UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS
216 FEDERAL BUILDING
PEORIA, ILLINOIS 61602

CHAMBERS OF
THOMAS L. PERKINS
CHIEF JUDGE

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February 8, 2010

09-BK-035

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedures
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Proposed Bankruptcy Rule 3002.1

Dear Mr. McCabe and Members of the Committee:

I write to raise several concerns about proposed new Bankruptcy Rule 3002.1 ("R 3002.1"). Paragraphs (a) and (b) impose an obligation upon a mortgage holder to supplement its proof of claim and to serve on the debtor, debtor's counsel and the standing trustee a notice of any postpetition change in the amount of the debtor's monthly mortgage payment.

By failing to limit its applicability to cases where the trustee pays the postpetition mortgage payments, this new filing and notice requirement incorrectly assumes a uniformity among bankruptcy courts that does not exist. My court, the Peoria Division of the CDIL, is one in which Chapter 13 debtors pay their postpetition mortgage payments directly to the mortgage holder, outside of the Chapter 13 plan. *See In re Nosek*, 544 F.3d 34, 45 n.11 (1st Cir. 2008) (noting that debtors "typically" pay the regular postpetition payments directly to the lender). The only mortgage related debt that is paid through the plan by the trustee is the prepetition arrearage, if any. In courts that follow our procedure, no apparent purpose is served by making the payment change notice a part of the bankruptcy record or by serving the trustee with the notice.

By its terms, paragraph (a) covers charges that cause the monthly payment to increase. Mortgage holders often debit mortgage accounts with fees and expenses that are not sought to be recovered through an immediate payment increase. Such fees and expenses do not trigger a need to comply with paragraphs (a) and (b).

The scope of paragraph (c) is much broader, encompassing all postpetition fees, expenses and charges, even when no payment change results and collection is not sought. In my view, this provision exceeds the scope of what may be permissibly addressed by the new Rule.

As is clearly stated in the first paragraph of the proposed Committee Note, R 3002.1 is intended to "aid in the implementation of § 1322(b)(5), 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." Likewise, the second paragraph states that the "debtor and the trustee must be informed of the exact amount needed to cure any prepetition arrearage...and the amount of the postpetition payment obligations." These statements implicitly, but correctly, acknowledge that the "cure and maintain" option permitted by Section 1322(b)(5) is an exception to the general rule that the rights of residential mortgage holders may not be modified in a Chapter 13 plan. In fact, Section 1322(b)(5) is one of only two such exceptions, the other being Section 1322(c)(2), which applies only to loans that mature during the term of the plan.

Those same Committee Note statements also correctly reflect the limits of bankruptcy court authority over the largely nonmodifiable, ongoing nonbankruptcy-related relationship between the debtor-mortgagor and the mortgage holder. Issues relating to the prepetition arrearage to be "cured," and the postpetition payments to be "maintained" (at least to the extent paid by the trustee), are proper issues for the bankruptcy court. Other issues that may arise between the mortgagor and the mortgage holder are not.

Specifically, the propriety of postpetition charges that are by definition not part of the prepetition arrearage and that are not used by the mortgage holder as a basis for increasing the monthly payment amount during the term of the plan, are not a proper subject for the exercise of bankruptcy court authority. To say it another way, to the extent that the mortgage holder has the right, by contract and nonbankruptcy law, to incur certain fees and expenses and to assess those fees and expenses against the borrower in its sole discretion (i.e., without the borrower's consent and without prior approval of a court of law) without causing a complimentary increase in the monthly payment, that right is nonmodifiable and must be honored and not interfered with by a bankruptcy court.

In light of that background, while the proposed Committee Note statements cited above appear to recognize applicable boundaries, the language of R 3002.1 does not. I would recommend the following corrections:

(a) Language should be added to paragraph (a) to clarify that it only applies to cases where the trustee is making the regular postpetition mortgage payments.

(c) Language should be added to paragraph (c) to clarify that it only applies to cases where the trustee is making the regular postpetition mortgage payments and the pospetition "fees, expenses, or charges incurred" cause a monthly payment increase that becomes effective during the term of the plan.

(e) Paragraph (d) deals with the issue of whether the prepetition arrearage has been fully cured. Paragraph (e), contemplating a "response" to the notice

required by paragraph (d), should be limited to the same issue. Accordingly, clause (2) of the first sentence should be deleted and the words "or postpetition" should be deleted from the second sentence.

(f) Consistent with the foregoing, in paragraph (f) the final phrase "and paid all required postpetition amounts in full" should be deleted.

To the extent that R 3002.1 is intended to make a bankruptcy issue of the propriety of "all fees, expenses, or charges incurred in connection with the [mortgage] claim after the bankruptcy case was filed," R 3002.1(c), even without a payment increase, this issue is the subject of a substantial split of authority among bankruptcy courts.

A number of courts have undertaken to resolve disputes over postpetition mortgage account charges. Many courts disagree, however, including the following:

1. *In re Booth,* 399 B.R. 316 (Bankr.E.D.Ark. 2009) (Ch. 13 plan violated anti-modification provision of Section 1322(b)(2) by requiring court approval for mortgagees's postpetition fees and costs and by requiring the mortgagee to notify the trustee and the debtor's attorney of changes in the interest rate and escrow charges).

2. *In re Segura,* 2009 WL 416847 (Bankr.D.Colo. 2009) (Ch. 13 plan impermissibly required creditor to obtain court approval for postpetition fees and costs).

3. *In re Rodriguez,* --- B.R. ----, 2009 WL 4823999 (Bankr.S.D.Tex. 2009) (nonmodifiable claims held by mortgage lenders are not discharged in Ch. 13 and a plan may not exclude collection of fees and costs incurred postpetition and allowed by the mortgage contract).

4. *In re Padilla,* 389 B.R. 409 (Bankr.E.D.Pa. 2008) (mortgagee had no obligation to give debtor notice or obtain court approval of postpetition legal expenses in order to collect such expenses, not from bankruptcy estate, but from debtor after exiting bankruptcy).

5. *In re Aldrich,* 2008 WL 4185989 (Bankr.N.D.Iowa 2008) (denying confirmation of Ch. 13 plan that purported to require mortgagee to obtain court approval of postpetition fees and costs as without statutory basis).

6. *In re Maxwell,* 343 B.R. 278 (Bankr.M.D.Fla. 2005) (rejecting Ch. 13 plan provision barring mortgagee from assessing fees and charges during pendency of plan without court approval, as impermissibly modifying mortgagee's rights contrary to Section 1322 (b)(2)).

7. *In re Araujo,* 277 B.R. 166 (Bankr.D.R.I. 2002) (disapproving language in Ch. 13 plan requiring mortgagee to obtain court approval before assessing postpetition attorney fees or other charges).

8. *Telfair v. First Union Mortg. Corp.,* 216 F.3d 1333 (11th Cir. 2000) (rejecting Ch. 13 debtor's claims that mortgagee's practice of charging mortgage account with attorney fees resulting from postpetition defaults violated Sections 506(b) or 362(a)).

This split of authority is properly resolved through the appellate process, ultimately by the Supreme Court. Adoption of the proposed rule as written would preempt that process. It would be an inappropriate use of the rule-making process to enact a rule that embodies one side or the other of this significant split of authority. Leaving the issue alone will permit each court to decide for itself whether and to what extent the issue of postpetition mortgage charges should be addressed in the bankruptcy forum.

For these reasons, I respectfully request that R 3002.1 be modified or withdrawn. Thank you for hearing my position.

Very truly yours,

Thomas L. Perkins, Chief U.S. Bankruptcy Judge
Central District of Illinois