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The Party's Over — or Is It? Secured Creditor Issues at the End of a Chapter 13 Case

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Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor

(a) In General. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

(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.

(c) Notice of Fees, Expenses, and Charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) Form and Content. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) Determination of Fees, Expenses, or Charges. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(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.

(g) Response to Notice of Final Cure Payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) Determination of Final Cure and Payment. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) Failure to Notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) 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

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Notes

(Added Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec 1, 2016.)

Committee Notes on Rules—2011

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments.

In order to be able to fulfill the 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. Compliance with the notice provision of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a). Subdivision (a) specifies that this rule applies only in a chapter 13 case to claims secured by a security interest in the debtor's principal residence.

Subdivision (b). Subdivision (b) requires the holder of a claim to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount at least 21 days before the new payment amount is due.

Subdivision (c). Subdivision (c) requires an itemized notice to be given, within 180 days of incurrence, of any postpetition fees, expenses, or charges that the holder of the claim asserts are recoverable from the debtor or against the debtor's principal residence. This might include, for example, inspection fees, late charges, or attorney's fees.

Subdivision (d). Subdivision (d) provides the method of giving the notice under subdivisions (b) and (c). In both instances, the holder of the claim must give notice of the change as prescribed by the appropriate Official Form. In addition to serving the debtor, debtor's counsel, and the trustee, the holder of the claim must also file the notice on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to any notice given under subdivision (b) or (c), and therefore the notice will not constitute prima facie evidence of the validity and amount of the payment change or of the fee, expense, or charge.

Subdivision (e). Subdivision (e) permits the debtor or trustee, within a year after service of a notice under subdivision (c), to seek a determination by the court as to whether the fees, expenses, or charges set forth in the notice are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (f). Subdivision (f) requires the trustee to issue a notice to the holder of the claim, the debtor, and the debtor's attorney within 30 days after completion of payments under the plan. The notice must (1) indicate that all amounts required to cure a default on a claim secured by the debtor's principal residence have been paid, and (2) direct the holder to comply with subdivision (g). If the trustee fails to file this notice within the required time, this subdivision also permits the debtor to file and serve the notice on the trustee and the holder of the claim.

Subdivision (g). Subdivision (g) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (f). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and also whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code. If the holder of the claim contends that all cure payments have not been made or that the debtor is not current on other payments required by § 1322(b)(5), the response must itemize all amounts, other than regular future installment payments, that the holder contends are due.

Subdivision (h). Subdivision (h) provides a procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. Within 21 days after the service of the statement under (g), the trustee or debtor may move for a determination by the court of whether any default has been cured and whether any other non-current obligations remain outstanding.

Subdivision (i). Subdivision (i) specifies sanctions that may be imposed if the holder of a claim fails to provide any of the information as required by subdivisions (b), (c), or (g).

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i).

Changes Made After Publication

Subdivision (a). As part of organizational changes intended to make the rule shorter and clearer, a new subdivision (a) was inserted that specifies the applicability of the rule. Other subdivision designations were changed accordingly.

Subdivision (b). The timing of the notice of payment change, addressed in subdivision (a) of the published rule, was changed from 30 to 21 days before payment must be made in the new amount.

Subdivision (d). The provisions of the published rule prescribing the procedure for providing notice of payment changes and of fees, expenses, and charges were moved to subdivision (d).

Subdivision (e). As part of the organizational revision of the rule, the provision governing the resolution of disputes over claimed fees, expenses, or charges was moved to this subdivision.

Subdivision (f). The triggering event for the filing of the notice of final cure payment was changed to the debtor's completion of all payments required under the plan. A sentence was added requiring the notice to inform the holder of the mortgage claim of its obligation to file and serve a response under subdivision (g).

Subdivision (h). The caption of this subdivision (which was subdivision (f) as published), was changed to describe its content more precisely.

Subdivision (i). The clause "the holder shall be precluded" was deleted, and the provision was revised to state that "the court may, after notice and hearing, take either or both" of the specified actions.

Committee Note. A sentence was added to the first paragraph to clarify that the rule applies regardless of whether ongoing mortgage payments are made directly by the debtor or disbursed through the chapter 13 trustee. Other changes were made to the Committee Note to reflect the changes made to the rule.

Other changes. Stylistic changes were made throughout the rule and Committee Note.

Committee Notes on Rules—2016 Amendment

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

Local Bankruptcy Rule 2015-3 (E.D. Mich.)

