09-BK-041

February 9, 2010

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice & Procedures
Administrative Office, United States Courts
Washington, D.C. 20544

RE: Comments on Proposed Changes to Bankruptcy Rules 3001(c) and 3002.1

Dear Mr. McCabe and Members of the Committee:

On behalf of the National Association of Chapter 13 Trustees, a non-profit organization devoted to the improvement of the administration of consumer bankruptcy and Chapter 13 in particular (the "NACTT"), I am pleased to submit the following comments in our strong support of the modifications proposed by the Rules Committee in connection with Rule 3001(c) and Rule 3002.1.

The NACTT is an educationally focused organization composed of trustees and practitioners representing both debtors and creditors in the consumer bankruptcy process. The NACTT has devoted significant resources to improve the quality of Chapter 13 administration across the country, providing educational training programs for trustees' staff and practitioners, has established working groups seeking to cooperate with various constituencies in the consumer bankruptcy process to establish "best practices" in differing areas of Chapter 13 case administration.

The trustee members of the NACTT are deeply concerned over the escalating deterioration of the quality of information provided in Proofs of Claim, particularly as consumer debt obligations become more complex and are freely transferred to third party debt buyers or are serviced by entities which are not the holders of the claims. The trustee members are also affected by the administration and handling of mortgage obligations that are part of Chapter 13 cases. We believe that these proposed rules go a long way to solve the problems we have encountered, particularly related to mortgage claims, curing mortgage defaults, and assist us in assuring that debtors who commit to the long and painful process of a Chapter 13 plan to cure their mortgage defaults successfully accomplish that goal by the end of their plan.

Rule 3001(c)

We have reviewed the comments of Judge Isgur (09-BK-004) submitted to the Committee on November 13, 2009, in connection with Rule 3001(c) and also join in his concern over the language of the Rule at 3001(c)(2)(C) by the use of the words "consistent with applicable non-bankruptcy law.". As he notes, the method by which RESPA permits the calculation of a monthly ongoing mortgage payment by including what may be pre-petition arrearages, and the provisions of 11 U.S.C. § 1322(b)(5), which permit such arrearages to be cured, may be inconsistent.

From the trustees' perspective, the important issue is that the Proof of Claim contain adequate information for us to be able to determine the amount of the pre-petition obligation, the amount of the post-petition payment, and how each was calculated. We accordingly would concur with his recommendation that the last phrase, "consistent with applicable non-bankruptcy law," be modified to be similar to: "with adequate information to disclose the amounts included within the pre-petition arrearage claim, the escrow account, and the escrow component of the ongoing, post-petition installments."

By recommending the committee re-examine the final phrase of 3001(c)(2)(C), we are not recommending the requirement of the submission of a loan history as part of the Proof of Claim process. We believe adequate tools exist for trustees to obtain such information either under RESPA or bankruptcy discovery rules.

Rule 3002.1

The NACTT members have long recognized that inadequacies in the mortgage servicing industry have led to confusion and misapplication of payments during the pendency of a Chapter 13 case and have often resulted in the assertion of large delinquencies following the discharge of a chapter 13 debtor. Often, these discrepancies could have been easily and quickly resolved had the information related to post-petition escrow payments, payment modifications, and other adjustments been effectively and promptly communicated to the debtor, the debtor's attorney, and the trustee.

By adopting Rule 3002.1, the Rules Committee is recognizing this problem and promoting a solution which is consistent to the "best practices" proposal adopted by the NACTT in consultation with servicers, representatives and their attorneys over the past five years. Our joint efforts should be seen as broad support for this rule.

Examining Judge Isgur's comments (09-BK-004) of November 13, 2009, we concur that it may be appropriate, in order to obtain the *res judicata* effect of the order, that the notice of final cure payment contained within Rule 3002.1(d) may be permitted by motion rather than notice. Several bankruptcy judges have held that trustees may not file a "motion" to determine whether a mortgage is current, requiring instead that adversary proceedings be initiated, a costly

and time-consuming process that has caused several trustees abandoning efforts of judicial reconciliation of the trustee's records and the creditor's records when a cure has been effected or at the end of a case. As Judge Isgur notes, the effect of a motion and a resulting order should have binding effect on the parties in any subsequent state or federal proceeding, to have the cure of the mortgage be meaningful. The recognition that a motion is appropriate or permitted will avoid the requirement of an adversary required by some courts.

The NACTT questions the timing the proposed rule places on the "notice of final cure payment" in Rule 3002.1(d). The proposed rule provides that the notice be filed "no later than 30 days after making final payment of any cure amount on a claim secured by a security interest in the debtor's principal residence..." In more than half of the Chapter 13 cases in which a mortgage is involved, the trustee administers only the pre-petition arrearage claim and the debtor is responsible for maintaining the payments on the mortgage post-petition. Judge Isgur correctly notes that the process of determining whether the final cure payment is successful is not limited to determining whether the pre-petition arrearage has been cured but also whether the post-petition, ongoing payments have been accurately applied, paid and are up to date at the time of the notice. In jurisdictions where the trustee is making post-petition mortgage disbursements, such a process is relatively easy: the trustee can file an application upon the satisfaction of the pre-petition arrearage and demonstrate that the pre-petition arrearage claim has been cured and that post-petition ongoing payments have been maintained through the date of the motion (or notice). One would assume that if either of those conditions does not exist, to wit, the pre-petition arrearage has not been satisfied, or the payments by the trustee on the post-petition monthly amounts are not current, the trustee need not file the motion (or notice) until after both conditions are met. Obviously where the trustee is only administering the pre-petition arrearage, the trustee need only verify that the pre-petition arrearage has been cured; the trustee can say nothing about whether the mortgage is current.

Because the difficulties experienced by trustees in mortgages relate mostly to post-petition, ongoing payments, resulting from the fees, charges, advances, escrow adjustments, interest rate adjustments, and other modifications made during the pendency of the case, the critical question is not whether the pre-petition arrearage has been cured, but whether the payments made during the plan, either by the trustee or the debtor, are current at the time of the request. Thus, timing the motion or notice of cure to 30 days after the pre-petition arrearage has been cured will not satisfy the difficulty that may be encountered if the Chapter 13 plan lasts another year or two after the pre-petition arrears are cured.

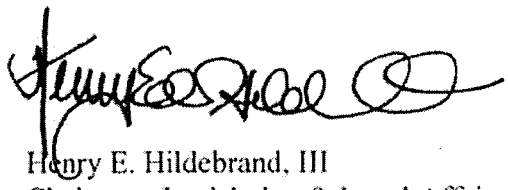
Conclusion

In summary, the NACTT strongly endorses Rule 3001(c) and 3002.1 with modifications only to clarify the intent of the Rule Committee. It may be appropriate that the comments attached to the Rules could clarify the questions raised by the NACTT and direct our trustee members and bench as to the appropriate avenues to be taken when a mortgage is being treated in accordance with 11 U.S.C. § 1322(b)(5) in a chapter 13 plan.

The NACTT recommends that Rule 3002.1(d) be adjusted to read "notice or motion." The NACTT also recommends that the notice or motion be filed once the trustee has determined that all defaults have been cured pursuant to the plan and that post-petition payments have been made current.

The NACTT members commend you for this work and for the efforts that you have put in to cure what has been a mounting problem in chapter 13 cases.

Very truly yours,



Henry E. Hildebrand, III
Chairman, Legislative & Legal Affairs Committee