

My name is Debra Miller and I serve as the Standing Chapter 13 Trustee for Northern District of Indiana, Fort Wayne and South Bend Divisions. I currently serve as the Trustee Chair for the National Association of Chapter Thirteen Trustee's (NACTT) Mortgage Liaison Committee.

This letter in support of the proposed Rules 3001 and 3002.1 as the Chair of that Committee.

The NACTT Mortgage Liaison Committee was formed in 2004 and seeks to develop and increase communication between the mortgage creditors, servicers and their counsel with the Chapter 13 Trustees. Members of our committee include over 100 servicers ranging from small to large national companies, attorneys for the servicers and over 20 Trustees.

Over two years ago, our Committee developed the NACTT Best Practices¹, which sought to provide guidance on these issues. The Committee determined that the filing of a Notice of Payment Changes and Notice of Post Petition Costs, Fees and Protective Advances was in the best interest of all of the stakeholders. After consultation with the Bankruptcy Judges Committee, the Bankruptcy Clerk's Committee and the Administrative Office, the Committee recommended that these Notices be filed as Supplemental Claims to the originally filed Proof of Claim.

The proposed Bankruptcy Rules are consistent with the spirit of the Best Practices and our Committee advocates the adoption of these Rules. These Rules will allow consistency on a national basis as to the procedure for notification of payment changes, post petition costs, fees or protective advances that have been paid by the servicer or mortgage holder during the pendency of the bankruptcy.

The Committee would like to raise concerns about the scope and language of particular provisions. While many of the large servicers have the technology and ability to run an escrow analysis on a date certain (as of the date of the filing of the bankruptcy), some smaller servicers do not have this ability. From our review, HELOC and DSI loans seem to be problematic with the rule as proposed. Some loan payments adjust every 30 days and in the case of a DSI loan may have interest rate changes on a daily basis. We would ask for guidance as to these issues when the Rules are finalized.

Additionally, the Committee would advocate for the Rules Committee to adopt a proposed attachment to the proof of claim on which the breakout of information regarding the mortgage would be provided. By having an adopted national attachment would allow the servicers and their attorneys to provide more detailed information in a more efficient and clear manner. I have attached a copy of the proposed notices and proof of claim attachment developed by the Committee for your review.

This attachment is a moderate combination- it provides "more and better" information while not incurring the cost for a detailed attachment in a typical bankruptcy. To the extent that the Debtor or Trustee has questions or needs additional documentation due

¹ These best practices have since been endorsed by the NACTT, AFN (American Financial Network), NACBA (National Consumer Bankruptcy Attorneys) and CMIS.

to concerns about the amounts or itemization in the POC, the Rules provides a remedy by the filing of an objection or requests for discovery.

Again, our Committee appreciates the time, effort and thought that is evident in the drafting of these proposed Rules. Thank you for allowing us to provide comment and please feel free to contact either I or any committee member if you have any questions or concerns.

Debra L. Miller, Trustee
Chair of NACTT Mortgage Committee

Rule 3001 (c)(2)(A)

Comment: Current case law in the 5th Circuit (In re Madison), 9th Circuit (In re Atwood) 11th Circuit (In re Dean) address the inclusion of post petition pre confirmation fees in the pre petition arrearage claim. The NACTT best practices, as written and endorsed, envisioned that these fees would be itemized in the proof of claim arrearage form for reasonable and necessary fees actually incurred. The fees are for attorney fees for the preparation and filing of the proof of claim, filing of an appearance and review of the debtor's plan. The committee found that these types of fees are common in the majority of the Chapter 13 bankruptcies, and incurred and paid throughout the term of the plan.

Concern: The language in Rule 3001(c)(2)(A) – “*prior to the date of the petition*” appears to indicate a change in this practice. As these post petition pre confirmation fees and costs are so common, requiring these to be filed with the court for approval will increase the attorney fees paid by the debtor without reason. If this change was not the intended consequence of this provision, some change would appear to be in order.

Our committee suggests that an advisory comment be included stating that “Nothing in this Rule should mandate a change to current local practice that allows the post petition, pre confirmation fees to be included in the pre petition arrearage claim.”

Comment: The language – “*an itemized statement of interest*” would appear to need some clarification in the commentary.

Concern: The committee asks the Rules committee to consider including in the advisory comments a clarification as to how the interest should be listed and itemized on the proof of claim. Our committee recommends that the commentary distinguish between nontraditional mortgages and traditional mortgages interest itemization. In nontraditional loans, (such as heloc's, daily simple interest and “exotic” loans) the itemized interest should actually be indicated as the interest accrued to the date of the petition. In traditional loans, some clarification as to whether or not the requirement is that each payment in arrears has to be detailed into principal and interest will need to be provided or if the total of interest can be provided.