Rule 2015-3 Trustee's Procedures Upon Chapter 13 Plan Completion

(a) Procedure Leading to Entry of the Debtor's Discharge. Within 30 days after the completion of plan payments by the debtor to the trustee, the trustee must file and serve on the debtor and all holders of allowed claims a notice stating that:

(1) the debtor's payments to the trustee under the plan have been completed;

(2) the order of discharge will include findings that:

(A) all allowed claims have been paid in accordance with the plan; and

(B) with respect to any secured claim that continues beyond the term of the plan, any pre-petition or post-petition defaults have been cured;

(3) the order of discharge will direct that:

(A) any creditor who held a secured claim that was fully paid must execute and deliver to the debtor a release, termination statement, discharge of mortgage or other appropriate certificate suitable for recording; and

(B) any creditor who holds a secured claim that continues beyond the term of the plan must take no action inconsistent with the above findings;

(4) in addition to the requirements for holders of claims governed by F.R.Bankr.P. 3002.1, any party may file with the court an objection to the trustee's notice under subpart (a)(1); to assert that the debtor is not current in the payments that the debtor was authorized to make directly to a creditor; to the proposed findings as stated in subpart (a)(2); or to the proposed terms of the order of discharge as stated in subpart (a)(3). (The provisions of this subpart (a)(4) do not apply to a creditor with respect to whom the automatic stay has been terminated.);

(5) the deadline to file an objection is 21 days after service of the notice. If no objection is timely filed with the court under this rule, and no statement disagreeing with the notice of final cure payment is timely filed under F.R.Bankr.P. 3002.1(g), the court may enter an order of discharge containing the provisions of subparts (a)(2) and (a)(3) without a hearing. If either a timely objection is filed with the court under this rule, or a timely statement disagreeing with the notice of final cure payment is filed under F.R.Bankr.P. 3002.1(g), the court will delay entry of the order of discharge until it resolves such objection or statement, after a hearing that will be scheduled by the court upon the filing of such objection or statement with notice to the party filing such objection or statement, the debtor and the trustee;

(6) to avoid defaulting on any continuing secured debt obligation, the debtor must immediately begin making the required payments on that obligation; and

(7) the chapter 13 discharge does not discharge the debtor from any obligation on any continuing secured debt payments that are due after the last contractually due payment to which the trustee's last disbursement is applied. The trustee must file a certificate of service of this notice.

(b) Additional Notice. The notice under subpart (a) must also state that unless a party timely objects under subpart (a)(4), the court may find without a hearing that there is no reasonable cause to believe that:

(1) § 522(q)(1) may be applicable to the debtor; and

(2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind specified in § 522(q)(1)(A) or liable for a debt of the kind described in § 522(q)(1)(B).

(c) Application. Subparts (a)(2)(B) and (a)(3)(B) will not apply to the extent that the court has entered an order providing otherwise

(d) Trustee's Final Report and Account. Within 120 days after the trustee files the notice required under subpart (a), the trustee must file the final report and account and serve it or a summary thereof on all holders of allowed claims and file a certificate of service.

(1) The final report must state the allowed amount of each claim and the amount paid thereon.

(2) The report and any summary thereof that is served must also state that the deadline to file an objection to the trustee's final report and account is 30 days after service of the final report; that if no objection is timely filed, the trustee may be discharged and the case may be closed without a hearing; and that if a timely objection is filed, a hearing will be scheduled with notice to the objecting party, the debtor and the trustee.

Western District

As required by Fed. R. Bankr. P. 3002.1(f), within 30 days of Debtor(s) making their last payment into their Chapter 13 Plan, the Trustee will file and serve a mortgagee with his Notice of Final Cure Payment (attached hereto as Exhibit A) on mortgages that were paid through the Chapter 13 Trustee which includes information such as the amount of the pre-petition arrearage as allowed, the amount of the pre-petition arrearage paid by the Trustee, total disbursements on any post-petition FRBP 3002.1 filings made by the Trustee, the current monthly mortgage payment, and the date in which the next post-petition payment is due. It is worth noting that pursuant to Fed. R. Bankr. P. 3002.1(f), if the Trustee does not timely file this Notice, Debtor has the option of filing such a Notice.

