# ***Monday, July 22***

***General Session 3***
Monday, July 22
1:45 - 3:15 p.m.
Broadmoor Hall B
**Implementation of the National Mortgage Settlement in Bankruptcy Cases**

*This panel will discuss the implementation of the national mortgage settlement by mortgage servicers in bankruptcy cases, and issues servicers, attorneys and judges are having with the changes being implemented (e.g., right to foreclosure language, supplemental declarations in support of motions for relief from stay). In addition, the panel will discuss the national Chapter 13 plan and rule changes being proposed by the Bankruptcy Rules Committee, and which come up for Public Comment in August, 2013.*

- *National Mortgage Servicing Standards*
  - *Affidavits and Declarations - how is this working where there was no prior affidavit requirement? How does this affect the time to file a MFR?*
  - *RTF language - any resistance by judges or trustees? What happens if the loan is subsequently transferred?*
  - *Payment Application requirements - what if no payment change notice was properly served/filed pursuant to Rule 3002.1*
- *Model Plan & Proposed Rule Change*
  - *Model Plan - Pros and Cons*
  - *Bifurcated PoC Filing Deadline - how will this work? Will it work?*
  - *Lien Stripping and Cramdown via Plan Provisions*
  - *Which controls: Plan or PoC?*
  - *Public Comment Period starts in August*

**Moderator:** Michael J. McCormick, Esq., Managing Partner, Bankruptcy Department, McCalla Raymer, LLC
**Speakers:** Anita M. Warner, Esq., Asst. General Counsel, JPMorgan Chase Bank, N.A.; Henry E. Hildebrand, III, Esq., Chapter 13 Trustee, Middle District of Tennessee; Hon. C. Ray Mullins, Chief Judge, U.S. Bankruptcy Court for the Northern District of Georgia and President of the National Conference of Bankruptcy Judges; Mike Bates, Esq., Senior Company Counsel, Wells Fargo

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After spending almost two (2) years as the managing attorney of the Memphis office for McCalla Raymer, LLC, Michael recently returned to Atlanta to be the managing attorney over the Bankruptcy Department with McCalla Raymer, LLC. In addition to overseeing a dozen bankruptcy attorneys, Michael assists in the bankruptcy representation for 200 mortgage lenders and servicers nationwide. He has been with the firm since 2004.

Before moving to the Atlanta area in 2004, and then to the Memphis area in 2008, Michael had a debtor practice with Bond, Botes & McCormick, P.C. in Biloxi, Mississippi and practiced civil and commercial litigation with Dukes, Dukes, Keating & Faneca, P.A. in Gulfport, Mississippi.

Michael is a native of Toronto, Canada and received his undergraduate degree from the University of Western Ontario. He graduated from Wake Forest University School of Law in 1994 and is admitted to practice in Alabama, Arkansas, Georgia, Kansas, Mississippi, Missouri, and Tennessee.

Michael has conducted continuing legal education seminars; written numerous articles; spoken to community groups, attorneys, and servicers; and even appeared on television to discuss bankruptcy. Recently he has discussed the Bankruptcy Reform Bill (BAPCPA) and federal regulations governing escrow accounts, and he has written articles on these subjects.

Michael is a member of several bankruptcy organizations, including the Mississippi Bankruptcy Conference; the bankruptcy sections of the Alabama, Georgia and Tennessee bar associations; the American Bankruptcy Institute, and the National Association of Chapter 13 Trustees (associate member). He was recently appointed to the TBA Bankruptcy Law Section Executive Council, and has served on the NACTT Mortgage Committee by helping to draft "Best Practices for Trustees and Mortgage Servicers in Chapter 13" and working with the Federal Rules Committee on the revisions to Federal Bankruptcy Rules which became effective on December 1, 2011 (i.e., Rules 3001 and 3002.1). Since 2010 Michael has served on the Emory Bankruptcy Developments Journal Notes and Comments Advisory Committee. Michael is also recognized by the American Board of Certification as a Consumer Bankruptcy Specialist.

In July, 2012 Michael was elected to the board of directors for the American Legal and Financial Network (ALFN).

In his spare time, Michael is an avid sports fan, especially hockey and baseball. He has also worked for several minor league baseball and hockey teams.

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Anita has undergraduate, graduate and law degrees from Louisiana State University. She clerked for the Louisiana Supreme Court and the United States Court of Appeals, Fifth Circuit. She is admitted in Louisiana and Texas, the federal bankruptcy and district courts in both states, the United States Court of Appeals, Fifth Circuit, and the United States Supreme Court. She has represented banks and mortgage creditors in bankruptcy matters for over 30 years. For the last 20 years she has been in house and represented Hibernia National Bank (now Capital One Bank), Washington Mutual and JPMorgan Chase Bank, N.A.

For the past several years she worked closely with her business, risk, controls, and compliance partners at Chase to comply with the OCC consent order, the implementation of the new Bankruptcy Rules effective December 1, 2011, and the National Mortgage Settlement. She is an associate member of NACTT, a member of the NACTT mortgage committee and has participated in panels involving ALFN, Legal League 100, USFN, and Texas Mortgage Bankers in discussions about representing creditors in bankruptcy and compliance with the new rules and the national mortgage servicing standards.

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Henry E. Hildebrand, III has served as Standing Trustee for Chapter 13 matters in the Middle District of Tennessee since 1982 and as Standing Chapter 12 Trustee for that district since 1986. He also is of counsel to the Nashville law firm of Lassiter, Tidwell, Davis, PLLC.

Mr. Hildebrand graduated from Vanderbilt University and received his J.D. from the National Law Center of George Washington University. He is a fellow of the American College of Bankruptcy and serves on its Education Committee. He is Board Certified in consumer bankruptcy law by the American Board of Certification. He is Chairman of the Legislative and Legal Affairs Committee for the National Association of Chapter 13 Trustees (NACTT). In addition, he is on the Board of Directors for the NACTT Academy for Consumer Bankruptcy Education, Inc.

Mr. Hildebrand has served as case notes author for The Quarterly, a newsletter dealing with consumer bankruptcy issues and Chapter 13 practice in particular, since 1991. He is a regular contributor to the American Bankruptcy Institute Journal. He is an adjunct faculty member for the Nashville School of Law and St. Johns University School of Law.

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The Honorable C. Ray Mullins is a United States Bankruptcy Court Judge for the Northern District of Georgia, Atlanta Division. He was appointed by the Eleventh Circuit Court of Appeals on February 29, 2000. A native of Steubenville, Ohio, Judge Mullins obtained his B.S. (Business Administration 1974) and M.B.A. (1977) from Bowling Green State University. Judge Mullins served as an instructor in the Management Department of Bowling Green's School of Business Administration from 1977-82. While teaching, he began law school in 1979, and in 1982 graduated magna cum laude from the University of Toledo, College of Law, where he was a member of the Law Review and the Order of the Coif. In 1982, Judge Mullins joined the Toledo, Ohio firm of Cooper, Straub, Walinski & Cramer (now Cooper Walinski). His practice focused primarily on civil litigation. From 1984-86, Judge Mullins also taught trial practice as an adjunct professor of law at the University of Toledo College of Law. In 1987, Judge Mullins joined Kilpatrick & Cody (now Kilpatrick, Townsend & Stockton LLP) in Atlanta and became a partner in 1993. He practiced in the firm's Financial Restructuring Group, specializing in Chapter 11 bankruptcy matters. In 2009, Chief Justice Roberts appointed Judge Mullins chair of the Federal Judicial Center Bankruptcy Judge Education Committee. In March 2013, Chief Justice Roberts appointed Judge Mullins to the board of the Federal Judicial Center. Judge Mullins is a Fellow in the American College of Bankruptcy, as well as a member of the board of directors of the American Bankruptcy Institute. Judge Mullins is also an advisor to the Emory Bankruptcy Developments Law Journal. Judge Mullins is the President of the National Conference of Bankruptcy Judges (2012-13). In January 2012, Judge Mullins was elevated to Chief Judge. Judge Mullins is a frequent speaker at various professional conferences, seminars and workshops.

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Michael T. Bates has served as Senior Company Counsel in the Wells Fargo & Company Law Department for the past twenty years. In this capacity, Mr. Bates provides legal advice to all consumer bankruptcy groups within Wells Fargo on all aspects of consumer collections, bankruptcy and debtor/creditor remedies. Prior to joining Wells Fargo, Mr. Bates was engaged in private practice in the Minneapolis, Minnesota law firm of Briggs and Morgan where his practice focused on commercial bankruptcy and debtor/creditor remedies.

Mr. Bates is a graduate of Iowa State University and Hamline University School of Law. Mr. Bates is currently admitted to practice law in Iowa and Minnesota and is a current member of the Conference on Consumer Finance Law, American Bankruptcy Institute and ACA International.

AMERICAN LEGAL & FINANCIAL NETWORK

# 2013 Annual Conference
# Bankruptcy General Session

# 2011 Bankruptcy Rule Changes

## Payment change notices (PCN)

- What are the consequences if the notice is not filed or filed late?
  - Lack of consistency or clarity
  - NMSS only says late charges must be waived
- HELOCs – must PCNs be filed monthly?
  - *See In re Pillow*, Case 11-11688 (Bankr. W.D. Mich. 2013)(Dales, J.) and *In re Adkins*, 477 B.R. 71 (Bankr. N.D. Ohio 2012)(Woods, J.).
- Do notices need to be sent to conduit trustee?
  - What's the purpose?
  - Trustees don't want them!

# 2011 Bankruptcy Rule Changes

## Notice of Fees, Charges & Expenses (PPFN)

- What does incurred mean (e.g., task completion vs. invoice date)?
  - The timing affects whether the fee appears on the PoC or on a PPFN
- With regard to fees approved in a consent order:
  - How do trustees monitor these fees?
  - How do servicers get paid these fees?
  - Will these fees be denied at discharge if not included in a PPFN?

# 2011 Bankruptcy Rule Changes

## Notice of Final Cure (NOFC)

- Suggestion: Rules Committee should develop an official form and an official response form
- Why do some trustees file a motion to deem the loan current instead?
- Why do we get a NOFC when stay relief was granted and the arrears claim was not paid in full?

# 2011 Bankruptcy Rule Changes

## Is compliance with Rule 3002.1 required upon stay relief?

- Do trustees still want the notices? HINT – they are no longer funding the claim
- *See In re Kraska*, 2012 WL 1267993 (Bankr.N.D.Ohio Apr 13, 2012), distinguished by *In re Thongta*, 480 B.R. 317 (Bankr.E.D.Wis. Oct 18, 2012).

# National Mortgage Servicing Standards

- Unlike with the rule changes in 2011, there was little lead time to become familiar with and discuss the national mortgage settlement and the servicing standards
- How familiar are judges, trustees, and debtor attorneys with the requirements?
- What contents of the declaration are helpful?
- Is the right to foreclosure language useful?
  - Any issues created by the RTF language?

# Official Plan & 2014 Rule Changes

## Who wants a official form plan?

- According to Judge Wedoff:
  - the lack of a national form makes it difficult for lawyers who practice in several districts, adding transactional costs that are passed on to debtors
  - a recent survey of the bankruptcy bench established that a majority of chief bankruptcy judges support developing a national form plan and simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and to clarify certain procedures
- Are debtor attorneys in favor of a official form plan?

# Official Plan & 2014 Rule Changes

What controls – the plan or the PoC?

