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**Committee on Rules of Practice and Procedure
Advisory Committee on Bankruptcy Rules
Judicial Conference of the United States**

**Comments by the National Consumer Law Center to
Proposed Amendments to the Federal Rules of Bankruptcy Procedure
and Official Forms**

Docket No. USC-RULES-BK-2021-0002

February 15, 2022

The National Consumer Law Center,¹ on behalf of its low-income clients, submits these comments to the proposed amendments to Bankruptcy Rule 3002.1 and new Official Forms.

1. Rule 3002.1(a)

- a. We support the amendment that would delete “installment” in Rule 3002.1(a). The 2016 amendment that deleted the reference to section 1322(b)(5) from Rule 3002.1(a) and replaced it with “for which the plan provides that either the

¹ These comments were prepared by John Rao, attorney at the National Consumer Law Center, Inc. (NCLC). NCLC is a non-profit corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of twenty-one practice treatises and annual supplements on consumer credit laws, including *Consumer Bankruptcy Law and Practice* (12th ed. 2020). NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for thousands of legal services and private attorneys on the law and consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws.

trustee or the debtor will make contractual installment” created ambiguity as to whether the rule applies to reverse mortgages. This change ensures that debtors with reverse mortgages will be provided notice of postpetition fees under Rule 3002.1(c) and are afforded the protections of the mid-case and end-of-case procedures (if adopted).

- b. We also support the related Committee Note indicating that the change is intended to clarify that Rule 3002.1 applies to reverse mortgages.

2. Rule 3002.1(b)(2)

- a. The proposed change addresses the effect of an untimely payment change notice, by establishing the “effective date of the new payment.” With respect to a notice that concerns a payment increase, proposed Rule 3002.1(b)(2)(A) provides that the debtor would be required to begin making the new increased payment “on the first payment due date that is at least 21 days after the untimely notice was filed and served.” Because the rule does not refer to a reconciliation amount as is provided in the change for HELOCs in proposed Rule 3002.1(b)(3), we have assumed that the rule operates effectively as a procedural sanction for the claim holder’s noncompliance with Rule 3002.1(b)(1), barring the claim holder from seeking payment from the debtor for the difference between the old and new payment amounts for the period of noncompliance. If that is the effect of an untimely payment change notice, we urge the Committee to include discussion of this in the Committee Note.
- b. With respect to a notice that concerns a payment decrease, proposed Rule 3002.1(b)(2)(B) provides that the debtor would be required to begin making the new lower payment “on the date stated in the untimely notice.” While the Committee likely contemplated that the date stated in the untimely notice would be the first payment due date after the date of the notice, the language in proposed Rule 3002.1(b)(2)(B) does not compel this or provide sufficient direction, and the general requirement under Rule 3002.1(b)(1) is that notices are sent *at least* 21 days before the new payment is due. Thus, a mortgage holder could comply with the rule by sending a notice on January 15 that told the borrower to begin making the lower payment on April 1 (which would be the “date stated in the untimely notice”). Proposed Rule 3002.1(b)(2)(B) should be changed as follows: “when the notice concerns a payment decrease, on the first payment due date that is after the date of the notice.”
- c. The mortgage holder should not benefit from its noncompliance with Rule 3002.1(b)(1). Consistent with our comment to proposed Rule 3002.1(b)(2)(A),

the Committee Note should state that the claim holder must take steps to address the overpayment by the debtor in accordance with the terms of the mortgage documents, such as by issuing a credit on payments that come due after the payment change or a refund to the debtor or trustee (if the trustee is disbursing ongoing mortgage payments). This would be consistent with the Committee Note that was added in 2018 when current Rule 3002.1(b)(2) was adopted, noting that if a motion to challenge a payment change is filed after the change goes into effect and the court later determines that the change was not required, the Committee Note states that “appropriate adjustments will have to be made to reflect any overpayments.”