Within 21 days of being served with the Notice of Final Cure, the holder of the claim must file a response indicating whether it is in agreement that the pre-petition mortgage arrears have been paid in full and whether the ongoing mortgage payments have been maintained during the bankruptcy resulting in Debtor being current on the ongoing mortgage payments. If the holder in its response states either that the pre-petition mortgage arrears have not been paid in full or that the ongoing mortgage payments are not current, the Chapter 13 Trustee then submits to the holder a report breaking down the disbursements on any disputed payments on either the ongoing mortgage payments or the pre-petition arrears during the pendency of the Chapter 13 Trustee with a request that its

Response be amended to reflect that the pre-petition mortgage arrears have been in paid and/or the ongoing mortgage payments to the holder are contractually current. If the holder refuses to respond to the Trustee in writing or amend its Response, then within 21 days after the Trustee being served with the Response under Fed. R. Bankr. P. 3002.1 (g), the Trustee will file a Motion for Determination of Final Cure as provided under Fed. R. Bankr. P. 3002.1(h) (attached hereto as Exhibit B).

The Trustee's Motion for Determination of Final Cure will include the following information: the amount of the ongoing mortgage payments throughout the pendency of the Chapter 13 case based upon the amounts declared in the holder's proof of claim and any subsequent notices of mortgage payment changes filed with the court, the amount disbursed by the Chapter 13 Trustee on the ongoing mortgage payments, the amount disbursed by the Chapter 13 Trustee on the pre-petition mortgage claim filed by the holder, and the dates and amounts of the checks that were disbursed to and cashed by the holder associated with any ongoing mortgage payments in dispute by the holder. Once the Motion for Determination of Final Cure is filed, the court will set the Motion for hearing since under Fed. R. Bankr. P. 3002.1(h), "the court shall, *after notice and hearing,* determine whether the debtor has cured the default and paid all required postpetition amounts."

It should be noted that in the Western District of Michigan, the new Model Chapter 13 Plan in effect at this time (attached hereto as Exhibit C) includes language that states "[t]he requirements and provisions of Fed. R. Bankr. P. 3002.1 shall not apply to the Trustee in any chapter 13 case where the Plan as confirmed surrenders property to the creditor as provided in 11 U.S.C. § 1325(a)(5)(C) or proposes that Debtor(s) pay the creditor directly or to any claim as to which the automatic stay is modified for purposes of allowing the secured creditor to exercise its rights and remedies pursuant to applicable non-bankruptcy law." Hence, if Debtor proposes to either surrender property to the holder or pay holder on such property directly by Debtor or in the event the automatic stay is modified to the holder on such property at any point in the bankruptcy, the Chapter 13 Trustee is not required to file a Notice of Final Cure Payment in compliance with Fed. R. Bankr. P. 3002.1(f). In those cases, if Debtor is not completely current on his/her obligations to the holder at the end of his/her Chapter 13 case, Debtor's Chapter 13 discharge could be denied and/or the holder could pursue its state law remedies against Debtor and/or the property after the Chapter 13 discharge.

Creditor's Preparation of Response

Principal Residence or "other" secured claim?

What was the plan treatment? Maintain, Cure & Maintain, Direct Pay, Total Debt, Modified, Stay lift?

Who was the disbursing agent? Direct Pay, Trustee Pay or some combination? When was the last disbursement or payment made?

Was there loss mitigation, Loan Modification, or resolution of a MFR?

Review of the POC, PACER, Orders, Plans, Motions filed, Loss Mitigation

Review Notices of Payment Changes – missed, late or service transfers

Review Notices of Fees, Expenses, and Changes

Review of Trustee Records (continuing, arrears, gap, supplemental) / Creditor's Records and Obtaining Discovery

Agreed vs. Disagreed? Not always so clear …. Examples

How to respond - Directors Form, Local Form, or something else?

Prosecuting Responses Disagreeing with Notice of Final Cure

Motion for Determination? A disagreed response automatically sets a hearing in both the Eastern & Western Districts.

Exchange information freely as the goal is to make clear to both the Debtor and the Creditor what needs to be cured, what the next payment due will be and how much that payment will be.

No withdrawal of the response. A response is required. Amend the response to agreed or resolve via Order?

Debtor's Review of Response

FRBP 3002.1 Primer

- Once the Chapter 13 plan is complete the Chapter 13 Trustee will file a "Notice of Final Cure Payment" pursuant to FRBP 3002.1(f)
- The Creditor has 21 days to file a response stating whether there is agreement or disagreement; however, if the response disagrees, a breakdown of the outstanding payments and fees and charges are still owing.
- Failure to file the response within the 21 days subjects mortgage company to the consequences available under 3001(c)(2)(D) and in E.D. Mich. renders the loan current with no fees or charges owing through the last trustee's disbursement upon discharge. Remedies for failure to file are different in each jurisdiction, check local bankruptcy rules.
- Responses may be filed by a "bankruptcy specialists" at the mortgage company, not an attorney. Keep in mind the required forms and sanctions if mortgage company does not file they may be precluded from presenting evidence at the hearing on the final cure

When Does Federal Rule of Bankruptcy Procedure 3002.1 Apply?

