West Virginia Bankruptcy Seminar 2022

Deeds of Trust in Chapter 13: Understanding them, Escrow, and their impact on Chapter 13 cases.

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Reference Materials

1. FannieMae/Freddie Mac Uniform Instrument for West Virginia
2. *In re Bardell, 361 B.R. 468 (Bankr. N.D. W. Va. 2007) and District Court Affirmance*
3. *Sheehan v. MERS, 244 W.Va. 106, 851 S.E>2d 769 (W. Va. 2020)*
4. Form 410a – Mortgage Proof of Claim Attachment
5. *In re Rodriquez*, 629 F.3d 136 (3d Cir. 2010)
6. Sample Form 410s1 – Notice of Payment Change
7. Sample Escrow Analysis (attached to Notice of Payment Change)
8. Sample 410s2 – Notice of Post Petition Fees and Advances
9. Sample Trustee's Notice of Final Cure
10. Sample Response to Notice of Final Cure
11. Current Rule 3002.1
12. Proposed Rule 3002.1
13. ABI Commission analysis of Proposed 3002.1

After Recording Return To:

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DEED OF TRUST

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated _____, _____, together with all Riders to this document.
(B) "Borrower" is _____.
Borrower's mailing address is _____
_____. Borrower is the trustor under this Security Instrument.
(C) "Lender" is _____.
Lender is a _____ organized and existing under the laws of _____. Lender's address is _____
_____. Lender is the beneficiary under this Security Instrument.
(D) "Trustee" is _____.
The Trustee resides at _____ County, West Virginia.
(E) "Note" means the promissory note signed by Borrower and dated _____, _____. The Note states that Borrower owes Lender _____
Dollars (U.S. $_____) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.
(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ Other(s) [specify] _____
☐ 1-4 Family Rider	☐ Biweekly Payment Rider	

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.) and its implementing regulation, Regulation X (12 C.F.R. Part 1024), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower hereby irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the _____
[Type of Recording Jurisdiction]
of _____:
[Name of Recording Jurisdiction]

which currently has the address of _____
[Street]
_____, West Virginia _____ ("Property Address"):
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

IN TRUST FOREVER to secure the payment of the Note which is payable to the order of Lender, the beneficial owner of said Note, at its principal office at the top of this Security Instrument, the residence of said beneficial owner, and to secure also any and all extensions, modifications and renewals of said Note, or any part thereof, however changed in form, manner or amount, and all other indebtedness of Borrower to Lender or Trustee hereunder.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note.

Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower makes a payment or partial payment that is not sufficient to bring the Loan current, such funds, if not applied earlier, will be applied to the outstanding principal balance under the Note prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied, as permitted by Applicable Law, to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note. With regard to the application of payments and the assessment and collection of late charges in this Section 2, Lender must comply with Applicable Law.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at

any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such

agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. If Borrower provides proof of insurance to Lender and that insurance meets Lender's requirements, then Lender will cancel the insurance that Lender purchased. Borrower may be entitled to a refund of unearned premiums. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest within 30 days after the date of the Notice of Placement of Insurance sent by Lender pursuant to W. Va. Code § 46A-3-109a(c).

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the

Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress

payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

If permitted under Applicable Law, any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the

Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest

in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge, as permitted by Applicable Law, Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for

under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in

accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) any such period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses and fees, as permitted by Applicable Law, incurred in enforcing this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by

Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property; and (e) such additional information as required by Applicable Law. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender

shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22 as permitted by Applicable Law.

If Lender invokes the power of sale, Lender or Trustee shall give Borrower, in the manner provided in Section 15, notice of Lender's election to sell the Property. Trustee shall give notice of sale by public advertisement for the time and in the manner prescribed by Applicable Law. Borrower hereby waives personal service of notice of any sale made hereunder, upon Borrower, its devisees, agents, successors or assigns, and also waives the posting of notice of sale at the courthouse. Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's fees as permitted by Applicable Law; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

In the event that foreclosure proceedings are instituted hereunder but are not completed, Trustee shall be reimbursed for all costs and expenses incurred by it in commencing such proceedings; and all costs and expenses so incurred by Trustee, together with interest thereon until paid at the Note default rate shall be and become a part of the obligations secured hereby and shall be collectible as such.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

24. Beneficiary's Address. The beneficial owner and holder of the Note at the time of execution and delivery hereof is Lender, whose residence address is stated on the first page of this Security Instrument.

25. Notice of Trustee's Sale. Any notice of other liens which may be given to Lender pursuant to W. Va. Code § 38-1-4, shall be effective upon the receipt of such notice, in writing, through the regular United States mail, postage prepaid, addressed to Lender at its address set forth above in the definition of Lender under DEFINITIONS.

A copy of any notice of Trustee's sale under this Security Instrument shall be served on Borrower by certified mail, return receipt requested, directed to Borrower at the address stated above or such other address given to Lender in writing by Borrower, subsequent to the execution and delivery of this Security Instrument.

26. Trustees and Substitution of Trustees. It is hereby expressly covenanted and agreed to all parties hereto that Lender may, at any time and from time to time hereafter, without notice, appoint and substitute another Trustee or Trustees, corporations or person, in place of the Trustee herein named to execute the trust herein created. Upon such appointment, either with or without a conveyance to said substituted Trustee or Trustees by the Trustees herein named, or by any substituted Trustee in case the said right of appointment is exercised more than once, the new and substituted Trustee or Trustees in each instance shall be vested with all the rights, titles, interests, powers, duties and trusts in the premises which are vested in and conferred upon the Trustees herein named; and such new and substituted Trustee or Trustees shall be considered the

successors and assigns of the Trustees who are named herein within the meaning of this Security Instrument, and substituted in their place and stead. Each such appointment and substitution shall be evidenced by an instrument in writing which shall recite the parties to, and the book and page of record of, this Security Instrument, and the description of the real property herein described, which instrument, executed and acknowledged by Lender and recorded in the office of the Clerk of the County Commission of the County wherein the Property is situate, shall be conclusive proof of the proper substitution and appointment of such successor Trustee or Trustees, and notice of such proper substitution and appointment to all parties in interest.

The Trustees, or either of them or the survivor thereof, may act in the execution of this trust and in the event either of the Trustees shall act alone, the authority and power of the Trustee so acting shall be as full and complete as if the powers and authority granted to the Trustees herein jointly had been granted to such Trustee alone. Either or both of the Trustees are hereby authorized to act by agent or attorney in the execution of this trust, and it shall not be necessary for any Trustee to be present in person at any foreclosure sale.

27. Waiver of Homestead Exemption. Borrower hereby waives all right of homestead exemption in the Property.

28. Lender's Purchase of Property Insurance. Unless Borrower provides Lender with evidence of the insurance coverage required and described above, Lender may purchase insurance at Borrower's expense to protect its interest in Borrower's Property. This insurance may, but need not, protect Borrower's interests. The coverage that Lender purchases may not pay any claim that Borrower makes or any claim that is made against Borrower in connection with the Property. Borrower may later cancel any insurance purchased by Lender, but only after providing Lender with evidence that Borrower has obtained insurance as required by this Security Instrument. If Lender purchases insurance for the Property, Borrower will be responsible for the costs of that insurance, including interest and any other charges Lender may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to Borrower's total outstanding balance or obligation. The costs of the insurance may be more than the cost of insurance Borrower may be able to obtain on Borrower's own. If Borrower provides proof of insurance to Lender and that insurance meets Lender's requirements, then Lender will cancel the insurance that Lender purchased. Borrower may be entitled to a refund of unearned premiums.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

_____ _____ (Seal)
- Borrower

_____ _____ (Seal)
- Borrower

_____[Space Below This Line For Acknowledgment]_____

361 B.R. 468
United States Bankruptcy Court,
N.D. West Virginia.

In re Jonathan Jerome BARDELL, Debtor.

No. 05–06808.
|
Feb. 8, 2007.

Synopsis
Background: In Chapter 13 case, debtor filed motion requesting that creditor be held in contempt of court for rejecting his post-petition mortgage payments, and creditor moved for relief from automatic stay.

Holdings: The Bankruptcy Court, Patrick M. Flatley, J., held that:

[1] debtor was not entitled to cure mortgage arrearage;

[2] debtor had no basis on which to avoid foreclosure sale; and

[3] creditor was entitled to modification of automatic stay to permit recording of foreclosure sale trustee's deed.

Debtor's motion denied; creditor's motion granted.

West Headnotes (7)

[1] **Statutes**
Plain, literal, or clear meaning; ambiguity

If statutory language is ambiguous or unclear, court may then look to legislative history for guidance in interpreting its meaning.

Cases that cite this headnote

[2] **Vendor and Purchaser**
Effect of executory contract on title to property

Under West Virginia law, even though legal title to real estate does not pass to purchaser until deed is delivered, equitable title passes to purchaser upon completion of contract for sale, in absence of right of redemption.

1 Cases that cite this headnote

[3] **Bankruptcy**
Accelerated maturity; effect of foreclosure
Mortgages and Deeds of Trust
Conveyance to Purchaser

Under West Virginia law, debtor had no equitable interest in property after execution of memorandum of sale following foreclosure, and thus debtor was not entitled to cure mortgage arrearage through his Chapter 13 plan, even though creditor failed to record sale deed prior to bankruptcy filing. 11 U.S.C.A. § 1322(c)(1); West's Ann.W.Va.Code, 36–1–1, 38–1–3.

1 Cases that cite this headnote

[4] **Bankruptcy**
Bona fide purchasers and rights thereof

In Chapter 13 case, it is trustee and not debtor that has standing to directly assert cause of action to avoid any transfer of property of debtor that is avoidable by bona fide purchaser of real property. 11 U.S.C.A. § 544(a)(3).

2 Cases that cite this headnote

[5] **Bankruptcy**
Property Exempt

Debtor cannot claim exemption against amounts

owed on secured debt that represent voluntary encumbrance of property.

Cases that cite this headnote

[6] **Bankruptcy**
Rights of Debtor or Injured Creditors
Bankruptcy
Claim of Exemption or Lien Avoidance
Bankruptcy
Accelerated maturity; effect of foreclosure

Debtor had no basis on which to avoid foreclosure sale of his principal residence and cure previously existing default through his Chapter 13 repayment plan, even though price for which residence was sold was greater than amount he owed mortgage lender; proper method for debtor to claim homestead exemption for excess sum was to claim exemption on his bankruptcy schedules. 11 U.S.C.A. §§ 522(h), 544(a)(3); West's Ann.W.Va.Code, 38–1–7, 38–10–4(a).

Cases that cite this headnote

[7] **Bankruptcy**
Mortgages; foreclosure
Bankruptcy
Debtor's want of interest or equity

Creditor was entitled to modification of automatic stay to permit recording of foreclosure sale trustee's deed, where sale was conducted before bankruptcy petition was filed, and only interest debtor had in property was bare legal title. 11 U.S.C.A. § 541(d).

2 Cases that cite this headnote

Attorneys and Law Firms

***469** Aaron C. Amore, Kratovil and Amore PLLC, Charles Town, WV, for Debtor.

MEMORANDUM OPINION

PATRICK M. FLATLEY, Bankruptcy Judge.

This matter came before the court on the motion of Jonathan Jerome Bardell (the "Debtor") requesting that Branch Banking & Trust, Riverside Trustee Company, and Draper & Goldberg, PLLC (the "Creditor") be held in contempt of court for rejecting the Debtor's post-petition mortgage payments. The Creditor filed a response to the motion asserting that refusal to accept payments was not a contemptuous act because the property subject to the mortgage had been sold at a foreclosure sale; therefore, the Debtor no longer had any right, title, or interest in the property. Argument was heard from the parties on April 18, 2006, and the parties subsequently supplemented their respective arguments with written briefs. The Creditor subsequently filed a motion for relief from the automatic stay (to the extent it was applicable), and the Debtor—whose Chapter 13 case had no filed claims—filed a motion to allow a late proof of claim on behalf of an unsecured creditor. All arguments and submissions concerning these matters have been considered by the court, and the issues are ripe for decision.

I. BACKGROUND

The facts of this case are not in dispute. The Creditor is the holder of a deed of trust on the Debtor's principal residence, which secures a note on which the Debtor owes about $114,040. The Debtor's payments on the note were in arrears, and the Creditor conducted a foreclosure sale on December 29, 2005. The foreclosure sale was conducted in accordance with West Virginia law, and the Debtor's real property was sold to Gracie Mews, LLC ("Gracie Mews") for $130,000. A trustee's deed conveying the property was prepared on January 25, 2006. On December 31, 2005, the Debtor filed his Chapter 13 bankruptcy petition, and he declared that the value of the property was $200,000. The Debtor also filed

a notice of his bankruptcy filing in Jefferson County, West Virginia on January 3, 2006. The Debtor's Chapter 13 petition was filed before the foreclosure sale deed was recorded, and the Debtor is attempting to undue the foreclosure sale ***470** and cure his mortgage arrearage in his proposed Chapter 13 plan.

II. DISCUSSION

This case requires the court to make a determination of whether a debtor may cure a mortgage arrearage after the property subject to the mortgage has been sold at a foreclosure sale conducted in accordance with non-bankruptcy law, when the debtor files a bankruptcy petition before the foreclosure sale deed is recorded.

A. § 1322(c)(1) and Foreclosure Sales Under West Virginia Law

[1] Section 1322(c)(1) provides, "a default with respect to ... a lien on the debtor's principal residence may be cured ... until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law." The court must first look to the plain language of the statute, and absent ambiguity in the language, the court's inquiry ends there. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). If the statutory language is ambiguous or unclear, the court may then look to the legislative history for guidance in interpreting its meaning. *Id.*

Courts have been divergent in determining whether the language of § 1322(c)(1) is ambiguous. One line of cases—the majority—has adopted the "gavel rule," finding that the phrase "sold at a foreclosure sale" refers to a specific event—a sale occurring at a foreclosure auction. The additional phrase "conducted in accordance with applicable nonbankruptcy law" refers merely to the state procedures required to be followed in noticing and holding a foreclosure auction. *See, e.g., Cain v. Wells Fargo Bank, NA*, 423 F.3d 617, 620 (6th Cir.2005) (holding that § 1322(c)(1) did not allow debtors to cure home mortgage defaults after a foreclosure sale regardless of state law redemption rights); *In re McCarn*, 218 B.R. 154, 160–61 (10th Cir. BAP 1998) (finding that under Wyoming law, the debtors' right to cure a mortgage arrearage in a Chapter 13 plan expired at the time of the foreclosure sale even though the state has a statutory redemption period); *In re Watts*, 273 B.R. 471, 476 (Bankr.D.S.C.2000) (granting the creditor's motion for relief from stay to allow it to record the foreclosure sale deed for the foreclosure sale that occurred prior to filing because the debtor no longer retained any equitable interest in the property and no right to cure the mortgage arrearage); *In re Crawford*, 232 B.R. 92, 96 (Bankr.N.D.Ohio 1999) (holding that the debtor's right to cure ended when the sheriff accepted the bid at the foreclosure auction even though the order confirming the sale had not been entered at the time of the bankruptcy filing). Thus, these courts employ a plain meaning approach to § 1322(c)(1) and conclude that the right to cure a default terminates once the hammer falls at the foreclosure sale.

