

BY ROBERT C. MEYER

## Can New Rule 3002.1 Snooker a Secured Creditor?

A secured creditor does not need to file a proof of claim in bankruptcy, but in chapter 13 proceedings, the secured creditor with a mortgage on the debtor's principal residence<sup>1</sup> is often the focus of the chapter 13 plan, and the proof of claim dictates many of the chapter 13 plan's terms. On Dec. 1, 2011, changes to the Federal Rules of Bankruptcy Procedure complicated the filing of claims and imported duties upon the secured creditor to file and continually amend its proof of claim. Those changes also provided an opportunity for debtors to obtain an expedited judicial review of the issue regarding the mortgage debt, which offers repose when a ruling is made. The essence is that a bankruptcy review of the mortgage debt may provide a valuable *res judicata* adjudication of the debt.

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### New Rule 3002.1

Combined with § 1322(b)(5), new Rule 3002.1 of the Federal Rules of Bankruptcy Procedure seeks to end the confirmed-and-paid plan's nightmare: where fully paid plan payments are calculated by the creditors as "short" and the debtor is informed that he or she is in default on a principal residence mortgage when obtaining the bankruptcy discharge. Prior to this rule's existence, after all payments were made, a debtor encountered the non-bankruptcy world of mortgage payments and discovered straddling uncovered additional costs, charges, fees or variable interest rate adjustments that were not addressed in the chapter 13 plan. Substantial sums on the residential mortgage were inevitably claimed due by the mortgagee—owed by the "fresh-start" debtor. This new rule seeks to terminate this quandary by imposing new duties upon creditors and the trustee.

### Fees and Charges

Rule 3002.1(c) now demands that post-petition fees and costs be noticed. Such notice must be served upon the debtor, the debtor's counsel and the chapter 13 trustee for post-petition fees, costs, expense(s) or charge(s). Notice shall be filed within 180 days of when the fee, expense or charge was "incurred."<sup>2</sup> If there is a dispute

by either the debtor or the chapter 13 trustee, a hearing on such a dispute shall be held.<sup>3</sup> The time for asserting such a dispute is "one year" after "service" of the notice of fee, expense or charge.<sup>4</sup> Failures to give notice can be costly.<sup>5</sup>

### Final Cure Notice

The *res judicata* concepts initiate with the chapter 13 trustee. Now, within 30 days after the debtor completes all plan payments, the chapter 13 trustee serves the secured claimant, the debtor and the debtor's counsel with a notice that all payments are made and informs the mortgagee that the pre-petition default is cured.<sup>6</sup> This notice shall also inform the secured claimant of a duty to respond within 21 days if there is agreement or dispute.<sup>7</sup> The response can either simply agree<sup>8</sup> or itemize any contested cure or post-petition payments. A response, positive or negative, is required.<sup>9</sup> The secured creditor's response is not to be filed with the main case docket, but instead is to be filed as a supplement to the proof of claim.<sup>10</sup> If a dispute arises under Bankruptcy Rule 3002.1(g), the debtor or chapter 13 trustee must dispute the assertions within 21 days of the service of the notice.<sup>11</sup> It takes a notice,<sup>12</sup> a response (Rule 3002.1(g)) and a motion (Rule 3002.1(h)) to present this dispute for hearing.

### Duties Must Be Followed

Bankruptcy Rule 3002.1(i) also provides teeth to ensure compliance. If the secured creditor fails to (1) file its notice of payment change within 21 days;<sup>13</sup> (2) file its notice of fee, costs or expenses within 21 days;<sup>14</sup> or (3) respond to the final cure within 21 days,<sup>15</sup> the court may either preclude the items from being introduced into evidence<sup>16</sup> or award other relief, including awarding fees.<sup>17</sup> And these sanctions give rise to a strategy.

<sup>3</sup> Rule 3002.1(e).

<sup>4</sup> Rule 3002.1(e).

<sup>5</sup> Rule 3002.1(i) offers the punishment discussed later.

<sup>6</sup> Rule 3002.1(f).

<sup>7</sup> Rule 3002.1(g).

<sup>8</sup> Rule 3002.1(g)(1).

<sup>9</sup> "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." Rule 3002.1(g) (emphasis added).

<sup>10</sup> "The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f)." Rule 3002.1(g), last sentence.

<sup>11</sup> "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." Rule 3002.1(h).

<sup>12</sup> Rule 3002.1(f).

<sup>13</sup> Rule 3002.1(c).

<sup>14</sup> Rule 3002.1(c).