- d. If the Committee does not adopt our suggestion to include language in the Committee Note on the effect of an untimely payment change notice as to underpayments and overpayments, we urge the Committee to add a new subsection (b)(2)(C) as follows: “Nothing in (A) or (B) limits the power of the court to take any of the actions under (i) for any failure to timely file and serve the payment change notice.”

3. Rule 3002.1(b)(3)

- a. Rule 3002.1(b)(3)(A) instructs the holder of a HELOC claim to file and serve the payment change notice “within one year after the bankruptcy petition was filed and then at least annually.” The rule should be more precise as to when the annual notice must be sent, such as “... and then at least annually, not more than 21 days after the conclusion of each 1-year period.”
- b. Rule 3002.1(b)(3)(C) refers to the “next payment” as the “first payment due after the effective date of the annual notice,” and the amount of this next payment is to be disclosed in the annual notice as an amount that “shall be increased or decreased by the reconciliation amount.” Rule 3002.1(b)(3)(D) refers to the “new payment amount” as the “first payment due date that is at least 21 days after the annual notice,” and it is to be disclosed in the annual notice as an amount that disregards the reconciliation amount. If there is a reconciliation amount, the “next payment” under Rule 3002.1(b)(3)(C) and the “new payment amount” under Rule 3002.1(b)(3)(D) would be two different amounts, and yet they appear to be due at the same time. These provisions should be changed to have “next payment” with the reconciliation amount under Rule 3002.1(b)(3)(C) be the first payment due date that is at least 21 days after the annual notice, and the “new payment amount” without the reconciliation amount under Rule 3002.1(b)(3)(D) be the first payment due date after the next payment under Rule

3002.1(b)(3)(C).

- c. The current Notice of Payment Change, Official Form 410S1, provides for disclosure of only one payment amount, the “New total payment.” We recommend that Official Form 410S1 be modified to include a disclosure of the one-time “next payment” that includes the reconciliation amount under Rule 3002.1(b)(3)(C), and a separate disclosure of the new payment amount without reconciliation under Rule 3002.1(b)(3)(D). Alternatively, a Committee Note should be added that instructs claim holders to make appropriate modifications to Official Form 410S1 in order to comply with the HELOC requirements.

4. Rule 3002.1(c)

- a. The Committee Note states that the changes to this subdivision are only stylistic. We disagree. The current version of this subdivision is carefully drafted to require a notice of fees when two distinct conditions are met: 1) a fee is incurred, and 2) the claim holder asserts that the fee is recoverable against the debtor or the debtor’s principal residence. Thus, a fee may be incurred but it is not subject to the notice requirement if the claim holder determines that it is not recoverable against the debtor. This is sensible because there may be fees that a claim holder may incur, such as property inspection fees, that the holder will not charge to the debtor or the property because that would violate guaranty agency guidelines, investor requirements, regulatory consent orders, the terms of the debtor’s confirmed plan, or local case law.

The proposed amendment adds “or imposed” in the first sentence in subdivision (c), so that the phrase “incurred or imposed” is used. The combination of adding “or imposed” and deleting the “and” completely changes the substance of the provision, so that a claim holder would be required to send a notice of a fee that has been incurred but is not recoverable against the debtor or the debtor’s principal residence. Moreover, the phrase “or imposed” is not needed because the imposition of fees is already covered by the language “that the claim holder asserts are recoverable against the debtor or the debtor’s principal residence.” We urge the Committee to delete “or imposed” from the first sentence and return it to its current formulation.

- b. The addition of “or imposed” in the second sentence in subdivision (c) is also a substantive change because it significantly affects the timing of when the fee notice must be sent. The current rule very intentionally requires that the notice be sent within 180 days after a fee is incurred, which is generally the date when any service related to the fee or expense is performed. *See In re Raygoza*, 556

B.R. 813 (Bankr. S.D. Tex. 2016) (date attorney fees were “incurred” under Rule 3002.1(c) was the date when the service was performed, not the date the servicer was invoiced by the law firm). Again, if the holder determines that the fee will not be imposed on the debtor or property, no notice need be sent. By adding “or imposed” to this sentence, a claim holder could incur a fee in the first year of the debtor’s chapter 13 plan but then not send the notice until the fifth year of the plan, contending that it only then decided to impose it. Far worse, a claim holder could completely evade the requirements of the rule by simply waiting until after the final cure and the bankruptcy case is closed to decide whether to impose fees incurred during the case. The current rule requires the claim holder to make an affirmative decision within 180 days after a fee is incurred as to whether it will impose it. This is an essential feature of the rule. We urge the Committee to delete “or imposed” from the second sentence.