Other courts have recognized that this plain meaning reading of the statute is at odds with its intent as expressed in the legislative history and have, therefore, adopted a more expansive reading requiring an examination of state law to determine when the property is actually sold. *See, e.g. In re Beeman*, 235 B.R. 519, 525 (Bankr.D.N.H.1999) (holding that the debtors were entitled to cure the mortgage arrearage through their Chapter 13 plan because the creditor's failure to record the sale deed prior to the bankruptcy filing rendered the sale incomplete under state law); *Christian v. Citibank, F.S.B.*, 214 B.R. 352, 355–56 (N.D.Ill.1997) (holding that the debtor had the right to cure the default because the foreclosure sale was not complete under state law until it was ***471** confirmed by a court); *In re Downing*, 212 B.R. 459, 462 (Bankr.D.N.J.1997) (holding that the debtors could cure the default until the delivery of a sheriff's deed to the successful purchaser rendering the sale complete under New Jersey state law); *In re Rambo*, 199 B.R. 747, 751 (Bankr.W.D.Okla.1996) (holding that the debtor is entitled to cure the arrearage until entry of an order confirming the foreclosure sale completes the foreclosure process under Oklahoma law); *In re Barham*, 193 B.R. 229, 232 (Bankr.E.D.N.C.1996) (holding that the debtors could cure their arrearage until the expiration of the 10–day upset bid period, which would render the foreclosure sale complete under North Carolina law); *Chisholm v. Cendant Mortgage Corporation*, No. 04–6398, 2005 WL 1522232, *3, 2005 U.S. Dist. LEXIS 32266, *9 (D.N.J. June 27, 2005) (recognizing the language of § 1322(c)(1) as a minimum floor in cutting off the debtor's right to cure and permitting the debtor to cure until the deed was delivered to the successful bidder, which would complete the sale under New Jersey law). Thus, these courts conclude that a debtor's right to cure default extends beyond the occurrence of the foreclosure

sale until such time as the sale is deemed to be completed in accordance with state law. Prior to the addition of the language in § 1322(c)(1), there was great inconsistency in the approaches the courts took in determining when a debtor's right to cure the default terminated. 2 Keith M. Lundin, *Chapter 13 Bankruptcy* § 130.1 (3d ed.2004). The language of § 1322(c)(1) was added by the Bankruptcy Reform Act of 1994 in an attempt to resolve this conflict. *Id.*

The legislative history of § 1322(c)(1) states, in relevant part:

> This section of the bill safeguards a debtor's rights in a Chapter 13 case by allowing the debtor to cure home mortgage defaults at least through completion of a foreclosure sale under applicable nonbankruptcy law. However, if the State provides the debtor more extensive "cure" rights (through, for example, some later redemption period), the debtor would continue to enjoy such rights in bankruptcy.

H.R. Rep. 103–835, 103rd Cong., 2nd Sess. 53 (Oct. 4, 1994); 140 Cong. Rec. 10752–01, 10769 (Oct. 4, 1994).

This portion of the legislative history has served as a foundation for interpreting the language of § 1322(c)(1) to extend the debtor's right to cure until the foreclosure sale is completed under state law, which requires courts to consider additional rights granted to debtors by state legislatures, such as the right of redemption. Because under the court's analysis of West Virginia law the outcome would be the same under the "gavel rule" or state law, it is not necessary to analyze the language of § 1322(c)(1).

West Virginia is a deed of trust state with non-judicial foreclosure. W. Va.Code § 38–1–3 ("The trustee in any trust deed given as security shall, whenever required ... sell the property conveyed by the deed ... at public auction, having first given notice of such sale...."); *Villers v. Wilson*, 172 W.Va. 111, 304 S.E.2d 16, 19 n. 4 (1983) ("Foreclosure under a trust deed normally occurs when a trustee, designated by the debtor in the trust deed, executes the trust and sells the property. In the trust deed situation, there is normally no requirement that the trustee institute a proceeding in any court; and there is also no requirement that he obtain judicial authorization to act."). Consequently, a foreclosure proceeding in West Virginia can occur relatively quickly. *See, e.g., Fayette County Nat'l Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232, 240 (1997) (describing ***472** West Virginia's trustee foreclosure laws to be "relatively quick and inexpensive").

Of course, the general rule in West Virginia is that no land can be conveyed unless the conveyance is by deed or will. W. Va.Code § 36–1–1 ("No estate ... in lands ... shall be created or conveyed unless by deed or will."). Indeed, as pointed out in *Atkinson v. Washington and Jefferson College*, 54 W.Va. 32, 46 S.E. 253, 255 (1903):

> The acceptance of the bid and the making of a memorandum thereof by the trustee being a complete contract of sale, binding the purchaser to accept the bid and pay the purchase money, must he, in seeking the enforcement of that contract, show that the trustee has proceeded regularly in making the sale? The contract does not confer title upon him. He obtains that by the deed. It confers only the right to call for the legal title, to enforce a specific performance of the contract of sale.

Accordingly, legal title to real property does not pass until a conveyance is made by deed; equitable title to the real property, however, passes to the purchaser at the time of sale. *See, e.g., Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 343, 351 (1971) (holding that the legal title holders to real property held it in constructive trust for the equitable title holder, who was entitled to the real property based on an earlier contract). In the absence of a true trustee-beneficiary relationship, the only duty of a party holding bare legal title without any equitable interest is to convey that legal title to the equitable interest holder. *E.g.*, 11 U.S.C. § 541(d) (stating, "Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest ... becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title...."); *Poss v. Morris (In re Morris)*, 260 F.3d 654, 668 (6th Cir.2001) (applying Ohio law and concluding that, once an enforceable contract for the sale of real property existed, a constructive trust arose and the legal title holder

was required to transfer that title to the purchaser). As stated by the West Virginia Supreme Court of Appeals:

> In a sale by a trustee ... the bid of the purchaser ... is accepted by the auctioneer, when he knocks the land down, and on the making by him of a memorandum of the sale and its terms, signed by the auctioneer. [T]he contract for the sale is as complete as the contract for the sale made by a commissioner is when the court accepts the bid by confirming the sale. [T]he purchaser must accept the deed and pay the purchase money, though he does find the title defective. He must if he wishes to do so, investigate the title in this case, as in the other, while the contract is incomplete, that is in the last case before land is knocked down to him.

Fleming v. Holt, 12 W.Va. 143, 156 (1877).

[2] Even though legal title to the real estate does not pass to the purchaser until the deed is delivered, equitable title passes to the purchaser upon the completion of the contract for sale in the absence of a right of redemption. *See* 55 Am.Jur.2d Mortgages § 797 (2006). Black's Law Dictionary defines "sale of land" as "a transfer of title to real estate from one person to another by a contract of sale." Therefore, absent a statutory right of redemption, the transfer of equitable title by the contract for sale completes the sale and ends a debtor's right to cure the arrearage under § 1322(c)(1).[1]

***473** The West Virginia Legislature has not protected the residents of this State with a statutory period of redemption following a foreclosure sale. *See In re Thompson*, 894 F.2d 1227, 1230 (10th Cir.1990) (stating that the dual purpose of a state's statutory right of redemption following a foreclosure sale is to provide the debtor with the opportunity to refinance the property and to assure that the foreclosure sale brings a fair price); *Oregon v. Hurt (In re Hurt)*, 158 B.R. 154, 158 (9th Cir. BAP 1993) (same); In re Barham, 193 B.R. 229, 232 (Bankr.E.D.N.C.1996) (holding that a foreclosure sale was not complete under North Carolina law until after the ten-day statutory period of redemption had expired). While the court recognizes that a statutory redemption period may extend the Debtor's right to cure the default under § 1322(c)(1), West Virginia law does not have such a redemption period, and therefore, the Debtor's right to cure the default ends at the foreclosure sale. *See Colon v. Option One Mortg. Corp.*, 319 F.3d 912, 920 (7th Cir.2003) (stating that a debtor's right to cure a home mortgage after foreclosure survives if the state allows a statutory period of redemption); *contra*, *Cain v. Wells Fargo Bank, N.A. (In re Cain)*, 423 F.3d 617, 620 (6th Cir.2005) (providing that the Bankruptcy Code precludes a cure of a home mortgage after a foreclosure sale based solely on a mortgagee's statutory right of redemption). In short, after a foreclosure sale is complete under West Virginia law, a debtor has no right—based solely on state law—to redeem the property and cure the previous default.

[3] In this case, the Creditor sold the Debtor's residence to Gracie Mews for $130,000 on December 29, 2005, and the trustee executed the memorandum of sale. The deed conveying the property, however, was not prepared until after the Debtor filed his Chapter 13 bankruptcy petition, and it still has not been signed or recorded. As a matter of West Virginia law, however, the foreclosure sale was complete on December 29, 2005 with the execution of the memorandum of sale—the only interest that the Debtor had in the real property after that time was bare legal title because the property had not yet been conveyed by deed. Because—as of the petition date—the Debtor did not have any equitable interest in the real property, the Debtor's only duty is to allow that legal title to be conveyed to Gracie Mews. Even assuming a more expansive reading of § 1322(c)(1), the Debtor has no right to cure his mortgage default under the Bankruptcy Code because he has no equitable interest in the property under State law after the execution of the memorandum of sale. 11 U.S.C. § 1322(c)(1) ("[A] default with respect to ... a lien on the debtor's principal residence may be cured ... until such residence is sold at a foreclosure sale that is conducted in accordance with applicable non-bankruptcy law...."). Therefore, the Debtor is not entitled to relief under § 1322(c)(1).

B. Sections 522(h) and 544(a)(3)

The Debtor asserts that even though the real property was sold at a foreclosure sale, the purchaser's failure to properly perfect its interest before the bankruptcy filing allows the Debtor to avoid the foreclosure sale pursuant to §§ 522(h) and 544(a)(3) of the Bankruptcy Code, reinstate the mortgage, and cure the default under his Chapter 13 plan.

***474** [4] Section 544(a)(3) of the Bankruptcy Code provides that the trustee—not the Chapter 13 debtor—shall have the power to avoid any transfer of property of the debtor that is avoidable by a bona fide purchaser of real property. Under West Virginia law, a bona fide purchaser, who is a subsequent purchaser, who pays valuable consideration, and is without notice of the foreclosure sale, may take title free of unrecorded interests in real property. W. Va.Code § 40–1–9; 40–1–13. In the context of a Chapter 13 case, it is the trustee and not the debtor that has standing to directly assert a § 544(a)(3) cause of action. *E.g.*, *Crawley v. Aurora Loan Servs. (In re Crawley)*, 318 B.R. 512, 517 (Bankr.W.D.Wis.2004) (denying a chapter 13 debtor's attempt to avoid a creditor's mortgage lien because the debtors were not trustees and had not been given the powers of a trustee under § 544); *Gilliam v. Bank of Am. Mortgage, L.L.C. (In re Gilliam)*, No. 02–24491, 2004 WL 3622646, *3, 2004 Bankr.LEXIS 1653, *8 (Bankr.D.Kan. October 28, 2004) (holding that a Chapter 13 debtor lacked standing to avoid a mortgage under § 544(a)(3)); *In re Binghi*, 299 B.R. 300, 303 (Bankr.S.D.N.Y.2003) (holding that chapter 13 debtors were unable to avoid a creditor's unperfected secured claim because they lacked standing); *Hollar v. United States (In re Hollar)*, 174 B.R. 198, 203 (Bankr.M.D.N.C.1994) (finding that "there is no statutory authority in Chapter 13 which grants a Chapter 13 debtor independent standing to sue under the trustee's ... avoidance power").

In this case, the Chapter 13 trustee has declined to exercise any § 544(a)(3) avoidance powers on the basis that no creditor has filed a proof of claim in the Debtor's bankruptcy case.[2] Notwithstanding the Chapter 13 trustee's refusal to bring a cause of action against the Creditor and Gracie Mews to avoid the foreclosure sale, the Debtor contends that he has standing to assert a § 544(a)(3) cause of action pursuant to § 522(h) of the Bankruptcy Code.

Section 522(h) provides:

> The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if—
>
> (1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and
>
> (2) the trustee does not attempt to avoid such transfer;

11 U.S.C. § 522(h).

In turn, § 522(g)(1) provides:

> Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—
>
> (1)
>
> (A) such transfer was not a voluntary transfer of such property by the debtor; and
>
> (B) the debtor did not conceal such property;

§ 522(g)(1).

Reading these statutes together reveals that, as a prerequisite to invoking the avoidance powers of § 522(h), the following ***475** conditions must be met: (1) the transfer sought to be avoided must not be a voluntary transfer by the debtor; (2) the debtor must not have concealed the transferred property; (3) the transfer of the property must be subject to avoidance under, inter alia, section 544; and (4) the trustee must not have attempted to avoid the transfer of the property. Assuming that these prerequisites are satisfied, then the Debtor may avoid the transfer "to the extent that the debtor could have exempted such property." § 522(h). *See also* § 522(f)(1) (allowing the avoidance of specified liens on a debtor's property "to the extent that such lien impairs an exemption to which the debtor would have been entitled...."). In short, absent an exemptible interest in transferred property, the debtor would lack prudential standing to assert a § 544(a)(3) cause of action to recover that exemptible interest. See e.g. *Humphrey v. Herridge (In re Humphrey)*, 165 B.R. 578, 580 (Bankr.D.Md.1993) (because the debtor did not have an interest to exempt, the debtor could not bring a § 522(h) claim).

[5] In this case, W. Va.Code § 38–10–4(a) provides a $25,000 homestead exemption for an individual debtor in bankruptcy. As of November 23, 2005, the Debtor owed the Creditor approximately $114,040. A debtor cannot claim an exemption against amounts owed on a secured debt that represents a voluntary encumbrance of property; consequently, the Debtor is not entitled to any exemption in the $114,040 owed to the Creditor. Because the

Debtor's principal residence was sold for $130,000, the Debtor's entitlement to an exemption based on the transfer sought to be avoided was only $15,960.[3] Assuming that all four of the requirements are met, a debtor has the right to avoid the transfer of his property to the extent that he could have exempted such property. *See Compton v. Compton (In re Compton),* No. 97–31367DWS, 1998 WL 372659, **4–5, 1998 Bankr.LEXIS 744, *13–14 (Bankr.E.D.Pa. June 22, 1998) (holding that a Chapter 13 debtor had standing to avoid a judgment lien to the extent of her exemption amount but not the entire judgment lien); *Davis v. Victor Warren Properties, Inc. (In re Davis),* 216 B.R. 898, 903 (Bankr.N.D.Ga.1997) (holding that the debtor had standing to avoid a foreclosure sale under § 522, but only to the extent of her $5,000 exemption).