- Federal Rule of Bankruptcy Procedure ("FRBP") 3002.1 only applies in Chapter 13 cases to a lender that has a lien in first position (not a junior lien or a second deed of trust) against Debtor's principal residence. If the lender/bank has a lien secured by a deed of trust against Debtor's commercial property, the rule will not apply.

- A lender is required to comply with the rule so long as the Debtor is in bankruptcy and no relief from the automatic stay was granted by the Court. In Chapter 13 cases, lenders move for relief from the automatic stay if a borrower does not make monthly mortgage payments; if said Motion by a lender is granted, the lender no longer has to comply with the notice requirement in FRBP 3002.1.

What Must a Lender or the Bank Due Pursuant to FRBP 3002.1

- Assuming the borrower's bankruptcy and the loan at question is subject to the FRBP 3002.1, the lender ***must give the borrower notices of any change in the monthly mortgage payment***, whether it be a change in the principal and interest component of the payment (such as an interest rate change) or a change in the escrow component of the payment. The lender must complete and file with the Court a specific form that outlines exactly which component of the payment is changing. Additionally, the form requires that the lender attached a notice (usually computerized), such as an annual escrow analysis, which provides further details on how the new payment is calculated.

What Happens if a Lender Fails to Comply with FRBP 3002.1?

- FRBP 3002.1(f) provides that if a lender fails to file a Notice of Monthly Mortgage Payment Change, the lender will be precluded from requiring the Debtor to pay the amount set forth in the "unless the court determines that the failure was substantially justified or is harmless." Additionally, the Court may "award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure."

What Happens if the Lender Complies with FRBP 3002.1, but Files a Late Notice of Mortgage Payment Change?

- FRBP 3002.1 does not provide guidance for failure to file a late Notice of Mortgage Payment Change. Where the payment is higher, the Debtor may not be responsible for the increased payment without notice. The Debtor may have received or should receive credit for any monthly mortgage payments tendered at the lower amount.
- Creditor may send a statement that includes outstanding fees or charges and/or may re-start foreclosure post discharge.

DEBTOR OPTIONS:

- 11 U.S.C. §524(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.
    - Motion for sanction under 524(i), and may have to reopen case in order to file motion.
    - Court will set a hearing and if sufficient evidence will award damages to the debtor including attorney fees.
    - If violation is egregious, punitive damages can be pursued.
    - File lawsuit against Mortgage Company in District Court. Generally, District Court will submit the case to the Bankruptcy Court. Bankruptcy Court will enter adversary proceeding on docket and litigate the issues with report and recommendation to the District Court for judgment entry.

Some Rule 3002.1 Cases That May Be Of Interest

What Are The Parties Required To Do When The Mortgage Payment Is Different (Or Changes) From What Is Stated In A Confirmed Chapter 13 Plan?

***In re Velazquez*,** 2017 WL 1380534 (Bankr. S.D. Tex. Apr. 17, 2017).
When a proof of claim filed by mortgagee shows a monthly payment different than that stated in the confirmed plan, the trustee is not authorized to retroactively adjust payments into the plan. Instead, the trustee must pay the mortgagee consistent with the allowed proof of claim and, if necessary, seek a court order to modify the Chapter 13 plan. When a mortgagee files a Bankruptcy Rule 3002.1 notice of mortgage payment change, local rules allow the trustee to notice that change to the debtor and to then adjust the plan payment prospectively — without the filing of a modified plan.

Mortgagees' Attorney Fees, Rule 3002.1, And Rule 2016.

***In re Cotsis*,** 2017 WL 745591, at *2–*3 (Bankr. D. Me. Feb. 24, 2017).
U.S. Bank need not file a Rule 2016 disclosure to include postpetition attorney fees in its Rule 3002.1 notice. If the debtor disputes the attorney fees in 3002.1 notice, the proper procedure is not an objection but rather a motion under Bankruptcy Rule 3002.1(e). "If U.S. Bank had been retained by the Debtors or their estate in accordance with §327 and wished to be paid for services rendered or expenses incurred for such work, it would be required to satisfy the federal and local Rule 2016 requirements before receiving compensation. These preconditions apply even though U.S. Bank is a creditor. . . . But those requirements do not pertain to creditors whose contractual arrangement with debtors permit the recovery of attorneys' fees or expenses. . . . Rule 3002.1 provides a procedural vehicle by which the Debtors could object to the fees sought by U.S. Bank. 'On motion of the debtor . . . .' Fed. R. Bankr. P. 3002.1(e).".

