National Association of Consumer Bankruptcy Attorneys

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

Re: **Comments by the National Association of Consumer Bankruptcy Attorneys to Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Forms**

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

The National Association of Consumer Bankruptcy Attorneys (NACBA),[1] on behalf of its members and their clients, submits these comments concerning the proposed amendments to Bankruptcy Rules and new Official Forms.

Proposed restyling of Rule 4002(b)(4)

Although the restyling of the rules should not make substantive changes, the proposed restyling of Rule 4002(b)(4) does make a substantive change. The provision implements Code section 521(e)(2)(C), which provides:

> If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor *at the time the debtor provides such tax return or such transcript to the trustee*, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor. [emphasis added]

As noted by Collier on Bankruptcy:

> At the same time as the return or transcript is provided to the trustee, it must be provided to any creditor that timely requests it. By the terms of the statute, if the return has already been provided to the trustee, a request from a creditor could not be timely because the debtor could not supply it at the same time the return is provided to the trustee.

[1] The National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization of more than 2,500 consumer bankruptcy attorneys practicing throughout the United States. Incorporated in 1992, NACBA is the only nationwide association of attorneys organized specifically to protect the rights of consumer bankruptcy debtors.

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[Current] Federal Rule of Bankruptcy Procedure 4002(b)(4) is consistent with this interpretation. It provides that if a creditor, at least 14 days before the first date set for the

creditors meeting requests a copy of the return *that is to be provided to the trustee*, the debtor must provide it to the creditor at least seven days before the creditors meeting. The rule does not require that a creditor be provided a return that has already been provided to the trustee. [footnotes omitted]

Accord In re Fontaine, 397 B.R. 191 (Bankr. D. Mass. 2008); *In re* Collins, 393 B.R. 835 (Bankr. E.D. Wis. 2008).

The proposed restyling of the rule would require a debtor to provide a return or transcript to a creditor if the creditor requests it at least 14 days before the first date set for the meeting of creditors, even if the debtor had already provided the return or transcript to the trustee before the request, thus changing the substance of the rule, and also going beyond the requirements of the Code.

Proposed Amendments to Rule 3002.1

Applicability of Rule 3002.1 to Claims Not Provided for in the Plan

While sections 1322(a) and 1325(a) list mandatory plan provisions, 11 U.S.C. § 1322(b) is permissive when it allows that "the plan *may*" provide for various treatments for secured claims including surrender, modification, cure and maintenance of on-going payments, etc. Many courts have held that a plan is not required to provide treatment of a secured claim in the plan. *See In re Limon*, 616 B.R. 380, 381 (Bankr. E.D. Wis. 2020). Arguably the change in Proposed Rule 3002.1(a) from "the plan *provides that either* the trustee or the debtor *will* make contractual installment payments" to "the plan *requires* the trustee or the debtor to make contractual payments" clarifies that the non-treatment of a claim is permissible, but that in such a plan Rule 3002.1 does not then apply. The Comments should make explicit that Rule 3002.1 does not apply to a plan that does not provide for a secured claim.

Deletion of the Term "Installment" from Rule 3002.1(a)

The 2016 amendment to Rule 3002.1(a) removed the reference to section 1322(b)(5) from Rule 3002.1(a) and replaced it with "for which the plan provides that either the trustee or the debtor will make contractual installment" and created ambiguity as to whether the rule applies to reverse mortgages. The current proposed deletion of the term "installment" in Rule

3002.1(a) and Committee Note clarify that debtors with reverse mortgages will be provided notice of postpetition fees under Rule 3002.1(c) and are afforded the protections of protections of Rule 3002.1.

Notice of Change in a Home-Equity Line of Credit

Neither the Rules nor the Bankruptcy Code include a definition of a *Home Equity Line of Credit* especially as contrasted with a *Home Equity Loan*. To avoid unnecessary confusion and litigation, it would be better to define for purposes of Rule 3002.1 a *Home-Equity Line of Credit* to be an "open end credit plan", pursuant to 15 U.S. Code § 1602(j), that is secured by the debtor's principal residence.