[6] As a matter of state law, however, any amount realized in excess of the secured creditor's foreclosure sale is payable to the Debtor. W. Va.Code § 38–1–7 (directing that proceeds of a deed of trust foreclosure sale shall be paid first to the expenses attending the execution of the trust, next to the payment of debts secured by the deed, and the surplus, if any, is to be paid to the grantor). If the Debtor seeks to exempt the sale proceeds in excess of the Creditor's deed of trust, he may simply claim an exemption on Schedule C of his bankruptcy petition without the need to resort to § 522(h) and 544(a)(3) of the Bankruptcy Code. The Debtor has no basis for avoiding a foreclosure sale to the extent that the Debtor could have claimed an exemption when the Debtor has not suffered any impairment of his exemption as a result of the sale. Concomitantly, the Debtor has no basis on which to avoid the foreclosure sale of his ***476** principal residence and cure the previously existing default through his Chapter 13 repayment plan.

C. Motion for Relief from the Automatic Stay

[7] The Creditor seeks an order from the court modifying the automatic stay to permit the Creditor to record the trustee's deed to Gracie Mews. Because the foreclosure sale of the Debtor's principal residence is complete, the only interest that the Debtor has in the real property is legal title, and the equitable title belongs to Gracie Mews. Pursuant to § 541(d), the equitable title to the property never became property of the estate. 11 U.S.C. § 541(d) ("Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest .... becomes property of the estate ... only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."). Because the only duty the Debtor has as the legal title holder to the property is to release that title to the equitable title holder, *Morris,* 260 F.3d at 668; *Watts,* 273 B.R. at 474–475; *Annon,* 185 S.E.2d at 351, the Creditor is entitled to a modification of the automatic stay to permit the recording of the foreclosure sale trustee's deed.

D. Motion to Allow Late Filed Claim

After the Chapter 13 trustee refused to pursue a cause of action to avoid the foreclosure sale on the basis that no unsecured creditors of the Debtor's estate existed, the Debtor filed a motion to allow the late filed claim of Jefferson Memorial Hospital, an unsecured creditor. The time for filing a proof of claim in a Chapter 13 case is ninety days after the first date set for the meeting of creditors. Fed. R. Bankr.P. 3002(c). A debtor has an additional 30 days after expiration of that deadline to file a proof of claim on behalf of a creditor. Fed. R. Bankr.P. 3004. The date first set for the meeting of creditors was February 3, 2006. The Debtor filed his motion seeking to allow the late filed claim on July 26, 2006, which was well beyond the time established under Fed. R. Bankr.P. 3002(c) and 3004. Pursuant to Fed. R. Bankr.P. 9006(b), the bankruptcy court is only permitted to enlarge the time for filing a proof of claim as set forth in Rule 3002(c). The claim for hospital charges does not satisfy any of the criteria set forth in Rule 3002(c), and no basis otherwise exists for granting the Debtor's motion.

III. CONCLUSION

The Debtor's real property was sold at a foreclosure sale prior to his bankruptcy filing, which extinguished his right to cure the default under § **1322**(**c**)(**1**). While a possible basis for avoiding unrecorded transfers of real property exists pursuant to § 522(h) and § 544(a)(3), the Debtor has not demonstrated that he is entitled to any relief based on those sections. Furthermore, because the Debtor only retains bare legal title to his principal residence as of the date of the petition, the Creditor is entitled to a modification of the automatic stay to permit the Creditor to record the foreclosure sale trustee's deed. Finally, the court will deny the Debtor's motion to allow a late filed proof of claim because no basis exists under Fed. R. Bankr.P. 3002(c), 3004 and 9006(b) to excuse the

untimely filing.

The court will enter a separate order pursuant to Fed. R. Bankr.P. 9021.

All Citations

361 B.R. 468, 57 Collier Bankr.Cas.2d 615

Footnotes

1 In the case of *In re White,* No. 02–10378 (Bankr.N.D.W.Va. May 2, 2002), the court determined that a foreclosure sale was not complete so long as the debtor retained a legal interest in that property. *White,* however, never cited § 541(d) and assumed that the foreclosure sale could be avoided even though no party had brought an avoidance action to set aside the sale.

2 In this regard, the Debtor has attempted to conjure an unsecured claim in his case by requesting that he be permitted to file a single unsecured claim—after expiration of the claims bar date—on behalf a creditor. *See infra,* Part II(D).

3 The reasonable value of property sold at foreclosure is deemed to be the amount realized at the sale. *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (holding that consideration received from a non-collusive real estate mortgage foreclosure sale conducted in conformance with applicable state law is an exchange for reasonably equivalent value).

374 B.R. 588
United States District Court, N.D. West Virginia, Martinsburg.

In re Jonathan Jerome BARDELL, Appellant/Debtor.

No. Civil Action No. 3:07–cv–36.
|
Aug. 10, 2007.

Synopsis

Background: Chapter 13 debtor, who filed his bankruptcy petition after his principal residence was sold at a foreclosure sale but before the sale was recorded, filed motion requesting that creditor be held in contempt of court for rejecting his postpetition mortgage payments, and creditor moved for stay relief so as to record the trustee's deed. The Bankruptcy Court, Patrick M. Flatley, J., 361 B.R. 468, denied debtor's motion and granted creditor's motion. Debtor appealed.

[Holding:] The District Court, Bailey, J., held that under West Virginia law, the prepetition foreclosure sale terminated debtor's equitable interest in the property, even though the deed of trust was not delivered to the purchaser until after the filing of the bankruptcy petition.

Affirmed.

West Headnotes (11)

[1] **Bankruptcy**
Conclusions of law; de novo review
Bankruptcy
Clear error

District court reviews the bankruptcy court's legal determinations de novo and its factual findings for clear error.

Cases that cite this headnote

[2] **Bankruptcy**
Interest of debtor in general
Bankruptcy
Trustee as representative of debtor or creditors

Except for the rights of the bankruptcy trustee to enlarge the bankruptcy estate through its strong-arm powers, the property interests which pass to the bankruptcy estate are no more extensive than those possessed by the debtor as of the date of filing. 11 U.S.C.A. §§ 541, 544 et seq.

2 Cases that cite this headnote

[3] **Bankruptcy**
Property pledged or encumbered; redemption rights

Filing bankruptcy cannot revest the debtor with property lost prepetition by foreclosure. 11 U.S.C.A. § 541.

1 Cases that cite this headnote

[4] **Bankruptcy**
Realty in general

Debtor's interest in real property is determined by the law of the state in which the real property is located. 11 U.S.C.A. § 541.

Cases that cite this headnote

[5] **Bankruptcy**
Property pledged or encumbered; redemption rights

Foreclosure sale is deemed complete so as to preclude the debtor from rescinding the sale

simply by filing a bankruptcy petition when the debtor no longer has under state law the right known as the "equity of redemption."

1 Cases that cite this headnote

[6] **Bankruptcy**
Property pledged or encumbered; redemption rights
Mortgages and Deeds of Trust
Persons Concluded or Affected

Under West Virginia law, prepetition foreclosure sale terminated Chapter 13 debtor's equitable interest in his principal residence, even though the deed of trust was not delivered to the purchaser until after the filing of the bankruptcy petition; after the bid was accepted and the memorandum of sale executed, the debtor had no interest in the property, as the equitable interest in the property rested with the purchaser at the sale and the legal title rested in the hands of the trustee. 11 U.S.C.A. § 541; West's Ann.W.Va.Code, 38-1-6.

2 Cases that cite this headnote

[7] **Common Law**
Constitutions and statutes of particular states

In construing West Virginia real property law, Virginia law is particularly relevant, inasmuch as West Virginia adopted the common law of Virginia at its inception. West's Ann.W.Va.Code, 2-1-1.

1 Cases that cite this headnote

[8] **Mortgages and Deeds of Trust**
Remedies and enforcement; foreclosure

West Virginia is a deed of trust state with non-judicial foreclosure. West's Ann.W.Va.Code, 38-1-3.

1 Cases that cite this headnote

[9] **Mortgages and Deeds of Trust**
Completion of Sale

Under West Virginia law, a foreclosure sale is "complete" when the trustee or auctioneer accepts the bid and executes a memorandum of sale.

1 Cases that cite this headnote

[10] **Mortgages and Deeds of Trust**
Time as of which rights vest in purchaser
Mortgages and Deeds of Trust
Conveyance to Purchaser

Even though legal title to real estate does not pass to the foreclosure sale purchaser until the deed of trust is delivered, equitable title passes to the purchaser upon the completion of the contract for sale in the absence of a right of redemption.

Cases that cite this headnote

[11] **Mortgages and Deeds of Trust**
Time for Redemption

West Virginia law provides no right to a mortgagor to redeem the property after a foreclosure sale.

Cases that cite this headnote

589 *MEMORANDUM OPINION AND ORDER AFFIRMING DECISION OF BANKRUPTCY COURT

BAILEY, District Judge.

This civil action is an appeal from the United States Bankruptcy Court for the ***590** Northern District of West Virginia of a decision which found that the debtor was not entitled to cure his mortgage default or to avoid the pre-petition foreclosure sale. The decision is published as *In re Bardell*, 361 B.R. 468 (Bankr.N.D.W.Va.2007). This Court, having received and reviewed the briefs of the parties and having heard oral argument, is of the opinion that the decision of the Bankruptcy Court should be affirmed.

I. Factual and Procedural History

The facts of this case are not in dispute. In 2001, the debtor borrowed the sum of One Hundred and Eight Thousand Three Hundred Dollars ($108,300.00) from Branch Banking and Trust (hereinafter "BB & T"). Repayment of the loan was secured by the execution and recordation of a deed of trust on the debtor's principal residence. The debtor defaulted under the promissory note, and on December 29, 2005, the trustee under the deed of trust conducted a foreclosure sale. The foreclosure sale was conducted in accordance with West Virginia law[1], and the debtor's property was sold to Gracie Mews, LLC (hereinafter "Purchaser") for $130,000. At the time of the sale, the Purchaser posted a ten percent (10%) deposit and executed the Trustee's Memorandum of Sale, which provided that final settlement would occur within twenty (20) days of the sale.

Two days later, on December 31, 2005, the debtor filed a petition under Chapter 13 of the Bankruptcy Code. The debtor included the property in question in his bankruptcy schedules and filed a notice of the bankruptcy filing in the Office of the Clerk of the County Commission of Jefferson County, West Virginia. The debtor's Chapter 13 petition was filed before the foreclosure sale deed was recorded, and the debtor is attempting to undo the foreclosure sale and cure his mortgage arrearage in his proposed Chapter 13 plan. In its decision, dated February 8, 2007, the Bankruptcy Court found that the foreclosure sale prior to the date of the filing of the debtor's petition extinguished the debtor's right to cure his default. A timely notice of appeal was filed on March 28, 2007 (Doc. 1).

II. Standard of Review

[1] This Court reviews the bankruptcy court's legal determinations de novo and its factual findings for clear error. *In re Dornier Aviation*, 453 F.3d 225, 230–31 (4th Cir.2006); *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396, 399 (4th Cir.1992).

III. Discussion

Title 11, section 541 of the Bankruptcy Code, 11 U.S.C. § 541, provides that the bankruptcy estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case."

[2] [3] [4] [5] "Except for the rights of the bankruptcy trustee to enlarge the bankruptcy estate under 11 U.S.C. §§ 544, *et seq.*, the property interests which pass to the bankruptcy estate are no more extensive than those possessed by the debtor as of the date of filing. Filing bankruptcy cannot revest the debtor with property lost prepetition by foreclosure." *See* 5 *Collier on Bankruptcy* ¶ 541.04, at 541–12 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.). The debtor's interest in real property is determined by the law of the state in which the real property is located. *See Butner v. United States*, 440 U.S. 48, 52–55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) (decided under the Bankruptcy Act); 5 *Collier on Bankruptcy* ¶ 541.05, at 541–15. ***591** A foreclosure sale is deemed complete so as to preclude the Debtors from rescinding the sale simply by filing a bankruptcy petition when the debtor no longer has under state law the right known as the "equity of redemption." *In re Wolfe*, 344 B.R. 762, 767 (Bankr.W.D.Va.2006).

[6] Accordingly, a significant issue in this case is whether the debtor possessed legal or equitable title to the property at the time of the filing of his petition.

[7] At oral argument, the parties agreed and stipulated that legal title passes to the trustee at the time of the execution of the deed of trust, with the equitable title remaining with the borrower or grantor. This is consistent with the language of the deed of trust in this case, in which the debtor granted the property to the Trustee, in trust. *See Citizens' Nat Bank of Connellsville v. Harrison–Doddridge Coal & Coke Co.*, 89 W.Va. 659, 109 S.E. 892, 895 (1921) ("assignment of a mortgage carries the legal title"); *First Nat. Bank v. McGraw*, 85 W.Va. 298, 101 S.E. 474 (1919); *Cox v. Horner*, 43 W.Va. 786, 28 S.E. 780 (1897). *See also Gravatt v. Lane*, 121 Va. 44, 92 S.E. 912 (1917); *Abdelhaq v. Pflug*, 82 B.R. 807, 809 (E.D.Va.1988).[2]

[8] As noted by Judge Flatley below, "West Virginia is a deed of trust state with non judicial foreclosure. W. Va.Code § 38–1–3 (The trustee in any trust deed given as security shall, whenever required ... sell the property conveyed by the deed ... at public auction, having first given notice of such sale....'); *Villers v. Wilson*, 172 W.Va. 111, 304 S.E.2d 16, 19, n. 4 (1983) ('Foreclosure under a trust deed normally occurs when a trustee, designated by the debtor in the trust deed, executes the trust and sells the property. In the trust deed situation, there is normally no requirement that the trustee institute a proceeding in any court; and there is also no requirement that he obtain judicial authorization to act.'). Consequently, a foreclosure proceeding in West Virginia can occur relatively quickly. *See, e.g., Fayette County Nat'l Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232, 240 (1997) (describing West Virginia's trustee foreclosure laws to be 'relatively quick and inexpensive')." *In re Bardell*, 361 B.R. at 471–72.

In *Fleming v. Holt*, 12 W.Va. 143 (1877), the West Virginia Supreme Court of Appeals held that:

> In a sale by a trustee, the court does not accept the bid of the purchaser, but it is accepted by the auctioneer, when he knocks the land down, and on the making by him of a memorandum of the sale and its terms, signed by the auctioneer, the contract for the sale is as complete as the contract for the sale made by a commissioner is when the court accepts the bid by confirming the sale. After such knocking down of the land by the auctioneer and the making of such memorandum, the purchaser must accept the deed and pay the purchase money, though he does find the title defective. He must if he wishes to do so, investigate the title in this case, as in the other, while the contract is incomplete, that is in the last case, before land is knocked down to him.

