

## Publications

### *Client Alert: Mortgage Holders, Mortgage Servicers Will be Significantly Affected by Recent Rule Changes*

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New amendments to the Bankruptcy Rules became effective on December 1, 2011. These amendments add new requirements and potentially harsh penalties for failure to comply. An overview of those amendments follows.

The changes to Rule 3001 of the Federal Rules of Bankruptcy Procedure require notices relating to claims secured by a mortgage on a debtor's principal residence, impose new obligations on mortgage holders, servicers and their attorneys for claims involving borrowers who are individual debtors in current and new bankruptcy cases. Mortgage holders and mortgage servicers must be aware of these changes, including requirements for changed proof of claim forms. Failure to abide by these requirements may result in serious consequences, including sanctions.

Pursuant to Rule 3001(c), proofs of claim must be made in writing. Official Form B-10 is the proof of claim form. Official Form B-10 has changed and the instructions for completing the proof of claim have changed. Creditors must now include information about the interest rate, each creditor must now sign off on a statement that it has attached documentation that is evidence of the creditor's perfected security interest, and the signature block of Official Form B-10 has changed.

Rule 3001(c)(2) has been amended and is now entitled "Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply". The changes require a claimant to include an itemized statement of the prepetition interest, fees, expenses or charges with a proof of claim, as well as a statement of the amount necessary to cure a default as of the petition date. If the mortgage payments include an escrow payment, an escrow statement must also be attached to the proof of claim. These requirements can be partially fulfilled by the completion and filing of new Official Form B10, Attachment A.

To complete Official Form B10, Attachment A, Part 1, the mortgage creditor must itemize the amount of principal and interest due as of the date of the filing of the bankruptcy petition, and the total interest due as of the petition date must be broken down by interest rate and the corresponding time periods. Part 2 requires a description of the fees, expenses and charges incurred in connection with the claim, as of the petition date, the dates these charges were incurred and the amounts of these charges.

Part 3 requires a statement of the amount necessary to cure the default as of the petition date. It is in this section that a mortgage creditor will check off the box indicating whether or not the mortgage payments that are in arrears include an escrow component. If so, the mortgage creditor must include a copy of an escrow statement. Also required in Part 3 is the date the last payment was received by the creditor, the number of payments due, and the amount of the payments due which the mortgage creditor must further analyze by adding the total of prepetition fees and expenses to the overdue payments and subtracting the total of any unapplied funds, resulting in an amount which is the total amount necessary to cure the default as of the petition date.

The bankruptcy court can impose sanctions against a creditor who files a proof of claim, but fails to provide the documentation and information required by Rule 3001(c). Those sanctions can be evidentiary, monetary or punitive.

Proofs of claim must be signed under penalty of perjury that the statements in the claim are "true and correct and to the best of my knowledge, information and reasonable belief." The penalty for presenting a fraudulent claim is a fine of up to \$500,000 or imprisonment for up to five years, or both. The changes to Rule 3001 and the addition of Rule 3002.1 are designed to respond to cases with facts and circumstances that bankruptcy courts found to be unacceptable. The liability for attorneys and proof of claim preparers who sign inaccurate forms can be substantial.

The changes also require an ongoing requirement for claimants in Chapter 13 cases. Creditors in Chapter 13 cases whose claims are secured by a security interest in a debtor's principal residence and whose claims are for arrearages being cured through a Chapter 13 plan, are required to file a Notice of Payment Change (Official Form B10, Supplement 1) no later than 21 days before the new amount is due. This consists of a change in the mortgage payment amount, including those changes which arise from escrow adjustments or from interest rate changes. The Notice of Payment Change must be served upon the debtor, the debtor's counsel and the Chapter 13 trustee. The Notice of Payment Change must be filed as a proof of claim supplement in the proof of claims registry.

The consequences for the mortgage creditor who fails to file a timely Notice of Payment Change will render the payment change ineffective. Mortgage creditors who fail to comply can expect evidentiary sanctions, where the court can prohibit a creditor from presenting evidence in a dispute about the claim. The court also has discretion to "award appropriate relief, including reasonable expenses and attorneys' fees".

Mortgage creditors in Chapter 13 cases whose claims are secured by a security interest in a debtor's principal residence and whose claims are being paid through a Chapter 13 plan, are required to file a Notice of Fees, Expenses and Charges (Official Form B10, Supplement 2) every 180 days (the "Notice of Fees") while the Chapter 13 case is ongoing. The Notice of Fees must be filed as a supplement to the mortgage creditor's proof of claim in the bankruptcy court's claims registry, and it must be served on the

debtor, the debtor's attorney and the Chapter 13 trustee within 180 days of when the charges were incurred. Failure to timely file the Notice of Fees will result in the inability for the creditor to collect the fees and expenses which should have been disclosed in the Notice of Fees.

Fees, expenses and charges include late fees, attorneys' fees, inspection fees, taxes advanced, property preservation fees and forced place insurance. The trustee and/or the debtor have up to one year after the filing of the Notice of Fees to file a motion requesting a hearing on whether or not the payment of the fees and charges in the Notice of Fees are lawful.

Pursuant to Rule 3002.1(f) – (h), within 30 days after a debtor completes all Chapter 13 plan payments, the trustee must file and serve a notice stating the debtor has paid in full the amount required to cure the default on the creditor's claim (the "Final Cure Notice"). The Final Cure Notice must include a statement that advises mortgage creditors of their obligation to file a response within 21 days after the Final Cure Notice. Failure to file the written response within this time period may be fatal to the creditor's position.

The mortgage creditor's response must state: (1) whether it agrees with the assertion that the debtor has paid the amount needed to cure the default on the creditor's claim; (2) whether the debtor is otherwise current; or (3) if the creditor asserts the debtor has not cured the default, the creditor must provide an itemization of the cure amount. The mortgage creditor's required response also must be filed as a supplement to the mortgage creditor's proof of claim in the claims registry, in addition to being served on the debtor, debtor's attorney and the Chapter 13 trustee.

In judicial foreclosure states such as Ohio, where a servicer fails to respond to a trustee's Notice of Final Cure, servicers may be faced with debtors asserting judicial estoppel in a subsequent judicial foreclosure action if the foreclosure action is brought because of unpaid fees, costs or charges.

The amendments to Rule 3001 and new Rule 3002.1 require dramatic changes to procedures for filing claims and the creation of an entirely new set of procedures to comply with requirements that mortgage creditors disclose postpetition payment changes as well as postpetition fees and costs being added to the mortgage accounts of debtors in Chapter 13 cases. The penalties for failure to comply can be very serious.

A copy of the Official Bankruptcy Form B-10 may be obtained from [www.uscourts.gov/FormsandFees](http://www.uscourts.gov/FormsandFees).