<sup>15</sup> Rule 3002.1(g).

<sup>16</sup> Rule 3002.1(i).

<sup>17</sup> Rule 3002.1(i)(2). These sanctions mirror the sanctions of Bankruptcy Rule 3001(c)(2)(D).

## The Snooker

Debtors and their counsel must take heed that one sanction is much more detrimental than the other to a creditor. The former affects bankruptcy and nonbankruptcy issues. The latter affects only the bankruptcy matter. For this reason, debtors may choose to seek the sanction of denying evidence,<sup>18</sup> obtain an adjudication of the mortgage debt on the merits, and enter the world of *res judicata*<sup>19</sup>—from which a legitimate attempt may be made to estop the mortgagee from arguing in the state forum what it could not argue in the bankruptcy forum.

The crux is that a bankruptcy court’s adjudication dictates the terms and conditions of the mortgage debt not only upon the debtor’s exiting of bankruptcy with a § 1325 discharge, but that the court’s ruling should legally describe the terms and conditions of the mortgage debt after the bankruptcy discharge. The full adjudication should be honored by any state foreclosing court because there are common identities of parties and issues in the Rule 3002.1 determination and a future foreclosure matter.

To many debtors, the bankruptcy court may be the court of choice for having a determination of the mortgage debt. Debtors may wish to be heard in bankruptcy court because debtors enter the court with a background of having made significant payments to the creditor over a period of years—contrasted with a state court, wherein the issue of payment is not favorable to the debtor. The bankruptcy court’s common concern may be deemed more sympathetic to debtors. Debtors may also favor a bankruptcy court’s review because it can offer more time and expertise for such an issue and because the court often moves more summarily than the state forum—especially in abbreviated evidentiary hearings. Each of these concepts, whether singularly or cumulatively, will seemingly deliver debtors to a forum that may be perceived as “warmer and fuzzier” than the incredibly overcrowded foreclosure dockets of the state judiciary.

*Res judicata* becomes an invaluable tool if the bankruptcy court’s Rule 3002.1 delivers a favorable ruling. Even if an adverse ruling is made, having knowledge of the status of the

mortgage debt is valuable because debtors will immediately know what can be anticipated or what is needed to finalize the “cure” of the mortgage’s debt. The Rule 3002.1 ruling brings repose to the status of the mortgage payments—past, present and, to some extent, future.

## Conclusion

Rule 3002.1 requires the creditors and the trustee to reveal to the debtors what the debt is and fully explain how adjustments were made. Some time constraints may not be complied with by the creditors, and such failure(s) can become a windfall to the debtors. The rule’s final hearing on the debt delivers the issue of payment or outstanding debt for the mortgage *after* all bankruptcy payments are received but *before* the debtor is released to the less disclosing world of the state forum. This hearing will bind the parties and give solace to debtors as to what the mortgage’s future should entail. Chart 1 outlines some of the deadlines. **abi**

**Chart 1: Outline of Some Deadlines of Rule 3002.1**

	Event	Time	Rule
1	Final Payment Reviewed by Trustee		
2	Trustee’s Final Report	Within 30 days of 1	3002.1(f)
3	Creditor’s Repsonse	Within 21 days of 2	3002.1(g)
4	Challenges by Defendant or Trustee	Within 31 days of 3	3002.1(h)
	Event	Time	Rule
1	Fee, Cost or Expense Incurred		
2	Notice of Fee, Cost or Expense	Within 180 days of 1	3002.1(c)
3	Notice of Dispute	Within one year of 2	3002.1(e)
	Event	Time	Rule
1	Payment Change’s Effective Date		
2	Notice of Payment Chapter	-21 days of 1	3002.1(b)

<sup>18</sup> The rule is in the disjunctive. A debtor may request the denial of evidence and attorneys’ fees.

<sup>19</sup> In most jurisdictions, there are four elements for *res judicata*: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties of the action; and (4) identity of the quality in the person for or against whom the claim is made. *Signo v. Fla. Farm Bureau Cas. Ins. Co.*, 454 So. 2d 3, 4 (Fla. Dist. Ct. App. 1984); see also *Gomez-Ortega v. Dorten Inc.*, 670 So. 2d 1107, 1108 (Fla. Dist. Ct. App. 1996) (citing *Albrecht v. State*, 444 So. 2d 8, 11-12 (Fla. 1984)), and *Selim v. Pan American Airways Corp.*, 889 So. 2d 149, 153 (Fla. Dist. Ct. App. 2004).

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