12 W.Va. at 156.

This holding was reiterated by the West Virginia Supreme Court in *Atkinson v. Washington & Jefferson College*, 54 W.Va. 32, 46 S.E. 253 (1903), in which the court stated:

> A contract of sale between a trustee in a deed of trust and a purchaser is complete when the trustee, selling at auction, ***592** knocks the land down to the bidder, makes a memorandum of the sale and its terms, and signs the same.

Syl. Pt. 1.

In the *Atkinson* decision, the court noted that the existence of the memorandum of sale did not confer legal title on the purchaser, but rather conferred the right to call for the legal title and to enforce specific performance of the contract of sale. In other words, after the property is knocked down by the auctioneer and a memorandum of sale is executed, the equitable title to the property passes to the purchaser.

These decisions are consistent with the law in Virginia. "After acceleration of the debt and before sale, the debtor has an 'equity of redemption.' " *Abdelhaq v. Pflug*, 82 B.R. 807, 810 (E.D.Va.1988), *citing In re Rolen*, 39 B.R. 260, 263 (Bkrtcy.W.D.Va.1983). "Equity of redemption allows the debtor to pay the indebtedness and require the secured party to reconvey the property to him free of the deed of trust lien." *Id.* "Once the property is sold, the debtor's equitable interest is extinguished, unless he can show that there was some deficiency in the sale process." *Id.* "According to the Bankruptcy Court for the Western District of Virginia, 'Virginia law appears to be conclusive [that] [i]n a sale by a trustee under a Deed of Trust, the sale is complete when the trustee knocks the land down to the bidder, makes a memorandum of the sale and its terms, and signs the same.' " *Id., citing In re*

Rolen, 39 B.R. at 264.

In *Abdelhaq*, Judge Ellis stated that "[t]he Abdelhaqs are correct in asserting that Virginia law requires a deed to transfer legal title to real property. *See* Va.Code § 55–2. However, this rule does not change the fact that they possessed neither a legal nor an equitable interest in the property once the auctioneer's hammer fell and the memorandum of sale was signed. At this point, and before settlement, the trustee retains legal title to the property, while the purchaser possesses the right to enforce the sale in equity. *See Ryland Group, Inc. v. Wills*, 229 Va. 459, 331 S.E.2d 399, 402–03 (1985). Thus, because the Abdelhaqs possessed no interest in the condominium units at the time they filed their petition, the property never became part of their estate under section 541. From this it follows, of course, that no automatic stay ever attached to the property to halt consummation of the foreclosure sale." 82 B.R. at 807.

In *Southwest Products Co., Inc. v. United States*, 882 F.2d 113 (4th Cir.1989), the Fourth Circuit reiterated that "[w]hile it is true that Virginia law requires a deed to transfer *legal title* to real property, *see* Va.Code § 55–2, when the trustee 'knocked the land down to [Southwest],' made a memorandum of sale and signed it, the sale was complete, *In re Rolen*, 39 B.R. 260, 264 (Bankr.W.D.Va.1983), and Southwest acquired an *equitable interest* in Laskin Road. *Abdelhaq v. Pflug*, 82 B.R. 807, 810 (E.D.Va.1988); *Ryland Group, Inc. v. Wills*, 229 Va. 459, 331 S.E.2d 399, 402–03 (1985)."

In *Litton v. Wachovia Bank (In re Litton)*, 330 F.3d 636, 645 (4th Cir.2003), the Fourth Circuit noted that "Wachovia's right to institute foreclosure proceedings is subject to the provisions of the Bankruptcy Code that permit a debtor to file a bankruptcy petition **up to the time of a foreclosure sale.** *See* 11 U.S.C. § **1322**(**c**)(**1**)." (Emphasis added).

The holding that the foreclosure sale itself terminates the debtor's property rights is consistent with the holdings in other courts as well. The Sixth Circuit has held that the actual auction at which the property is knocked down to the high bidder ends the debtor's right to cure the default. The Court stated that "[t]he ***593** event we choose as the cut-off date of the statutory right to cure defaults is the sale of the premises. We pick this in preference to a number of other potential points in the progress of events ranging from the date of first default to the day the redemption period expires following sale." *In re Glenn*, 760 F.2d 1428 (6th Cir.), *cert. denied*, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985).

In *Ferrell v. Southern Financial*, 179 B.R. 530 (W.D.Tenn.1994), the District Court found that the actual sale of the property terminated the debtor's rights in the property.

Similarly, in *Pearson v. Fleet Finance Center, Inc.*, 75 B.R. 254 (Bankr.N.D.Ga.1985), the Bankruptcy Court stated:

> The pivotal determination with respect to the Debtor's attempt to cure and reinstate the mortgage is the point at which the Debtor's equity of redemption expires under Georgia law. As indicated in *[In re] Gray*, 37 B.R. 532 (Bankr.N.D. Ga.1984) and *[In re] Foster*, [37 B.R. 537 (Bankr.N.D.Ga.1984)], Georgia law states that the equity of redemption expires when the high bid is received at the foreclosure sale. *See Carrington v. Citizens' Bank of Waynesboro*, 144 Ga. 52, 53, 85 S.E. 1027 (1915); *McKinney v. South Boston Savings Bank*, 156 Ga.App. 114, 116, 274 S.E.2d 34 (1980).

In *Oregon v. Hurt (In re Hurt)*, 158 B.R. 154 (9th Cir. BAP 1993), the Ninth Circuit Bankruptcy Appeals Panel also held that the rights of the debtor are terminated by the sale of the property:

> The concept of property of the estate under §§ 541 and 1306 is the proper starting point to establish uniformity within the circuits, *[In re] Thompson*, 894 F.2d [1227], 1229 (10th Cir.1990). Section 541 provides that at the commencement of the case, the estate includes "all legal or equitable interests of the debtor in property...." 11 U.S.C. § 541(a)(1). However, a state law evaluation is not necessary to determine the debtor's interest.... Accordingly, the *Thompson* court looked at the debtor's redemptive rights to create uniformity.
>
> The statutory or equitable rights of redemption are included in the concept of property under § 541. *Thompson*, 894 F.2d at 1230 (citing *Collier on Bankruptcy* ¶ 541.07[3]). "All states apparently permit redemption of mortgaged property, not simply until the date of the foreclosure judgment, but until a foreclosure sale.... About half of the states go beyond that, to allow

> a statutory period of redemption." *Thompson*, 894 F.2d at 1230 (citing *Real Estate Finance Law* § 7.1, at 478–479).
>
> Although this analysis implies the cure should be available until the conclusion of the statutory redemption period, the cutoff for cure should nevertheless be established at the foreclosure sale. *Thompson*, 894 F.2d at 1230–31. The foreclosure sale introduces a third party when, as here, the property is purchased by someone other than the mortgagee. *See, Thompson*, 894 F.2d at 1230. In addition, the inherent philosophy separating the redemption periods supports the adoption of the foreclosure sale as the cutoff point. "[T]he equitable period of redemption before sale exists to provide the debtor sufficient time to attempt to refinance the property which appears to be the same goal as the bankruptcy right to cure." *Thompson*, 894 F.2d at 1230 (citations omitted). While "the principle objective of statutory redemption is to assure that the foreclosure sale brings a fair price." *Thompson*, 894 F.2d at 1230 (citations omitted).

158 B.R. at 160–161.

In the case of *In re Martin*, 276 B.R. 552, 557 (Bankr.N.D.Miss.2001), the Bankruptcy ***594** Court held that "§ 541(a)(1) provides that a bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the date of the bankruptcy filing.... Under Mississippi law, the right of redemption is extinguished upon the sale of the property at foreclosure. (citations omitted). Accordingly, since there were no irregularities in the foreclosure processes, the court finds that the debtor herein possessed no legal or equitable interest in the subject property at the time that her bankruptcy case was filed."

The appellant relies, in part, upon *Smith v. Mooney*, 155 B.R. 145 (Bankr.S.D.W.Va.1993), in which Judge Friend held that a foreclosure sale was not complete when the deed was not delivered until after the filing of the bankruptcy petition. This Court respectfully disagrees with Judge Friend. In his discussion, Judge Friend cited *Atkinson v. Washington & Jefferson College*, 54 W.Va. 32, 40, 46 S.E. 253 (1903), for the proposition that the acceptance of the bid at the foreclosure sale and execution of a memorandum of sale does not confer title on the purchaser, but rather confers a right to call for the deed. While this is certainly true, the fact remains that after the bid is accepted and the memorandum executed, the debtor has no interest in the property. The equitable interest in the property lies with the purchaser at the sale. The legal title rests in the hands of the trustee. While the purchaser only has a right "to call for the deed," it is the trustee to whom the call is to be made, and it is the trustee who will execute the deed. *See West Virginia Code* § 38–1–6.

In addition, 11 U.S.C. **1322**(**c**)(**1**) provides no relief. Section 1332(c)(1) provides that "a default with respect to ... a lien on the debtor's principal residence may be cured ... until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law."

As noted by Judge Flatley in his opinion:

> Courts have been divergent in determining whether the language of § **1322**(**c**)(**1**) is ambiguous. One line of cases-the majority-has adopted the "gavel rule," finding that the phrase "sold at a foreclosure sale" refers to a specific event-a sale occurring at a foreclosure auction. The additional phrase "conducted in accordance with applicable nonbankruptcy law" refers merely to the state procedures required to be followed in noticing and holding a foreclosure auction. *See, e.g., Cain v. Wells Fargo Bank, NA*, 423 F.3d 617, 620 (6th Cir.2005) (holding that § **1322**(**c**)(**1**) did not allow debtors to cure home mortgage defaults after a foreclosure sale regardless of state law redemption rights); *In re McCarn*, 218 B.R. 154, 160–61 (10th Cir. BAP 1998) (finding that under Wyoming law, the debtors' right to cure a mortgage arrearage in a Chapter 13 plan expired at the time of the foreclosure sale even though the state has a statutory redemption period); *In re Watts*, 273 B.R. 471, 476 (Bankr.D.S.C.2000) (granting the creditor's motion for relief from stay to allow it to record the foreclosure sale deed for the foreclosure sale that occurred prior to filing because the debtor no longer retained any equitable interest in the property and no right to cure the mortgage arrearage); *In re Crawford*, 232 B.R. 92, 96 (Bankr.N.D.Ohio 1999) (holding that the debtor's right to cure ended when the sheriff accepted the bid at the foreclosure auction even though the order confirming the sale had not been entered at the time of the bankruptcy filing). Thus, these courts employ a plain meaning approach to § **1322**(**c**)(**1**) and conclude that the right ***595** to cure a default terminates once the hammer falls at the foreclosure sale.

361 B.R. at 470.

[9] [10] As noted above, in West Virginia a foreclosure sale is "complete" when the trustee or auctioneer accepts the bid and executes a memorandum of sale. "Even though legal title to the real estate does not pass to the purchaser until the deed is delivered, equitable title passes to the purchaser upon the completion of the contract for sale in the absence of a right of redemption. *See* 55 Am.Jur.2d,

Mortgages § 797 (2006). Black's Law Dictionary defines 'sale of land' as 'a transfer of title to real estate from one person to another by a contract of sale.' Therefore, absent a statutory right of redemption, the transfer of equitable title by the contract for sale completes the sale and ends a debtor's right to cure the arrearage under § **1322**(**c**)(**1**)." *Bardell*, supra at 472.

[11] As correctly stated by Judge Flatley, West Virginia law provides no right to a mortgagor to redeem the property after a foreclosure sale.

In *Cain v. Wells Fargo Bank, N.A. (In re Cain)*, 423 F.3d 617, 619 (6th Cir.2005), the Sixth Circuit held that "§ **1322**(**c**)(**1**) unambiguously designates the foreclosure sale itself as the event that terminates a Chapter 13 debtor's right to cure a home mortgage default by filing a plan that calls for repayment outside the redemption period." The Sixth Circuit "agree[d] with the courts that have held § **1322**(**c**)(**1**) to be unambiguous. In our view, 'a foreclosure sale' is a single, discrete event-typically an auction at which the highest bidder purchases the property. *See Crawford*, 232 B.R. at 96; *In re McCarn*, 218 B.R. 154, 160 (BAP 10th Cir.1998)." *Id.* at 620.

At oral argument before this Court, the appellant (1) argued that the purchaser did not pay the full amount due under the memorandum of sale in a timely manner, but rather the trustee and the purchaser extended the date of payment by agreement, and (2) asked what would happen to the equity of redemption if the purchaser should fail to follow through with the purchase. With regard to the first argument, this Court cannot fault the trustee and purchaser for waiting to receive a lift stay order from the Bankruptcy Court before completing the sale when the debtor was arguing that the property was an asset of the bankruptcy estate. *See Abdelhaq v. Pflug*, 82 B.R. 807 (E.D.Va.1988).

With regard to the second argument (which is a hypothetical since there is no indication in the record that the purchaser will be unable to complete the purchase), case law indicates that the debtor's equitable right of redemption is terminated at the first sale, even if a second sale should be necessary. *In re McCreery*, 72 B.R. 275 (Bankr.N.D.Ohio 1987).

IV. Conclusion

Based upon the foregoing, it is the opinion of this Court that the Bankruptcy Court correctly determined that (1) the debtor is not entitled to cure his mortgage default; (2) the debtor has no basis upon which to avoid the foreclosure sale; and (3) that BB & T is entitled to modification of the automatic stay to permit it to record the trustee's deed.

Accordingly, it is hereby **ORDERED** that the decision of the United States Bankruptcy Court for the Northern District of West Virginia, *In re Bardell*, 361 B.R. 468 (Bankr.N.D.W.Va.2007), is **AFFIRMED.**

The Clerk is directed to provide copies of this Order to all counsel of record.

All Citations

374 B.R. 588

Footnotes

1 At oral argument, the debtor confirmed that he does not challenge the manner in which the property was sold.

2 Virginia law is particularly relevant in areas of property law, inasmuch as West Virginia adopted the common law of Virginia at its inception. *West Virginia Code* § 2–1–1.

244 W.Va. 106
Supreme Court of Appeals of West Virginia.

Martin P. SHEEHAN, Trustee, Petitioner
v.
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., WEI Mortgage Corporation, and Seneca Trustees, Inc., Respondents

No. 19-1082
|
Submitted: September 22, 2020
|
Filed: November 17, 2020

Synopsis

Background: Bankruptcy Court for the Northern District of West Virginia certified a question to the Supreme Court of Appeals about perfecting a security interest on a manufactured home by deed of trust when that manufactured home still maintains a motor vehicle title.