- The current draft of the official form plan (OFP) now provides that the amounts listed on a POC as to the current installment payment and the arrearage for secured claims will control over contrary amounts listed in the plan
- Rule 3012 - the amount of secured claims may be determined in a proposed plan, subject to objection and resolution at the confirmation hearing.
- Where modification is proposed by the plan, the plan must be served per Rule 7004.

# Official Plan & 2014 Rule Changes

When must the PoC be filed?

- Rule 3002 is amended to clarify that secured creditors MUST file a POC in order to have an allowed secured claim and receive distributions
- The current draft of Rule 3002(c)(2) provides that for the debtor's principal residence, the POC is timely filed if filed within 60 days of the petition date and includes the mortgage form attachment required by Rule 3001(c)(2)(C).
  - The documentation required by Rule 3001(c)(1) and (d) (supporting evidentiary documents) may be filed as a supplement not later than 120 days after the petition.
  - What issues are created by this bifurcated process?

# Official Plan & 2014 Rule Changes

Other changes:

- Rule 2002 will be amended and 3015(f) will be added to designate a notice of plan objection deadline and the actual plan objection deadline, which will be 7 days prior to confirmation.
  - Can servicers meet this deadline?

# Official Plan & 2014 Rule Changes

Other changes:

- 4003(d) will be amended to allow chapter 12 and 13 plans to seek the avoidance of liens encumbering property pursuant to 522(f) of the code.
- Rule 9009 will be amended to ensure use of the OFP (and other Official documents) without alteration, except as otherwise provided in the rules or in a particular Official Form.

# Official Plan & 2014 Rule Changes

Other changes:

- The Committee Notes to the proposed OFP regarding surrender of collateral in section 3.5 of the proposed OFP indicates that the surrender will result in automatic stay termination at confirmation
- Why is this in the Committee Notes instead of appearing conspicuously on the OFP?
- What about relief from the co-debtor stay?

# Official Plan & 2014 Rule Changes

Other changes:

- Section 3.1 of the proposed OFP, read together with the Committee Notes for Section 3.1, indicates that upon termination of the stay, the provisions of Rule 3002.1 will no longer apply, as the plan no longer provides for the treatment of the claims under 11 U.S.C. § 1322(b)(5) (curing arrears and maintaining current payments)
- Why is this in the Committee Notes instead of appearing in the actual rule and on the OFP?

C

United States Bankruptcy Court,
N.D. Ohio.
In re James Leslie ADKINS and Tina Marie Adkins, Debtors.

No. 10–44214.
Aug. 10, 2012.

**Background:** Creditor that held a second mortgage on Chapter 13 debtors' residence filed motion to be excused from filing the notice of payment change admittedly required by the bankruptcy rule governing notices relating to claims secured by security interest in a debtor's principal residence, contending that compliance with rule was "virtually impossible" due to the varying amounts of the required monthly payments under debtors' open-ended revolving line of credit.

**Holding:** The Bankruptcy Court, Kay Woods, J., held that the court lacked authority to excuse compliance with the subject rule.

Motion denied.

West Headnotes

**[1] Bankruptcy 51 2131**

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2131 k. Notice. Most Cited Cases

**Bankruptcy 51 2903**

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2903 k. Amendment or withdrawal. Most Cited Cases

Bankruptcy court lacked authority to excuse mortgagee's compliance with bankruptcy rule requiring the holder of a claim to serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, even if, as mortgagee asserted, its compliance with the rule was "virtually impossible" due to the rule's 21-day notice requirement and the varying amounts of the monthly payments required under debtors' open-ended revolving line of credit; Federal Rules of Bankruptcy Procedure contain no provision for excusing compliance with a particular rule, nor does the rule in question contain language indicating that the court has discretion to extend time or excuse performance. Fed.Rules Bankr.Proc.Rules 1001, 3002.1(b), 11 U.S.C.A.

**[2] Bankruptcy 51 2129**

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2129 k. Rules. Most Cited Cases

Application of the Federal Rules of Bankruptcy Procedure is mandatory in every case and proceeding. Fed.Rules Bankr.Proc.Rule 1001, 11 U.S.C.A.

**[3] Bankruptcy 51 2129**

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2129 k. Rules. Most Cited Cases

**Bankruptcy 51 2132**

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2132 k. Extension of time. Most Cited Cases

When a court has discretion to extend time or excuse performance, the Federal Rules of Bank-

ruptcy Procedure so provide.

***71** Robert A Ciotola, Canfield, OH, for Debtors.

Michael A Gallo, Youngstown, OH, for Trustee.

**ORDER DENYING FIFTH THIRD MORTGAGE COMPANY'S MOTION TO BE EXCUSED FROM FILING A NOTICE OF PAYMENT CHANGE PURSUANT TO FRBP 3002.1(B)**

KAY WOODS, Bankruptcy Judge.

This cause is before the Court on Fifth Third Mortgage Company's Motion to be ***72** Excused from Filing a Notice of Payment Change Pursuant to FRBP 3002.1(b) ("Motion to Excuse Notice") (Doc. # 36) filed by Fifth Third Mortgage Company ("Fifth Third") on June 27, 2012.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Order Nos. 84 and 2012–7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Fifth Third holds a second mortgage on the residence of Debtors James Leslie Adkins and Tina Marie Adkins ("Debtors") based on a Note (defined by Fifth Third as the "HELOC"), which Fifth Third represents is attached as Exhibit A to the Motion to Excuse Notice.[FN1]

> FN1. The Court assumes that HELOC stands for Home Equity Line of Credit even though the term is not defined in the Motion to Excuse Notice. Contrary to the representations in the Motion, the Note attached as Exhibit A provides for the Debtors to pay Fifth Third $167,600.00 at an interest rate of 6.750% in monthly installments of $1,087.05 beginning August 1, 2009, for thirty years (until July 1, 2039). It does not appear that Exhibit A is the Note to which Fifth Third refers in its Motion.

Fifth Third states that "[u]nder the terms of the HELOC, the required payments are only in the amount of the finance charges from the outstanding balance for the prior billing period" and that the "agreement matures and the outstanding balance is due in 2026." (Mot. to Excuse Notice at 1.)

On November 10, 2010 ("Petition Date"), the Debtors filed (i) a voluntary petition pursuant to chapter 13 of the Bankruptcy Code; and (ii) Chapter 13 Plan (Doc. # 2), which provided for the treatment of two claims held by Fifth Third in Article 2E. Fifth Third contends that, as of the Petition Date, "there were arrearages on [Fifth Third's] claim which were subject to being cured pursuant to 11 USC 1322(b)(5)." (*Id.* at 1–2.) The Debtors' Chapter 13 Plan was confirmed pursuant to Confirmation Order (Doc. # 29) entered on June 24, 2011.

Fifth Third seeks an order from this Court excusing it from the requirements of Federal Rule of Bankruptcy Procedure 3002.1(b) in this case. Fifth Third concedes that the provisions of Rule 3002.1(b) apply, but argues:

> The HELOC is an open ended revolving credit line. Its principal amount can change if there are draws on the credit line or if the Debtor [ sic] pays an amount over and above the finance charges.
>
> * * *
>
> .... The payment amounts can, and typically do, vary from month to month.
>
> Furthermore, the 21 day notice requirement, coupled with the monthly payments under the terms of the HELOC make it virtually impossible for Fifth Third to comply with [Rule 3002.1(b) ].

(*Id.* at 2.)

As Fifth Third concedes, there is no question that the terms of Rule 3002.1(b) apply to its claim. ( *Id.*) ("Accordingly, the provisions of Subsection (b) [of Rule 3002.1] apply.") Fifth Third admits, "The HELOC in this case is secured by the Debtors' principal residence and is provided for under § 1322(b)(5)." (*Id.*) Rule 3002.1 provides, in pertinent part:

> (a) In General. This rule applies in a chapter 13 case to claims that are (1) ***73** secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.
>
> (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(a)-(b) (West 2012). Despite acknowledging the applicability of Rule 3002.1(b) to its secured claim, Fifth Third asks to be "excus[ed]" from compliance with the Rule because it argues that compliance is "virtually impossible." (Mot. to Excuse Notice at 1–2.)

[1] The Court will accept Fifth Third's representations concerning the HELOC as true and accurate despite lack of support for such representations in the Note attached to the Motion. Based on such representations, the Court sympathizes with Fifth Third and the difficulty that compliance with Rule 3002.1(b) presents under these circumstances.[FN2] Despite such sympathy, however, this Court does not believe that it can excuse compliance with Rule 3002.1.

> FN2. Before Rule 3002.1 became effective, there was a public comment period during which Fifth Third could have: (i) raised the difficulty of complying with the proposed rule under this type of situation; and/or (ii) suggested/requested that proposed Rule 3002.1 except revolving lines of credit from the notice requirements. This Court has no knowledge if Fifth Third took advantage of the comment period to express its views or if such views were expressed, but rejected. In any event, the appropriate way for Fifth Third to obtain the relief it now seeks would be to have Rule 3002.1(b) amended.

[2] Federal Rule of Bankruptcy Procedure 1001 provides, "The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code.... These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." FED. R. BANKR.P. 1001 (West 2012). Application of the Federal Rules of Bankruptcy Procedure is mandatory in "every case and proceeding." *Id.* This Court has found no provision for excusing compliance with a Bankruptcy Rule.

[3] The Bankruptcy Rules require certain acts within prescribed time frames. When a court has discretion to extend time or excuse performance, the Bankruptcy Rules so provide. To that end, the phrase "unless the court orders otherwise" appears in the following Bankruptcy Rules: 1004.2, 1007(a)(3), 1007(a)(4), 1007(b)(1), 1007(c), 1019(5)(C), 1021(a), 2002(a)(1), 2002(g)(3), 2003(b)(3), 2015.1(a), 2015.1(b), 2015.2, 2015.3(f), 2019(b)(2), 3006, 3015(g), 3019(b), 3020(e), 4001(a)(3), 6004(h), 6006(d), 8011(c), 9006(a)(3) and 9037(a). In contrast, Bankruptcy Rule 3002.1 has no such discretionary language. Instead, Rule 3002.1 provides, in subsection (a), that it "applies" to "claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan" and, in subsection (b), that the holder of the claim "shall file and serve" the required notice. FED. R. BANKR.P. 3002.1(a)-(b).

Fifth Third cites three examples that it characterizes as "exemptions from strict compliance," but such examples are not exemptions from compliance with Bankruptcy Rule 3002.1. (Mot. to Excuse Notice at 3.) As Fifth Third notes, "Other Bankruptcy Courts that had notice of payment change requirements *prior to the adoption of 3002.1* have recognized the ***74** unique burden on open end revolving credit lines secured by mortgages and have excused creditors with such claims from compliance with payment change notice requirements." (*Id.* at 3 (emphasis added).) Each of the local bankruptcy rules and standing orders cited by Fifth Third harkens back to 2009 and pre-dates adoption of Bankruptcy Rule 3002.1, which became effective on December 1, 2011. As such, these examples do not and cannot serve as examples of exemption from strict compliance with Rule 3002.1 because that Rule was not then in effect. Exhibit C to the Motion to Excuse Notice is General Order Adopting Supplemental Chapter 13 Plan Provisions Requiring: (1) Supporting Information Concerning Proof of Claim and (2) Disclosure and Adjudication of Postpetition Mortgage Charges Pending Amendment of the Federal Rules of Bankruptcy Procedure. As the name explicitly states, this General Order, which is dated May 21, 2009, provided a stop-gap procedure until adoption of "uniform national procedures ... currently pending pursuant to proposals to amend Fed. R. Bankr.P. 3001(c) and to adopt a new Fed. R. Bankr.P. 3002.1." (*Id.*, Ex. C at 1.) Once the uniform national procedures became effective, the General Order would no longer be needed or in effect.