In re Marks, 548 B.R. 703, 714 (Bankr. D.S.C. 2016).
A Rule 3002.1 Notice for $72,671 of postpetition attorney fees was reduced to $62,475 because some of the fees requested were untimely, having been filed more than 180 days after the fees were incurred. The court first determined that Nationstar had authority to enforce the note and mortgage, including the attorney fee provision that was triggered by the debtor's unsuccessful state court lawsuit. Nationstar filed a 3002.1 Notices for fees incurred in the state court litigation. But, "Nationstar failed to comply with Rule 3002.1 by filing notices that were untimely, vague, confusing, and lacked adequate documentation. Rule 3002.1(b) provides that the notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred. . . . Nationstar's Notice is untimely as to

amounts incurred between May 2, 2012 and May 11, 2012 (the 180th day prior to the filing of the Notice). . . . [P]ursuant to Rule 3002.1(i), the Court will preclude Nationstar from recovering attorneys' fee based on requests that were untimely filed . . . and finds that a further reduction of the amount Nationstar is entitled to collect from Debtor is warranted[.]"

Untimely 3002.1 Notices.

In re Salazar, 2016 WL 6068819, at **1–3 (Bankr. S.D. Tex. Oct. 14, 2016). A Rule 3002.1 Notice filed on April 25, 2016, for fees and expenses incurred between January and May of 2015 is untimely and fails to comply with the 180-day requirement in Bankruptcy Rule 3002.1(c). The consequence of failing to timely file notice is disallowance of the fees and expenses under Bankruptcy Rule 3002.1(i). "The mandatory nature of the word 'shall' in 3002.1(c) suggests that the notice must be filed within the 180-day deadline. . . . The Advisory Committee Notes shed light on this purpose. . . . Nothing in subparagraph (i) purports to extend the generous 180-day deadline in subparagraph (c) . . . . The fees and expenses requested in [creditor's] untimely notice are disallowed.".

In re Raygoza, 556 B.R. 813, 819-24 (Bankr. S.D. Tex. Sept. 1, 2016).
Legal fees were "incurred" for purposes of Rule 3002.1 when the creditor became liable for the fees, not when the fees were billed. The objection to the Rule 3002.1 Notice was sustained because the Notice was filed more than 180 days after legal services were performed. The $825 charge for filing a proof of claim was reduced to one hour at $250. The Bank's Notice of postpetition mortgage fees, expenses and charges, filed on May 25, 2016, included legal services performed on November 6 and November 9, 2015. "In order to be timely, the creditor's notice for the fees, expenses or charges must be filed and served within 180 days from the day the creditor incurred the expense. . . . Rule 3002.1 does not expound on when exactly an expense is incurred. . . . [A]n expense is incurred when a legal obligation to pay the debt arises, which is the date the service is rendered. . . . Both the dictionary definition and the statutory context establish that an expense is 'incurred' [when] there is a legal obligation to pay the debt. The [notice of postpetition expenses] was filed outside the 180-day limit imposed by Rule 3002.1(c) for the legal fees incurred in November 2015. . . . There is considerable debate among bankruptcy courts as to whether services completed by attorneys drafting proofs of claim for their clients are considered legal acts warranting attorney's fees. . . . [S]everal bankruptcy courts regard the drafting and filing of a proof of claim as nothing more than a ministerial act, which does not require an attorney. . . . [T]he drafting and filing of a proof of claim is partially an 'administrative function' that does not constitute the practice of law, which in turn cannot be subject to attorney's fees. . . . [T]his Court will allow a portion of the December 2015 attorney's fees for work on the [proof of claim]. . . . Based on the lack of evidence presented,

this Court finds that the nature and extent of . . . Counsel's services include one-hour of legal work in conducting the necessary legal services in preparing the [proof of claim]."

But this raises the question: how does Debtors' counsel or the Trustee find out when legal services were preformed - do they have to conduct discovery every time the receive a Rule 3002.1 notice of this type of expense?

In re Tatum, 2017 WL 3311219 (Bankr. D.N.J. May 15, 2017).
Mortgagee argued that the late filing of a Notice under Rule 3002.1(c) was "harmless". Debtor objected, and the court agreed with the Debtor. The court held that "any general statements by the Bank as to the accrual of fees and expenses without specifying amounts, dates and other details are insufficient to satisfy Rule 3002.1's requirements and, more significantly, its substance and intent. Those general statements simply do not provide the Debtor and other interested parties with the specific information they need to know as to the amount of the fees sought to be recovered that would, in turn, allow them to determine how the Debtor's plan is affected, whether the Debtor's plan is confirmable and prevent unexpected surprises, as would be the case here if the additional fees were allowed."