Holdings: The Supreme Court of Appeals, Walker, J., held that:

[1] cancellation statute is not the exclusive means to convert a manufactured home from personal property to real property, and

[2] satisfying the requirements of *Snuffer v. Spangler*, 79 W. Va. 628, 92 S.E. 106 converts the legal character of a manufactured home from personal to real property such that a lien on that property may be perfected by a deed of trust, even if the homeowner has not cancelled title under the provisions of Motor Vehicle Code.

Certified question answered.

Workman, J., filed dissenting opinion in which Armstead, C.J., joined.

West Headnotes (4)

[1] **Appeal and Error** Cases or questions reported, reserved, or certified

The Supreme Court of Appeals undertakes plenary review of legal issues presented by certified question from a federal district or appellate court.

1 Cases that cite this headnote

[2] **Property** Manufactured, modular, and mobile structures

Manufactured homes, by virtue of requiring title under the Motor Vehicle Code, are considered personal property until they are affixed to the land. W. Va. Code Ann. § 17A-3-12.

[3] **Property** Manufactured, modular, and mobile structures

The cancellation statute, which provides manufactured homeowners with the means to have their manufactured home declared real property, to the exclusion of personal property, by operation of statute, while the preferable process, is not the exclusive means to convert a manufactured home from personal property to real property. W. Va. Code Ann. § 17A-3-12b.

[4] **Mortgages and Deeds of Trust** Ownership, Estate, or Interest in Property

Property Manufactured, modular, and mobile structures

Satisfying the requirements of *Snuffer v. Spangler*, 79 W. Va. 628, 92 S.E. 106 converts the legal character of a manufactured home from personal to real property such that a lien on that property may be perfected by a deed of trust, even if the homeowner has not cancelled title under the provisions of Motor Vehicle Code; under *Snuffer*, the personal property must be attached to the real estate, it must be reasonably

> necessary and adapted to the purposes for which the real estate is being used, and it must be the intention of the party placing such property upon the real estate to make it a part thereof. W. Va. Code Ann. § 17A-3-12b(a).

Syllabus by the Court

*****1** 1. "This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court." Syllabus Point 1, *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999).

2. Satisfying the requirements of *Snuffer v. Spangler*, 79 W. Va. 628, 92 S.E. 106 (1917), converts the legal character of a manufactured home from personal to real property such that a lien on that property may be perfected by deed of trust even if the homeowner has not cancelled title under the provisions of West Virginia Code § 17A-3-12b(a).

Certified Question from the United States Bankruptcy Court, For the Northern District of West Virginia, Honorable Patrick M. Flatley, United States Bankruptcy Judge, Case No. 18-bk-712; Adversary No. 18-ap-51

Attorneys and Law Firms

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Opinion

WALKER, Justice:

****770** ***107** The Bankruptcy Court for the Northern District of West Virginia certifies a question to this Court about perfecting a security interest on a manufactured home by deed of trust when that manufactured home still maintains a motor vehicle title. Essentially, that court asks how, under West Virginia law, does one perfect a security interest upon a manufactured home that maintains both personal and real property characteristics? We conclude that a manufactured home with a title issued by the Division of Motor Vehicles (DMV) may become affixed, and therefore legally converted to real property, by operation of common law, even if the home's owners have not cancelled the DMV title under the cancellation procedure of West Virginia Code § 17A-3-12b(a). So, because the title cancellation procedure is not the exclusive means of conversion, perfection of a security interest may be made by deed of trust. We therefore answer the certified question in the affirmative.

I. FACTS AND PROCEDURAL HISTORY

In the course of managing the Chapter 7 bankruptcy proceedings of Debtors Ronald and Jamie Lancaster, Petitioner and Bankruptcy Trustee Martin P. Sheehan (Bankruptcy Trustee) uncovered an issue with one of Debtors' assets, a "Double wide with land," that, while listed as one asset, appeared to be two separate assets. Respondent WEI Mortgage Corporation (WEI Mortgage) had recorded a deed of trust that would have perfected a security interest in the land and the manufactured home,[1] but the manufactured home also had a DMV certificate of title that did not show WEI Mortgage's lien.

Bankruptcy Trustee filed a complaint to obtain an order from the Bankruptcy Court of the Northern District of West Virginia (Bankruptcy Court) finding that WEI Mortgage did not have a perfected security interest in the Debtors' manufactured home.[2] WEI Mortgage did not necessarily dispute the factual allegations underlying the complaint, but took issue with the relief sought, as it asserted that it had a perfected security interest in the manufactured home because the manufactured home was affixed to real estate and it had perfected its security interest by recorded deed of trust. The Bankruptcy Trustee moved for summary judgment.

*****2** In the course of consideration of Bankruptcy Trustee's motion for summary judgment, the Bankruptcy Court concluded that the issue turned on an unanswered point of West ****771** ***108** Virginia law and agreed, at the request of Bankruptcy Trustee, to certify the following question in relation to this dispute:

> Does a creditor have a perfected security interest in a manufactured home that has been affixed to real estate based on the factors of *Snuffer v. Spangler*, 79 W. Va. 628, 92 S.E. 106 (1917) when it properly records a deed of trust

> that describes both the real estate and the manufactured home, even though the manufactured home has an active certificate of title issued by the West Virginia Department of Motor Vehicles pursuant to W. Va. Code § 17A-3-12, which certificate of title 1) has not been cancelled pursuant to W. Va. Code § 17A-3-12b and 2) does not show the creditor's lien on its face, particularly in light of W. Va. Code § 46-9-303(b) to cause the manufactured home to be treated as a fixture?

We address that question first by providing the parties' stipulated facts as a backdrop:

> This case arises out of the Bankruptcy Trustee's challenge to whether there is a perfected lien applicable to a manufactured home. Originally, Debtors' mortgage loan was obtained from Embrace Home Loans, Inc., on or about June 4, 2015. The loan is secured by a Deed of Trust held by MERS, with WEI [Mortgage] as the nominee/beneficiary, encumbering the real estate commonly known as 2307 St. Johns Road, Colliers, West Virginia 26035, together with all improvements erected on the property and fixtures that are a part of the property. A true and correct copy of that document is attached to the Complaint in this matter as Exhibit B. The legal description attached to the Deed of Trust contains a proper metes and bounds description and also makes reference to a 2003 Fairmont 8028 mobile home with HUD certification 1388320 1388321 and VIN MY0457930ABK. Said Deed of Trust was recorded on June 23, 2015, in Book 542, at Page 626, in the office of the Clerk of the Brooke County Commission. There is no dispute that the recording of the Deed of Trust perfected a security interest in the real estate. The dispute is whether the manufactured home is part of the real estate and so whether the Deed of Trust perfects the lien on that component of property.
>
> The West Virginia Division of Motor Vehicles issued two titles for the 2004 double wide bearing VINs MY04579320AK and MY04579320BK, respectively. No lien is on record on the titles according to the records of the West Virginia Division of Motor Vehicles. The titles remain active and have not been cancelled pursuant to the procedure set forth in [W. Va.] Code § 17A-3-12B. The DMV-2-TR form, used to implement the aforesaid section of the West Virginia Code, has not been filed with the West Virginia Division of Motor Vehicles nor recorded in the office of the Clerk of the Brooke County Commission.
>
> For purpose of the Certification of Legal Question and the pending Motion for Summary Judgment, MERS and WEI [Mortgage] contend the manufactured home is physically affixed to the real estate for all intents and purposes. The Trustee does not contest that contention at this time.

II. STANDARD OF REVIEW

[1] Consistent with our de novo review of questions certified by a circuit court,[3] "[t]his Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court."[4]

III. DISCUSSION

*****3** We begin by paring down the certified question into the basic inquiry that ultimately resolves the dispute: is the manufactured home personalty or has it been legally converted to real property? Given the parties' ****772** ***109** stipulations, if the manufactured home is personalty (i.e., still a "vehicle"), WEI Mortgage does not have a secured interest in it because it has not complied with the lien perfection procedures contained in West Virginia Code § 17A-4-3; but, if it is real property, the deed of trust suffices to perfect WEI Mortgage's security interest. That much is beyond dispute of these particular parties. The complicated inquiry is ascertaining the means by which the legal character of a manufactured home may be converted from personalty to real estate. And, more pointedly, whether there is more than one way. The answer to that question alone dictates the perfection requirements under these stipulated facts.

[2] Property, generally speaking, is either real or personal; real property includes both the land and things affixed to that land.[5] Manufactured homes, by virtue of requiring title under our Motor Vehicle Code,[6] are considered personal property until they are affixed to the land. To answer the question we've been tasked with, we analyze whether manufactured homes become affixed to the land—and are thereby converted from personal to real property for legal purposes—when they meet the common law requirements for affixation as espoused by this Court, or when the homeowner complies with the statutory scheme to cancel title under the Motor Vehicle Code.

So, we analyze two apparently competing schemes which may serve to convert the legal character of a manufactured home from personalty to real estate: the common law scheme and the statutory scheme. The common law scheme is derived from *Snuffer v. Spangler*.[7] In that 1917 case, this Court set forth three factors that determine whether personal property used in connection with real estate becomes part of the realty:

> From the foregoing authorities we conclude that personal property used in connection with real estate is fixtures and part of the realty, when the following conditions concur: First, [i]t must be attached to the real estate, and by this we do not mean that it has to become so attached as to do serious damage to the realty, or to the property itself in order to remove it, but that it must be so attached as that the two, the real estate and the fixtures, work together to one end; second, it must be reasonably necessary and adapted to the purposes for which the real estate is being used; and, third, it must be the intention of the party placing such property upon the real estate to make it a part thereof. If the first two of these elements concur–that is, its attachment to the real estate and it adaptability to the purposes for which the real estate is being used–it will be presumed that the party attaching it intended that it should be a part of the real estate, unless a contrary intention appears from the conduct of the parties in relation to it.[8]

But, *Snuffer* is an old case. Since then, the Uniform Commercial Code (UCC)[9] and the Motor Vehicle Code[10] have been enacted. The Bankruptcy Trustee argues that the scheme derived from these statutes has abrogated the applicability of *Snuffer* in the context of manufactured homes, and that the procedures of the Motor Vehicle Code are now the exclusive means by which a manufactured home may be converted to real property such that a lien could be perfected by deed of trust.

Specifically, West Virginia Code § 46-9-303 (2000), part of the UCC, relates to "perfection and priority of security interests in goods covered by a certificate of title" and addresses first at subsection (b) how goods are covered by a certificate of title:

> ***4** *When goods covered by certificate of title.* Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. **773 *110 Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

And, at subsection (c), addresses choice of law:

> *Applicable law.* The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

This choice of law provision simply states that the law of the local jurisdiction that issues the certificate of title for goods governs lien perfection on those goods.[11] Bankruptcy Trustee argues that under the UCC, the Motor Vehicle Code provisions are controlling, and exclusive, as far as they dictate a procedure for cancelling manufactured home titles when they become affixed to real estate to allow for conversion of the legal character by operation of statute, and conversely reinstate DMV title when the manufactured home becomes unaffixed. That code provision, West Virginia Code § 17A-3-12b, states:

> (a) The commissioner may cancel a certificate of title for a mobile or manufactured home affixed to the real property of the owner of the mobile or manufactured home. The person requesting the cancellation shall submit to the commissioner an application for cancellation together with the certificate of title. The application shall be on a form prescribed by the commissioner. The commissioner shall return one copy of the cancellation certificate to the owner and shall send a copy of the cancellation certificate to the clerk of the county commission to be recorded and indexed in the same manner as a deed, with the owner's name being indexed in the grantor index. The commissioner shall charge a fee of $10 per certificate of title canceled. The clerk shall return a copy of the recorded cancellation certificate to the owner, unless there is a lien attached to the mobile or manufactured home, in which case the copy of the recorded cancellation certificate shall be returned to the lienholder. Upon its recording in the county clerk's office, the mobile or manufactured home shall be treated for all purposes as an appurtenance to the real estate to which it is affixed and be transferred only as real estate and the ownership interest in the mobile or manufactured home, together with all liens and encumbrances on the home, shall be transferred to and shall encumber the real

property to which the mobile or manufactured home has become affixed.

(b) The commissioner shall reinstate and reissue any title for a mobile home or manufactured home which was previously titled in this state and for which the title was canceled pursuant to this section when the owner of the mobile or manufactured home seeks to sever the home from the real property and applies for a certificate of title in accordance with the provisions of this section. For purposes of this subsection, "owner" means the owner, secured lender of foreclosed or surrendered property, owner of real property who takes possession of an abandoned manufactured home on the property or other person who has the legal right to the manufactured home through legal process.

*****5** (1) The owner shall file with the clerk of the county commission where the real property is located an affidavit that includes or provides for all of the following information:

(A) The manufacturer and, if applicable, the model name of the mobile or manufactured home;

(B) The vehicle identification number and serial number of the mobile or manufactured home;

(C) The legal description of the real property on which the mobile or manufactured home is or was placed, stating that the ****774** ***111** owner of the mobile home or manufactured home also owns the real property;

(D) Certification that there are no security interests in the mobile home or manufactured home that have not been released by the secured party; and

(E) A statement by the owner that the home has been or will be physically severed from the real property.

(2) The owner must submit the following to the commissioner:

(A) A copy of the affidavit filed in accordance with subdivision (1) of this subsection; and

(B) Verification that the manufactured home has been severed from the real property. Confirmation of severance by the assessor where the real property is located is acceptable evidence that the unit has been severed from the real property.

(3) Upon receipt of the information required in subdivision (2) of this subsection, together with a title application and required fee, the commissioner shall issue a new title for the manufactured home.

[3] It is undisputed that the Debtors in this case did not apply to have their certificate of title cancelled under these provisions. So, Bankruptcy Trustee argues that the property was never converted to real property so as to permit WEI Mortgage to perfect its security interest by the deed of trust. And, because the manufactured home remains personal property (a "vehicle" under the Motor Vehicle Code), the deed of trust cannot perfect a security interest in the manufactured home because WEI Mortgage did not comply with West Virginia Code § 17A-4A-3 by causing a lien to be listed on the motor vehicle title.[12]

Bankruptcy Trustee does not dispute that the manufactured home at issue in this case satisfies the requirements of *Snuffer*. And, Bankruptcy Trustee does not appear to dispute that under the common law scheme of conversion, the manufactured home is real property and the deed of trust would suffice to perfect WEI Mortgage's lien.[13] Bankruptcy Trustee's argument, rather, is that the common law, as it pertains to manufactured home titles and liens thereon, has been abrogated because the Legislature enacted a procedure to cancel a title to a manufactured home.

*****6** In other words, Bankruptcy Trustee argues that the existence of the statutory procedure to cancel a title to a manufactured home and convert it to real property definitively provides the *only* means by which manufactured homes may be converted from personalty to real property. It follows, according to the Bankruptcy Trustee, that the perfection of a lien on a manufactured home may *only* be made through notation on the face of the DMV certificate of title under West Virginia Code § 17A-4A-3 if the titleholder has not cancelled the title under § 17A-3-12b(a).