There is no reason to assume that any of the examples attached as Exhibits to the Motion to Excuse Notice are still in effect after the effective date of Bankruptcy Rule 3002.1— *i.e.*, December 1, 2011. Even if any of the orders or local rules is still in effect, such order or rule provides no basis for this Court to excuse one creditor's compliance with Bankruptcy Rule 3002.1 in a single bankruptcy case. This is especially true where, as here, Fifth Third acknowledges the applicability of the Bankruptcy Rule.

Because of the mandatory application of Bankruptcy Rule 3002.1 to Fifth Third's claim, this Court does not believe it has the authority to "excuse" Fifth Third's compliance with the Rule. For the reasons set forth above, this Court hereby denies the Motion to Excuse Notice.

Bkrtcy.N.D.Ohio,2012.
In re Adkins
477 B.R. 71

END OF DOCUMENT

Slip Copy, 2012 WL 1267993 (Bkrtcy.N.D.Ohio)
**(Cite as: 2012 WL 1267993 (Bkrtcy.N.D.Ohio))**

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
N.D. Ohio,
Eastern Division.
In re Laurie Ann KRASKA, Debtor.

No. 11–63013.
April 13, 2012.

**MEMORANDUM OF OPINION (NOT INTENDED FOR PUBLICATION)**

RUSS KENDIG, United States Bankruptcy Judge.

***1** On March 1, 2012, Aurora Bank FSB ("Aurora Bank") filed a motion for relief from the automatic stay and the co-debtor stay. No objections were filed. When Aurora Bank submitted an order for the court's review, it contained a provision that waived compliance with Federal Rule of Bankruptcy Procedure 3002.1. For the reasons that follow, the court declines to waive the requirements of the rule.

The court has jurisdiction of this case under 28 U.S.C. § 1334 and the general order of reference entered in this district on July 16, 1984, now superseded by General Order 2012–7 dated April 4, 2012. In accordance with 28 U.S.C. § 1409, venue in this district and division is proper. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the court.

***DISCUSSION***

Debtor's petition lists ownership of real estate identified by the address of 697 West Wayne Avenue, Wooster, Ohio. Debtor is listed as the fee simple owner of this property, which appears to be Debtor's residence. Pursuant to the terms of her confirmed plan, she is surrendering the real estate. On March 1, 2012, Aurora Bank filed a motion for relief from stay and the co-debtor stay. It appears Debtor was solely obligated on the note. Debtor and Joseph P. Kraska, III granted a mortgage on the property to secure the note. The motion specifically requests the court waive any requirements under Rule 3002.1 for both Aurora Bank and the chapter 13 trustee.

Federal Rule of Bankruptcy Procedure 3002.1, which became effective on December 1, 2011, is new. At its core, the rule is targeted to individual chapter 13 debtors with mortgages covered by 11 U.S.C. § 1322(b)(5) and "is designed to insure that individual debtors and trustees obtain information necessary to deal appropriately with creditor claims." Eugene R. Wedoff, *Proposed New Bankruptcy Rules on Creditor Disclosure and Creditor Enforcement of the Disclosures—Open for Comment*, 83 Am.Bankr.L.J. 579, 582 (2009). The judicial conference summarized the need for the new rule:

> Proposed new Rule 3002.1 implements § 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 intended to provide the mortgagor-debtor information necessary to determine the exact amount needed to cure any pre-petition arrearage and the amount of the postpetition payments. If the latter amount changes over time because of changing interest rates, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment must be conveyed to the debtor and trustee. Numerous consumer bankruptcy lawyers, trustees, and judges have reported that debtors often do not learn until after completing a chapter 13 plan that the mortgage payments have changed. In particular, debtors do not learn that fees, expenses, or other charges have been imposed during the life of the plan. As a result, debtors may face renewed foreclosure proceedings immediately after emerging from bank-

ruptcy. Timely notice of such changes will permit the debtor and trustee to adjust post-petition mortgage payments and, if appropriate, challenge the validity of fees, expenses, or other charges assessed during the bankruptcy.

***2** Excerpt from the Report of the Judicial Conference, Committee on Rules of Practice and Procedure, available at: *http://www.uscourts . gov/ RulesAndPolicies/FederalRulemaking/PendingRules/ SupremeCourt 042611.aspx* (last visited April 11, 2012) (attached as Exhibit A); *see also In re Carr,* 2012 WL 930337 (Bankr.E.D.Va.2012); *In re Jackson,* 446 B.R. 608 (Bankr.N.D.Ga.2011).

Under the authority of 28 U.S.C. § 2075, the Supreme Court adopted various amendments to the bankruptcy rules, including new Rule 3002.1, on April 26, 2011 and proscribed that the amendments "shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." Order of the Supreme Court of the United States Adopting and Amending Rules, April 26, 2011, available at: *http:// www.uscourts.gov/Ru lesAndPolicies/ FederalRulemaking/PendingRules/ SupremeCourt042611.aspx* (last visited April 11, 2012) (see attached Exhibit B).

To meet its intended goals, the new rule provides the procedure for a creditor to provide notice of payment changes, see Fed.R.Bankr .P. 3002.1(b), and postpetition fees, expenses and charges assessed on an account. Fed.R.Bankr.P. 3002.1(c). Subsection (d) governs the form and content of the creditor notices, while subsection (e) establishes the procedure for determining whether any fee, expense or charge under subsection (c) is allowable. The balance of the rule covers the final cure payment on arrearage claims and effect of a creditor's failure to provide notice under the rule. A failure to notice applicable changes may result in prejudice to the creditor. Fed.R.Bankr.P. 3002.1(i).

At first blush, Rule 3002.1 may seem inapplicable to cases where a debtor intends to surrender real estate. Undisputedly, the bulk of the rule is intended to address the cure of arrearage claims. However, the absence of an arrearage claim does not obviate the need for the protections the rule provides.

First, the nature of the claim as secured or unsecured is immaterial to § 1322(b)(5) because that code section covers both secured and unsecured claims. While the claim may ultimately become an unsecured deficiency claim, at present it is a secured mortgage claim secured by Debtor's residence, making § 1322(b)(5) applicable.

Second, Aurora Bank will be filing a claim. As the court sees it, part of the point of Rule 3002.1 is to provide a procedure for the filing of an accurate mortgage claim. Here, this may be particularly important to Debtor because there is a possibility that this is a one hundred percent plan.[FN1] In this case, the intent is to allow Aurora Bank to foreclose its lien, sell the property, and file a deficiency claim. (Order Conf. Ch. 13 Plan, Nov. 17, 2011). The court can conceptualize situations, including adjustments to an adjustable rate mortgages or changes in an escrow analysis, where payment changes may occur between the date of filing and the judgment of foreclosure, thereby impacting the claim. Similarly, it is easy to understand that postpetition charges may also be added to the account, particularly foreclosure costs. Requiring a creditor to provide notice of these figures will allow parties to examine the basis of the amounts due and challenge the figures when necessary. The information produced in compliance with the rule may be useful to multiple parties. While cure of an arrearage claim may not be at issue in this case, obtaining accurate information for the calculation of the underlying claim is consequential.

FN1. Thus the reason the trustee has imposed the requirement of interest to the unsecured creditors. (Ag. Order Settling Trustee's Obj. to Conf. of Plan, November 17, 2011).

***3** Third, the rule does not contain a pass for situations that are outside the norm, like the surrender proposed here. There are simply no exceptions contained in the rule.

For these reasons, the court finds that the rule is not inapplicable to a surrender situation. Consequently, blanket waiver is not appropriate, especially without any foundation. The court therefore declines to waive the requirements of Rule 3002.1.

An order conforming to this opinion will be entered contemporaneously.

So ordered.

Exhibit A

**EXCERPT FROM THE 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: FEDERAL RULES OF BANKRUPTCY PROCEDURE**

***Rules Recommended for Approval and Transmission***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2003, 2019, 3001, 4004, and 6003, new Rules 1004 .2 and 3002.1, and proposed revisions to Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2009. Fifteen witnesses appeared at a public hearing conducted on February 5, 2010, in New York, The other scheduled public hearing on the proposed changes was cancelled because the one witness who asked to testify at the hearing agreed to do so by telephone. The advisory committee considered more than 150 written comments on the proposed amendments.

*Rule 1004.2*

Proposed new Rule 1004.2 requires that a petition for recognition of a foreign proceeding under new chapter 15 of the Bankruptcy Code identify the countries where a foreign proceeding is pending against the same debtor and the country where the debtor has its "center of main interests." The rule sets out applicable notice provisions and generally requires that a challenge to the debtor's designation of the center of main interests be raised at least seven days before the hearing on the petition for recognition. The proposed new rule was published in August 2008 and republished with a revision in August 2009. As revised, the deadline to file a motion challenging the debtor's designation was changed from "60 days after the notice of the petition has been given" to no later than seven days before the petition hearing. No comments were submitted following republication.

*Rule 2003(e)*

The proposed amendments to Rule 2003(e) require a presiding official who "adjourns" a meeting of creditors to file a statement specifying the date and time to which the meeting is adjourned. The requirement ensures that the record clearly reflects whether the meeting of creditors was concluded or extended to another day. The Committee Note makes clear that an adjournment to a specific date is the equivalent of holding the meeting "open" for purposes of § 1308(b) of the Bankruptcy Code. Under 11 U.S.C. § 1308(a), a chapter 13 debtor is required to file certain tax returns "[n]ot later than the day before the date on which the meeting of creditors is first scheduled to be held." Under § 1307(e), the debtor's failure to file the required tax returns is a basis for dismissal or conversion of the chapter 13 case. Section 1308(b), however, provides that if the debtor has not filed the required tax returns by the date on which the meeting of creditors is first scheduled, the trustee may "hold open that meeting for a reasonable period of time"—not to exceed 120 days for a return that is past due as of the date the petition is filed—which gives the debtor additional time to file the required return.

***4** Eight of the nine comments submitted on the proposed amendments expressed support. The Office of Chief Counsel of the IRS recommended revising the proposed amendments to require the official presiding at the meeting of creditors to specify whether the meeting is being "held open" to allow a taxpayer additional time to file a tax return, or whether the meeting is being "adjourned" for some other purpose. The advisory committee concluded that requiring the trustee to make this distinction expressly and on the record in every case would subject chapter 13 cases to conversion or dismissal merely because the trustee failed to make the necessary statement or unintentionally used the wrong words in adjourning a meeting of creditors. Instead, the advisory committee concluded that it would be simpler and less confusing, and would avoid an unnecessary trap for debtors, to treat a meeting that is "adjourned" to a specific date as "held open" under § 1308(b) and as allowing the debtor additional time to file a tax return, There is no risk that this would create an indefinite extension because the additional time for filing tax returns is limited by statute.

*Rule 2019*

The proposed amendments to Rule 2019, which applies in chapter 9 and chapter 11 proceedings, expand disclosure requirements to facilitate openness and transparency by revealing potentially divergent economic interests within groups of creditors or equity security holders and on the part of putative representatives of other stakeholders. The proposed amendments require committees, groups, or entities that consist of or represent creditors or equity security holders who are acting in concert to identify their "disclosable economic interests" relating to the debtor. This term is broadly defined in subdivision (a) to include economic rights and interests that are affected by the value, acquisition, or disposition of a claim or interest. The amendments require every such group or committee to provide a verified statement of, among other things, the nature and amount of each disclosable economic interest relating to the debtor. In addition, each member of an unofficial group or committee that claims to represent any entity in addition to the members of the group or committee must disclose the acquisition date of each disclosable interest by quarter and year, unless the interest was acquired more than a year before the bankruptcy petition was filed. Such information is important to evaluate positions taken by these groups and entities. For example, it is important to know that members of a committee purporting to represent the debtor's bond holders also hold a derivative position the value of which is inverse to that of the bonds.