Additionally, the committee asks the Rules subcommittee to consider changing the term of “itemized statement” to an “itemization”. The committee is concerned that the term “itemized statement” can be construed as an additional requirement. To the extent that an itemized statement is being required, the committee requests that the Rules Committee consider a model or form itemization be included in the new Rules. Our committee is currently working on a model arrearage attachment for the proof of claim and we will provide this when completed in the next month or so. We thought that by providing a model form from the committee would allow greater consistency throughout various districts and provide clarification as to the type of itemization needed.

Rule 3001 (c)(2)(B)

Comment: With regard to listing the amount necessary to cure the default in the claim, the committee requested language indicating that post-petition, pre-confirmation fees and costs may be included where it is allowed by local practice. The language in Rule 3001(c)(2)(B) – “*as of the date of petition*” – appears to again indicate this change in current practice of including reasonable post petition pre confirmation fees in the proof of claim.

Concern: If this change was not the intended consequence of this provision, some change would appear to be in order.

Our committee suggests that a advisory comment be included stating that “Nothing in this Rule should mandate a change to current local practice that allows the post petition, pre-confirmation fees to be included in the pre petition arrearage claim.”

Comment: “*necessary to cure any default as of the date of the petition*”

Concern: An ongoing issue in practice, litigation and local rules is how to resolve the “escrow shortage” issue. The committee asks that clarification be provided in the commentary as to how the “escrow shortage” should be paid.

The escrow shortage is the amount needed to properly fund the escrow account on the date of the filing of the bankruptcy. If the mortgage is deemed “current” as of the date of filing, the escrow shortage is the amount that needed (the default) to be in the escrow account of the mortgage to be fully funded for the taxes, insurance and escrow disbursements for the coming escrow cycle.

If an escrow analysis is run as of the date of filing, the escrow shortage is calculated pursuant to RESPA guidelines and a specific amount is listed. Generally, this shortage amount is then divided by the 12 months in the analysis period and the post petition mortgage payment is raised accordingly. There are many local rules and practices on this issue – however consistency and national practice on this issue would be the committee’s goal.

The committee would suggest including this escrow shortage amount in the pre petition arrearage claim as is the current practice of many servicers to be the recommended practice.

Rule 3001(c)(2)(C)

Comment: on the language *“shall be accompanied by an escrow account statement”*

The trustees on the committee believe that this information and addition is critical as to the correct escrow amount for the payment if new legislation modifying mortgages was enacted allowing parties to know the amount of the escrow to be included in the modified payment.

Concern: The Real Estate Settlement Procedures Act (RESPA) applies to most mortgages. The requirements of RESPA are not abrogated by the filing of the bankruptcy. Under RESPA, a servicer must give 60 days notice from the time of the escrow analysis to the date of the change of payment. As such, the payment that will be indicated on the escrow analysis filed with court will not be effective for 60 days after filing.

This leaves a 60 day period in which direction would need to be provided as to the payment to be made.

If the Rule this seeks to calculate the monthly payment retroactive to the date of filing, this would appear to conflict with the requirements of RESPA. While this Rule is pending approval, we believe that HUD should be able to resolve this issue with a change to the RESPA regulations prior to enactment.

Our committee’s suggestion would be that the “new” calculated payment is immediately effective as of the date of the petition. This would appear to be fairer to the debtor as the “new” payment does not include any shortage that would have been included in the prepetition arrearage amount. It also provides more certainty to the servicer as they know what payment to expect as of the date of filing.

The committee asked that the comments clarify that an escrow analysis that resulted in a payment change be listed in the proof of claim and would not be required to file an additional payment change notice under Rule 3023(a). Our suggestion as to language is as follows:

“The Rule is not intended to be construed so that the giving of immediate effect to adjustments in the monthly payment amounts would constitute a per se violation of the noticing requirements of the Real Estate Settlement Procedures Act (RESPA) or any other applicable nonbankruptcy law.”

Rule 3001(c)(3)

Comment: *“Failure to provide supporting information”*

Our committee supports an itemization of the interest, fees and other charges due prior to the date of filing as part of the proof of claim and a copy of the note and mortgage. However, there is a concern as to the wording of the rule that it would require the creditor to file and include all of the documents evidencing each itemized amount listed in the arrearage in the proof of claim.

The committee suggests that the claim holder be allowed to present the information as evidence if the failure to provide or attach the supporting documentation is substantially justified or harmless.

If the rules seek to have each broker price opinion, each late fee printout and invoices for the foreclosure attorney fees filed with the proof of claim, the committee believes that this is excessive. This documentation is not necessary for most cases.