We do not read that statute so restrictively. Notably absent from § 17A-3-12b is any explicit statement of exclusivity.[14] Likewise, we grasp at straws to read into the statute an *implicit* indication that the Legislature intended this title cancellation procedure to be the exclusive means of converting a manufactured home from personal to real property.

Our statute provides that a manufactured homeowner may *request* a cancellation of title, which the commissioner *may*

cancel and, if approved, the property will be treated as real estate for all purposes. It does not provide that the manufactured home is personal property unless and until the application is approved by the commissioner. Compare our ****775** ***112** cancellation statute with North Carolina's. N.C. Gen. Stat. § 20-109.2(a) (2016) provides,

> If a certificate of title has been issued for a manufactured home, the owner listed on the title has the title, and the manufactured home qualifies as real property as defined in G.S. 105-273(13), the owner listed on the title shall submit an affidavit to the Division that the manufactured home meets this definition and surrender the certificate of title to the Division.

Even that statute's *shall* submit and surrender scheme has not been held to be exclusive: "[t]he lack of surrender of the MH Title and the lack of filing of an affidavit is not conclusive evidence that the provisions of N.C. Gen. Stat. § 105-273(13) have not been met. That determination must be made by a review of the evidence and an analysis of the case law."[15]

Our title cancellation statute has been examined in two cases, and neither found the cancellation procedure to be the exclusive means of converting a manufactured home from personal to real property. In *Sanders v. Brown*, this Court examined a conveyance of real estate where it was disputed whether the manufactured home had been conveyed with the land given the failure to cancel title pursuant to West Virginia Code § 17A-3-12b.[16] We reasoned that there was "no error in the circuit court's refusal to find that West Virginia Code § 17A-3-12b (2004) is dispositive[,]" applied *Snuffer*, and affirmed the circuit court's order that the manufactured home was affixed to the land.[17] Granted, in that case, the facts involved a familial dispute rather than perfection of a lien by a creditor. But, we nonetheless find it instructive here because, given the stipulations of the parties, the certified question is dependent only upon the legal character of the manufactured home as real or personal property, not the commercial character of the encumbrance.

In 2017, the Bankruptcy Court of the Southern District of West Virginia looked at this issue in a similar context to the case before us, and also applied *Snuffer* in evaluating the legal character of a manufactured home.[18] In that case, the bankruptcy debtors (Weikles) were arguing against the validity of a deed of trust. The bankruptcy court in *Weikle* applied the common law rule after considering the lack of statutory authority.[19] Specifically, the bankruptcy court discussed that "[t]he Weikles appear to assert that, inasmuch as they did not cancel their manufactured home vehicle title in accordance with a West Virginia statute, the home necessarily could not be a fixture."[20] In rejecting that argument, the bankruptcy court concluded that West Virginia Code § 17A-3-12b(a) "speaks only to the condition precedent to canceling a certificate of title on a manufactured home and the consequences resulting[,]" and that if the Legislature intended the categorical and far-reaching result advocated by the Weikles, "it would have unquestionably used more sweeping language."[21]

*****7** The *Weikle* court also found the corresponding tax provisions telling:

> a corresponding measure, West Virginia Code section 11-5-12, provides that a "mobile home" permanently attached to the owner's real estate may not be classified as personal property if the owner has complied with section 17A-3-12b(a). The immediately preceding observation by the Court concerning the Legislature's approach applies to this measure as well. Additionally, section 17A-3-12b(a) offers no guidance concerning whether a manufactured home becomes a fixture to the land for all purposes. This appears so inasmuch as the statute, like its many counterparts in Chapter 11 of the West Virginia Code, are ****776** ***113** concerned only with the proper levy and collection of tax revenue.[22]

And, it ultimately concluded in light of these statutes, that "[t]hese provisions, whether apart or in combination do not purport to prescribe the only means by which a manufactured home becomes part of an owner's real property."[23] It certainly would have been a simpler analysis to state that if the DMV title had been cancelled, the manufactured home is considered real property; and if it had not been cancelled, it was still personal property.

A review of the legislative materials leading to the enactment and amendments to West Virginia Code § 17A-3-12b do not persuade us to find exclusivity either. Rather, the legislative history indicates the Legislature's intent to clarify that, if the cancellation procedures were met, manufactured homes may *not* be treated as personal property for legal purposes, presumably taxation and DMV fees.[24] That is a marked distinction from a legislative intent that manufactured homes

may *only* be affixed and legally considered real property if the homeowner complies with the cancellation procedures.

And, while taxation of property is its own beast, we do find the tax provision § 11-5-12 helpful as far as it references and sheds light on § 17A-3-12b. That code provision states, "[a] mobile home permanently attached to the real estate of the owner may not be classified as personal property if the owner has filed a canceled certificate of title with the clerk of the county commission and the clerk has recorded it in the same manner as deeds are recorded and indexed." The Legislature, in enacting § 11-5-12 to the tax code with reference to the cancellation procedures, clearly provided that if a manufactured home is attached to the real estate of the owner and that homeowner complies with the cancellation statute, the manufactured home *may not* be assessed as personal property. Implicit in that rule is that if a homeowner does not comply with the title cancellation procedures, the manufactured home may still be taxed as either real or personal property at the discretion of the assessor – and, as a practical matter, it is often taxed as real property.[25] The taxation of manufactured homes as real property underscores the lack of exclusivity in this statute. If the Legislature had intended an exclusive conversion scheme, § 11-5-12, in corresponding with § 17A-3-12b(a) would provide that manufactured homes are taxed as personal property and *only* as personal property unless and until the homeowner complied with the cancellation procedure because until that point, it could not be considered real property for legal purposes.

*****8** We conclude that given the statute's language that compliance with the cancellation procedure alters the legal character for all purposes, the Legislature contemplated that it would be one mechanism by which a manufactured home may be converted from personal to real property. Bankruptcy Trustee appears to advocate that the procedure is ****777** ***114** exclusive purely because it exists. But, for the reasons set forth above, we decline to adopt that view given the language employed, and conversely, not employed, by the Legislature in drafting this statute, and disagree that the statute provides the exclusive means to accomplish conversion of a manufactured home to real property.

However, Bankruptcy Trustee raises important policy concerns: the efficiency and transparency of a single titling system which, undoubtedly, would serve to benefit lenders and bona fide purchasers alike, not to mention the correlative lowering of costs associated with lending, and the ever-alluring benefit of circumventing litigation. Those concerns do not fall on deaf ears; we simply find that if this statutory scheme were enacted, as Bankruptcy Trustee suggests, to accomplish an *exclusive* means of conversion for manufactured homes, it fails in that purpose. And, we believe the exclusivity of the cancellation statute should be made plain before we may apply it as such. Had the Legislature intended such a strict application, it would have said so.

As it stands, the cancellation statute provides manufactured homeowners with the means to have their manufactured home declared real property, to the exclusion of personal property, by operation of statute. From a practical perspective, we believe that process is the preferable, but not exclusive means to convert a manufactured home property to real property. The statutory scheme provides notice to creditors that the property may not be considered personal property and provides a single means to perfect a lien, and for those reasons dissuades litigation. A manufactured home may also be converted to real property by operation of common law, but reaching that result may require costly litigation, which is a risk associated with the failure to apply for cancellation of title under § 17A-3-12b(a). So, a lender who does not require compliance with the statutory cancellation procedure or neglects to complete a DMV title search before encumbering a manufactured home does so at its own risk. In other words, the lender who encumbers a manufactured home as though it is real property in the eyes of the law risks that its priority may be usurped if, through litigation, the manufactured home is deemed unaffixed under the common law or there is a prior lien on the motor vehicle title.

[4] Under the stipulation of these parties as presented to this Court, the perfection of a security lien in the manufactured home at issue rests on its legal classification as real or personal property. We therefore hold that satisfying the requirements of *Snuffer v. Spangler*, 79 W. Va. 628, 92 S.E. 106 (1917), converts the legal character of a manufactured home from personal to real property such that a lien on that property may be perfected by deed of trust even if the homeowner has not cancelled title under the provisions of West Virginia Code § 17A-3-12b(a). Accordingly, we answer the certified question in the affirmative.

IV. CONCLUSION

For the foregoing reasons, we answer the question certified by the Bankruptcy Court for the Northern District of West Virginia in the affirmative.

Certified Question Answered.

CHIEF JUSTICE ARMSTEAD and JUSTICE WORKMAN dissent and reserve the right to file separate opinions.

Workman, Justice, dissenting:

The majority's holding that allows a security interest for a lien on a manufactured home to be perfected by "[s]atisfying the requirements of *Snuffer v. Spangler*, 79 W. Va. 628, 92 S.E. 106 (1917)[ ]" is in direct conflict with, and ignores, the Legislature's establishment of a single means to perfect such security interest. Specifically, under the Uniform Commercial Code, West Virginia Code § 46-9-303 (2007) and West Virginia Code § 46-9-311(b) (2007 & Supp. 2020), where the manufactured home is registered with and has a certificate of title issued by the West Virginia Division of Motor Vehicles ("DMV"), the sole means of perfecting a security interest in a manufactured home against third parties is to have the lien placed on the vehicle's certificate of title pursuant to West Virginia Code § 17A-4A-1 (2017). In this case, despite the ****778** ***115** respondent creditors'[1] (hereinafter "the respondents") argument that their lien interest in the manufactured home was perfected by the recording of a Deed of Trust referencing the property "together with all improvements erected on the property and fixtures that are a part of the property[,]"[2] the respondent simply failed to follow the applicable statutes discussed in greater detail *infra.* This failure to properly record their lien interest in the manufactured home on the certificates of title[3] was fatal to the respondents' claim that they have any perfected security interest under the salient statutes. As such, they are not entitled to a superior priority as a creditor in the bankruptcy proceeding.

*****9** To find otherwise, as the majority has done, allows the respondents, who are sophisticated lenders, to benefit from their failure to follow the legislatively prescribed methods for lien perfection on a manufactured home. The result will necessarily increase the transaction costs for other parties, including consumers, engaging in these types of transactions because rather than searching for a lien in the place prescribed by the statute, a search will also have to be conducted in other locations where a lien might be recorded.

A fundamental precept of any secured transaction is that for a lender to acquire a valid interest in collateral against third parties, the claim against the collateral must be perfected.[4] To ascertain the appropriate means for perfecting a lien interest against collateral one must determine the type of collateral at issue, which, in this case, is a double wide manufactured home.

Critical to any analysis of whether a perfected security interest exists on this manufactured home is the fact that certificate of titles were issued by the DMV for the double wide manufactured home.[5] For purposes of perfecting a security interest in goods covered by a certificate of title, under the UCC,[6] "[e]xcept as otherwise provided in sections 9-303 through 9-306, the following rules *determine the law governing perfection, the effect of perfection or nonperfection and the priority of a security interest in collateral*...." W. Va. Code § 46-9-301 (2007). Specifically, West Virginia Code § 46-9-303 "applies to goods covered by a certificate of title" and provides:

> (b) **When goods covered by certificate of title**. Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. ****779** ***116** Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.
>
> (c) **Applicable law**. *The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.*

*****10** (Some emphasis added). The majority's examination of the applicable UCC provisions ends here.

The majority fails to examine West Virginia Code § 46-9-311(b) (2020 Supp.), which provides that "a security interest in property subject to a statute, regulation or treaty described in subsection (a)[7] *may be perfected* ***only*** *by compliance with those requirements*, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral." (emphasis

and footnote added). Neither party cited, discussed or relied upon this statute; however, its unequivocal meaning is that the failure to follow the relevant statutory requirements for perfecting a security interest is fatal to the perfection. The majority's decision that complying with these statutory provisions was not the exclusive means for perfection of a security interest is legally incorrect.

Following the directive of the UCC, *see* W. Va. Code § 46-9-311(b), in examining the specific statutes that govern perfecting a security interest in a manufactured home, our focus turns to the provisions of West Virginia Code § 17A-4A-1 to -16 (2017), entitled "Liens and Encumbrances on Vehicle to be Shown on Certificate of Title; Notice to Creditors and Purchasers."[8] West Virginia Code § 17A-4A-1 requires the DMV to show all liens and encumbrances on the face of any certificate of title it issues as follows:

> *The division upon receiving an application for a certificate of title to a* vehicle, trailer, semitrailer, pole trailer, *factory-built home* or recreational vehicle *for which a certificate of title is required under article three of this chapter*, all of which are hereinafter in this article referred to as vehicles, *showing liens or encumbrances upon the vehicle*, *shall*, upon issuing to the owner thereof a certificate of title therefor, *show upon the face of the certificate of title all liens or encumbrances disclosed by the application.*

(Emphasis added). West Virginia Code § 17A-4A-4(a) further establishes that

> [a] purchase money lien or encumbrance upon any vehicle *shall be perfected on the date and at time of delivery to the division of motor vehicles of either the application for a certificate of title with all supporting documents, or a completed notice of lien form in a format determined by the division.*

(Emphasis added).

*****11** According to West Virginia Code § 17A-4A-3(a) and (b):

> a) *A certificate of title, when issued by the division showing a lien or encumbrance, shall be considered from and after the filing with the division of the application therefor or the notice of lien authorized in section four of this article adequate notice* to the state and its agencies, boards and commissions, to the United States government and its agencies, boards and commissions, ****780** ***117** *to creditors and to purchasers that a lien against the vehicle exists.*
>
> (b) Notwithstanding any other provision of this code to the contrary, and subject to the provisions of subsection (c) of this section, any lien or encumbrance placed on a vehicle by the voluntary act of the owner shall be void as against: (i) Any lien creditor who, without knowledge of the lien, acquires by attachment, levy or otherwise a lien thereupon, *unless the lien or encumbrance is noted on the certificate of title*, a filed application for certificate of title or the notice of lien authorized in section four of this article; and (ii) any purchaser who, without knowledge of the lien or encumbrance, purchases the vehicle, *unless the lien or encumbrance is noted on the certificate of title*, a filed application for certificate of title or the notice of lien authorized in section four of this article: Provided, That a purchaser under this subsection who purchases the vehicle without knowledge of the lien or encumbrance and contemporaneously obtains actual physical possession of the vehicle and the certificate of title for the vehicle *without the lien or encumbrance noted on the certificate of title*, receives the vehicle free and clear of the lien or encumbrance.

(Emphasis added).