The overwhelming majority of individuals and groups commenting on the published proposed amendments supported a clarified and reinvigorated Rule 2019. During the public comment period, the advisory committee heard concerns from some distressed-debt investors about the potential impact of the proposed rule on certain proprietary business information and about the breadth of the proposed rule's enforcement provision. The advisory committee revised the published amendments in several important respects to address these concerns.

***5** As published, the amendments would have required disclosure of the precise date when each disclosable economic interest was acquired (if not more than one year before the filing of the petition) and, if directed by the court, the amount paid for each disclosable economic interest. The proposed disclosure obligations would have applied to each covered entity, indenture trustee, or member of a group or committee, and to each creditor or equity security holder represented by a covered entity, indenture trustee, or committee or group (other than an official committee). During the public comment period, the advisory committee was informed that pricing information is highly guarded by distressed-debt purchasers who fear that its disclosure could give industry participants unfair insight into competitors' trading strategies. Though the published amendments had taken the conservative approach of requiring automatic disclosure only of the acquisition date and insisting on a court order to ob-

tain price information, the advisory committee was persuaded by the public comments that this approach was still too broad. The combination of market volatility and publicly available price data means that requiring disclosure of the date of purchase would as a practical matter reveal the acquisition price, even if the court did not order disclosure. Effectively requiring pricing information disclosed in every case could discourage investors from purchasing distressed debt, which would be counterproductive.

After careful consideration, the advisory committee made several changes to the published rule. The advisory committee eliminated the provision specifically authorizing a court to order the disclosure of the amount paid for a disclosable economic interest. In addition, the acquisition-date disclosure provision was modified to require disclosure only by quarter and year. The information that was eliminated is not necessary to accomplish the primary purpose of the amendments. As revised, the proposed amendments require the disclosure of enough information to reveal potential conflicts of interest. If more specific information is important in an individual case, disclosure could be obtained through discovery or ordered pursuant to the court's existing authority.

The advisory committee also added language in subdivision (b)(1) limiting the covered groups, committees, and entities to those that represent or consist of multiple creditors or equity security holders acting in concert to advance their common interests. This revision clarifies that groups composed entirely of affiliates or insiders of one another are not subject to Rule 2019's disclosure requirements.

The advisory committee also added a definition of “represent” or “represents” in subdivision (a)(2) that limits the application of the rule to groups, committees, and entities taking a position before the court or soliciting votes on a plan. This revision excludes from the rule those whose involvement in a case is merely passive. The revision addresses concerns expressed during the public comment period that the rule's disclosure requirements should not be triggered when, for example, a law firm represents more than one client with respect to a chapter 11 case but does not appear in court to seek or oppose relief on behalf of more than one of those clients. There is no reason to require an entity that remains passive in the case to publicly disclose its holdings merely because it retained a firm that happens to represent one or more other creditors or equity security holders.

***6** For similar reasons, the advisory committee eliminated the provision in subdivision (b) of the published amendments that authorized a court to require disclosure by an entity that does not represent anyone else, The advisory committee also added subdivision (b)(2), which excludes certain entities—including indenture trustees and class action representatives—from the rule's disclosure requirements unless the court orders otherwise.

Finally, the published enforcement provisions that authorized the court to determine failures to comply with legal requirements regulating the activities and personnel of an entity, group, or committee were deleted, limiting the scope of the enforcement provision to failures to comply with the rule itself.

*Rule 3001*

The proposed amendments to Rule 3001 require creditors to provide additional information supporting certain proofs of claim and impose penalties if creditors fail to comply with the new disclosure requirements. The amendments proposed for Judicial Conference approval were revised after publication to refer to an official form that will be prepared to facilitate reporting certain of the disclosure items. Other revisions limit the amended rule's sanctions provision. Provisions of the published rule that imposed certain disclosure ‘requirements in connection with claims based on open-end or revolving credit arrangements have been revised more extensively and, as explained below, will be republished in August 2010 for further public comment.

As revised, the proposed amendments presented for Judicial Conference consideration continue and clarify the long-established disclosure requirement that a creditor presenting a claim in an individual-debtor case provide an itemized statement of the interest, fees, expenses, and other charges incurred before the petition was filed. Special disclosure requirements apply under the amendments if the claim is secured by a security interest in the individual debtor's property. In such a case, a statement of the amount necessary to cure any prepetition default and, for home mortgages, a statement of any escrow account must also be provided.

The proposed amendments, modified after public comment, also strengthen the penalties for failing to comply with the Rule 3001 requirements. The provision published for comment generally mandated sanctions for creditors who failed to provide the required information, including prohibiting the creditor from presenting any of the omitted information as evidence in a contested matter or adversary proceeding in the case, unless the court determined that the failure was substantially justified or harmless. The penalty provision is based on Civil Rule 37, which prohibits a party from using information "to supply evidence on a motion, at a hearing, or at a trial" that it fails to disclose as part of its disclosure obligations. The proposed amendments to the sanctions provision of Rule 3001 are grounded in the courts' well-recognized authority to control the presentation of evidence used in court proceedings. The sanctions provision, as revised after public comment, continues to permit exclusionary sanctions only if the failure to provide the required information was not "substantially justified or ... harmless"; further emphasizes the court's discretion to determine whether that sanction or any other should be imposed; and makes it clear that "notice and hearing" is required before the imposition of any sanction. The Committee Note specifically recognizes that a creditor's failure to provide the required information under the proposed amendment to Rule 3001(c) is not in itself a ground for disallowance of the claim. The claim can be disallowed only if it comes within one of the grounds for disallowance under § 502(b) of the Bankruptcy Code.

***7** As published in August 2009, the proposed amendments to Rule 3001(c) would have required the holder of a claim based on an open-end or revolving consumer credit agreement to attach to its proof of claim the last account statement sent to the debtor before the commencement of the bankruptcy case. Consumer bankruptcy lawyers, trustees, and judges have long raised concerns about creditors filing bare proofs of claim with little supporting documentation, especially bulk purchasers of credit-card debt. Such bare proofs of claim make it virtually impossible to ascertain whether the claims are valid. Though such bare proofs of claim raise suspicions, debtors' lawyers have little incentive to expend time and resources to evaluate such claims because they generally receive no compensation for the effort and any money derived from such efforts is paid to other unsecured creditors. The trustees often cannot investigate suspicious proofs of claim because of their workload burdens. As a result, despite the lack of supporting documentation, many invalid claims purchased in bulk are simply not challenged.

During the public comment period, many supported the increased disclosure requirements. Representatives of bulk purchasers of credit card debt, however, strongly objected to the account statement requirement. They asserted that the statement will often not be available when the proof of claim is filed. Under federal record retention policies for financial institutions, credit card account records generally need to be retained for only two years. Furthermore, account information is usually stored in an electronic format, and it may not be practicable to produce a duplicate of an account statement. The advisory committee concluded that if there is a less burdensome way for a creditor to provide the information needed to assess the validity of its claim, the rule should not insist on an exclusive, more costly, means of providing such information. This provision was revised to allow creditors to

provide information relevant to determinations of the age, prior holders, and other salient features of the claim in a more convenient fashion. The modified proposed rule also relieves claimants to which it applies from the general requirement of filing the original or duplicate of the writing on which the claim is based. Instead, the proposed rule provides that documentation relating to an open-end or revolving consumer credit claim must be disclosed if a party in interest requests it. Because the revisions were so significant, this proposal will be published in August 2010 for public comment and is not presented to the Judicial Conference at this time.

*Rule 3002.1*

Proposed new Rule 3002.1 implements § 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 intended to provide the mortgagor-debtor information necessary to determine the exact amount needed to cure any prepetition arrearage and the amount of the postpetition payments. If the latter amount changes over time because of changing interest rates, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment must be conveyed to the debtor and trustee. Numerous consumer bankruptcy lawyers, trustees, and judges have reported that debtors often do not learn until after completing a chapter 13 plan that the mortgage payments have changed. In particular, debtors do not learn that fees, expenses, or other charges have been imposed during the life of the plan. As a result, debtors may face renewed foreclosure proceedings immediately after emerging from bankruptcy. Timely notice of such changes will permit the debtor and trustee to adjust postpetition mortgage payments and, if appropriate, challenge the validity of fees, expenses, or other charges assessed during the bankruptcy.

***8** Under the proposed rule, the holder of a home mortgage claim must give: (1) a notice itemizing any postpetition fees, expenses, or charges within 180 days after they are incurred; and (2) at least 21 days' advance notice to the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. To address suggestions for different time periods and concerns about how the time period would apply to loan payments that adjust frequently, the deadline to notify the debtor of any payment changes was revised after the public comment period from thirty to 21 days before the debtor's payment in the new amount is due.

The proposed rule also establishes a procedure for determining whether the debtor has cured any default and is otherwise current on mortgage payments at the close of a chapter 13 case. Finally, the proposed rule provides for sanctions if the holder of a claim secured by the debtor's principal residence fails to provide any of the required information.

*Rule 4004*

The proposed amendments to Rule 4004 provide that a party may seek an extension of time, based on newly discovered information, to object to a debtor's discharge after the time for objecting expires but before a discharge is granted. In some cases the court does not enter a discharge immediately after the objection deadline passes. A gap period—between the expiration of the time for objecting and the actual entry of a discharge—is created during which a party may discover information that would have provided a basis for objecting had it been known in time to object. When the discharge is later entered, revocation of the discharge under § 727(d) of the Bankruptcy Code may not be available based on information acquired in the gap period, because some grounds for revocation require the complaining party to have learned of the debtor's misconduct after the entry of the discharge. The amendments allow a party in that circumstance to file a motion for extension of time to object to the debtor's discharge even though the objection period has expired.

*Rule 6003*

The proposed amendments to Rule 6003 clarify

that the 21–day waiting period before a court can enter certain orders at the beginning of a case, including an order approving employment of counsel, does not prevent the court from specifying in the order that it is effective as of an earlier date. The amendments recognize the common practice of such nunc pro tunc orders.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference—

a. Approve the proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Exhibit B

## SUPREME COURT APPROVED RULES AMENDMENTS (APRIL 26, 2011)

On April 26, 2011, the Supreme Court approved the amendments to the following rules and new rules, which were approved by the Judicial Conference at its September 2010 session:

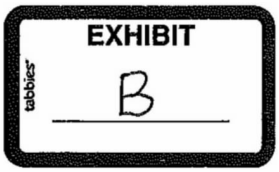
- Appellate Rules 4 and 40;
- Bankruptcy Rules 2003, 2019, 3001, 4004, 6003; new Rules 1004.2 and 3002.1;
- Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1; and
- Restyled Evidence Rules 101-1103.

(The Supreme Court suggested minor style revisions to Evidence Rules 408(a)(1) and 804(b)(4), as approved by the Judicial Conference in September 2010. The Rules Committees and the Executive Committee acting on behalf of the Judicial Conference approved the suggested revisions to Evidence Rules 408 and 804 on March 31, 2011.)

The rules amendments and new rules were transmitted Congress in accordance with the Rules Enabling Act, and will take effect on December 1, 2011, unless Congress enacts legislation to the contrary. The approved rules amendments and new rules are posted here.

