



THE PROOF OF CLAIM THAT KILLED MY PLAN, AND OTHER TALES OF SUSPENSE

Mortgage Issues Panel

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REASON FOR FILING VS. PURPOSE OF FILING

- **Medical Debt** – biggest driver of filing of bankruptcies
 - 66.5% of filings related to medical debts (American Journal of Public Health)

- **Major reasons people file a Chapter 13:**
 - **Equity in Home ***
 - **Cure default on mortgage on Home ***
 - **Cannot qualify for Ch.7**



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RULE 3002 – FILING A PROOF OF CLAIM

- Rule 3002 (as amended in 2017) requires all secured creditors, unsecured creditors and equity security holders to file a proof of claim.
 - Mortgage creditors used to not have to file a claim, but now it is certain based upon the amended rule
 - Note: 11 USC §501 is the code section for filing a claim, and it still says creditors “may” file a claim.
- Timing: The time for filing a Proof of Claim was lowered to 70 days following the entry of the relief order for bankruptcy.



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FILING A MORTGAGE PROOF OF CLAIM

- Items a creditor needs to prepare a mortgage proof of claim:
 - Note
 - Mortgage
 - Escrow Statement
 - Payment History
- Creditor must complete form 410A, including the Part 5.
 - Requires creditor to run a payment history from date of “first default” and put it into the form



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LATE-FILED CLAIM – WHAT IS THE EFFECT?

- Section 502 states that a claim filed under Section 501 is allowed, unless a party in interest objects.
 - See In re Nwonwu, 352 B.R. 705, at 710 (Bankr.E.D.Va. 2007): “[A] claim filed after the claims bar date is not thereby deprived of its character as a claim but is simply subject to disallowance. Under the statutory scheme, a filed proof of claim is ‘deemed allowed’ *unless* a party in interest objects.”
- Section 1326(a)(2) states that after confirmation of the plan, the trustee “shall distribute any such payment in accordance with the plan as soon as practicable.”



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LATE-FILED CLAIMS AND THE CH.13 TRUSTEE

- Trustee Objections to late claims:
 - §1302(b)(1): Ch.13 Trustees have the duties listed under §704(a)(5), which states: *The Trustee shall – if a purpose would be served, examine proof of claims and object to the allowance of any claim that is improper.*
 - See In re Cade, 552 B.R. 800 (Bankr.S.D.OH 2014) – NOT a mortgage claim, but an unsecured claim.
 - Must Trustee object to ALL late claims?
 - See In re McLarry, 273 B.R. 753 (Bankr.S.D.Tx. 2002)
 - What purpose is served by objecting to the late-claim of the mortgage creditor?



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EXTENDING TIME FOR A LATE-FILED CLAIM:

- Enlargement under Rule 9006(b)?
 - No. Rule 9006(b)(3) states that claims filing is governed exclusively under 3002(c).
 - Excusable neglect is **not** a basis.
 - See:
 - In re Cisneros, 2018 WL 4473621 (Bankr.N.D.OH)
 - In re Heyden, 570 B.R. 489 (Bankr.W.D.Pa.2017)
 - In re Tench, 2016 WL 2892497 (6th Cir. BAP)
 - In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000)



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EXCEPTIONS ALLOWING EXTENSION OF TIME TO FILE A CLAIM:

- Exceptions under Rule 3002(c)(6) for insufficient notice:
 - Failure to timely file list of creditor names and addresses; or
 - Notice mailed to foreign address
- See In re Mazik, 592 B.R. 813 (Bankr.E.D.Pa.2018) – failure to timely filed the creditor matrix
- Creditor must be the party to file the Motion. May be before or after expiration of the time to file the claim.



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CURES FOR THE MORTGAGE CLAIM NOT FILED IN TIME:

- Rule 3004 allows the Trustee or Debtor to file a Proof of Claim
 - 30 day window opens as soon as the creditor's time to file runs out.
 - Contact the creditor for figures, to ensure full cure of any default



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MISSED RULE 3002 AND 3004 DEADLINES. NOW WHAT?

- In cases where both the creditor and debtor have missed the deadlines under Rules 3002 and 3004, all may not be lost:
 - While enlargement of time is not allowed for Rule 3002, it IS allowed for Rule 3004.
 - You must show excusable neglect.
 - See In re Morgan, 2019 WL 548532 (Bankr. E.D.Wi.): failure to seek extension prior to expiration of 30-day window under Rule 3004 may undercut the “excusable neglect” claim if filed AFTER the window has closed.



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PROOF OF CLAIMS – OTHER ISSUES UNDER RULE 3002.1

In a perfect world, mortgage creditor should...

