


LEGAL LEAGUE QUARTERLY

WINTER 2011 COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

 National

SYSTEM SYNERGY

Sophisticated new processing and reporting capabilities merge their momentum to raise the servicing bar.

By Richard Geary, NDeX: National Default Exchange


IT WAS JUST A MATTER of time. The default servicing industry has been moving toward more robust and sophisticated processing technologies and correspondingly powerful reporting capabilities for some time, but the events of the past few years have accelerated that timeline. Today, in the wake of more formal regulatory momentum—such as the consent orders issued earlier this year by the Office of the Comptroller of the Currency (OCC)—the industry-wide trend is even more evident. While evaluation and debate continues on the specifics of how to best move forward, there is a strong general consensus that new systems, new technologies, and new reporting capabilities that provide more transparency, accountability, security, and verifiable processing are not a luxury; they are a necessity.

NEW CHALLENGES

Fortunately, visionary and proactive law firms have been working diligently to make that necessity a reality by designing and implementing powerful new systems. The record volume of foreclosures has put enormous amounts of pressure on existing technological and personnel infrastructure. Higher volume also leads to greater complexity and a series of new challenges.

Law firms are not only dealing with more defaults, but also longer timelines and higher levels of scrutiny and regulatory review. From the need to reduce or eliminate avoidable errors to the need to provide clients and investors with more detailed, timely information, the demands on the industry are growing. As a result, there is a growing respect for the power and potential of

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 Opinion

FORECLOSURE MEDIATIONS IN ACTION

Many other factors contribute to stabilizing foreclosure rates, but productive mediation programs can only help get us closer to that goal.

By Majenica Springer, Reisenfeld & Associates, LPA, LLC

OVER THE PAST couple of years, foreclosure mediations have become a national trend, with the rules varying by state, county, and even by city. Some states have passed statutes giving borrowers the right to mediations, such as Indiana, Washington (the "Foreclosure Fairness Act"), and Hawaii. Florida has enacted administrative orders to the same effect. Providence, Rhode Island, requires lenders to go through its mediation program before proceeding with foreclosure. Although the laws enacted in each area vary in many ways, they state similar purposes based on the same reasoning.

After looking through the various laws that have been enacted, the general purpose of foreclosure mediation programs seems to be to ensure that lenders do not unnecessarily foreclose on borrowers' homes, to facilitate foreclosure prevention agreements (in some programs these include non-retention options, such as short sales and deeds in lieu), and to crimp foreclosure rates. Since the majority of mediation programs were enacted within the last two years, it is too early to tell if they have had the desired effect of preventing unnecessary foreclosures and stabilizing foreclosure rates. However, it does seem that mediations are successful

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FEDERAL RULES OF BANKRUPTCY PROCEDURE

A rundown of the new amendments and their accompanying requirements.

By Ashley Osborn, South & Associates, P.C.

IN THE SPRING of 2011, the Supreme Court approved amendments and additions to the Federal Rules of Bankruptcy Procedure. The new and amended rules took effect December 1, leaving little time to make sure creditors comply with the new requirements. Changes to Rule 3001 and the addition of Rule 3002.1 add procedural requirements to consumer creditors filing proof of

claims and assessing and notifying courts, trustees, debtors, and their counsel of payment changes, incurred fees, and completions of plans.

The first change is in the proof of claim form itself, form B-10. The new form adds a space for a Uniform Claim identifier (section 3b), a number that will be assigned to the particular claim and is a combination of several numbers that link the

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creditor and debtor. The use of this number is optional, not required. Additionally, a space has been added to list the interest rate and classify it as "Fixed" or "Variable."

Section 8 in the new form requires that a box is checked for the claimant to be labeled. The options are as follows: I am the creditor; I am the creditor's authorized agent; I am the trustee or the debtor; I am a guarantor, surety, indorser, or other co-debtor. (See Bankruptcy Rule 3005.) A final addition to the amended form B-10 is that when the proof of claim is signed, the claimant does "declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief."

The documents required to be filed with the proof of claims are also expanded by the amendments. Amended Rule 3001 adds three subsections in regards to proofs of claims when the debtor is an individual. New section 3001(c)(2)(A) states that if the claim includes pre-petition interest, fees, expenses, or other charges, then an itemized statement must be filed with the claim. New section 3001(c)(2)(B) states that if the claim is a security interest in the debtor's property, a statement of the amount that would be necessary to fully cure the default as of the petition date must be filed along with the claim.

New section 3001(c)(2)(C) states that if the security interest is in the debtor's principal residence, then the B-10 Attachment (A) must be filed and an escrow account statement must be filed if the loan is escrowed. The new B-10 Attachment (A) requires the fees to be broken down with the dates incurred. The statement must, per the committee notes, include specificity that is enough to make the basis for the claimed amount clear.

The teeth in the amended rule are in 3001(c)(2)(D), the sanctions portion. This new section states that if the holder of the claim fails to comply with the new requirements, then, after notice and hearing, the court may bar the holder from presenting any of the omitted information in any form as evidence in any subsequent proceeding. If the court determines that the failure was substantially justified or harmless, then the sanction can be avoided, although that escape route should not be relied upon. In addition to disallowing the information, the court may also award other appropriate relief, including reasonable expenses and attorney fees.

Following amended Rule 3001 is new Rule 3002.1, applying to the holder of a claim secured by the debtor's principal residence and provided for by 11 U.S.C. §1322(b)(5) in the debtor's plan. In other words, it applies when the debtor has incurred pre-petition arrearage on the residence and when either the debtor or the trustee makes the post-petition mortgage payments.

Section 3002.1(b) requires a notice of payment change to be filed as a supplement to the originally filed proof of claim. The notice must be served on the trustee, debtor, and debtor's counsel 21 days before the effective date of a change in payment amount and is to be filed using form B-10 (Supplement 1). Note that the notice form requires an escrow account statement to be filed if the payment change is due to an escrow change.

Section 3002.1(c) requires a notice of fees, expenses, and charges to be filed with the court as a supplement to the claim no later than 180 days after the date incurred, also to be served on the trustee, debtor, and debtor's counsel. The notice is filed on form B-10 (Supplement 2), itemizing any post-petition fees/expenses/charges that are recoverable against the debtor or debtor's principal residence. Escrow account disbursements or any

other amounts itemized in previous notices that have been ruled on by the bankruptcy court are not to be included. On motion by the debtor or trustee filed within one year of the notice, the court may review the fee and determine its validity by hearing.

Section 3002.1(f) requires a notice of final cure payment be filed by the trustee within 30 days of the debtor completing all payments under the plan, stating that the debtor has paid in full the amount required to cure any default in the claim. There is no required form for this notice and, if the trustee does not file the notice, the debtor/debtor's attorney may. No later than 21 days after the notice of final cure is filed, the holder of the claim is required to file a response, whether or not they agree that the arrearage is satisfied. If the claimant disagrees, then an itemized account of what is necessary to cure should be filed. The debtor or trustee then has an additional 21 days to file a motion to have the court determine whether the debtor has cured the default and is post-petition current.

Section 3002.1(i) carries the same sanctions with it as the additional section to 3001 by preventing the claimant from using any of the omitted information as evidence in any subsequent contested matter absent finding that the failure was substantially justified or harmless. Additionally, the court may award reasonable attorney fees and expenses caused by the omission.

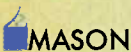
The amended and new rules add various requirements on creditors, but do not define every term (when is a fee incurred?) or address every instance (do trustees pay out on fees still within the one-year objection period?). How local rules and practices are affected will vary per district, making communication between creditors and their local counsel vital in the upcoming months. ■

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