- **August 2008 - December 2010 Amendments**
  - Report of the Standing Committee to the Judicial Conference
  - Summary of Proposed Amendments
  - Controversial Report
  - Supreme Court Orders and Transmittal Letters
  - Proposed Amendments to the Federal Rules of Appellate Procedure
    - Transmittal Memorandum (pdf)
    - Amendments Incorporated into Clean Version of the Rules (Word) (pdf)
    - Excerpt of the Judicial Conference Report (pdf)
    - Excerpt of the Report of the Advisory Committee on Appellate Rules* (pdf)
  - Proposed Amendments to the Federal Rules of Bankruptcy Procedure
    - Transmittal Memorandum (pdf)
    - Amendments Incorporated into Clean Version of the Rules (Word) (pdf)
    - Excerpt of the Judicial Conference Report (pdf)
    - Excerpt of the Report of the Advisory Committee on Bankruptcy Rules* (pdf)
  - Proposed Amendments to the Federal Rules of Criminal Procedure
    - Transmittal Memorandum (pdf)
    - Amendments Incorporated into Clean Version of the Rules (Word) (pdf)
    - Excerpt of the Judicial Conference Report (pdf)
    - Excerpt of the Report of the Advisory Committee on Criminal Rules* (pdf)
  - Proposed Amendment to the Federal Rules of Evidence Procedure
    - Transmittal Memorandum (pdf)
    - Amendments Incorporated into Clean Version of the Rules (Word) (pdf)
    - Excerpt of the Judicial Conference Report (pdf)
    - Excerpt of the Report of the Advisory Committee on Evidence Rules* (pdf)

* Contains the "redline" version of the amendments showing the changes to the rules.



Bkrtcy.N.D.Ohio,2012.
In re Kraska
Slip Copy, 2012 WL 1267993 (Bkrtcy.N.D.Ohio)

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UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

COLLENE MAE PILLOW,

Debtor.

Case No. DK 11-11688
Hon. Scott W. Dales

_____/

OPINION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

Fifth Third Bank (the "Bank") filed a motion for an order relaxing the mortgage payment reporting requirements that would otherwise apply under Rule 3002.1(b) (the "Bank's Motion," DN 39).[1] After the notice period under LBR 9013(c)(2) passed without objection, the court entered its order granting the Bank's Motion under Rule 9006 (the "Order," DN 42). The United States Trustee ("UST") timely filed a motion for reconsideration of the Order pursuant to Rule 9024 (the "UST's Motion," DN 43), arguing that the UST did not receive notice of the Bank's Motion, and challenging the court's authority to modify the reporting requirements under Rule 3002.1. Although not a party with a financial stake in this case, the UST has statutory authority to raise and be heard on any issue.[2] Therefore, the court announced its intention at the March 6, 2013 hearing to reconsider the Order and review the Bank's Motion *de novo,* keeping in mind the UST's position.

[1] In this Opinion and Order, each reference to a "Rule" or "the rules" is a reference to one or more of the Federal Rules of Bankruptcy Procedure, unless otherwise indicated.

[2] *See* 11 U.S.C. § 307. The docket in this matter establishes that the Bank did not serve the Bank's Motion upon the UST, contrary to the representation in the applicable certificate of service. The Bank evidently assumed, incorrectly, that the UST receives electronic service in all cases. By local rule, however, there is no general, mandatory service on the UST in chapter 13 cases. *See* LBR 5005-3. Given the volume of cases, automatic, electronic service on the UST would impose a substantial burden on his office.

After reviewing the authorities that the parties called to the court's attention and considering the arguments advanced during the March 6, 2013 hearing, the court stands by its original decision to relax the reporting requirements under the circumstances of this case, with a minor revision described below.

## I. JURISDICTION

The court has jurisdiction over the chapter 13 bankruptcy case of Collene Mae Pillow (the "Debtor") pursuant to 28 U.S.C. § 1334(a), and the case and this contested matter have been referred to the bankruptcy court under LCivR. 83.2(a) (W.D. Mich.) and 28 U.S.C. §157(a). The contested matter concerns the administration of the case, and is therefore a "core" proceeding. 28 U.S.C. § 157(b)(2)(A).

## II. ANALYSIS

In their papers and again during oral argument, the parties referred the court to Rule 3002.1 and Rule 9006. They agree that the Bank holds a claim falling within the ambit of Rule 3002.1 because it is secured by the Debtor's principal residence and the Debtor has provided for the claim under 11 U.S.C. § 1322(b)(5). *See* Fed. R. Bankr. P. 3002.1(a). As a result, the parties agree that the Bank is subject to the reporting obligations prescribed in Rule 3002.1(b). Accordingly, without the relief granted in the Order, the Bank would be obligated to file a notice of payment change every month, and do so no later than twenty-one days before the payment change takes effect. The UST, however, does not agree that Rule 9006 authorizes the court to modify the twenty-one day notice requirement under Rule 3002.1(b) as the court did in the Order. At oral argument, the UST's counsel suggested that extending the deadline to file the reports in response to the Bank's Motion "is a different animal" than the enlargement

contemplated under Rule 9006, and effectively re-writes Rule 3002.1(b). *See* Transcript of hearing held March 6, 2013 ("Tr.") at 14:23.

By way of background, the Bank's claim arises from a home equity line of credit ("HELOC") which is a revolving or "open end" credit arrangement secured by residential real estate. *See* Bank's Motion at Exh. A. Under the loan documents, the interest rate on the HELOC, and therefore the Debtor's payment obligation, changes monthly, though not necessarily dramatically. More specifically, as the Wall Street Journal's published "Prime Rate" fluctuates on "the business day immediately preceding the first business day of each month," the Debtor's payment obligation changes. *See* Bank's Motion at Exh. A (Equity Flexline Credit Agreement, Security Agreement and Federal Truth in Lending Initial Disclosure at ¶ 8). Every time the payment changes, regardless of the frequency, the Bank concedes it is obligated to give notice of this change to the Debtor, her lawyer and the chapter 13 trustee. The applicable rule provides as follows:

> 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). Under the circumstances of this case, the Bank would have approximately nine days to calculate the payment change and communicate that information to counsel in time for counsel to prepare and file the payment change notice with the court no later than twenty-one days before the change takes effect in the next billing cycle. This is an exceedingly small window.

The Advisory Committee Note to this relatively new rule explains the drafters' purpose in imposing the notification requirements:

> In order to be able to fulfill the [cure and maintain] obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment.

*See* Fed. R. Bankr. P. 3002.1 (Advisory Committee Note (2011)). Ultimately, the drafters hoped that by requiring lenders to give periodic notice of payment changes, debtors could avoid the shock that some have experienced at the end of their plan terms upon discovering that, despite having made all payments in good faith, their mortgage arrears quietly grew -- in some instances, substantially. The culprits usually were tax and insurance escrow changes, interest rate adjustments, late payments, appraisal fees, and collection costs. Some debtors who complied with their plan obligations and received a chapter 13 discharge nevertheless found themselves facing foreclosure because they were not aware that their plan payments were inadequate to cure and maintain the very defaults and obligations that prompted them to seek bankruptcy protection in the first place. Rule 3002.1 addresses this problem in several ways, principally by requiring periodic disclosures. Like all rules, Rule 3002.1 imposes burdens on the parties in interest, including residential mortgage lenders.

Citing the "unique burden" that the rule imposes on it as the holder of a HELOC loan with frequent payment adjustments, the Bank filed its motion seeking relief from what would, in effect, amount to giving monthly notices. In place of the requirement to report payment changes not later than twenty-one days before the change takes effect, the Bank proposed, and the court

approved, a six month reporting interval, citing its authority to enlarge deadlines under Rule 9006. *See* Order at (unnumbered) ¶¶ 3 and 5.[3]

At the March 6, 2013, hearing, counsel for the UST argued that the Bank has in fact filed two notices under Rule 3002.1, contradicting the Bank's argument that the notification requirements are "virtually impossible" to meet. *See* Bank's Motion at p. 4 (supporting brief at p. 2). Putting aside the Bank's hyperbole, however, the thrust of its argument is that giving notice is impractical. Stated differently, the Bank argues that giving notice every month for *de minimis* changes is burdensome, taking into account the purpose of Rule 3002.1.

Moreover, the Bank's notices, filed after the UST filed its motion, actually fortify the Bank's contention that the requirement is burdensome: the Bank's first notice shows that between January and February, the monthly payment changed from $117.72 to $120.40 -- a mere $2.68. At the hearing, Bank's counsel stated without contradiction that in other months the payment has changed by as little as thirty-two cents. *See* Tr. at 9:25. Giving monthly notice of these small changes does not materially advance the purpose of Rule 3002.1, which (as noted above) is to permit debtors to "cure and maintain" under § 1322(b)(5) during their bankruptcies, and avoid unhappy surprises when their plan terms come to an end.

In addition, the clerical and legal expenses associated with preparing, filing, and serving monthly payment change notices for nominal or negative adjustments support the Bank's position that the notice requirement imposes a "unique burden" in this particular case. During the hearing, despite concurring in the UST's Motion, counsel for the chapter 13 trustee (the "Trustee") nevertheless stated that the Bank's monthly reporting would impose a burden on his client. *See* Tr. at 12:3 (acknowledging burden on the Bank, and noting that the reporting is "also

[3] Artlessly and somewhat inconsistently, the Order purported to "excuse" the Bank from the notice requirement of Rule 3002.1. Fairly construed, rather than excusing the Bank from giving notice of payment changes under the rule, the Order substituted a six month reporting interval for each monthly period that otherwise would apply.

really burdensome on the trustee"). Furthermore, under most consumer loan documents, including the HELOC documents in this case, the borrower is ultimately responsible for the lender's collection costs. *See* Bank's Motion at Exh. A, ¶¶ 22-23. In other words, for HELOC loans like this one with foreseeably modest monthly payment changes, the creditors, debtors, and trustees will bear the cost of compliance with Rule 3002.1. Significantly, none of these parties opposed the Bank's Motion, at least not initially.[4] It seems safe to assume that the lender who incurs collection costs for complying with Rule 3002.1(b) will seek to pass along the costs to the borrower under the loan documents. If so, Rule 3002.1(c) will require the lender to give another notice within 180 days after incurring the expense. Assuming monthly payment adjustments lead to monthly notices (and monthly charges), in six months the lender will be giving two monthly notices, one under Rule 3002.1(b) for the interest rate change, and one under rule 3002.1(c) for the cost of giving the first monthly notice. Over a five year plan period, a debtor could be required to pay substantial additional collection costs to compensate her HELOC lender for giving notice of payment changes in the range of $1.00-$3.00 per month, all in the name of transparency. Enlarging the reporting periods under Rule 9006 mitigates the burden and expense of complying with the time periods that would otherwise apply under Rule 3002.1(b) and (c).

In its Motion, the Bank cited general orders from bankruptcy courts in other districts that attempt to address the problem of revolving or open-end credit agreements and postpetition arrears. It also cited Rule 9006, governing calculation of, and relief from, various time periods in bankruptcy cases.

[4] Indeed, the Trustee has agreed in at least one other case to substitute a six month interval for the twenty-one day notice that otherwise would apply. *See* Stipulation Resolving Creditor Fifth Third Bank's Motion to Be Excused from Filing a Notice of Payment Change (DN 33) at ¶ 2, filed May 23, 2012 in *In re Prestly*, Case No. 10-13560-SWD.