5. Rule 3002.1(f)

- a. The midcase review process set out in proposed Rule 3002.1(f) will help identify debtors, particularly in non-conduit districts, who have fallen behind on postpetition mortgage payments and give them an opportunity to cure any postpetition default before the end of the case. We support this general concept but have concerns that the proposed rule will increase costs for all debtors in chapter 13 cases, even those who would not benefit from the rule.

When Rule 3002.1 was initially adopted, it was intended that most, if not all, of the rule’s requirements would be performed by non-attorney personnel who work for mortgage servicers. Several of the requirements, such as providing payment change notices, rely upon actions that are routinely performed by mortgage servicer employees without attorney involvement, such as preparing annual escrow account statements and interest rate adjustment notices, so as to comply with the Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA). These RESPA and TILA forms are attached to Official Form 410S1, as applicable, when the claim holder complies with Rule 3002.1(b). Similarly, the information required to populate Official Form 410A, including the payment history, is drawn from the mortgage servicer’s system of records. In fact, the Committee Note when the form was revised in 2015 states that “[b]ecause completion of the form can be automated, it will permit claimants to comply with Rule 3001(c)(2)(C) with efficiency and accuracy.” All of these forms can be prepared, filed, and served by mortgage servicer employees with no, or minimal, attorney involvement.

Sadly, however, servicers have recently begun charging excessive fees for

compliance with Rules 3001 and 3002.1, claiming that these fees can be passed on to debtors as attorney fees under the fee shifting provision of the mortgage documents. For example, attorney fees for reviewing the initial chapter 13 plan and preparing Official Form 410A until recently had been in the range of \$200 to \$400. While even those amounts were unreasonable in some cases, debtors are now routinely being charged \$1000 to \$1500, even in cases that do not involve any objection to the plan. While some courts have questioned these fees,² other courts have approved them.³ However, most of these fees simply do not get challenged due to the costs of bringing an objection and because debtors rightfully fear that an unsuccessful challenge will result in even more fees.

Mortgage servicers will likely contend that the midcase review under proposed Rule 3002.1(f) will require attorney involvement. To avoid all debtors in chapter 13 cure plans being charged excessive and unnecessary fees, we urge the Committee to revise proposed Rule 3002.1(f) in the manner set out below that still preserves its basic purpose.

Rather than have the midcase review initiated by the filing of a notice by the trustee, we propose that the process begin with the submission by the claim holder of an existing periodic mortgage statement that is prepared in the normal course of servicing the mortgage loan. Rule 3002.1(f)(1) should provide that the claim holder must send to the trustee, the debtor, and the debtor's attorney, between 18 and 24 months after the petition was filed, a periodic statement that the claim holder has prepared in accordance with the Truth in Lending Act and Regulation Z, 12 C.F.R. § 1026.41(f). The periodic statement should be current for the month in which it is sent. Mortgage servicers are required to send monthly mortgage statements to virtually all debtors in chapter 13 cases with a

² *In re Garcia Rivera*, 2018 WL 5281625 (Bankr. D. P.R. Oct. 22, 2018) (filing of a Rule 3002.1(c) notice generally does not require the assistance of counsel); *In re Roife*, 2013 WL 6185025 (Bankr. S.D. Tex. Nov. 26, 2013) (disallowing \$50 in legal fees for preparation of the fee notice); *In re Boyd*, 2013 WL 1844076 (Bankr. S.D. Tex. May 1, 2013) (same); *In re Carr*, 468 B.R. 806 (Bankr. E.D. Va. 2012) (response statement under Rule 3002.1(g) is not a pleading and its preparation does not involve the practice of law). See also *In re Pittman*, 2015 WL 1262837 (Bankr. D.S.C. Mar. 16, 2015) (denying creditor request for \$650.00 in postpetition fees where court could not determine from notice whether any attorney was involved or that the fees were allowable); *In re Hale*, 2015 WL 1263255 (Bankr. D.S.C. Mar. 16, 2015) (merely listing "review of plan" and "proof of claim" on the notice did not provide sufficient detail to the debtor and counsel to determine whether the fees were justified).