The import of the foregoing statutory language is that the only way to perfect a secured interest in a lien on a manufactured home is through a certificate of title issued by the DMV showing the lien, which provides "adequate notice to ... creditors and to purchasers that a lien against the vehicle exists." *Id.; see In re Johnson*, 105 B.R. 352, 356 (Bkrtcy.S.D.W.Va. 1989) (finding that a mobile home was a "motor vehicle" within the meaning of West Virginia title registration statutes and holding that "*the sole effective means of perfecting a security interest in such a mobile home against third parties is to have the lien placed on the vehicle's certificate of title pursuant to § 17A-4A-1*.") (emphasis added)). When a lien is perfected according to the relevant DMV statutes, it has priority over all other liens involving the vehicle. *See* W. Va. Code § 17A-4A-5 (2017) (declaring that "[t]he *liens shown upon a certificate of title* issued by the department pursuant to applications for same *shall have priority over any other liens against such vehicle*, *however created and recorded*, except as otherwise provided in this article." (emphasis added)); *see also Ford Motor Credit Co., LLC v. Hicks*, No. 5:10-cv-00811, 2012 WL 1906419, at *9 (S.D. W. Va. May 25, 2012) (district court, on review of bankruptcy court decision, recognized that "[w]ith *respect to perfection*, *goods covered by a certificate of title, like the motor vehicle in this case, 'become covered by a certificate of title when a valid application for the certificate of title and the*

applicable fee are delivered to the appropriate authority.' W. Va. Code § 46-9-303(b); *see also* W. Va. Code §§ 46-9-309(1), 46-9-311(a).") (emphasis added).

*****12** Having established that there is only one way to perfect a security interest in a lien on a manufactured home, the question becomes: what occurs when the manufactured home becomes affixed to real property? That this can and does occur was contemplated by the Legislature when it enacted West Virginia Code § 17A-3-12b(a). The statute provides, in relevant part:

> The commissioner may cancel a certificate of title for a mobile or manufactured home affixed to the real property of the owner of the mobile or manufactured home. The person requesting the cancellation shall submit to the commissioner an application for cancellation together with the certificate of title.... The commissioner shall return one copy of the cancellation certificate to the owner and shall send a copy of the cancellation certificate to the clerk of the county commission to be recorded and indexed in the same manner as a deed, with the owner's name being indexed in the grantor index.... The clerk shall return a copy of the recorded cancellation certificate to the owner, unless there is a lien attached to the mobile or manufactured home, in which case the copy of the recorded cancellation certificate shall be returned to the lienholder. Upon its recording in the county clerk's office, the mobile or manufactured home shall be treated for all purposes as an appurtenance to the real estate to which it is affixed and be transferred only as real ****781** ***118** estate and the ownership interest in the mobile or manufactured home, together with all liens and encumbrances on the home, shall be transferred to and shall encumber the real property to which the mobile or manufactured home has become affixed.

By providing for the cancellation of the certificate of title, the Legislature provided a way for personal property, i.e., a manufactured home affixed to real property, to cease being treated as personal property under the DMV statutes, and instead to be treated as real property governed by the rules for securing liens to real estate. *See* W. Va. Code § 38-1-1a (2011) (providing for deed of trust used for lien on real estate) and W. Va. Code § 40-1-9 (2019) (providing that deeds of trust are invalid as to creditors and subsequent purchasers for valuable consideration until recorded). Had the certificate of title issued by the DMV been cancelled, there would be no question that lien interest in the manufactured home could have been secured by the relevant Deed of Trust – but these are not the facts in the instant case.

*****13** Here, there was no compliance (or even attempted compliance) by the respondents with any of the foregoing statutes. The certificates of title issued on the manufactured home remain active, having never been cancelled. The majority ignores the respondents' lack of compliance, choosing to embrace the respondents' argument that they did not comply with these statutes for three reasons. First, the respondents argue that there is no statute that specifically provides that following the statutory scheme embraced in the UCC and DMV statutes is the sole way to perfect a security interest in a manufactured home. This argument wholly disregards W. Va. Code § 46-9-311(b), which provides, in no uncertain terms, that "a security interest in property subject to a statute ... described in subsection (a) [which includes manufactured homes] *may be perfected only by compliance with those requirements* ...." (Emphasis added).

Second, the respondents contend in a rather circular argument that because the manufactured home is physically affixed to real estate it is no longer a "vehicle" as defined by West Virginia Code § 17A-1-1. This argument, however, completely overlooks the facts in this case that two certificates of title were issued on the manufactured home, no liens were ever recorded on the certificates of title, and both certificates of title remain active, having never been cancelled. *See* W. Va. Code § 17A-3-12b. According to the respondents, none of these facts matter. The respondents essentially argue that the entire statutory scheme for perfecting a lien on the double wide manufactured home can be wholly disregarded simply by affixing the manufactured home to real property, because then the manufactured home is no longer a "vehicle" and, presumably, the DMV certificates of title magically disappear.

Third, the respondents contend that because West Virginia Code § 17A-3-12b provides that "[t]he [DMV] commissioner *may* cancel a certificate of title for a mobile or manufactured home affixed to the real property of the owner of the mobile or manufactured home[,]" suggests that "the process is optional while the reference to a manufactured home already 'affixed' to real estate indicates that cancellation of the title is not necessary for affixing a manufactured home to real estate." This very narrow reading of the statute is premised upon the respondents' assumption that

> [i]f notation of a lien on a certificate of title is not required for perfection of a security interest in a manufactured home that is not a vehicle as defined by WV Code § 17A-1-1(a), it follows that cancellation of the certificate of title under WV Code § 17A-3-12b(a) is not required for the manufactured home to be affixed.

However, this assumption clearly ignores the express language of West Virginia Code § 17A-3-12b and the UCC provisions governing perfection of a security interest in such property.

It is unfortunate that the majority chooses to embrace the respondents' arguments that the statutory law in West Virginia does not dictate only one means for perfecting a security interest in a manufactured home. Relying upon case law from 1917 to rectify the respondents' failings, the majority adopts the respondents' argument that the manufactured ****782** ***119** home can also be considered affixed to the real estate through application of West Virginia common law as set forth in *Snuffer*. *See* 79 W. Va. 628, 92 S.E. 106. Thus, according to the majority, a security interest in a lien on a manufactured home affixed to the real estate can also be secured by the recording the deed of trust under common law.

In *Snuffer*, decided long before enactment of the UCC and the DMV statutes, the Court developed the following test in order to determine whether certain machinery located on property in Raleigh County and used in the operation of a woolen factory was part of the real estate or "mere personal chattel":

> *****14** we conclude that personal property used in connection with real estate is fixtures and part of the realty, when the following conditions concur: First[,] [i]t must be attached to the real estate, and by this we do not mean that it has to become so attached as to do serious damage to the realty, or to the property itself in order to remove it, but that it must be so attached as that the two, the real estate and the fixtures, work together to one end; second[,] [i]t must be reasonably necessary and adapted to the purposes for which the real estate is being used; and, [t]hird[,] [i]t must be the intention of the party placing such property upon the real estate to make it a part thereof. If the first two of these elements concur—that is, its attachment to the real estate and it adaptability to the purposes for which the real estate is being used—it will be presumed that the party attaching it intended that it should be a part of the real estate, unles[s] a contrary intention appears from the conduct of the parties in relation to it.

Id. at 634, 637-38, 92 S.E. at 109 and 110.[9]

The problem with the majority's reliance upon *Snuffer* to resolve the current issue is that neither *Snuffer*, nor the *Sanders* memorandum decision referenced *infra*, involved perfection of a secured interest, i.e. a secured transaction. Undoubtedly the principles enunciated by the Court in *Snuffer* are still viable where the issues do not involve areas expressly governed by specific statutes, in this case the UCC and DMV statutes concerning perfection and priority of a security interest in a manufactured home. However, this Court has consistently held that "[i]t has been a mainstay of Anglo-American jurisprudence that the common law gives way to a specific statute that is inconsistent with it; when a statute is designed as a revision of a whole body of law applicable to a given subject, it supersedes the common law." *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995). It is clear that the common law has been superceded by the statutes as discussed *supra.* Therefore, the majority's holding, excusing respondents' noncompliance with the statutory scheme for perfecting a security interest in a manufactured home affixed to real estate, undermines relevant UCC and DMV statutes and is plainly wrong.

For the foregoing reasons, I respectfully dissent, and I have been authorized to state that Chief Justice Armstead joins me in dissenting from the majority's decision.

All Citations

244 W.Va. 106, 851 S.E.2d 769, 2020 WL 7222454

Footnotes

1 The terms "double wide," "mobile home," and "manufactured home" are used synonymously. To the extent possible, we use the term "manufactured home." Nothing in this opinion is intended to affect manufactured homes situated on land owned by someone other than the owner of the manufactured home.

2 Under 11 U.S.C. § 544(a)(3) and 11 U.S.C. § 544(a)(2), at the time of the filing of the bankruptcy petition, the Bankruptcy Trustee is afforded the status of a bona fide purchaser for value concerning real estate assets, and a judicial lien creditor concerning personalty.

3 *See* Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996) ("The appellate standard of review of questions of law answered and certified by a circuit court is *de novo.*").

4 Syl. Pt. 1, *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999). *See also*, Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998) ("A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.").

5 *See* Real Property, Black's Law Dictionary (11th ed. 2019). *See also* Mixed Property, Black's Law Dictionary (11th ed. 2019).

6 *See* W. Va. Code § 17A-3-12.

7 79 W. Va. 628, 92 S.E. 106 (1917).

8 *Id.* at 632, 92 S.E. at 110.

9 West Virginia Code §§ 46-1-101, *et seq.*

10 West Virginia Code §§ 17A-1-1, *et seq.*

11 The comments to § 46-9-303 confirm that subsection (c) is "the basic choice-of-law rule" relating to the *governing jurisdiction* as opposed to a substantive rule.

12 West Virginia Code § 17A-4A-3(a) provides:

> A certificate of title, when issued by the division showing a lien or encumbrance, shall be considered from and after the filing with the division of the application therefor or the notice of lien authorized in section four of this article adequate notice to the state and its agencies, boards and commissions, to the United States government and its agencies, boards and commissions, to creditors and to purchasers that a lien against the vehicle exists.

13 *See* W. Va. Code § 38-1-1a (1965).

14 *Compare* Va. Stat. § 46.2-653.1 (2016): "... the provisions of this section constitute the only manner by which a manufactured home owner may convert a manufactured home to real property."

15 *In re Tillman*, 565 B.R. 586, 598 (Bankr. E.D.N.C. 2016).

16 No. 18-0017, 2018 WL 6119215, at *4 (W. Va. Nov. 21, 2018).

17 *Id.* at *5.

18 *In re Weikle*, No. 1:17-BK-10001, 2017 WL 4127994, at *2-3 (Bankr. S.D.W. Va. Sept. 13, 2017).

19 *Id.*

20 *Id.* at *3 n.3.

21 *Id.*

22 *Id.*

23 *Id.*

24 *See* W. Va. Code § 11-5-12 (2014) ("A mobile home permanently attached to the real estate of the owner may not be classified as personal property if the owner has filed a canceled certificate of title ...."). *See also*, W. Va. S.B. 574, 2014 81st Leg., Reg. Sess. (W. Va. 2014); W. Va. S.B. 320, 2004 West Virginia Legislative Wrap-Up, 5/4/2004 ("The purpose of the legislation is to provide a procedure to permit owners of mobile or manufactured homes that are affixed to the real property of the home owner to obtain cancellation of certificates of title.... In addition, the measure provides that those mobile homes permanently attached to real estate of the owner may not be classified as 'personal' property but instead, real property.").

25 *See, e.g.*, *Mobile Homes*, Fayette County, West Virginia Assessor, https://fayettecounty.wv.gov/assessor/personalproperty/Pages/Mobile-Homes.aspx ("Mobile homes are assessed as either real estate or personal property depending on the situation .... If your mobile home is located on land that you own it is considered real estate and the taxes will be included on your real estate tax bill."); *Mobile Homes as Real Property*, Berkeley County Assessor's Office, http://www.theassessor.org/mobilehomes.html ("If you own a mobile home and also own the land on which it sits, your mobile home will be assessed as real property."); *Personal Property*, Kanawha County Assessor, https://kanawhacountyassessor.com/personalproperty, ("Mobile home can be assessed as Personal Property or Real Property.... If you do own the land the mobile home is sitting on it can be assessed as Real Property.").

1 The respondent creditors are Mortgage Electronic Registration Systems, Inc., WEI Mortgage Corporation, and Seneca Trustees, Inc.

2 It is an undisputed fact for the purposes of this case that the manufactured home is physically affixed to the real estate.

3 The titles remain active and have not been cancelled pursuant to the procedure set forth in West Virginia Code § 17A-3-12b (2017), which is discussed in greater detail *infra.*

4 This Court recognized in *Daniel v. Stevens*, 183 W. Va. 95, 394 S.E.2d 79 (1990), that

> [o]ne of the purposes of the filing requirements of article 9 of the Uniform Commercial Code, like that of any recording statute, is to protect third parties by providing notice of the existing interest in the collateral to subsequent potential

> creditors of and purchasers from the debtor. *A concomitant purpose is to protect the creditor who has perfected a security interest, by giving such creditor priority over almost all subsequent third-party claimants to the collateral, because the creditor has taken action which would put a reasonably diligent searcher on notice of the prior interest in the collateral.* *Landon v. Stroud*, 147 Ariz. 208, 211, 709 P.2d 565, 568 (Ct. App. 1985), *review denied* (Ariz. Nov. 13, 1985). *See also* syl. pt. 2, *American National Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970) (framers of Uniform Commercial Code, by adopting "notice filing" system, intended to protect perfected security interests and at the same time give subsequent potential creditors and other interested persons general information and procedures adequate to enable ascertainment of factual details) ....

183 W. Va. at 100-101, 394 S.E.2d at 84-85 (emphasis added).

5 Because it was a double wide manufactured home, two separate certificates of title were issued by the DMV.

6 It is important to note that neither party argues that the statutes involved are ambiguous. This Court has held that in deciding the meaning of a statutory provision, "[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995);

7 West Virginia Code § 46-9-311(a) includes property such as manufactured homes.

8 The parties and the bankruptcy court describe the "vehicle" at issue as a "manufactured home." A "manufactured home" clearly falls within any of the following statutory definitions of a motor vehicle provided in West Virginia Code § 17A-1-1(2017 & Supp. 2020), including: a factory-built home as defined in West Virginia Code § 17A-1-1(pp); a manufactured home as defined in West Virginia Code § 17A-1-1(qq); a mobile home as defined in West Virginia Code § 17A-1-1(rr); or a house trailer as defined in West Virginia Code § 17A-1-1(ss). The respondents' suggestion that the manufactured home at issue is not a vehicle within the confines of the foregoing statutory definitions is legally untenable.

9 This Court continued to adhere to the principles of *Snuffer* recently in a memorandum decision. *See* *Sanders v. Brown*, No. 18-0017, 2018 WL 6119215 (W. Va. Nov. 21, 2018). In *Sanders*, like its predecessor *Snuffer*, the issue before the Court did not involve secured transactions and priority of secured interests in liens. Instead, the issue in *Sanders* was who owned the manufactured home that was affixed to the real estate at issue in the case.