The court does not regard the Bank's citation to other courts' general orders as particularly persuasive because the orders do not apply in this district and, in any event, have generally been abrogated. At most, they show that these courts have attempted to create disclosure obligations without the burdens that Rule 3002.1(b) imposes on HELOC lenders. Even if the general orders were not abrogated by the courts themselves, Rule 9029 does not permit any court to modify any national rule. Because of this limitation, the court is more receptive to the Bank's reliance on Rule 9006 and the "case by case" safety-valve provided under that rule.

Specifically, Rule 9006(b) grants the court authority to enlarge deadlines prescribed in the rules or by court order, subject to enumerated exceptions or conditions:

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1). The court notes that paragraphs (2) and (3) of Rule 9006(b) do not mention Rule 3002.1, and therefore the relief that Rule 9006 affords may apply to the time periods prescribed in Rule 3002.1.

Moreover, the language in Rule 9006 is inescapably broad and flexible, using such phrases as "at any time," "in its discretion," "with or without a motion," and "for cause." These phrases echo other signals in the rules directing the court to apply the rules in a practical way to secure the "just, speedy, and inexpensive determination of every case and proceeding." Fed. R. Bankr. P. 1001.

Viewing the Bank's Motion through the lens of Rule 9006, giving twenty-one days advance notice of payment changes under Rule 3002.1(b) is an act "required . . . to be done at or within a specified period by these rules or by a notice given thereunder," and therefore within the scope of Rule 9006(b)(1). The Bank sought relief from this time period by filing a motion, and as "cause" articulated the "unique burden" associated with the twenty-one day period, given the nature of the HELOC loan with its nominal but monthly interest rate adjustment. In response to the motion, which drew no objection from the only parties with a concrete stake in the matter and the only parties entitled under the rules to notice of payment changes,[5] the court entered its Order relaxing the reporting requirements, concluding that the Bank's Motion established cause to modify the twenty-one day period in this case under Rule 9006(b).

The UST, however, takes a different view, arguing that Rule 9006 does not authorize the court to modify the reporting requirements of Rule 3002.1. The court respectfully disagrees. In its Order, the court did not intend to excuse the Bank from reporting, but simply modified the deadlines for doing so, after taking into account the cause associated with HELOC loans. The UST's citation to *In re Adkins*, 477 B.R. 71, 74 (Bankr. N.D. Ohio 2012), is not particularly instructive. The court does not quarrel with that decision to the extent it stands for the proposition that Rule 3002.1 itself provides no safety valve to address burdensome or impractical application. The *Adkins* court, however, did not consider whether another rule, such as Rule 9006, might provide relief.

As for Judge Gregg's bench ruling in another case withholding similar relief,[6] the UST's citation to the resulting order is similarly unpersuasive. First, without the benefit of the

[5] Rule 3002.1 requires the Bank to notify the Trustee and the Debtor; the rule omits the UST, for practical reasons. *See also* LBR 5005-3 (Service of Documents on the United States Trustee).

[6] *In re May*, Case No. 12-07004-JDG.

transcript of the oral ruling, the court cannot determine what factors influenced the decision. Second, the court doubts that Judge Gregg intended his oral ruling on this new and important issue to have precedential effect, at least not before he issues a published opinion setting forth his reasoning. The court hesitates to rely on Judge Gregg's unwritten ruling in *May*, and doubts that he intended it as the last word on this issue in our district.

On reconsideration, the court recognizes that it might have done a better job of balancing the burdens the Bank described against the concerns the UST expressed in his motion (and that motivated the drafters of Rule 3002.1(b)), namely preventing the Debtor from unwittingly falling way behind on her mortgage debt. Although the court doubts that there will be significant payment changes resulting from the interest rate adjustments under the HELOC in this case, there may nevertheless be payment changes that the Debtor will need time to account for before exiting bankruptcy. Therefore, the court will adhere to its decision to permit six month reporting intervals, but will require quarterly reporting in the last year of the Debtor's plan term. This should give the Debtor ample time to address the impact of any modest payment changes before she concludes her case. Moreover, if developments in the case persuade the Debtor or the Trustee that cause exists to revisit the reporting interval, the court will consider readjusting the period in response to a motion under Rule 9006.

## III. CONCLUSION AND ORDER

If the drafters of the rules intended to make the twenty-one day time period impregnable, they could have included Rule 3002.1 among the rules listed in Rule 9006(b)(2) or (b)(3). They did not. Until the parties devise a practical solution,[7] or the Supreme Court includes a safety

[7] Modifying the twenty-one day period is not the only possible solution to the problem. It is conceivable, for example, that the Bank and the Debtor might mitigate the hardships imposed by the rule by agreeing to modify the payment provisions of the HELOC. The court, however, does not have the authority to order the modification, nor may the Supreme Court "abridge, enlarge, or modify any substantive right" of the Bank by promulgating any rule,

valve within Rule 3002.1 itself,[8] or excludes the new rule from the scope of Rule 9006, the court will continue to apply Rule 9006 to motions seeking relief from the time periods under Rule 3002.1, insisting each time, of course, that the movant establish cause. The UST's position gives too little weight to the court's authority under Rules 1001 and 9006(b) and the finding of cause in the context of this case involving the inevitably frequent and predictably modest payment changes associated with the HELOC loan.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The UST's Motion (DN 43) is GRANTED only to the extent it seeks reconsideration, and on reconsideration, the court's Order (DN 42) is VACATED;

2. The Trustee's concurrence (DN 51), to the extent it requests relief, is DENIED;

3. The Bank's Motion (DN 39) is GRANTED as provided herein:

   a. The Trustee shall continue to pay the monthly amount indicated in the Bank' last payment change notice and notices filed thereafter; and

   b. The Bank shall file a notice of payment change on or about the date that is six months after entry of the last payment change notice, and every six months thereafter, provided, however, that during the last year of the Debtor's plan, the Bank shall file quarterly notices of any payment changes.

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including Rule 3002.1. *See* 28 U.S.C. § 2075; *cf.* 11 U.S.C. § 1322(b)(2). Nothing in this Opinion and Order modifies the rights or obligations of the Bank or the Debtor under their loan documents.

[8]Inserting the phrase "Unless the court, for cause, orders otherwise," at the beginning of Rule 3002.1(b) would probably suffice.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Opinion and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon the Debtor, Debtor's counsel, Panayiotis Marselis, Esq., Dean T. Rietberg, Esq., and Manish Joshi, Esq.

END OF ORDER

**IT IS SO ORDERED.**

**Dated March 18, 2013**

Scott W. Dales
United States Bankruptcy Judge

United States Bankruptcy Court,
E.D. Wisconsin.
In re Michael C. THONGTA, Debtor.

No. 07–21837–svk.
Oct. 18, 2012.

**Background:** Mortgage holder objected to notice of final cure payment provided by Chapter 13 trustee following debtor's completion of plan payments.

**Holdings:** The Bankruptcy Court, Susan V. Kelley, J., held that:
(1) mortgage holder was not subject to bankruptcy rule requiring that certain notices be given by creditors holding claims secured by principal residence of debtor pursuing Chapter 13 cure-and-maintain plan, and
(2) given inapplicability of notice rule, trustee was not required to file notice of final cure payment, and neither debtor nor mortgage holder gained or waived any legal right by responding or not responding to notice.

Ordered accordingly.

West Headnotes

**[1] Bankruptcy 51 2045**

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2045 k. Particular proceedings or issues. Most Cited Cases

**Bankruptcy 51 2123**

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2123 k. Bankruptcy judges. Most Cited Cases

Bankruptcy courts, as non-Article III courts, may not enter final judgments on common law claims that are independent of federal bankruptcy law. U.S.C.A. Const. Art. 3, § 1 et seq.

**[2] Bankruptcy 51 2045**

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2045 k. Particular proceedings or issues. Most Cited Cases

**Bankruptcy 51 2123**

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2123 k. Bankruptcy judges. Most Cited Cases

Contested matter in which mortgage holder that had been granted stay relief and had its claim deemed withdrawn objected to notice of final cure payment provided by Chapter 13 trustee following debtor's completion of plan payments did not involve common law claim independent of federal bankruptcy law, but instead involved interpreting and applying bankruptcy rule requiring creditors and trustees to provide certain notices, and therefore bankruptcy court, as non-Article III court, had authority to enter a final order in proceeding. U.S.C.A. Const. Art. 3, § 1 et seq.; 11 U.S.C.A. § 362; 28 U.S.C.A. § 157(b)(2)(A); Fed.Rules Bankr.Proc.Rule 3002.1, 11 U.S.C.A.

**[3] Bankruptcy 51 3715(12)**

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(9) Effect
51k3715(12) k. Liens and encumbrances; secured creditors. Most Cited Cases

Bankruptcy rule requiring holder of claim se-

cured by security interest in Chapter 13 debtor's principal residence and addressed in cure-and-maintenance plan to provide notices of post-petition payment changes, fees, expenses, and other charges applies only to creditors that have filed claims secured by security interest in debtor's residence; if there is no such claim, rule does not apply. 11 U.S.C.A. § 1322(b)(5); Fed.Rules Bankr.Proc.Rule 3002.1, 11 U.S.C.A.

**[4] Bankruptcy 51 ⚿2903**

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2903 k. Amendment or withdrawal. Most Cited Cases

**Bankruptcy 51 ⚿3715(12)**

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(9) Effect
51k3715(12) k. Liens and encumbrances; secured creditors. Most Cited Cases

Mortgage holder that had its claim deemed withdrawn, upon grant of relief from automatic stay permitting it to pursue foreclosure proceedings, no longer held claim secured by Chapter 13 debtor's principal residence, and thus was not subject to bankruptcy rule requiring holder of claim secured by security interest in Chapter 13 debtor's principal residence and addressed in cure-and-maintenance plan to give notices of postpetition payment changes, fees, expenses, and other charges. 11 U.S.C.A. §§ 362, 1322(b)(5); Fed.Rules Bankr.Proc.Rule 3002.1, 11 U.S.C.A.

**[5] Bankruptcy 51 ⚿3715(12)**

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(9) Effect
51k3715(12) k. Liens and encumbrances; secured creditors. Most Cited Cases

Once automatic stay in debtor's Chapter 13 case was terminated as to mortgage holder, and mortgage holder withdrew its claim, debtor no longer was pursuing cure-and-maintain plan, as required for application of bankruptcy rule requiring holder of claim secured by security interest in Chapter 13 debtor's principal residence and addressed in cure-and-maintenance plan to give notices of postpetition payment changes, fees, expenses, and other charges. 11 U.S.C.A. §§ 362, 1322(b)(5); Fed.Rules Bankr.Proc.Rule 3002.1, 11 U.S.C.A.

**[6] Bankruptcy 51 ⚿3715(12)**

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(9) Effect
51k3715(12) k. Liens and encumbrances; secured creditors. Most Cited Cases

Following granting of stay relief to mortgage holder and withdrawal of mortgage holder's claim, which rendered inapplicable bankruptcy rule requiring that certain notices be given with respect to claims secured by principal residence of debtor pursuing Chapter 13 cure-and-maintain plan, trustee was not required to file notice of final cure payment upon debtor's completion of plan payments, and neither debtor nor mortgage holder gained or waived any legal right by responding or not responding to notice. 11 U.S.C.A. §§ 362, 1322(b)(5); Fed.Rules Bankr.Proc.Rule 3002.1, 11 U.S.C.A.

***318** Jeffery D. Nordholm, Jennifer M. Hayden, Storm, Balgeman, Miller & Klippel, S.C., Wauwatosa, WI, for Debtor.

**MEMORANDUM DECISION ON OBJECTION OF U.S. BANK, N.A. TO NOTICE OF FINAL CURE PAYMENT**

SUSAN V. KELLEY, Bankruptcy Judge.