- Timely file accurate proof of claim for prepetition arrearage
- Properly calculate postpetition PITI payment
- Apply payments in accordance with confirmed plan
- Conduct annual escrow account analysis that reflects payments made under confirmed plan
- Send accurate payment change notices, with attachments for RESPA escrow account statement or TILA rate change notice
- Timely file accurate response to notice of final cure
- Conduct a case closing audit



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RULE 3002.1 AND YOU - PAYMENT CHANGE NOTICES

If change based on escrow account or adjustable rate mortgage, mortgage creditor must attach to Supplement 1 an escrow account statement or rate change notice prepared in form consistent with RESPA and TILA.

Pay attention to escrow change at first year anniversary!

Is the “present payment” shown on the first change statement the same as the “new payment” on statement filed on petition date?

Date fees, expenses and charges are “incurred” under Rule 3002.1(c) is the date the service is performed, not the date the servicer was invoiced by the third-party service provider. In re Raygoza, 556 B.R. 813 (Bankr. S.D. Tex. 2016)

What if fee is “tracked” but not noticed, and case later dismissed?

In re Owens, 2014 WL 184781 (Bankr. W.D.N.C. Jan. 15, 2014)

What if fee is “waived” and not noticed, but keeps reappearing?

In re Gravel, 556 B.R. 561 (Bankr. D. Vt. 2016)



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RULE 3002.1 AND YOU - NOTICE OF FINAL CURE

Notice of final cure filed by trustee no later than 30 days after plan completion – Rule 3002.1(f)

If trustee does not file notice and debtor believes all cure and plan payments have been made, debtor may file notice

Notice informs mortgage creditor of obligation to file response

Although there is no Official Form for the Notice of Final Cure Payment, an optional Director's Form (Form 4100N) may be used by trustees or the debtor



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RULE 3002.1 AND YOU - NOTICE OF FINAL CURE: CREDITOR'S RESPONSE

Within 21 days after service of cure notice, mortgage creditor must file a response - Rule 3002.1(g)

Response must state:

- whether creditor agrees that debtor has paid in full amount required to cure
- whether debtor is otherwise current on all postpetition payments consistent with § 1322(b)(5)
- any cure or postpetition amounts, separately itemized, that the creditor claims are due as of the response date

Director's Form 4100R, Response to Notice of Final Cure Payment, may be used by creditor



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RULE 3002.1 AND YOU - NOTICE OF FINAL CURE: WHAT'S A DEBTOR TO DO?

On motion filed by debtor or trustee within 21 days after statement, court shall determine if debtor has cured default and paid all required postpetition amounts – Rule 3002.1(h)

If mortgage creditor does not file response, debtor should file motion seeking order that debtor has cured default and paid all amounts

In re Bodrick, 498 B.R. 793 (Bankr. N.D. Ohio 2013) – court rejected creditor argument that rule provides the exclusive procedure for a court determination or that debtor is estopped from seeking a determination in an adversary proceeding filed after the twenty-one day period expired



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RULE 3002.1 AND YOU - NOTICE OF FINAL CURE: POSSIBLE CLAIMS

Possible claims if creditor treats loan in default postbankruptcy after final cure order:

- Rule 3002.1(i) sanctions
- Section 105 sanctions (and court's inherent powers)
- Contempt of confirmation order
- Section 524(i) violation
- FDCPA or state debt collection statute violation
- FCRA violation
- TILA prompt crediting rule violation
- RESPA notice of error violation
- State UDAP statute violation
- Breach of implied covenant of good faith and fair dealing



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RULE 3002.1 AND YOU - RULES 3001(c)(2)(D) AND 3002.1(i)

If the holder of a claim fails to provide any information required by [Rule 3001(c) and Rule 3002.1(b), (c), or (g)], 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 hearing or submission 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.



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RULE 3002.1 AND YOU - WHY YOUR MALPRACTICE CARRIER THINKS ITS IMPORTANT

Recent trend of chapter 13 Trustees seeking denial of discharge for failure to maintain post-petition mortgage payments:

- In re Gonzales, 532 B.R. 828 (Bankr. D. Colo. June 9, 2015); In re Formanek, 534 B.R. 29 (Bankr. D. Colo. July 13, 2015); In re Cherry, 10-25318 TBM (Bky. D. Colo. Jan. 19, 2016) (granting time to cure default); In re Payer, 2016 WL 5390116 (May 5, 2016) (granting time to cure default); In re Diggins, 561 B.R. 782 (Bankr. D. Colo. Dec. 20, 2016) (loan modification satisfied “all payments” requirement).
- In re Foster, 670 F.2d 478 (5th Cir.1982)
- In re Perez, 339 B.R. 385, 390 n. 4 (Bankr. S.D. Tex. 2006); In re Kessler, 2015 WL 4726794 (Bankr. N.D.Tex. June 9, 2015); In re Hankins, 62 B.R. 831, 835 (Bankr. W.D.Va.1986); In re Russell, 458 B.R. 731, 739 (Bankr. E.D.Va.2010).



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