To the extent that the Debtor questions or wants additional information as to the itemized amounts contained in the arrearage, an objection to the proof of claim would appear to be the correct method.

The committee suggests that an advisory comment include "To the extent that the specifics of an itemized amount listed in the prepetition arrearage claim is at question, an objection should be filed."

Rule 3002.1(a) Notice of Payment Change

Comment: The committee supports the filing of Notice of Payment Changes with the Court as included in the NACTT Best Practices.

Concern: The committee requests clarification as to whether the notice provisions applied to mortgage loans that were not secured by the debtor's principal residence, such as rental property.

The committee's suggestion include in the commentary include procedures if payment change results in a decrease in payments. In these types of scenarios, the committee believes the creditor should refund any over payment to the payer of the ongoing mortgage payment- in trustee pay jurisdictions, the payment would be refunded to the Trustee, direct pay refunded to the debtor.

The committee advocates that the payments be made as a supplemental claim, with the ability for the servicer to file same without the added cost of their attorney.

Due to some adjustable rate loans that require monthly adjustments to the payment amount due to interest rate changes, some additional provisions or commentary which addresses this issue may want to be considered. Possible language is attached

New Provision in 3002.1 (non-traditional loan products)

(a) If a creditor has a claim that is secured by real property and is based on an open-ended credit agreement, such as a home equity line of credit (HELOC) or other loan type that may have frequent interest or payment adjustments that makes compliance with 3002.1((a) impracticable or burdensome, the real property creditor shall provide notice

of the loan type with creditor's proof of claim or in any future payment change notice.

Upon filing of said Notice the claimant's compliance with the 30 day notice requirement is vacated for the duration of the case and the trustee is directed to adjust the disbursements to the creditor effective with the date of the notice provided.

Rule 3002.1(c) Notice of Fees, Expenses and Charges

Comment: The committee supports the filing of Notice of Fees, Expenses and Charges with the Court. The committee notes that in many Courts, the filing of such a Notice is still not possible by the creditor as a supplemental claim, due to restrictions by the Courts and lack of fields in CM/ECF.

Concern: The timelines of requiring the servicer to file within 30 days a Notice with the Court is too short of a timeline and will add additional cost to the Debtor/borrower with little benefit.

The committee suggests lengthening the timeline to require the filing of all fees, expenses and costs on at least an annual basis as it is more efficient and cost effective than filing each time such items are incurred. Additionally, the committee believes that the timelines to object to the Notice is too long. The committee suggests that the timeline for objection by the Trustee or debtor's counsel be shortened to the standard objection timeframe of 30 days. The timeline allows clarity for the trustee as to whether or not to pay the additional monies outlined in the supplemental claim and allows for clarification and finality as to what may be added to an account for the servicer and the Debtor.

The proposed rule does not address those fees, expenses or charges that were approved and ordered by the Court. The Best Practices had suggested that those fees not be included in the Notice as they may have already been paid by the Trustee or Debtor as ordered by the Court and the inclusion of these fees, costs could cause double payment and confusion. The committee suggests the Notice should be solely for those fees that have not been ordered by the Court.

The proposed Rule has no payment mechanism. Once the fees, costs and expenses are ordered, the proposed rule is silent as to who is to pay those fees and costs. In order to have a nationwide practice, the committee would suggest a uniform manner would be the most beneficial.

The committee requests an additional provision providing for the debtor to take action once the notice is filed. For example: the debtor should have 60 days to either (1) pay all post petition amounts included in the supplement to the claim; (b) file an objection to the supplement to claim with the court to be served on the creditor, the creditor's attorneys and the trustee; (c) enter into an agreed order allowing the claim (to be paid by the trustee); or (d) take no action and the amounts claimed shall be deemed allowed, but will not be paid by the trustee nor be discharged upon closure or conversion of the case.

The committee suggests that the commentary in the proposed rule address the payoff/request for reinstatement filed during the timeframe between the incurring of the fee or cost and the filing of the Notice.

Rule 3002.1(d)-(g)

Comment: The committee supports the idea of filing a Notice of Final Cure Payment but recommends a change in the procedure to better serve all parties in interest. It is the committee's recommendation that this Notice be provided within 90 days of the final payment in trustee conduit jurisdictions and after the prepetition arrearage claim is paid in non trustee conduit jurisdictions.

Concern: The committee is unclear as to what constituted a "final cure" payment. Some members believed that the Rule is addressed the last payment made the Trustee on the pre petition arrearage claim. Some believed that the Final Cure was actually the last payment made on an ongoing mortgage payment by a Trustee at the end of the case.