This case involves the application of the new Chapter 13 notice provisions of Bankruptcy Rule 3002.1. Michael C. Thongta (the "Debtor") filed a Chapter 13 petition on March 20, 2007. At the time of filing, the Debtor owned a residence located at 4926 North 90th Street, Milwaukee, Wisconsin, encumbered by a mortgage held by Homecomings Financial (now U.S. Bank, N.A., as Trustee for RASC 2006KS5) (the "Creditor"). The mortgage was in default, and in his Chapter 13 plan, the Debtor proposed to cure the pre-petition defaults and maintain post-petition mortgage payments. (This is known as a "cure and maintain" plan in Chapter 13 parlance.)

When the Debtor defaulted on the post-petition mortgage payments, the Creditor requested relief from the automatic stay. *See* 11 U.S.C. § 362. On January 21, 2011, after a failed attempt to cure the defaults, the Court entered an Order granting the Creditor's Motion. In addition to terminating the stay and enabling the Creditor to continue with foreclosure proceedings in state court, the Order states: "[A]ny and all claims filed by or on behalf of the [Creditor] are hereby deemed withdrawn and the trustee need not make any further disbursements thereon."

The Debtor completed all payments under the plan in July 2012, and on August 27, 2012, the Chapter 13 Trustee, Thomas J. King (the "Trustee"), filed a Notice of Final Cure Payment (the "Notice") and served a copy on the Creditor. The Debtor received a discharge on September 11, 2012. The Creditor objected to the Trustee's Notice, alleging that because the Creditor received relief from the stay, the Court should strike the Notice or find that the Creditor is not required to respond to the Notice. At a hearing on the Objection, the Trustee and the Creditor sought the Court's guidance on application of the new Rule under these conditions.

[1][2] Before addressing the merits, the Court confirms its authority to enter a final order in this proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Under *Stern v. Marshall*, —— U.S. ——, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), bankruptcy courts may not "enter final judgments on common law claims that are independent of federal bankruptcy law." ***319***In re USA Baby, Inc.*, 674 F.3d 882, 883–84 (7th Cir.2012). This contested matter does not concern such a claim. Rather, it involves interpreting and applying Bankruptcy Rule 3002.1, an administrative provision requiring creditors and trustees to provide certain notices. The Court has authority to enter a final order in this proceeding.

Rule 3002.1 is a procedural mechanism designed to effectuate the Chapter 13 policy goal of providing debtors a "fresh start." *In re Sheppard*, 2012 WL 1344112, at *2, 2012 Bankr.LEXIS 1696, at *6 (Bankr.E.D.Va. April 17, 2012). Previously, debtors could emerge from bankruptcy facing significant post-petition mortgage obligations that they did not know existed because mortgage creditors, for fear of violating the automatic stay, would not inform debtors of post-petition charges. To combat the problem, courts adopted local rules or confirmed plans requiring mortgage lenders to disclose all post-petition charges. *See, e.g.*, *In re Ramsey*, 421 B.R. 431, 435–36 (Bankr.M.D.Tenn.2009) (collecting cases).

With the enactment of Rule 3002.1, courts nationally are able to ensure that debtors who successfully complete "cure and maintain" Chapter 13 plans emerge from bankruptcy with either a fully current home mortgage or the knowledge of and ability to object to any claimed amounts due. The Rule's structure is straightforward. The Rule is entitled "Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence." Subsection (a) gives the application of the Rule: "This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan." Subsections (b) and (c) require holders of such claims to provide notices of post-petition pay-

ment changes, fees, expenses and other charges. Subsection (d) provides that new Official Bankruptcy Forms prescribe the form and content of these notices. Either the debtor or the Chapter 13 trustee can object to any of the claimed fees, expenses, or other charges. Subsection (f) of the Rule is a "final safeguard." *Sheppard*, 2012 WL 1344112, at *2–3, 2012 Bankr.LEXIS 1696, at *7. It provides:

> (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 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.

Subsections (g) and (h) of the Rule govern the claim holder's response to the trustee's notice of final cure payment, and subsection (i) contains the Rule's remedies for a creditor's failure to comply with the Rule.

A critical component of Rule 3002.1 is providing a procedure for filing an accurate mortgage claim. ***In re Kraska*, 2012 WL 1267993, * 2, 2012 Bankr.LEXIS 1647, * 5– 6 ( Bankr.N.D.Ohio Apr. 13, 2012)** (creditor that received surrender of property and would be filing a deficiency claim required to comply with post-petition notice requirements). The ***Kraska*** court quoted Judge Wedoff's article on the Rule, as " ' **designed to insure that individual debtors and trustees obtain information necessary to deal appropriately with creditor claims**.' " ***320*Id.* at * 1, 2012 Bankr.LEXIS 1647, at * 2** (quoting Eugene R. Wedoff, *Proposed New Bankruptcy Rules on Creditor Disclosure and Creditor Enforcement of the Disclosures—Open for Comment*, 83 AM. BANKR. L.J. 579, 582 (2009)). After pointing out that "**Aurora Bank will be filing a claim**," the court in ***Kraska*** required the Bank to continue to file and serve notices "for the calculation of the underlying claim." ***Id.* at * 2, 2012 Bankr.LEXIS 1647, at * 5– 6**.

[3][4] By its terms, Rule 3002.1 applies only to creditors that have filed claims secured by a security interest in the debtor's residence. If there is no such claim, the Rule does not apply. In this case, the Creditor withdrew its claim on January 21, 2011 and thereafter was no longer a "holder of a claim" as provided for in the language of the Rule. Unlike in ***Kraska***, the Creditor never intended to file a deficiency claim (an extremely rare event in a Wisconsin foreclosure). Since the Creditor no longer holds a claim secured by the Debtor's principal residence, the Rule does not apply to the Creditor. The Debtor is not prejudiced by this result, as nonbankruptcy law, including state foreclosure law and the Real Estate Settlement Procedures Act ("RESPA"), will govern the Creditor's required disclosures. Among other provisions, RESPA, codified at 12 U.S.C. §§ 2601 – 2617, requires lenders to notify borrowers of changes in escrow account payments due to increased premiums or fees.

[5] Moreover, once the stay was terminated and the Creditor withdrew its claim, the Debtor no longer was proposing a "cure and maintain" plan under Bankruptcy Code § 1322(b)(5), the second prong of Rule 3002.1(a)(2). In *In re Merino*, 2012 WL 2891112, at *1–2, 2012 Bankr.LEXIS 3331, at *2–3 (Bankr.M.D.Fla. July 16, 2012), Judge Delano ruled that Rule 3002.1 does not apply to claims being paid "outside the plan" because such a claim does not qualify for treatment under the cure and maintain provisions of § 1322(b)(5). Similarly, in *In re Garduno*, 2012 WL 2402789, at *1, 2012 Bankr.LEXIS 2899, at *3 (Bankr.S.D.Fla. June 26, 2012), the Debtors' plan listed the Bank as a secured creditor, but stated that the Bank would receive $0.00. The court held that the Bank's claim was not provided for under § 1322(b)(5), and Rule

3002.1 did not apply. *Id.* This case is the same; after the Court's Order terminating the stay, the Creditor's claim no longer was "provided for under § 1322(b)(5) of the Code in the Debtor's plan," as necessary for application of Rule 3002.1.

[6] In *Garduno,* the court addressed the effect of the mortgage creditor's filing of a notice that was not required by Rule 3002.1:

> Because neither Fed. R. Bankr.P. 3002.1 nor Local Rule 3070–1(B) apply to the Bank's claim in this case, the Bank gained nothing by filing the Notice. Failure to file the Notice would not have resulted in the Bank waiving any right it may have with regard to the Debtors or their property. Similarly, because the above-cited rules do not apply to the Bank's claim, the filing of the Notice did not trigger a need for the Debtors to respond. If the Debtors had failed to respond to the Bank's Notice the Debtors would not have waived any right they may have with regard to the Bank's claim or lien. In short, neither the Notice nor the Objection were required under the Federal Rules of Bankruptcy Procedure or this Court's Local Rules and neither will be given any effect in this case.

*Id.* at *1–2, 2012 Bankr.LEXIS 2899, at *3–4. In this case, upon entry of the Order granting relief from stay and the withdrawal of the Creditor's claim from ***321** the case, Rule 3002.1(f) no longer applied, and the Trustee was not required to file a Notice of Final Cure Payment. As in *Garduno,* neither the Debtor nor the Creditor gained or waived any legal right by responding or not responding to the Notice. If the Trustee files an unnecessary notice, the Creditor is not required to respond. And failure of the Creditor to respond does not trigger any waiver of the Creditor's rights to claim post-petition charges in the state court foreclosure proceeding, as appropriate.

An Order will be entered consistent with this Decision.

Bkrtcy.E.D.Wis.,2012.
In re Thongta
480 B.R. 317

END OF DOCUMENT

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **IN RE:** | § | **Case No. 09-30796** |
| **JEFFREY HARRIS,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 09-32318** |
| **PATRICIA ANN DAVIS,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 09-34770** |
| **TONYA STALSBY, GEORGE W** | § | **Chapter 13** |
| **STALSBY,** | § | **Judge Isgur** |
| **Debtor(s).** | § | |
| | | |
| **IN RE:** | § | **Case No. 09-38370** |
| **DONALD NELMS, DEBRA D NELMS,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 09-33800** |
| **CESAR A PICCINI,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 09-35431** |
| **TERRY JESSEE, MATILDA JESSEE,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 10-37775** |
| **JOHN HANKINS,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 10-37833** |
| **ANTHONY C THOMPSON,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 11-39468** |
| **KELVIN DOUGLAS,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |
| | | |
| **IN RE:** | § | **Case No. 12-33389** |
| **GUILLERMINA WATTS-NUNEZ,** | § | **Chapter 13** |
| **Debtor(s).** | § | **Judge Isgur** |

## MEMORANDUM OPINION

Creditors have been required to attach various documents and records to their proofs of claim since before the adoption of the Bankruptcy Code in 1978.[1] Federal Rule of Bankruptcy Procedure 3001 was amended, effective December 1, 2011, to provide for possible fee shifting against a claimant that failed to attach the required documents.

The Court now holds:

- The December 1, 2011 fee-shifting provisions apply to claims filed on or after December 1, 2011, whether the bankruptcy case was filed before or after December 1, 2011.
- The December 1, 2011 fee-shifting provisions do not apply to claims filed before December 1, 2011.

### Background

This Memorandum Opinion is being issued in a number of cases. The cases have the following similarities:

- Each case was filed before December 1, 2011.
- Each case was filed when Rule 3001 and Official Form 10 required the attachment of supporting documents.
- The Debtors in each case were represented by the same law firm.
- The Debtors seek to impose fees against the claimant for noncompliance with Rule 3001.
- Each attempt at fee shifting is incorporated into a claim objection.
- Each objection to claim was accompanied by a declaration from the Debtor attesting to a basis for invalidity of the claim.

[1] *See In re Guardian Mortg. Investors,* 15 B.R. 284 (M.D. Fla. 1981) (attaching a copy of Official Form 15, which had an effective date of March, 1974).

The proofs of claim at issue were filed without any supporting documents. Because the supporting documents were *always* required to be filed, it is plain that the proofs of claim did not comply with Rule 3001.