³ *In re Morris*, 603 B.R. 127 (Bankr. W.D. Okla. 2019) (\$900 attorney's fees for proof of claim and plan review approved); *In re Susaneck*, 2014 WL 4960885 (Bankr. W.D. Pa. Sept. 30, 2014) (fees allowed because appropriate for Rule 3002.1(c) notices to be reviewed by attorney).

confirmed cure plan.⁴ Most servicers use forms that are similar to the sample form of statement for consumers in chapter 13 cases made available by the Consumer Financial Protection Bureau in Appendix H to Regulation Z (appendix H-30(F)). These statements must disclose the amount due, an explanation of the amount due, a past payment breakdown, recent transaction activity, partial payment information, the total of all prepetition payments received since the last statement, the total of all prepetition payments received since the beginning of the consumer's bankruptcy case, and the current balance of the consumer's prepetition arrearage. See 12 C.F.R. § 1026.41(f)(3). Because our proposal would require the servicer to submit the same periodic statement that would be prepared and sent to the debtor in accordance with TILA, the servicer can comply with the rule without incurring any attorney fees or charging any fee to the borrower.

The information contained on the periodic mortgage statement will permit the trustee to assess, based on the servicer's records, whether the servicer believes the debtor is current with prepetition and postpetition payments. If the claim holder fails to timely send a mortgage statement, or if the trustee is unable to determine the status of the mortgage claim after reviewing the statement because the information is insufficient or the trustee believes it is inaccurate, the trustee may file a notice as contemplated by proposed Rule 3002.1(f)(1), using proposed Official Form 410C13-1N. Thus, the claim holder will be required to file a response under proposed Rule 3002.1(f)(2) only in cases in which the case status cannot be adequately determined from the periodic statement. This change, if adopted, will significantly reduce the number of cases in which the midcase review procedure will be invoked, thereby minimizing costs to debtors, trustees, and claim holders.

- b. Proposed Rule 3002.1(f)(2) requires the claim holder to file and serve a response to the trustee's notice about the status of the mortgage claim. Unlike the filings and responses by claim holders required under other parts of the rule, namely subdivision (d) and current subdivision (g), the proposed rule does not state that the response shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f). It is important that the claim holder's response not be given a presumption of validity, particularly if an objection to the claim holder's response is filed under proposed subdivision (f)(2)(C) and the claim holder fails to participate at a hearing on the objection conducted under

⁴ In general, debtors in confirmed chapter 13 cases must be sent statements unless they have affirmatively requested in writing that the servicer stop sending periodic statements. See 12 C.F.R. § 1026.41(e)(5)(i)(B)(1).

subdivision (f)(2)(D). *See, e.g., In re Kreidler*, 494 B.R. 201 (Bankr. M.D. Pa. 2013) (when creditor responded to final cure notice but did not appear at hearing, creditor did not meet burden of showing additional payments were due); *In re Lopez*, 2012 WL 6760175 (Bankr. S.D. Tex. Dec. 31, 2012) (disallowing over \$4000 in attorney fees, property inspections and other fees when creditor failed to respond to debtor's objection under Rule 3002.1(e) and notice was not entitled to presumption of validity). We urge the Committee to amend proposed Rule 3002.1(f)(2) to state that the claim holder's response is not subject to Rule 3001(f).