The committee was concerned that this provision covers the original claim and pre petition arrearage, but did not address payment of supplemental claims filed under this subsection or any amounts allowed by order of the Court post filing.

The creditors on the committee are concerned about completing the audit of the mortgage account within the current 21 day timeline. They have requested that subcommittee consider a time increase from 21 days to 60 days to complete the final audit and file a response to the Notice of Cure Status. Additionally, the creditors of the committee are concerned if the rule no longer allows the court continues to have discretion to allow the creditor to present information required by this section where the failure to provide is substantially justified or harmless.

The committee suggests that Committee consider modifying the proposed rule as follows:

(d) Notice of Cure Status by Trustee

No later than 90 days prior to the anticipated final payment under a confirmed chapter 13 plan which contains a claim secured by the debtor's principal residence and such claim is provided for under §1322(b)(5) of the Code, the Trustee shall file and serve a statement containing the following information:

- (i) The pre petition arrearage claim of Rule 3001(c)(2)(A)and(B) has been cured or the balance that remains to be paid on such claim.*
- (ii) If the plan provides that the trustee acts as the disbursement agent for payments that come due during the pendency of the plan, a statement that the*

post petition payments have been made in accordance with the claim and supplement to the claim filed pursuant to Rule 3992.1(a) or the balance that remains to be paid to bring such amounts current.

- (iii) Whether any amounts disclosed in a claim supplement filed pursuant to Rule 3002.1(c) have been paid by the Trustee or the balance that has not been paid by the Trustee.*

(e) Notice of Cure Status by Debtor

If the debtor acts as the disbursement agent for payments that come due during the pendency of the plan, the debtor may file and serve the notices specified in (d)(ii) and/or (iii) above.

(f) Response to Notice of Cure Status

Within 30 days after the service of notice given pursuant to subdivision (d) or (e) of this rule, the holder of a claim secured by a security interest in the debtor's principal residence shall file and serve a statement indicating that the holder contests the notice. If applicable, the statement shall contain an itemization of any required cure or post-petition amounts that the holder contends remains unpaid in connection with the security interest as of the date of the statement. The statement shall not be subject to Rule 3001(f).

(g) Hearing on Notice

If a response is filed pursuant to subdivision (f) of this Rule, the Court shall determine whether the notice filed pursuant to subdivision (d) or (e) is accurate and whether the default and all post-petition amounts required by the underlying agreement and applicable non-bankruptcy law have been paid.

Rule 3002.1(g) Failure to Notify

Failure to Notify

Comment: The committee recommends a provision in the commentary that allows a remedial filing. If a creditor does not notify the appropriate parties of the payment changes in accordance with the proposed rules, the committee recommends that notice be effective and the trustee or debtor be able to make the payment change prospectively 30 days after the filing of the notice of payment change.

For example, a payment change that should have been filed and implemented on January 1, 2008 was actually filed on March 1, 2008. The recommendation would be that the payment change is effective on

April 1, 2008 and the payment changes for the period of January to March 2008 would be moot due to the servicer's failure to modify.

If the creditor fails to provide information required by subsection (a) of the Rule within the time period proscribed, such payment change shall be effective prospectively thirty (30) days after the filing of the notice of the payment change. If the payment change resulted in a decrease in the monthly payment the trustee shall retroactively adjust the payment down and make necessary adjustment to future disbursements.

PART A – CASE AND CREDITOR INFORMATION

IN RE: [DEBTOR NAME]

CASE NO. [CASE#]

CHAPTER: 7/11/12/13

- If this loan is escrowed for future taxes and insurance at the time of filing, please attach a copy of the Escrow analysis performed at the time of filing pursuant to Federal Rule of Bankruptcy Procedure 3001.

PROPERTY ADDRESS: [address] _____

CREDITOR ENTITLED TO ENFORCE NOTE AND MORTGAGE: [name] _____

SERVICER OF LOAN: _____

PROOF OF CLAIM PREPARER CONTACT INFORMATION:

Name _____

Phone _____

Email _____

ATTORNEY FOR CREDITOR:

Name _____

Phone _____

Email _____

POST-PETITION MONTHLY MORTGAGE PAYMENT AS OF [DATE] \$XXX.XX

P&I: \$XXX.XX

Escrow/Ins: \$XXX.XX

Escrow/Taxes: \$XXX.XX

PMI: \$XXX.XX

RESPA Reserve: \$XXX.XX (amounts due for reserve that were required or should have been paid prior to the date of filing and should be included in the pre petition arrearage.)