Rule 3002.1(b)(3)(E) requires a claim holder of a Home-Equity Line of Credit to file a Notice of Payment Change "[i]f the monthly payment increases or decreases by more than $10 in any month." As changes can be less than $10 in any month, but over time cumulatively exceed that amount, Proposed Rule 3002.1(b)(3)(E) should instead require a Notice of Payment Change "if the monthly payment has increased or decreased by more than $10 a month since the filing of the Proof of Claim or the last allowed Notice of Payment Change."

Further, Rule 3002.1(b)(3)(E) does not describe what should occur if that payment increases or decreases by less than $10. This would not be a substantial problem if the monthly payment decreases, as presumably any excess amount would be applied to the principal balance. For increased payments, however, the claim holder should file a Notice of Fees, Expenses and Charges Incurred After the Case Was Filed, pursuant to Rule 3002.1(c), for any shortfall. Rule 3002.1(b)(3)(E) should be subdivided with the above as (b)(3)(E) and (b)(3)(F) as:

> (F) Payment Changes Less Than $10. If the monthly payment increases or decreases by less than $10 a month since the filing of the Proof of Claim or the last allowed Notice of Payment Change, the claim holder shall file and serve (in addition to the annual notice) a notice under (c).

Lastly, the Comments should make clear that the claim holder of a *Home-Equity Line of Credit* can file a Notice of Payment Change for increases or decreases less than $10 and that the failure to do so may result in the disallowance of late fees with respect to such increases.

Trustee's Midcase Notice of the Status of a Mortgage Claim

NACBA opposes the new requirement for a midcase notice of the status of mortgage claim as proposed. This notice would almost certainly give rise to claims for attorney's fees by mortgage holders and increase the cost of chapter 13, even though, as discussed below, courts have held with respect to notices of payment changes that such claims are unwarranted. The debtor already has

the right to obtain the information required by the new notice at no charge. If the notice requirement is adopted, it should be modified as discussed below.

Rule 3002.1(f)(1) requires that "the trustee file a notice about the status of any mortgage claim." First, that this is required between 18 and 24 month "after the bankruptcy petition is filed" should be changed to "after the confirmation of the plan." Particularly if there is a contested confirmation, the bankruptcy petition may be filed a substantial time before the plan is confirmed, i.e., the effective date of the plan. This could result in a status review shortly after confirmation, defeating the purpose.

Secondly, Proposed Rule 3002.1(f) is, with its "the trustee shall," mandatory. For plans that have the on-going mortgage payment made by disbursements from the trustee, *viz.* "conduit plans," this will often be an unnecessary notice. Instead Rule 3002.1(f) should provide that "unless the court orders otherwise, the trustee shall…" which would allow jurisdictions with conduit plans to limit this burden, as the trustee's records of disbursements are certainly at least as reliable as those from the mortgage servicer.

Instead, 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 confirmation of the plan, a copy of 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).[2] The periodic statement should be current for the month in which it is sent. Mortgage servicers are already required to send periodic statements to virtually all debtors in chapter 13 cases with a confirmed cure plan. 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,

[2] The Comment should, however, instruct mortgage servicers **only** to send this periodic statement to the trustee and the debtor's attorney **once** during the case, unless otherwise requested. Barring such limiting instruction, mortgage servicers may unnecessarily send periodic statements to the trustee and debtor's attorney **every month**. See 15 C.F.R. § 1026.41(e)(5)(i)(B)(1) or (e)(5)(ii). Such repeated submission of these periodic mortgage statements would be an onerous burden on the trustee and debtor's attorney and also dilute the utility of receipt of this statement.

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). As this would only require the mortgage 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.

In disputed circumstances where a periodic statement is insufficient, trustees and the debtor can already regularly obtain a status update and full payment history from a claim holder by sending a Request for Information under the Real Estate Settlement Procedures Act ("RESPA"). No fees may be charged for responding to such a request. 15 C.F.R. § 1024.36(g) provides that:

> (1) Fees prohibited. Except as set forth in paragraph (g)(2) of this section, a servicer shall not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to an information request.
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> (2) Fee permitted. Nothing in this section shall prohibit a servicer from charging a fee for providing a beneficiary notice under applicable State law, if such a fee is not otherwise prohibited by applicable law.