- c. Proposed Official Form 410C13-1R is the form the claim holder files in response to the trustee's notice for midcase review. In part 4 of the form, if the claim holder disagrees with the trustee's notice, it must provide an itemized payment history, and the form lists the items to be provided. We suggest that the form should require that the payment history information be provided in the same format as used on Official Form 410A, prepared with payment information from the filing of the petition through the date of the response. This would ease compliance, as mortgage servicers are accustomed to preparing payment histories in this format.

6. Rule 3002.1(g)

- a. The end-of-case procedure is initiated under proposed Rule 3002.1(g)(1) by the filing of a motion by the trustee when the debtor completes payments under a chapter 13 plan. Unlike current Rule 3002.1(f), there is no provision permitting the debtor to file the motion if the debtor believes all payments have been made and the trustee does not timely file the motion. The option for the debtor to file a motion to begin the end-of-case procedure under the circumstances set out in the current rule should be restored in Rule 3002.1(g).
- b. Our concern that some trustees may not file the Rule 3002.1(g)(1) motion is exacerbated by Official Form 410C13-10C and 10NC. These forms in part 6 require the trustee to request an order that the debtor is current on "all payments required by the plan and § 1322(b)(5)" and that "all postpetition fees, expenses, and charges are satisfied in full." Some trustees may refuse to file the motion if, for example, the debtor has not paid a \$15 property inspection fee or a \$35 late fee. While such fees may be obligations due under the contract, they may not be required to be paid under the terms of the debtor's confirmed plan or to satisfy the "maintenance of payments" requirement under section 1322(b)(5) of the Code. By instructing the trustee to request an order that the debtor has satisfied the plan requirements and section 1322(b)(5) only if all

postpetition fees, expenses, and charges have been paid by the debtor, the Official Form is taking a legal position on what is required by section 1322(b)(5), and that the term “payment” in section 1322(b)(5) includes items other than the periodic payment (consisting of principal, interest, taxes, and insurance). Even the uniform mortgage instruments used in virtually all mortgage transactions do not refer to late fees and other charges as payments due from the borrower. Thus, in addition to amending proposed Rule 3002.1(g)(1) to permit the debtor to file the motion if the trustee does not, part 6 of these forms should be revised so that the trustee requests simply an order determining the status of the mortgage claim. The court can then determine whether the debtor has made all payments required by the plan and section 1322(b)(5), and enter an order reflecting that determination in accordance with proposed Rule 3002.1(h)(4).

- c. We have a similar concern with part 3 of Official Form 410C13-10R, the claim holder’s response to the trustee’s motion. The form permits the claim holder to check the box for the first bulleted item, affirming that the debtor is “current on all ongoing postpetition mortgage payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, and costs.” The form should not ask the claim holder to make a legal determination of what payments are consistent with section 1322(b)(5). The form should simply direct the claim holder to confirm whether all payments and fees owed by the debtor have been paid, not whether they are also required to be paid under section 1322(b)(5). We urge the Committee to strike “consistent with § 1322(b)(5) of the Bankruptcy Code” in the first and second bulleted items.
- d. The first bulleted item in part 3 of Official Form 410C13-10R requires the claim holder to provide seven categories of information if the claim holder believes the mortgage is current. The form should request the listed information in all cases, even if the claim holder believes the mortgage is not current. After providing the information, the form could then have the claim holder check a box as to whether the debtor is current with all postpetition payments, and another box (as on the proposed form) to check as to whether the debtor has fees, charges, and expenses that are recoverable against the debtor or the debtor’s principal residence and are unpaid.
- e. Similar to proposed Official Form 410C13-1R, part 4 of proposed Official Form 410C13-10R asks the claim holder to provide an itemized payment history, and the form lists the items to be provided. We suggest that the form should require that the payment history information be provided in the same format as used on Official Form 410A, prepared with payment information from the filing of the

petition through the date of the response.