SUBJECT TO IMPOUND/ESCROW: YES/NO

ADJUSTABLE RATE MORTGAGE? YES/NO

IF YES – NEXT SCHEDULED CHANGE DATE IS: [DATE]

UNIFORM CLAIM IDENTIFIER: _____

Per Official Form 10 – paragraph 7 – please attach:

1. Documents that evidence support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, and security agreements. You may also attach a summary.
2. Redacted copies of documents providing evidence of perfection of security interest.
3. Additional documents as required by State and Local Rules.
4. If the documents are not available, state why and the circumstances.

PART B – ITEMIZATION OF PRE-PETITION ARREARAGE/DEBT

1. This payment is for arrearages through _____ date.
 2. Missed P&I Payments (month yr to month yr at \$XX.XX/pymt) \$ _____
 - a. Principal Amount Due _____
 - b. Interest Amount Due _____
 3. Late Charges (for missed payments above - # at \$XX.XX) \$ _____
 4. Escrow Advances (past advances not recouped) \$ _____
 - a. Taxes – (date/amount)
 - b. Insurance – (date /amount)
 5. Escrow Shortages (Escrow amounts due at time of filing pursuant to agreement and applicable nonbankruptcy law including escrow deficiencies and prepetition monthly amounts needed to create RESPA cushion.
Do not include these arrearages in the recalculated monthly payment) \$ _____
 6. Property Inspections \$ _____
 - a. Date/Amount
 7. Property Preservation \$ _____
 - a. Taxes – (date/amount)
 - b. Forced Placed Insurance – (policy period/amount)
 8. Property Appraisals: \$ _____
 9. Insufficient Funds/NSF \$ _____
 10. Previous Attorneys’ Fees (Foreclosure) \$ _____
 11. Previous Attorneys’ Costs (Foreclosure):
 - a. Title work \$ _____
 - b. Filing Fee \$ _____
 - c. Skip Trace \$ _____
 - d. Service \$ _____
 - e. Document Acquisition Costs \$ _____
 - f. Sale Costs \$ _____
 - g. Other (specify) _____ \$ _____
 - h. Total Previous Attorneys Costs \$ _____
 12. Previous Attorneys’ Fees (Bankruptcy – specify): \$ _____
 13. Previous Attorneys’ Costs (Bankruptcy - specify): \$ _____
 14. Other unpaid Fees (specify) \$ _____
 15. Suspense/Unapplied Funds (credit): \$ _____
 16. Attorneys’ Fees (Bankruptcy – (Post-Petition, Pre-Confirmation) \$ _____
- TOTAL PRE-PETITION ARREARAGE: \$ _____
- TOTAL PAYOFF/DEBT \$ _____

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF

IN RE:

DEBTOR 1

SSN: xxx-xx-1234

DEBTOR 2

SSN: xxx-xx-1235

Debtors

CASE NO:

CHAPTER 13

JUDGE

NOTICE OF POST-PETITION PROTECTIVE ADVANCE OR OTHER
CONTRACTUAL EXPENSE AND
REQUEST FOR PAYMENT PURSUANT TO PLAN or CONTRACT

The following advances have been made in accordance with the mortgage contract from (DATE) to (DATE).

Choose one -

The mortgage is paid by the Trustee.

The mortgage is paid directly by debtor(s).

**Trustee is asked to pay the amounts listed below as an amended claim or
An amended claim will be filed for these amounts.**

- Attorney Fees \$
 Filing & Attendance at MFRFS hearing
(Subject to state law and/or Local Rules)
- Court Fee for Filing of Motion \$
 Motion for Relief from Stay filed 3/12/2007
- Late Charges \$
 Late Payment post petition due received
 Late Payment post petition due received
- Title Report (if any) \$
- Appraisals/BPO \$
 Drive by inspection- performed 5/1/2007
- Insurance (non-escrowed loan) \$
- Taxes (non-escrowed loan) \$

- Other: Type of Advance or Contractual Expense:

_____ \$

Total funds advanced/expensed: \$

Entity or Entities that funds were paid to:

If taxes or forced placed insurance
Dates covered by advance

Any questions should be directed to _____.

NAME OF MORTGAGE
Address of Mortgage Co.
Phone no. (extension)
Facsimile no.
E mail:

CERTIFICATE OF SERVICE

I hereby certify that on _____, I have served a copy of this Notice and all attachments to the following:

By U.S. Mail, postage pre paid

Debtor: John Q. Debtor, 1234 Main St., Anywhere, IN 46601

By CM/ECF

Debtor's Attorney: Mary Counselor m.counselor@gmail.com

Trustee: Tom Trustee ttrustee@trustee.com

Marian the Mortgage Servicer Employee
Mortgage Servicer
Dated: