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MORTGAGE BANKERS ASSOCIATION

February 16, 2024

TO: The Committee on Rules of Practice and Procedure
Judicial Conference of the United States

FROM: The USFN Bankruptcy Section's Subcommittee on Amendments to the Federal Rules of
Bankruptcy Procedure and the MBA's Loan Administration Committee

RE: Comment on Proposed Changes to Rule 3002.1

Founded in 1988, the USFN - America's Mortgage Banking Attorneys® ("USFN") is a national, not-for-profit association of law firms that specialize in matters of real estate finance. USFN consists of law firms that represent banks, mortgage lenders, mortgage servicing companies and government sponsored enterprises in connection with foreclosure, bankruptcy, loan modifications and other workouts, inventoried properties, and litigation related to these areas of representation. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of its membership to the mortgage servicing industry. As part of its mission, USFN also supports the interests of its members and the mortgage servicing industry through education, political and governmental advocacy, and by encouraging the use of industry standard procedures, technologies, and best practices.

The Bankruptcy Section of the USFN established a subcommittee to study and comment on proposed revisions to Rule 3002.1. The subcommittee is a group of 5 lawyers that are members of the USFN's Bankruptcy Section, which consists of 17 members who are attorneys from Law Firms throughout the United States that represent mortgage lenders and servicers.

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Proposed Rule Provisions:

3002.1(a), IN GENERAL:

The proposed revisions continue to make the Rule applicable only to the debtor's principal place of residence. If so we suggest that this provision be permissive rather than mandatory as to real property that is not the principal place of residence. The critical issue is to make clear that a lender or loan servicer that provides Notices of Payment Change or Notices of Fees, Expenses, and Charges regarding property that is not the principal place of residence should not, as has been the case in some districts, be sanctioned for simply providing these notices. Frequently the real property in question is income producing which income may be relied upon by the debtor to fund the plan and notices under Rule 3002.1 could be of assistance.

The update to subsection (a) of the rule removes the word "installment". This does not completely clarify what types of transactions are subject to the Rule such as reverse mortgages; statutory liens like tax lien transferees and HOA liens; and total debt plans (a plan in which the entire debt owed on the mortgage is paid through the plan), cramdowns, or non-traditional liens on primary residences.

As to reverse mortgages, the Committee Notes indicate that the provisions of the Rule are applicable to these types of loans. It is our belief the proposed Rule does not apply to reverse mortgages because, although there are contractual financial obligations in a reverse mortgage, like the obligation of the mortgagor to pay taxes and insurance, those payments are not made to the mortgage claimant and, therefore, proposed Rule 3002.1 would not apply to reverse mortgages.

As to total debt claims (and also reverse mortgages), the mortgage claimant may make post-petition payments for taxes and insurance to protect the claimant's position if the debtor does not make these payments. Servicers/attorneys do not have a definitive answer as to whether a Notice of Post-Petition Fees, Expenses and Charges under Rule 3002.1(c) is required for recovery of these post-petition escrow advances, or if another procedure is more appropriate (i.e. motion for reimbursement, Rule 2016(a) application, or a motion for relief). Clarity would be appreciated.

3002.1(b)(3)(B), EFFECT OF AN UNTIMELY NOTICE:

This section concerns the effective date of a payment decrease and currently provides that the effective date of a payment decrease is the "first payment due date after the date of the notice." Clarification in the Rule that a payment decrease is effective on the actual payment due date, even if such date is in the past is suggested.

3002.1(b)(4), PARTY IN INTEREST’S OBJECTION:

There is no stated deadline to file a motion to determine the validity of a payment change, We suggest that the Committee consider amending this provision to provide for a three to six month deadline for filing a motion to determine the validity of a payment change to add some finality to the process.

3002.1(e):

We suggest a shorter time deadline for a party-in-interest to file a motion to determine fees, expenses or charges. In the average case 60 days from the date the creditor’s notice is filed is an adequate period of time for the diligent Debtor and Debtor’s counsel to file such an action and would give the bankruptcy court an opportunity to resolve the issues between the debtor and mortgage claimant before the conclusion of the case, and, as noted regarding the Notices of Payment Change, would add some finality to the process.

Additionally, there is nothing in the proposed rule that requires the debtor to state how and when the fees, expenses or charges will be paid. This often results in objections to the notice of final cure that could otherwise be avoided.

3002.1(f), MOTION TO DETERMINE STATUS; RESPONSE; COURT DETERMINATION:

This new procedure could be initiated by either the Trustee or the debtor at any time during the case until the Trustee files a (g)(1) notice at the end of the case. There is no limit on the number of times the Trustee or debtor can utilize this provision/new form motion. The Committee Note states that this “should be used only when necessary and appropriate” which seems to recognize the potential for misuse or vexatious behavior, but the Note on its own will not prevent potential abuse. We suggest a modification to the language of the Rule to allow the debtor and/or the Trustee to file this motion to be informed of any deficiencies and to reconcile payments as needed and appropriate while also including clear limitations/parameters to help curb misuse. We support the following recommendations:

- (1) Define the timeframe for when a debtor or Trustee may file this motion. Remove the phrase “At any time” and replace that language. An example would be “At any time between 18-36 months after the date of the order for relief . . .”
- (2) Alternatively, specify the frequency with which the debtor or the Trustee may file this motion in a case, we suggest no more than twice per case.
- (3) Specify potential remedies for the mortgage claimant if the provision is misused or used in a vexatious manner.
- (4) Providing that a pro-se debtor must provide an attestation as to the facts set forth in the motion.

- (5) Providing that it is a ground for setting an adverse order aside if the movant has failed to name and serve the correct mortgage claimant /servicer with the motion, based on the documents filed in the case as of the time the motion is filed and served.

Rule 3002.1 (f)(2):

The response period for creditors to reply to the Trustee or debtor's motion is listed as 21 days. We suggest that as this review and investigation as to the status of payments is substantially similar to that as required by 3002.1(f)(1), that the response period mirror that section at 28 days.

3002.1(g)(3) and (4):

Subpart (g)(3) requires the claimant to file a response to the Trustee's Notice of Payments Made. Subpart (g)(4) provides that "after service of the response ... the debtor or the trustee *may* file a motion to determine whether the debtor has cured all defaults and paid all required post petition amounts on a claim."

The proposed Rule states the Trustee "must" file the notice, and the creditor "must" file a response, and the pleadings "must" be on the official forms. However, (g)(4)(A) says the debtor or Trustee "*may*" file a motion to determine. What if neither debtor nor the Trustee file this motion? Mortgage claimants may be left with uncertainty as to the status of a claim after the case closes.

If a creditor files a "disagreed" response to the final cure, the proposed Rule does not mandate a motion to resolve the disagreement. If the debtor/Trustee just allows the case to discharge does the credit's disagreed response serve as the controlling status of the account? The proposed Rule should be amended to provide clarity.

We request a provision that it is a ground for setting an adverse order aside if the movant has failed to name and serve the correct mortgage claimant /servicer with either (1) the Trustee's End-of-Case Notice of Payments Made or (2) the Motion to Determine Final Cure and Payment of Mortgage Claim, based on the documents filed in the case as of the time the motion is filed and served.

Additionally, 3002.1(g)(3) provides that the mortgage claimant must file a response to the Trustee's End-of-Case Notice as a supplement to the proof of claim. "Response" indicates it is a document to be filed in the main case which is where most of us would assume that a response to a notice or motion would be filed. "Supplement to the proof of claim" indicates that the document should be filed in the claims record. It would add clarity to state that the response must be filed in the main case and will be construed as a supplement to the proof of claim.

FORMS

410C13-M1, Motion Under Rule 3002.1 (f)(1) to Determine the Status of the Mortgage Claim and Official Form 410C13-M2, Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim:

These forms require a debtor or Trustee to provide payment dates and amounts, but here is no affidavit or oath requirement. With regard to debtor filed motions, we recommend the addition of an affidavit or oath requirement to ensure the accuracy of the information being provided.

410C13-M1R, Response to [Trustee's/Debtor's] Motion Under Rule 3002.1 (f)(1) to Determine the Status of the Mortgage Claims; 410C13-NR, Response to Trustee's Notice of Payments Made; and 410C13-M2R, Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim:

These forms require that the claim holder's itemized payment history must be provided "using the format of Official Form 410A, Part 5." Part 5 of Official Form 410A often requires manual completion (which can be prone to scrivener error) and may cause unnecessary confusion as the format of Part 5 may not be responsive to a specific request. Questions and confusion may arise, in part, because Part 5 of the 410A is intended to capture a pre-petition payment history and does not lend itself to distinguishing between outstanding pre-petition arrears from any post-petition delinquency. Instead, a payment history would provide the information in a more concise and clear manner. The recommendation is to remove the requirement to use the format of the Official 410A or to specify that the claim holder "may" use the Official 410A format but is not required to do so. Additionally, with respect to the requirement that the responding creditor attach a payoff statement in support of its response, such requirement is somewhat onerous and exceeds the scope of a typical Notice of Final Cure/Motion to Determine inquiry – which is usually limited to the whether the subject loan is current. The recommendation is that such requirement be removed.

410C13-N, Trustee's Notice of Payments Made:

An issue with stating when the next mortgage payment is due, even when the Trustee has made all the post-petition contractual payments, is that by the time the Trustee files the Notice of Payments Made, other ongoing contractual payments will have come due and may have been paid by the debtor following completion of the plan payments. Take the example a conduit case in which the last payment disbursed by the Trustee was the payment due on October 1, 2023. By the time the Trustee files the Notice of Payments Made, at least one more payment will probably have come due, post plan term, but the Trustee

will not know whether that payment was made by the debtor. It can create confusion if the Notice states that the next payment due is the payment for November 1, 2023, but that payment has already been made, so that in reality the next payment due is the December 1, 2023, payment. It would be less confusing to state that the next mortgage payment following the completion of the plan would be due on (in this example) November 1, 2023.

On behalf of USFN



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