- f. Proposed Rule 3002.1(g)(2) requires the claim holder to file and serve a response to the trustee's end-of-case motion about the status of the mortgage claim. Although the response under proposed Rule 3002.1(g)(2) operates in the same manner as the response to the notice of final cure under current Rule 3002.1(g), proposed Rule 3002.1(g)(2) does not state that the response shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f). See *In re Kreidler*, 494 B.R. 201 (Bankr. M.D. Pa. 2013) (Rule 3002.1(g) response was not entitled to presumptive validity). For the reasons stated above concerning proposed Rule 3002.1(f)(2), the claim holder's response should not be given a presumption of validity, particularly if an objection to the claim holder's response is filed under proposed subdivision (g)(2)(C) and the claim holder fails to participate at a hearing on the objection held under proposed subdivision (h)(3). See *In re Ferrell*, 580 B.R. 181 (Bankr. D.S.C. 2017) (claim holder waived its right to disputed amounts by failing to appear at Rule 3002.1(h) hearing).

7. Rule 3002.1(h)

- a. Proposed Rule 3002.1(h) establishes a procedure for the debtor to obtain an order that contains the information specified in subdivision (h)(4). This information is necessary to establish that the debtor is fully current on the mortgage and to avoid disputes between the claim holder and the debtor after the chapter 13 case is concluded. See *In re Thongta*, 480 B.R. 317, 319 (Bankr. E.D. Wis. 2012) ("With the enactment of Rule 3002.1, courts nationally are able to ensure that debtors who successfully complete 'cure and maintain' Chapter 13 plans emerge from bankruptcy with either a fully current home mortgage or the knowledge of and ability to object to any claimed amounts due."); *In re Sheppard*, 2012 WL 1344112, at *6 (Bankr. E.D. Va. April 17, 2012) ("Rule 3002.1 is a procedural mechanism designed to effectuate the Chapter 13 policy goal of providing debtors a 'fresh start.'"). We applaud the Committee for proposing these improvements to the final cure procedure.
- b. Proposed Rule 3002.1(h)(1) permits the court to enter an order determining that all payments have been made and all fees have been satisfied in full if the claim holder is ordered to file a response following a motion to compel and the claim holder fails to respond. If the claim holder files a response and no objection is filed, proposed Rule 3002.1(h)(2) permits the court to enter an order determining that the amounts stated in the claim holder's response reflect the status of the case. While the entry of an order by the court pursuant to proposed Rule 3002.1(h)(1) is appropriate as a sanction for the claim holder's

failure to respond after being ordered to do so, we believe that that an order pursuant to proposed Rule 3002.1(h) should be entered only upon the request of a party in interest. We are concerned that the debtor or trustee may not have information sufficient to determine that the response was inaccurate, or that other grounds to object to the response exist, until after the 14-day objection period has expired. Debtors are often not in regular contact with their bankruptcy counsel by the end of their bankruptcy case, and may not review the response to notice of final cure. Debtors and their counsel may fail to realize within the 14-day objection period that a claim holder has failed to apply payments correctly pursuant to a confirmed plan, failed to send a notice of payment change, or miscalculated the escrow. Debtors who fail to object to the claim holder's response due to informational imbalances or a lack of awareness of potential consequences should not be barred from later disputing the status of their mortgage. *See In re Bodrick*, 498 B.R. 793 (Bankr. N.D. Ohio 2013) (debtor is not estopped from seeking a determination of mortgage status by failing to dispute the creditor's response to notice to final cure within the 21-day period under Rule 3002.1(h)). To do so would reward misbehavior and mistake by claim holders. Thus, we urge the Committee to delete subdivision (h)(2).

- c. Proposed Rule 3002.1(h)(3) authorizes the court to enter an order determining the status of the mortgage claim only if an objection is filed to the claim holder's response. Consistent with our suggestion to delete subdivision (h)(2), we believe subdivision (h)(3) should permit the debtor or trustee to request an order containing the information specified under subdivision (h)(4) without objecting to the claim holder's response. This would be consistent with current Rule 3002.1(h), which permits an order to be entered on motion of the debtor or trustee, after notice and hearing.

We commend the Rules Committee for proposing significant improvements to Rule 3002.1, and thank you for this opportunity to submit comments on the proposed changes. If we can provide additional information, please feel free to contact John Rao, jrao@ncl.org.