.3.17.pdf

[535] https://www.txeb.uscourts.gov/sites/txeb/files/2017%20TXEB%20Local%20Rules_clean_rev%2012-1-17.pdf

[536] https://www.txeb.uscourts.gov/sites/txeb/files/TXEB%20Local%20Form%203015-a_Ch%2013%20Plan%20Form_rev%201114.pdf

treated by the Plan. The completion of payments contemplated in this subsection constitutes a cure of all defaults of the Debtor's obligation to each listed claimant.

- Claimant Collateral/Property/Contract Description **Debtor's DPO Amount** Projected Cure Claim Amount Plan Interest Rate Projected Monthly Payment by Trustee Projected Total Cure Payment by Trustee

Virginia Western[537]

- Chapter 13 Plan, Official Form 113[538]: 3.1 Maintenance of payments and cure of default, if any. Check one. None. If "None" is checked, the rest of § 3.1 need not be completed or reproduced. The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Washington Eastern[539]

- Local Bankruptcy Rule 2083-1: (f) Treatment of Secured Creditors Secured by Real Property (1) If at the time of the filing a petition for relief, a delinquency exists on any payments for debt secured by real property, then all payments, both current and delinquent, for such debt shall be paid through the office of the Chapter 13 trustee. (2) If during the pendency of the plan a debt secured by real property falls into arrearage, then the plan may be modified pursuant to subsection (k) of this rule to require payments, both current and delinquent, to be paid through the office of the Chapter 13 trustee. (3) If during the pendency of the plan arrearages are brought current, then the plan may be modified to allow for payments to be made directly to the creditor by the debtor.

Wisconsin Western[540]

[UNCLEAR – Based on the plan options below, I think this is case-by-case.]

- Local Chapter 13 Plan[541]: II. PLAN PAYMENTS, LENGTH OF PLAN AND DEBTOR(S)' ATTORNEY'S FEE
    - A. MONTHLY PLAN PAYMENT: This Plan pays for the benefit of the creditors the amounts listed below, including trustee's fees beginning 30 days from the

[537] http://www.vawb.uscourts.gov/sites/default/files/Local%20Rules%202018%20Final%20120118.pdf
[538] https://www.uscourts.gov/sites/default/files/b_113_1217_0.pdf
[539] https://www.waeb.uscourts.gov/local/LocalRules/LocalRules.pdf
[540] https://www.wiwb.uscourts.gov/court-info/local-rules-and-orders
[541] https://www.wiwb.uscourts.gov/sites/wiwb/files/Local%20Form%20No.%203015-1.1%20v6.pdf

filing/conversion date. Debtor(s) will make payments by employer wage order, unless otherwise specified herein. The payments must be made for the Applicable Commitment Period, either 36 or 60 months, or for a shorter period that is sufficient to pay allowed nonpriority unsecured claims in full.

- III. TREATMENT OF SECURED CLAIMS

A. SECURED CLAIMS: ☐ NONE

[Retain Liens pursuant to 11 U.S.C. §1325 (a)(5)] Mortgage(s)/Lien on Real or Personal Property:

+ / -

1. Creditor:

Address:

Account No.:

Arrearage/ Payoff on Petition Date

Arrears Payment (Cure)	$0.00	/month
Regular Payment (Maintain)	$0.00	/month
Regular Payment (Direct)	$0.00	/month

Other:

☐ Real Property

☐ Principal Residence

☐ Other Real Property

Check one below for Real Property:

☐ Escrow is included in the regular payments

☐ The debtor(s) will pay ☐ taxes ☐ insurance directly

Address of Collateral:

☐ Personal Property/Vehicle

Description of Collateral:

Appendix B[542]

Dear Chief Judges,

My name is Elizabeth Jones and I am the 2018-19 U.S. Supreme Court Fellow assigned to the Federal Judicial Center. During my fellowship, I am required to produce a publishable-quality work of scholarship. My research project is independent from work at the FJC, and does not reflect the views of the FJC or the U.S. Supreme Court.

I'm doing a study of the interplay between Federal Rule of Bankruptcy Procedure 3002.1 and Bankruptcy Code Section 1322(b)(5). My particular emphasis is on Rule 3002.1(f)-(h), as I'm interested in how "cure and maintain" payments are affecting a debtor's discharge, and I will present my work-in-progress to the Advisory Committee on Bankruptcy Rules this spring.

To provide a comprehensive picture, it is important to include information on how bankruptcy judges are making determinations with respect to Rule 3002.1 and "cure and maintain" payments. To help obtain this information, I am surveying the chief judge of each bankruptcy court. Would you please complete the questionnaire at this link?

<INSERT LINK>

Your input is important to this project and I look forward to receiving it. Please complete the questionnaire by [**insert deadline]**. I can be reached at ejones@fjc.gov or (202)-502-4075 if you have any questions or comments.

Questionnaire:

The purpose of this questionnaire is to obtain information on how bankruptcy judges are making determinations with respect to Rule 3002.1 and "cure and maintain" payments. It is germane to the work of scholarship the Supreme Court Fellow is required to produce as part of the fellowship.

Because practices sometimes vary between judges in the same district, the questionnaire often first asks about your own practice and then asks if your practice is representative of your district as a whole (that is, whether the practice is uniform across all judges). No one except the Supreme Court Fellow and the assisting FJC researchers will see your completed questionnaire. For the oral and written reports, responses will be compiled so that no response can be individually attributed to you or any other respondent.

The questionnaire should take approximately 15-25 minutes to complete, depending on the variation of practices in your district.

Please complete the questionnaire by [insert deadline]. If you have any questions or comments about the questionnaire, please contact Elizabeth Jones at ejones@fjc.gov or (202)502-4075.

[542] As of 3/19/2019 the questionnaire has not been distributed. There might be a few changes between this version and the final questionnaire. The questionnaire is expected to be sent out before the April 4, 2019, meeting. The questionnaire will be sent to the chief bankruptcy judges in each district.

1. In the district as a whole, if the **Chapter 13 trustee** is responsible for disbursing postpetition mortgage payments pursuant to Section 1322(b)(5), how does your district inform parties-in-interest? (Select all that apply.)
    a. The Chapter 13 trustee is NOT responsible for disbursing postpetition mortgage payments pursuant to Section 1322(b)(5).
    b. The local rules
    c. An administrative order/general order
    d. A case-by-case court order
    e. In the Chapter 13 plan
    f. Other. Please describe: _____
2. In the district as a whole, if the **debtor** is responsible for disbursing postpetition mortgage payments pursuant to Section 1322(b)(5), how does your district inform parties-in-interest? (Select all that apply.)
    a. The debtor is NOT responsible for disbursing postpetition mortgage payments pursuant to Section 1322(b)(5).
    b. The local rules
    c. An administrative order/general order
    d. A case-by-case court order
    e. In the Chapter 13 plan
    f. Other. Please describe: _____
3. Is your district considered a conduit district, direct district, or a case-by-case district with respect to postpetition mortgage payments pursuant to Section 1322(b)(5)?
    a. A conduit district: postpetition mortgage payments are typically disbursed by the Chapter 13 trustee.
    b. A direct district: postpetition mortgage payments are typically disbursed by the debtor.
    c. A case-by-case district: postpetition mortgage payments are disbursed differently in each case.
    d. Not sure

    Please explain the basis for your answer (e.g., local rules dictate how payments are made; typical court practice).
4. When the debtor has pre-petition mortgage arrears and is attempting to "cure and maintain" pursuant to Section 1322(b)(5), in approximately what percentage of your Chapter 13 cases do the following entities disburse postpetition mortgage payments ?
    a. Chapter 13 trustee ____%
    b. Debtor ____%
    c. Other ____%

    Total ____%
5. To the best of your knowledge, is your answer to Question 4 representative of your district as a whole?
    a. Yes
    b. No
    c. Not sure

Please explain the basis for your answer (e.g., local rules dictate how payments are made; typical court practice).