Unintended Consequences - Responses To Notice Of Final Cure Leading To Debtors Not Receiving A Chapter 13 Discharge Because Direct Payments Not Made.

In re Coughlin, 568 B.R. 461, 463 (Bankr. E.D.N.Y. 2017).
A debtor's failure to make post-petition mortgage payments directly to a mortgagee constitutes a default of the plan and debtors who default on direct payments are not entitled to a discharge under Section 1328(a). However, in one of the two Chapter 13 cases addressed in the decision, based upon Debtors explanation that post-Confirmation default resulted from illness that prevented Debtor-Husband from working, court would allow modification of Plan to surrender the mortgage property to the mortgagee. And the court would not vacate the Debtors' discharges because they were not obtained by fraud, and the discharge order was not issued through mistake or inadvertance.

In re Freyta, 2016 WL 5390115 (Bankr. D. Colo. May 5, 2016).
Payments are not complete, and the debtor is not eligible for discharge, and the trustee has not completed administration of the case when, in response to trustee's Bankruptcy Rule 3002.1(f) Notice of Final Cure Payment, mortgagee states that its arrearage has not been fully paid and debtor failed to maintain postpetition payments under § 1322(b)(5). Thus, the Debtor is not eligible for a discharge and the trustee's request for final decree is denied.

Evans v. Stackhouse, 564 B.R. 513 (Bankr. E.D. Va. 2017).

Postpetition mortgage payments to be made by the Chapter 13 Debtor directly to the Lender to which such payments are owed are still considered "payments under the plan". Debtor is statutorily required to complete such payments in order to receive a discharge under Section 1328(a) if the Plan provides for the curing of prepetition arrearages on the same mortgage.

In re Abila, 2016 WL 5389266 (Bankr. D. Colo. Apr. 20, 2016).
Debtor was not entitled to discharge because the Response to Trustee's 3002.1 Notice of Final Cure indicated that the debtor failed to make all monthly mortgage payments directly to lienholder.

In re Bethe, 2017 WL 3994813 (Bankr. E.D. Wis. Sept. 8, 2017).
Court did not revoke the Debtor's discharge where the Rule 3002.1 Response disclosed unpaid post-Confirmation direct mortgage payments. The discharge was not revoked, in part, because the parties were following established local procedures. But, the court indicated that those procedures would need to change, and that in the future discharges should not be granted where post-Confirmation direct payments had not been maintained, even though the Chapter 13 Trustee had paid the pre-Petition arrearage claim.

In re Payer, 2016 WL 5390116, at *2–*4 (Bankr. D. Colo. May 5, 2016).
On an Order to Show Cause, the court found cause for dismissal where the debtors failed to make required direct payments to mortgagee. The confirmed Plan required payment of the mortgage arrearage and maintenance of regular postpetition mortgage payments directly to holder of first mortgage. The Trustee filed a Notice of Final Cure Payment under Bankruptcy Rule 3002.1(f), to which mortgagee responded that prepetition arrearages had been paid in full but that the debtor was more than $10,000 behind in postpetition mortgage payments. No party requested specific action from the bankruptcy court, and the court issued its show-cause order after the trustee filed a notice that the case was fully administered. "'[P]ayments under the plan' includes payments made directly to a mortgage holder when provision for that direct payment is a term of a debtor's confirmed plan. . . . Debtors are in material default under the terms of their confirmed Plan. . . . [I]t leaves over $10,000.00 that the Debtors had committed to use for making ongoing mortgage payments under their confirmed Plan unaccounted for. . . . [A] discharge in this case would allow the Debtors to extinguish the [junior lien] . . . on the Debtors' residence. . . . [C]ause exists to either dismiss the Debtors' case or convert it to a case under chapter 7."

In re Hoyt-Kieckhaben, 546 B.R. 868, 869-74 (Bankr. D. Colo. Feb. 23, 2016).
Because direct payment of the mortgage is a payment "under the plan," default in direct payments means that payments under the plan are not complete, and the debtor is not entitled to discharge notwithstanding that debtor made all payments to the trustee that

were required by the confirmed plan. "In the past year, . . . this Court and others within this district have seen a new and disturbing trend emerge in chapter 13 cases. At the conclusion of the three- or five-year plan, the lender objects on the basis that it has not received the Direct Payments from the debtor, often over a substantial portion of the plan's term. . . . [L]enders could seek relief from the automatic stay or file a motion to dismiss. Instead they do nothing until they respond to the Rule 3002.1 notice near the conclusion of the plan. . . . [R]egardless of who disburses the payment, it is remains [sic] a payment 'under the plan' whenever the plan contains a provision effecting the treatment of that secured creditor's claim. . . . [W]hen the court 'orders otherwise' to allow the debtor to act as the disbursing agent of the Direct Payments, the plan is nevertheless providing for this secured claim. All payments, regardless of who disburses them, are payments 'under the plan.' . . . Both the cure payments and regular payments while the case is pending are equal and necessary parts of a plan's treatment of a secured claim under § 1322(b)(5). . . . [T]he Direct Payments were payments under the Debtor's plan that she did not complete. She is, therefore, not entitled to a discharge under § 1328(a)."