**Rule 3001 and Official Form 10**

Rule 3001 generally governs the requirements for the filing of a proof of claim. Even before the December 1, 2011 amendments, Rule 3001 required claimants to attach a copy of any writing that formed the basis of the claim. FED. R. BANKR. P. 3001(c). Proofs of claim must "conform substantially" to the appropriate Official Form. FED. R. BANKR. P. 3001(a). The "Official Form" referenced in Rule 3001 is Official Form 10.

Prior to December 1, 2011, the Official Form required the attachment of supporting documents "such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements." Official Form 10, par. 7.[2] Summaries were allowed. *Id.*

The Official Form was substantially amended effective December 1, 2011. Paragraph 7 continued to require attachment of supporting documents "such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements." However, the provision allowing a summary was deleted from paragraph 7 of the Official Form.[3]

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[2] The form was amended from time-to-time, including during the pendency of this case. Paragraph 7 was not amended during the course of this case.

[3] Rule 3001 and Official Form 10 were again amended, this time effective December 1, 2012. Although none of the proofs of claim at issue in this dispute were filed on or after December 1, 2012, the Court includes this footnote for completeness. Under the December 1, 2012 amendments, an exception was made for claims based on open-end credit agreements, such as credit card agreements. With the new amendments, claims that are based on open-end credit agreements are no longer required to file the credit agreement. Instead, the credit agreement must be provided within 30 days if requested by a party in interest. *See* FED. R. BANKR. P. 3001(c)(3). However, the holder of the open-end claim must still file "an itemized statement of the interest, fees, expenses or charges" included in the proof

**Fee Shifting**

The December 1, 2011 amendments to Rule 3001 include a provision[4] that allows for fee shifting. The text of the new provision is:

> *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.*

FED R. BANKR. P. 3001(c)(iii)(D).

The Court interprets this provision as follows:

1. The provision only applies to a creditor that fails to provide the information required by Rule 3001(c).

2. Any remedy may be imposed only after notice and hearing.

3. Use of the term "may" rather than "shall" indicates that the Court has discretion.

4. One potential remedy is to prohibit the claimant from using the omitted information in any contested matter or adversary proceeding, unless the omission was substantially justified or harmless.

5. Other appropriate relief may be imposed.

6. An example of other appropriate relief is an award of reasonable expenses and legal fees (that is, fee shifting), so long as the reasonable expenses and legal fees were *caused* by the failure to include the information.

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of claim. FED. R. BANKR. P. 3001(c)(2)(A).

[4] This provision was retained in the 2012 amendments.

In each of these cases, the Debtors sought fee shifting. Inexplicably, the request for fee shifting was combined with an objection to the claim. This is, at best, an awkward use of this provision. If the Debtor has independent information sufficient to support a claim objection, it is difficult to see what legal fees were caused by the creditor's failure to include the information.[5]

It is certainly possible that the omission of the information caused counsel to spend additional research time to learn whether the claim was valid. In such a situation, fee shifting might be appropriate. This does not appear to be the situation here.[6]

The Court will not shift fees if the information was not required to understand the validity of the claim, or the defenses to the claim. In those instances, the fees were not "caused" by the omission of the information.

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[5] The Court recognizes that a claim objection may be filed on information and belief. In those instances, further investigation may be warranted and it may be appropriate to shift the cost of the further investigation. However, when an objection can be filed without conducting a further investigation, it will be a rare case in which fee shifting is justified. Two hypothetical examples may assist. In the first example, assume that the debtor knows that no payments or charges have been made on an open-end account during the applicable statute of limitations period. In that instance, the debtor can sign a declaration supporting a statute of limitations defense, and no further investigation is likely warranted. Fee shifting would likely not be appropriate. In the second example, assume that the debtor believes that no payments or charges were made during the applicable statute of limitations period, but has uncertainty in that belief. The objection to claim could be filed based on the debtor's information and belief. The objection would commence a contested matter under Rule 9014, invoking the discovery rules. Counsel could then send two requests for admission ("Admit that no charges were made on this account during the four year period preceding the petition date."; and, "Admit that no payments were received on this account during the four year period preceding the petition date."). The two requests for admission could be sent with a request for production of documents if either of the requests for admission was denied. Because this information should have been included with the original proof of claim, the cost of discovery might be shifted to the person filing the claim.

[6] It appears that Debtor's counsel is attempting to use the fee-shifting provisions for the principal purpose of shifting the cost of a routine objection to claim. As set forth in note 5, there may be instances where the fee-shifting provisions would apply as part of an objection to claim. An obvious function of Rule 3001 is to require the creditor to file the information with the proof of claim so as to avoid the necessity of a debtor or trustee seeking the information through discovery or outside investigation. If a debtor or trustee is required to spend money to obtain the required information—even if the investigation ultimately proves the validity of the claim—fee shifting could be authorized under the Rule. Where the debtor determines that such additional investigation is unnecessary, fee shifting should not be authorized.

**Application of Amendments to Existing Cases**

When Rule 3001 was amended effective December 1, 2011 and December 1, 2012, the amendments governed "all proceedings in bankruptcy cases thereafter commenced and, *insofar as just and practicable*, all proceedings then pending."(emphasis added).[7]

There are two categories of proofs of claim for which the Court must decide if the new provisions should be applied retroactively:

- Proofs of claim filed before December 1, 2011.
- Proofs of claim filed after December 1, 2011 in cases that were commenced prior to December 1, 2011.

Although there is some support for ordering fee shifting for proofs of claim filed before December 1, 2011, the Court ultimately concludes that it would not be "just" to do so.

The claimants willfully filed proofs of claim in violation of Rule 3001, which required supporting documentation even before the December 1, 2011 amendments. In one sense, it would be just to require the noncompliant claimant to reimburse a debtor for legal fees caused by the noncompliance.

The Fifth Circuit previously addressed a roughly analogous situation. In *Mortgage Am. Corp. v. Bache Halsey Stuart Shields, Inc.,* 789 F.2d. 1146 (5th Cir. 1989), the Fifth Circuit approved retroactive application of a remedy contained in Rule 8010. Rule 8010 had not been in effect when the party had violated the prior Rule 806. Because the conduct violated Rule 806, the Fifth Circuit approved retroactive application of the remedy contained in Rule 8010.

The principles used to determine the retroactive application of amendments to procedural rules are the same as those used to determine retroactive application of amendments to federal

[7] The amendments were adopted by Supreme Court Orders on April 26, 2011 and April 23, 2012, respectively.

statutes. *F.D.I.C v. Deglau,* 207 F.3d 153, 164 (3rd Cir. 2000). The retroactive application of an amendment "'ordinarily depends on the posture of the particular case.'" *Id.* (quoting *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1494 n.29 (1994)).

In *Landgraf,* the Supreme Court emphasized the need for a commonsense approach to retroactive application of a procedural rule:

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case. See, e.g., .... ORDER AMENDING BANKRUPTCY RULES AND FORMS, 421 U.S. 1021 (1975) (amendments applicable to pending cases "except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice").

*Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1494 n.29 (1994).

Although it is a close call, the Court concludes that the retroactive application of this Rule differs from the situation in *Mortgage America.* A commonsense view is that the removal of the safe harbor provisions of Rule 9011 (as explained below) would not produce the just result required by the Supreme Court. No similar concerns were present in *Mortgage America.*

Judge Houser, in a thoughtful opinion, opined that the amendments to Rule 3001 may be retroactively applied to cases that were filed before December 1, 2011, but only if the Court determines that it is "just and practicable" to apply it to the relief requested in a particular case. *In re Brunson,* 486 B.R. 759 (Bankr. N.D. Tex. 2013). However, *Brunson* did not consider whether to order fee shifting for any of the 28 claim objections filed. Instead, Judge Houser

explains that the differences in remedies between the amendment to Rule 3001 and the remedies before the amendment to Rule 3001 are not great. She correctly explains that—prior to the amendments—debtors could conduct discovery and seek fee shifting if a creditor refused to provide the requested information.

Judge Houser was not confronted with the persuasive defense now raised—whether proofs of claim filed before December 1, 2011 were governed by an alternative enforcement mechanism (principally, Rule 9011) that makes the retroactive application of the new rule unjust. The defense, of course, only applies to claims filed before December 1, 2011.

Prior to the 2011 amendments, there were several potential consequences of failing to file the required documents along with a proof claim. Rule 3001 provided (as it still provides) that a proof of claim filed in accordance with the rules has prima facie validity. FED. R. BANKR. P. 3001(f). It was commonplace for bankruptcy courts to determine that one consequence of the absence of documents was that the claim would not be given prima facie validity. *In re Brunson,* 486 B.R. 759 (Bankr. N.D. Tex. 2013).

Prior to December 1, 2011, claimants who failed to comply with Rule 3001 were also subject to potential fee shifting. That fee shifting was invoked through Rule 9011. Under Rule 9011, a creditor who failed to attach relevant documents could be liable for sanctions for filing a proof of claim without a proper investigation of the validity of the claim. *In re Wingerter,* 594 F.3d 931 (6th Cir. 2010). Rule 9011 fee shifting was not mandatory for a failure to comply with Rule 3001, but the failure to comply "might be a factor in determining whether a Rule 9011(b) violation has occurred." *In re Wingerter,* 594 F.3d 931 (6th Cir. 2010).

Under Rule 9011 (the bankruptcy equivalent of Rule 11), a noncompliant creditor must be notified and given 21 days to comply with Rule 3001. FED. R. BANKR. P. 9011(c)(1)(A). The

21-day notice letter was mandatory before a Court could order Rule 9011 fee shifting. *In re Pratt,* 524 F.3d 580 (5th Cir. 2008).

Of course, there were other means of fee shifting available prior to the adoption of the 2011 amendments to Rule 3001. The Court's inherent power to impose sanctions was preserved following the adoption of Rule 9011. *Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991). The inherent power rests with bankruptcy courts as well as district courts. *In re Yorkshire, LLC,* 540 F.3d 328 (5th Cir. 2008). Nevertheless, the use of the Court's inherent sanctioning authority requires a showing of bad faith. *In re Yorkshire, LLC,* 540 F.3d 328 (5th Cir. 2008). The mere failure to attach documents is insufficient to establish bad faith, and the claimants would have had no reasonable expectation of the use of inherent sanctioning authority. *See In re Wingerter,* 594 F.3d 931 (6th Cir. 2010).

The Court concludes that it would be unjust to apply fee shifting retroactively. The Rules in effect at the time the proof of claim was filed provided a specific remedy in the form of Rule 9011. The Fifth Circuit has held that the procedural protections afford by Rule 9011 are mandatory.

It was beyond the reasonable expectations of the parties that an absence of documents would result in fee shifting, at least before giving the claimant an opportunity either (i) to amend the claim by including the documents; or, (ii) to withdraw the offending claim.

However, after the new rules became effective, the reasonable expectations of the parties should have changed. There is no injustice in ordering fee shifting if the creditor's failure to comply caused a Debtor to expend additional legal fees to evaluate the claim.

**Conclusion**

As to each claim objection and request for fees, the parties must submit proposed orders that are consistent with this opinion.

For claims that were filed on or after December 1, 2011, the proposed orders should provide for the payment only of those legal fees incurred as a consequence of the failure to attach documents. If the parties cannot agree on the amount of the fees, then the proposed orders should provide for a hearing date obtained from the Court's Case Manager.

For claims that were filed before December 1, 2011, the proposed orders should give the claimant 21 days either to file an amended claim that includes the requisite documents or to withdraw the claim. The proposed orders should provide for fee shifting only if the claimant does not comply, and only to the extent that the fees were incurred as a result of noncompliance.

SIGNED **June 5, 2013.**

Marvin Isgur
UNITED STATES BANKRUPTCY JUDGE