6. In approximately what percentage of your Chapter 13 cases do you receive a Rule 3002.1(g) response at the end of the case stating that the debtor is NOT current on the debtor's postpetition mortgage payments?
    a. 0%
    b. 1-5%
    c. 6-10%
    d. 11-20%
    e. 21-35%
    f. 36-50%
    g. 51-75%
    h. 76-99%
    i. 100%
7. To the best of your knowledge, is your answer to Question 6 representative of your district as a whole?
    a. Yes
    b. No
    c. Not sure
    Please explain the basis for your answer (e.g., conduit district; case-by-case district).
8. Do you consider postpetition mortgage payments disbursed by the debtor to be payments under the Chapter 13 plan?
    a. Yes
    b. No
    Please explain the basis for your answer (e.g., local rules refer to them as payments under the Chapter 13 Plan; district practice; legal interpretation).
9. To the best of your knowledge, is your answer to Question 8 representative of your district as a whole?
    a. Yes
    b. No
    c. Not sure
    Please explain the basis for your answer (e.g., local rules refer to them as payments under the Chapter 13 plan; district practice; legal interpretation).
10. If a debtor is not current on postpetition mortgage payments at the end of the debtor's Chapter 13 plan should the debtor be denied a discharge?
    a. Yes
    b. No
    c. It depends. Please explain: _____
11. Would your answer to Question 10 change if the debtor had a second mortgage lien on the debtor's residence that was going to be stripped and classified as a nonpriority unsecured claim upon the issuance of a discharge?
    a. Yes. Please explain why your answer to Question 10 would be different.

b. No
c. It depends. Please explain:_____

12. At the end of a debtor's Chapter 13 bankruptcy, if the debtor is not current on the debtor's postpetition mortgage payments, what options, other than a denial of discharge, should the debtor have? (Select all that apply.)
    a. Conversion to Chapter 7
    b. Loan modification to "cure" postpetition arrears into new loan
    c. Extension of time and plan modification if original plan less than a five year plan
    d. Other option. Please describe:_____
    e. None of the above
13. Approximately what percentage of your Chapter 13 cases provide the following distribution to unsecured creditors?
    a. 0-5% Distribution
    b. 6-10% Distribution
    c. 11-20% Distribution
    d. 21-30% Distribution
    e. 31-40% Distribution
    f. 41-50% Distribution
    g. More than 50% Distribution
    h. [Drop down percentage rates for each category: 0%; 1-10%; 11-25%; 26-50%; 51-75%; 76-90%; 91-99%; 100%]
14. To the best of your knowledge, is your answer to Question 13 representative of your district as a whole?
    a. Yes
    b. No
    c. Not sure

    Please explain the basis for your answer (e.g., district practice; conduit district; direct district).
15. Approximately what percentage of your Chapter 13 cases use wage deduction orders to make monthly payments to the Chapter 13 trustee?
    a. 0%
    b. 1-10%
    c. 11-25%
    d. 26-50%
    e. 51-75%
    f. 76-90%
    g. 91-99%
    h. 100%
16. To the best of your knowledge, is your answer to Question 15 representative of your district as a whole?
    a. Yes
    b. No
    c. Not sure

Please explain the basis for your answer (e.g., local rules require wage order plan; Chapter 13 trustee prefers wage order plan).

17. Who do you think should be monitoring postpetition mortgage payments disbursed by a debtor?
    a. Debtor and/or Debtor's Attorney
    b. Chapter 13 trustee
    c. Mortgagee
    d. Judge/Clerk's Office
    e. Other. Please describe:_____
18. At what time should a debtor's discharge be entered?
    a. After the Chapter 13 trustee files a certification of completed plan
    b. After the Chapter 13 trustee files a Rule 3002.1(f) notice and the creditor files a Rule 3002.1(g) response
    c. After the Chapter 13 trustee files both a certification of completed plan and Rule 3002.1(f) notice and the creditor files a Rule 3002.1(g) response
    d. At a different time. What would be a better time? [This would be a pop-up when a respondent selects this response.]
19. Were you appointed to the bankruptcy bench before or after 2011?
    a. Before
    b. After
    c. Does not apply