Rule 3002.1 Does Not Apply To Mortgage Debt That Is To Be Paid In Full Through The Plan Under Section 1322(c)(2).

In re Tavares, 547 B.R. 204, 215-16 (Bankr. S.D. Tex. 2016).
A confirmed Plan that paid short-term mortgage "pro rata" did not provide for the mortgage under § 1322(b)(5) for purposes of Bankruptcy Rule 3002.1(f). Thus, the Trustee's notice of final cure was "stricken." Mortgagee protested the Trustee's 3002.1(f) Notice of Final Cure. The confirmed Plan provided for payment in full of the mortgage, with interest, over 60 months on a "pro rata basis." Trustee's records and mortgagee's records disagreed because the mortgagee had applied payments to interest and postpetition taxes rather than to principal and interest. "Rule 3002.1 . . . is entirely inapplicable to the instant case, because [mortgagee's] claim was provided for under §1322(c)(2) and not §1322(b)(5), as required by Rule 3002.1(a). . . . [T]he underlying claim did not contemplate the existence of the debt beyond the date in which final payments were to be made under the plan. . . . Rule 3002.1 applies in cases where the security interest is the debtor's principal residence and for which payments are provided under § 1322(b)(5)."

Does Rule 3002.1 Apply Where There Is No Arrearage To Be Cured?

Several older cases held: “No.”

In re Weigel, 485 B.R. 327, 328 (Bankr.E.D.Va.2012). This case says: “no”. The court held that Rule 3002.1 is not applicable “because there were no pre-petition arrearages to be

cured[.]" There is no "cure and maintain" under 1325(b)(5) where there is no prepetition arrearage to "cure". *See also*, *In re Wallett*, 2012 WL 4062657, at *4 (Bankr.D.Vt. Sept.14, 2012) (stating that when payments were made directly to lender, claim was not "treated in the plan in accordance with § 1322(b)(5)"); *In re Merino*, 2012 WL 2891112, at *1 (Bankr.M.D.Fla. July 16, 2012) (stating that because Rule 3002.1 was adopted to aid in the implementation of §1322(b)(5), "[a]n inference may be drawn that Rule 3002.1 does not apply to claims being paid outside the plan."); *In re Garduno*, 2012 WL 2402789 (Bankr.S.D. Fla. June 26, 2012) (finding that Rule 3002.1 did not apply because the mortgage addressed in the notice was not the debtors' principal residence and § 1322(b)(5) did not apply where the bank was not receiving any payments through the plan).

The majority of more recent cases say: "yes".

In re Tollios, 491 B.R. 886, 887 (Bankr.N.D.Ill.2013). This case says: "yes". The court held that Rule 3002.1 "applies to all chapter 13 cases in which the debtor's plan provides for the maintenance of monthly mortgage payments on the debtor's principal residence, regardless of whether the plan also provides for payment of prepetition arrears owed to the mortgage creditor."

In re Fitch, 540 B.R. 13, (Bankr. D. Me. 2015). The decision agreed with *Tollios* (in what may be viewed as *dicta*) thereby answering the question "yes".

In re Cloud, 2013 WL 441543 (Bankr. S.D. Ga. Jan. 31, 2013). Section 1322(b)(5) encompasses all long-term debt, not just debt with a prepetition default cured through the plan, so Rule 3002.1 applies to mortgage where direct payments are being made, even if there were no prepetition arrearages owed. *See also*, *In re Roife*, 2013 WL 6185025 (Bankr.S.D.Tex. Nov. 26, 2013) (finding that payments "outside the plan" can nonetheless fall under §1322(b)(5) and be "provided for by the plan" so long as the debtor exercises his or her discretion "to make a provision in a chapter 13 plan for an unmodified secured claim. If the plan does not make a provision for the un-modified secured claim, the plan does not provide for the claim. It follows that if a plan makes a provision for an unmodified secured claim, the plan provides for the claim."

