

NACTT MORTGAGE COMMITTEE

SUGGESTED PRACTICES FOR TRUSTEES and MORTGAGE SERVICERS IN CHAPTER 13 REGARDING:

Amended Bankruptcy Rule 3001

New Bankruptcy Rule 3002.1

Proposed Amended Bankruptcy Form B10

Proposed Mortgage Proof of Claim Attachment (Attachment A to Form B10)

Proposed Notice of Mortgage Payment Change (Supplement 1 to Form B10)

Notice of Postpetition Mortgage Fees, Expenses & Charges (Supplement 2 to Form B10)

Application to Pending Cases, Triggering of Obligation in Converted Cases

Amended Bankruptcy Rule 3001, new Bankruptcy Rule 3002.1 (“Rule Changes”) and the proposed forms and notice referred to above (“New Forms”) are applicable to all pending Chapter 13 cases, effective December 1, 2011, and to any cases converted from another chapter of the Bankruptcy Code after that date.

Modifications to Existing Best Practices for Trustees and Servicers

Among other things, the Rule Changes clarify the actions that servicers/mortgagees must take with regard to escrow statements; statement of amount necessary to cure defaults as of the filing date; notice of payment change; and notice of fees, expenses, and charges incurred post-petition.

The New Forms replace the “Notice of Payment Change,” “Notice of Protective Advance or Other Contractual Expense,” and “Notice of Assessed Contractual Expense” forms attached to the “Best Practices for Trustees and Mortgage Servicers in Chapter 13.”

Except as they are supplemented or amended by Amended Rule 3001 and Rule 3002.1, the “Best Practices for Trustees and Mortgage Servicers in Chapter 13” continue to provide important guidance on many practice issues, such as the inclusion of certain costs and fees; calculation of pre-petition default, mortgage arrears, and escrow balance; communication between servicers/mortgagees, Chapter 13 Trustees, and debtors’ counsel; collection of post-petition fees; tracking of post-petition payments; resolution of payment discrepancies; Trustee voucher checks; and posting of payment receipts.

Escrow Account Statement

Rule 3001(c)(2)(C) permits servicers/mortgagees to use the same RESPA form used outside of bankruptcy. The form must be “consistent with applicable nonbankruptcy law.”

Pre-petition escrow shortages or deficiencies should be provided for as part of the arrears claim filed in the case, and should not be added to post-petition payments. Escrow shortages should be itemized separately from escrow deficiencies on the proof of claim.

In conduit jurisdictions, to determine the correct post-petition escrow amount, servicers/mortgagees should include the RESPA low point, adding any resulting pre-petition shortage to the pre-petition arrears as the escrow deficiency amount. The post-petition escrow analysis may then be adjusted to account for any shortage or surplus.

Notice of Payment Changes / Notice of Fees, Expenses and Charges

Servicers/mortgagees should file a proof of claim in every case, even in cases where debtors are current. This will allow servicers/mortgagees to supplement their proofs of claim in the event of a post-petition payment change, or if fees, expenses or charges are incurred during the pendency of the Chapter 13 case.

All notices should be issued within the time limits set forth under the Rule Changes. The Rule Changes provide penalties for failure to notify as required, and these penalties may also apply to untimely notification. Penalties may include barring the omitted information as evidence (unless the failure was substantially justified or harmless), or reasonable expenses and attorney fees caused by the failure to comply. Notices should include the most accurate, complete information currently available. Notices should be corrected or supplemented if the lender or servicer later becomes aware of errors, omissions or additional information.

In non-conduit jurisdictions, plan payments should not be increased, or the plan modified, in response to a notice of payment change or notice of fees, expenses and charges incurred, unless the plan includes specific provisions for doing so. Although the notices are treated as supplements to the proof of claim, they do not result in an automatic amendment to the amount of pre-petition arrears asserted in the proof of claim.

In both non-conduit and conduit jurisdictions, debtors should consider including plan provisions that provide for payment of any payment change, or notice of fees, expenses and charges incurred.

A fee, expense or cost should be treated as “incurred,” as the term is used in Bankruptcy Rule 3002.1(c), when the service is assessed to the mortgagors’ accounts. Such assessments should be completed timely after the service is performed. Servicers/mortgagees may have contractual arrangements that result in periodic invoicing or payment that may occur several months after the service giving rise to the fee, expense or cost has been performed. Servicers/mortgagees should be aware that if those fees, expenses and costs are being assessed to the accounts several months after the service giving rise to the fee, expense, or cost has been performed, such fee, expense, or cost may be deemed untimely and may bar recovery against the debtor, the debtor’s principal residence, or the estate.

Servicers/mortgagees should stagger portfolios so that 180-day notices are issued evenly over the course of a calendar year.

Servicers/mortgagees should provide electronic, data-searchable copies of all notices required by the Rule Changes if requested by Trustees, debtors or debtor’s counsel. If electronic copies of notices are provided, the requesting parties should agree that service of printed copies will not be required.

Where payments include interest based on an indexed rate determined on a date certain, compliance with the 21-day notice required by Rule 3002.1(b) may not be possible, or may prove impractical. In such cases, servicers/mortgagees should contact the debtor and debtor’s counsel to discuss alternative methods of interest calculation, at least during the pendency of the Chapter 13 case. Servicers/mortgagees may agree to convert the interest rate to a fixed rate, or agree to a certain rate to be reassessed periodically, with advance notice of any change to be provided as required by Rule 3002.1(b).

Notice of Final Cure Payment

Rule 3002.1(f) requires the Trustee to serve the Notice of Final Cure Payment on “the holder of the claim” in addition to the debtor and debtor’s counsel. Where the holder of the claim is not clearly identified, serve the creditor listed in the proof of claim form under “Name of Creditor” at the address provided for notices on page one of the proof of claim form. If an authorized agent or servicer is identified in Item #8 of the proof of claim form, provide additional notice to the agent or servicer at the address provided in Item #8.

The Trustee’s duty and timeline to issue a Notice of Final Cure Payment is triggered by (1) the debtor’s completion of all payments under the Chapter 13 plan, and (2) the existence of a filed claim asserting a default that the debtor’s plan proposes to cure under Section 1322(b)(5) of the Bankruptcy Code.

The Trustee may issue an Interim Notice of Cure when all payments have been completed on the pre-petition arrearage claim and prior to completion of all plan payments, but the Notice of Final Cure Payment may still be required notwithstanding the issuance of an Interim Notice of Cure. The interim notice provides parties with an opportunity to raise and resolve issues at an earlier stage in the case.

Where the servicer/mortgagee fails to timely file a proof of claim, Bankruptcy Rule 3004 permits the debtor or Trustee to file a proof of claim on behalf of the servicer/mortgagee. While the servicer/mortgagee, as the holder of the claim, will be entitled to notice of the final cure payment, the servicer/mortgagee may be bound by the amounts set forth in the filed proof of claim, and may also be precluded by Rules 3001(c)(2)(D) and 3002.1(i) from presenting information previously omitted.

- ### -