Comments to Rule 3002.1(f) should similarly and explicitly reference these limitations on the imposition of fees, as this is a disclosure that can be obtained through other statutory means without charge.

Consequences of Claim Holder's Failure to Give Notice or Respond

Proposed Rule 3002.1(i)(3) allows a court to "take any other action authorized by this rule." Particularly in the wake of *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019) and In re Gravel, 6 F.4th 503 (2d Cir. 2021) it is important that Rule 3002.1(i)(3) does not amplify any "fair ground of doubt" that a claim holder might have regarding the consequences of noncompliance with the rule. Instead, Proposed Rule 3002.1(i)(3) should explicitly reaffirm that a court is allowed to "take any other action authorized by this rule, the Bankruptcy Code, or other state or federal law."

Trustee's End- of-Case Motion to Determine the Status of a Mortgage Claim

The end-of-case procedure may only be 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), if the trustee declines (despite the mandatory "shall") or delays in filing this motion, the debtor is not explicitly permitted to 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).

Order Determining the Status of a Mortgage Claim

The Order Determining the Status of the Mortgage Claim at the end of the chapter is perhaps the most important improvement in the proposed Rules. Currently, only if the mortgage servicer files a response to a Notice of Final Cure disputing the status of the mortgage claim **and** if the debtor or trustee moves the court to determine "whether the debtor has cured the default and paid all required postpetition amounts" is there an explicit order entered. In many jurisdictions if no response is filed, no order is entered. Most problematically, this can amplify the assertion by a mortgage servicer that there was a "fair ground of doubt", See *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801, 204 L. Ed. 2d 129 (2019), regarding the status of the mortgage in defending against an action under Rule 3002.1(I). *See e.g. In re Gravel*, 6 F.4th 503 (2d Cir. 2021). Additionally, and likely more frequently, this explicit order will provide greater clarity for debtors, non-bankruptcy attorneys, title insurance companies and future lenders about the status of mortgage claim, as the current rule requires an understanding and negative inference that a Notice of Final Cure to which there was no response is binding.

Further, the requirement in proposed Rule 3002.1(h)(4)(A)(i) that the order shall include a determination of the principal balance owed is a vital improvement. By providing a new date from which a sum certain is owed on the mortgage, the debtor, mortgage servicer and any court hearing their subsequent disputes will not need to excavate the mortgage history prior to the completion of the chapter 13 plan. This should, however, explicitly be the "total amount owed", to prevent a mortgage servicer from later asserting that the "principal balance owed" did not include fees, charges or interest that were not otherwise allowed. This concern arises particularly whenever there is a transfer of mortgage servicing. As any defaults on these mortgage claims have been cured and maintained pursuant to 11 U.S.C. § 1322(b)(5), the calculation of the "principal balance owed" should for a traditional fixed rate mortgage merely require a review of the original amortization schedule for the mortgage. When a more involved calculation is needed, for example with adjustable-rate and daily-simple interest mortgages, mortgage servicers are separately required by 15 C.F.R. § 1026.36(c)(3), which specifically applies to mortgages in bankruptcy, to "provide an accurate statement of the total outstanding balance" within a "reasonable time."

Style Usage in Proposed Rule 3002.1

To avoid future restyling changes, the Proposed Rule 3002.1 should be consistent, particularly in its hyphenation of phrases. For example, Rule 3002.1(b) hyphenates "Home-Equity" but Rule 3002(f) does not hyphenate "Midcase" but then Rule 3002.1(g) hyphenates "End-of-Case".

In conclusion, the National Association of Consumer Bankruptcy Attorneys would thank the Advisory Committee on Bankruptcy Rules both for the attention and efforts it has put forward in drafting these proposed amendments and for its consideration of our comments and suggestions.

Very Truly Yours,

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