What Does The Mortgage Holder Have To Put In Its Response If It Disagrees With The 3002.1 Notice?

In re Nieves, 499 B.R. 222 (Bankr. D. Puerto Rico 2013).
If Mortgagee disagrees that arrearage has been cured, claimholder must provide a detailed itemization of charges which it asserts are still unpaid. This detailed itemization must be filed under penalty of perjury using the Official Form, or a substantially similar form.

What If The Mortgage Holder Does Not Respond To A Rule 3002.1 Notice?

In re Howard, 563 B.R. 308 (Bankr. N.D. Cal. 2016).
Mortgage holder failed to file an appropriate response to the Chapter 13 Trustee's 3002.1 Notice of Final Cure under debtor's confirmed cure-and-maintenance plan. Chapter 13 debtor moved for award of sanctions. The court held that responses that mortgagee filed to trustee's notice of a final cure, which either did not contain any itemized statement of amounts that mortgagee contended were still owing or were unsigned and filed one-and-one-half months after court-ordered deadline, were insufficient to comply with mortgagee's obligations under Rule 3002.1. Accordingly, Debtor was entitled, as sanctions, to order striking mortgagee's responses, to an award of reasonable attorney fees, and to order precluding mortgagee from introducing evidence of any unpaid arrearages. However, the court held that the Debtor was not entitled, as "other appropriate relief" authorized under catch-all provision of the Rule, to an order deeming her mortgage current.

Is The Mortgage Holder Entitled To The Fee Or Expense?

In re Brumley, 570 B.R. 287 (Bankr. W.D. Mich. 2017).
Following confirmation of Chapter 13 Debtor's "cure and maintenance" plan, Debtor's home mortgage lender, through its servicer, filed notice of postpetition fees, expenses, and charges, seeking $90 in inspection fees for six inspections of debtor's residence. The court held that the lender had the burden of proving its entitlement to any postpetition fees, and although the lender demonstrated that it was entitled to inspect the property if the loan was in default, it did not show that it was authorized to impose fees for any such inspections.

In re Herman, 2016 WL 520306, at *2-*3 (Bankr. S.D. Tex. Feb. 9, 2016).
Oversecured mortgagee, whose debt was current and being paid directly under confirmed plan, failed to prove reasonableness or necessity under § 506(b) for $425 postpetition charge for filing proof of claim. "Although Debtors are current on their payments to Creditor who is being paid outside of the confirmed plan, the fact that the bankruptcy proceeding is pending might still significantly affect Creditor's interest in the property. . . . [I]t is not unreasonable for Creditor to have filed a proof of claim under the facts of this case, regardless of whether the creditor is required to do so. . . . The court has concluded in other bankruptcy cases, after the submission of evidence, that a flat or fixed fee of $425 for the filing of a proof of claim is reasonable. In order for the court to determine that the fees are reasonable under section 506(b) of the Bankruptcy Code, the creditor must establish that fees were for services rendered that were necessary, that the fees were actually

incurred, and that the amounts charged for the services rendered were reasonable. Creditor offered no testimony or evidence. . . . [N]o evidence was submitted or proffer made to describe the services rendered . . . . Creditor failed to sustain its burden of proof to show that the fees are reasonable under section 506(b) of the Bankruptcy Code. . . . [T]he burden of proof is on the oversecured creditor . . . . [T]he court must determine whether the creditor took the kinds of actions that similarly situated creditors might reasonably conclude should be taken under the circumstances and that the fees and costs claimed are reasonable amounts to charge for the services rendered."

What Happens To Fees And Expenses That Are Disallowed Under Rule 3002.1?

Kilbourne v. CitiMortgage, Inc. (In re Kilbourne), 555 B.R. 628 (Bankr. S.D. Ohio 2015). Bankruptcy court refuses to dismiss class action request in adversary proceeding alleging that CitiMortgage routinely violated discharge injunction by attempting to collect fees, costs and expenses that were not noticed during Chapter 13 cases under Bankruptcy Rule 3002.1 and in which orders were entered declaring the mortgage current at completion of payments.

Bainbridge v. Ocwen Loan Servicing, LLC, 2017 WL 1178047 (M.D. Pa. Mar. 30, 2017). Fair Debt Collection Practices Act action with respect to a Rule 3002.1 Response filed by Ocwen is not barred by the one-year statute of limitations, but claims with respect to a foreclosure are barred. The action against US Bank and Ocwen under state consumer protection statutes was dismissed in part.

Implementing Steps to Comply with the Discharge Order

Waiver / removal of non-recoverable items

Advancing or returning funds

Account adjustments