
From: Eric Frank
Sent: Monday, February 10, 2020 1:44 PM
To: RulesCommittee Secretary
Subject: Suggested Revision to Instructions to Form B410A, Part 2

February 10, 2020

To: The Advisory Committee on Bankruptcy Rules
From: Judge Eric L. Frank

In October 2019 and December 2019, I published two decisions which, read together, raise a very specific and limited issue about the efficacy Official Form B410A in obtaining an accurate disclosure of the total secured debt when the creditor obtained a prepetition judgment in mortgage foreclosure in a jurisdiction in which the “merger doctrine” applies. Specifically, I suggested that Part 2 of the form (Total Debt Calculation) contains some ambiguity that, , may cause a residential mortgage lender to overstate the “total debt.”

In the first case, In re Bernadin, 609 B.R. 26, 38-39 (Bankr. E.D. Pa. 2019), I held that, based on the terms of the underlying mortgage, the creditor was not entitled to recover post-judgment advances for taxes and insurance (i.e., escrow advances). See also In re Culler, 584 B.R. 516, 523-24 (Bankr. E.D. Pa. 2018).

In the second case, In re Bernadin, 2019 WL 7171292, at *12–13 (Bankr. E.D. Pa. Dec. 20, 2019) (“Bernadin II”), I held that the debtor’s complaint stated a cause of action under the Federal Debt Collection Practices Act, 15 U.S.C. § 15 U.S.C. §§ 1692 et seq. (“FDCPA”) for filing a proof of claim which demanded payment of post-judgment escrow advances. In evaluating the issue, it was necessary for me to examine Official Form B410A and, more specifically Part 2: Total Debt Calculation in order to evaluate whether there is a conflict between the FDCPA and the Bankruptcy Code and Rules. See Simon v. FIA Card Servs., N.A., 732 F.3d 259, 273–74 (3d Cir. 2013).

Part 2 of Form B410A requires the following disclosure:

Part 2: Total Debt Calculation

Principal balance: _____

Interest due: _____

Fees, costs due: Escrow deficiency for funds advanced: _____

Less total funds on hand _____

Total debt:

In Bernadin II, I reasoned that the term “principal balance” is ambiguous in that it

is commonly employed as the starting point in calculating the “payoff” amount of a mortgage debt that has not been reduced to judgment, after which the creditor may add the other components itemized in Part 2 in order to calculate the “total debt.” Thus, the drafters of the Form did not tailor the terminology of the Form with precision to account for cases in which the traditional concept of the “principal balance” (and the additional charges accruing under the note and mortgage) have merged into a prepetition judgment.

2019 WL 7171292, at *13.

I then held:

[I]t is possible for a debt collector of a residential mortgage creditor to complete Part 2 of Form 410A accurately when the creditor's mortgage has merged into a prepetition foreclosure judgment. This is accomplished simply by treating the foreclosure judgment amount as the “principal balance” amount to be filled in on the Form and then adding to that amount those post-judgment charges that survive the merger of the mortgage into the judgment or that otherwise are authorized by law.

Id.

In my view, if Form 410A, Part 2 is not revised (perhaps a cumbersome task), at a minimum, the

Instructions to the form should be modified.

The Instructions presently read as follows:

Information required in Part 2: Total Debt Calculation

Insert:

- *the principal balance on the debt;*
- *the interest due and owing;*

- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; and
- any Escrow deficiency for funds advanced— that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed.

Also disclose the Total amount of funds on hand. This amount is the total of the following, if applicable:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

Total the amounts owed—subtracting total funds on hand—to determine the total debt due.

Insert this amount under Total debt. The amount should be the same as the claim amount that you report on line 7 of Official Form 410.

I suggest revising the Instructions as follows:

Information required in Part 2: Total Debt Calculation

Insert:

- the principal balance on the debt *or, if the mortgage has merged into a pre-petition judgment, the amount of the judgment;*
- the interest due and owing;
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; *and if the mortgage has merged into a pre-petition judgment, the amount of the post-judgment fees and costs that are collectible under applicable law; and*
- any Escrow deficiency for funds advanced— that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed. *and if the mortgage has merged into a pre-petition judgment, the amount of the post-judgment escrow advances that are collectible under applicable law.*

Also disclose the Total amount of funds on hand. This amount is the total of the following, if applicable:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

Total the amounts owed—subtracting total funds on hand—to determine the total debt due.

Insert this amount under Total debt. The amount should be the same as the claim amount that you report on line 7 of Official Form 410.

Thank you for your consideration of this proposal

Judge Eric L. Frank
U.S. Bankruptcy Court
Robert N.C. Nix Sr. Federal Courthouse – Room 201
900 Market Street
Philadelphia, PA 19107