End of Document

Mortgage Proof of Claim Attachment (12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information

Case number: _____

Debtor 1: _____

Debtor 2: _____

Last 4 digits to identify: ___ ___ ___ ___

Creditor: _____

Servicer: _____

Fixed accrual/daily simple interest/other: _____

Part 2: Total Debt Calculation

Principal balance: _____

Interest due: _____

Fees, costs due: _____

Escrow deficiency for funds advanced: _____

Less total funds on hand: − _____

Total debt: _____

Part 3: Arrearage as of Date of the Petition

Principal & interest due: _____

Prepetition fees due: _____

Escrow deficiency for funds advanced: _____

Projected escrow shortage: _____

Less funds on hand: − _____

Total prepetition arrearage: _____

Part 4: Monthly Mortgage Payment

Principal & interest: _____

Monthly escrow: _____

Private mortgage insurance: _____

Total monthly payment: _____

Part 5 : Loan Payment History from First Date of Default

		Account Activity				How Funds Were Applied/Amount Incurred						Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance

Case number: _____

Debtor 1: _____

Part 5 : Loan Payment History from First Date of Default

		Account Activity				How Funds Were Applied/Amount Incurred						Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____

Case number _____

Official Form 410S1

Notice of Mortgage Payment Change

12/15

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice _____

New total payment:
Principal, interest, and escrow, if any $ _____

Part 1: Escrow Account Payment Adjustment

1. Will there be a change in the debtor's escrow account payment?

❑ No
❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

_____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

2. Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable-rate account?

❑ No
❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

_____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Other Payment Change

3. Will there be a change in the debtor's mortgage payment for a reason not listed above?

❑ No
❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

❑ I am the creditor.

❑ I am the creditor's authorized agent.

I 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.

✘ _____ Date _____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Print Save As... Add Attachment Reset

Statement Date: 11-08-2016

Account Number [redacted]98
Escrow Balance: $433.48

Account #

For Customer Inquiries Call:

[redacted]
Fairbanks 99701

ANNUAL ESCROW ACCOUNT DISCLOSURE STATEMENT
PROJECTIONS FOR COMING YEAR 01-2017 THRU 12-2017

Calendar Year

This is an estimate of activity in your escrow account during the coming year based on payments anticipated to be made from your account.

Month/ Year	Payments To Escrow Account	Payments From Escrow Account	Description	Projected Escrow Balance
Required Starting Balance.....				776.68
01-2017	258.86	0.00		1,035.54
02-2017	258.86	0.00		1,294.40
03-2017	258.86	0.00		1,553.26
04-2017	258.86	0.00		1,812.12
05-2017	258.86	0.00		2,070.98
06-2017	258.86	0.00		2,329.84
07-2017	258.86	0.00		2,588.70
08-2017	258.86	1,186.54	Fairbanks North Star Borough	1,661.02
09-2017	258.86	733.34	USAA	1,186.54
10-2017	258.86	1,186.54	Fairbanks North Star Borough	258.86
11-2017	258.86	0.00		517.72
12-2017	258.86	0.00		776.58

Est. Escrow only with paying shortage

Expected Pymts

Under Federal Law, your lowest monthly balance should not exceed $517.74 or 2 months of the anticipated payments from escrow. We chose a low balance of $258.86 or 1/12th of anticipated payments from escrow. In order to achieve this low balance, your starting balance should be $776.68 as shown above.

Cushion

In fact, your anticipated escrow balance at the beginning of 01-2017 is $705.40. This means that you have a shortage of $71.28. This shortage may be collected from you over a period of 12 months unless the shortage is less than 1 month's deposit, in which case we have the additional option of requesting payment within 30 days. We have decided to collect it over 12 months.

Please keep this statement for comparison with the actual activity in your escrow account at the end of the escrow computation year.

Your new monthly mortgage payment for the coming year starting 01-2017 will be $863.94 of which $599.14 will be for principal and interest, and $264.80 will go into your escrow account.

Important new monthly full pymt amt. w/o paying shortage

Est. Escrow only w/o paying shortage

If you have chosen to pay the shortage, your new payment will be the $599.14 shown in the last paragraph plus the $258.86 shown in the project 2017 analysis above for a total monthly payment of $858.00.

Fairbanks AK 99701

Current year projected vs. actual.
Reason for overage or shortage

ANNUAL ESCROW ACCOUNT DISCLOSURE STATEMENT
ACCOUNT HISTORY

This is a statement of the activity in your escrow account from 01-2016 up to the beginning of your new escrow computation year - 01-2017.

Your monthly mortgage payment for the period was $871.06 of which $599.14 was for principal and interest, and $271.92 went into your escrow account.

The following compares Actual Activity to Prior Projection:

Month/ Year	Projected Payments To Escrow	Actual Payments To Escrow	Projected Payments From Escrow	Actual Payments From Escrow	From Escrow Description	Escrow Balance Projected	Escrow Balance Actual
Starting Balance						762.40	548.78
01-16	254.12	271.92	0.00	0.00*		1,016.52	820.70
02-16	254.12	543.84	0.00	0.00*		1,270.64	1,364.54
03-16	254.12	0.00	0.00	0.00*		1,524.76	1,364.54
04-16	254.12	271.92	0.00	0.00*		1,778.88	1,636.46
05-16	254.12	543.84	0.00	0.00*		2,033.00	2,180.30
06-16	254.12	0.00	0.00	0.00*		2,287.12	2,180.30
07-16	254.12	271.92	0.00	0.00*		2,541.24	2,452.22
08-16	254.12	543.84	1158.07	1186.54*	Fairbanks North Star Borough	1,637.29	1,076.18
			0.00	733.34*	USAA		
09-16	254.12	0.00	733.34	0.00*		1,158.07	1,076.18
10-16	254.12	271.92	1158.07	0.00*		254.12	1,348.10
11-16	254.12	271.92	0.00	1186.54*	Fairbanks North Star Borough	508.24	433.48
12-16	254.12	0.00	0.00	0.00*		762.36	433.48
		271.92			Anticipated		705.40

An asterisk (*) indicates a difference from a previous estimate either in the date or the amount.

On your prior statement, we anticipated that payments from your account would be made during the escrow computation year totaling $3,049.48. Under Federal Law, your lowest monthly balance should not have exceeded $508.25 or 1/6 of anticipated payments. We chose a low balance of $254.12 or 1/12th of anticipated payments from escrow.

Your low balance which was to have occurred at the end of 10-2016 exceeded this amount. The asterisks on this statement may help you identify the reason.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/16

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ☐ No
- ☐ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case. If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

- ❑ I am the creditor.
- ❑ I am the creditor's authorized agent.

I 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.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Fill in this information to identify the case:

Debtor 1 KIMBERLY DAWN ARMSTRONG

Debtor 2 (Spouse, if filing) JOSEPH ALLEN ARMSTRONG

Unites States Bankruptcy Court for the: Northern District (State)

Case Number: 16-00270

Form 4100N

Notice of Final Cure Payment

10/15

File a separate notice for each creditor.

According to Bankruptcy Rule 3002.1(f), the trustee gives notice that the amount required to cure the prepetition default in the claim below has been paid in full and the debtor(s) have completed all payments under the plan.

Part 1: Mortgage Information

Name of creditor: CALIBER HOME LOANS

Court claim no. (if known): 7-2

Last 4 digits of any number you use to identify the debtor's account 8 8 8 0

Property Address: 13 OAK FOREST TRAIL
GERRARDSTOWN, WV 25420

Part 2: Cure Amount

Total cure disbursments made by the trustee:		Amount
a. Allowed prepetition arrearage:	(a)	$ 14,513.50
b. Prepetition arrearage paid by the trustee:	(b)	$ 14,513.50
c. Amount of postpetition fees, expenses, and charges recoverable under Bankruptcy Rule 3002.1(c):	(c)	$ -0-
d. Amount of postpetition fees, expenses, and charges recoverable under Bankruptcy Rule 3002.1(c) and paid by the trustee:	(d)	$ -0-
e. Allowed postpetition arrearage:	(e)	$ 2,207.44
f. Postpetition arrearage paid by the trustee:	+ (f)	$ 2,207.44
g. **Total.** Add lines b, d, and f.	(g)	$ 16,720.94

Part 3: Postpetition Mortgage Payment

Check one

☒ Mortgage is paid through the trustee.

Current monthly mortgage payment $ 743.21

The next postpetition payment is due on 11 / 01 / 2021 (MM / DD / YYYY)

☐ Mortgage is paid directly by the debtor(s).

Debtor 1 **KIMBERLY DAWN ARMSTRONG** Case number *(if known)* **16-00270**
Name

Part 4: A Response Is Required By Bankruptcy Rule 3002.1(g)

Under Bankruptcy Rule 3002.1(g), the creditor must file and serve on the debtor(s), their counsel, and the trustee, within 21 days after service of this notice, a statement indicating whether the creditor agrees that the debtor(s) have paid in full the amount required to cure the default and stating whether the debtor(s) have (i) paid all outstanding postpetition fees, costs, and escrow amounts due, and (ii) consistent with § 1322(b)(5) of the Bankruptcy Code, are current on all postpetition payments as of the date of the response. Failure to file and serve the statement may subject the creditor to further action of the court, including possible sanctions.

To assist in reconciling the claim, a history of payments made by the trustee is attached to copies of this notice sent to the debtor(s) and the creditor.

✘ /s/ Helen M. Morris Date 09/28/2021
Signature

Trustee Helen M. Morris

Address Chapter 13 Trustee
P O Box 8535
South Charleston, WV 25303

Contact phone (304) 744-6730 Email

DISBURSEMENT HISTORY

DATE	CODE	DESCRIPTION	CREDITOR #	CHECK NO.	AMOUNT
CALIBER HOME LOANS			**Claim Number 11**		
May 27, 2016	PRSC	Principal (System Check)		0850853	737.00
Jun 29, 2016	PRSC	Principal (System Check)		0852139	737.00
Jul 28, 2016	PRSC	Principal (System Check)		0853412	737.00
Aug 30, 2016	PRSC	Principal (System Check)		0854627	727.97
Sep 28, 2016	PRSC	Principal (System Check)		0855855	727.97
Oct 28, 2016	PRSC	Principal (System Check)		0857052	727.97
Nov 22, 2016	PRSC	Principal (System Check)		0858213	727.97
Dec 22, 2016	PRSC	Principal (System Check)		0859295	727.97
Jan 30, 2017	PRSC	Principal (System Check)		0860496	727.97
Feb 27, 2017	PRSC	Principal (System Check)		0861666	727.97
Mar 30, 2017	PRSC	Principal (System Check)		0862841	727.97
Apr 21, 2017	PRSC	Principal (System Check)		0864024	727.97
May 25, 2017	PRSC	Principal (System Check)		0865053	727.97
Jun 28, 2017	PRSC	Principal (System Check)		0866289	727.97
Jul 31, 2017	PRSC	Principal (System Check)		0867463	727.97
Aug 25, 2017	PRSC	Principal (System Check)		0868599	727.97
Sep 29, 2017	PRSC	Principal (System Check)		0869761	727.97
Oct 30, 2017	PRSC	Principal (System Check)		0870963	727.97
Nov 29, 2017	PRSC	Principal (System Check)		0872119	727.97
Jan 30, 2018	PRSC	Principal (System Check)		0874277	1,455.94
Feb 27, 2018	PRSC	Principal (System Check)		0875446	727.97
Mar 28, 2018	PRSC	Principal (System Check)		0876527	727.97
Apr 27, 2018	PRSC	Principal (System Check)		0877625	727.97
May 30, 2018	PRSC	Principal (System Check)		0878722	727.97
Jun 28, 2018	PRSC	Principal (System Check)		0879882	727.97
Jul 30, 2018	PRSC	Principal (System Check)		0880921	727.97
Aug 31, 2018	PRSC	Principal (System Check)		0881995	727.97
Sep 28, 2018	PRSC	Principal (System Check)		0883050	727.97
Oct 31, 2018	PRSC	Principal (System Check)		0884083	727.97
Nov 30, 2018	PRSC	Principal (System Check)		0885173	727.97
Dec 21, 2018	PRSC	Principal (System Check)		0886239	727.97
Jan 31, 2019	PRSC	Principal (System Check)		0887162	727.97
Feb 27, 2019	PRSC	Principal (System Check)		0888243	727.97
Mar 29, 2019	PRSC	Principal (System Check)		0889245	727.97
Apr 29, 2019	PRSC	Principal (System Check)		0890326	727.97
May 31, 2019	PRSC	Principal (System Check)		0891358	727.97
Jun 26, 2019	PRSC	Principal (System Check)		0892420	727.97
Jul 31, 2019	PRSC	Principal (System Check)		0893433	727.97
Aug 28, 2019	PRSC	Principal (System Check)		0894443	727.97
Sep 30, 2019	PRSC	Principal (System Check)		0895457	727.97
Oct 31, 2019	PRSC	Principal (System Check)		0896449	727.97
Nov 26, 2019	PRSC	Principal (System Check)		0897458	727.97
Dec 30, 2019	PRSC	Principal (System Check)		0898325	760.53
Jan 29, 2020	PRSC	Principal (System Check)		0899320	760.53
Feb 27, 2020	PRSC	Principal (System Check)		0900307	760.53
Mar 24, 2020	PRSC	Principal (System Check)		0901313	760.53
Apr 29, 2020	PRSC	Principal (System Check)		0902237	760.53
Sep 28, 2020	PRSC	Principal (System Check)		0906958	1,521.06
Oct 28, 2020	PRSC	Principal (System Check)		0907821	1,521.06
Nov 25, 2020	PRSC	Principal (System Check)		0908673	1,521.06
Dec 29, 2020	PRSC	Principal (System Check)		0909543	743.21
Feb 26, 2021	PRSC	Principal (System Check)		0911299	1,486.42
Mar 30, 2021	PRSC	Principal (System Check)		0912223	743.21
Apr 27, 2021	PRSC	Principal (System Check)		0913122	743.21
May 26, 2021	PRSC	Principal (System Check)		0914012	743.21
Jun 14, 2021	PCDCC	Principal Continuing Debt - Cancelled Check		0911299	-1,486.42
Jun 29, 2021	PRSC	Principal (System Check)		0914870	743.21
Jul 29, 2021	PRSC	Principal (System Check)		0915724	743.21
Aug 27, 2021	PRSC	Principal (System Check)		0916581	743.21
Sep 29, 2021	PRSC	Principal (System Check)		0917384	2,229.63
TOTAL FOR CALIBER HOME LOANS					**47,127.73**

DISBURSEMENT TOTAL	**47,127.73**

Debtor 1 **KIMBERLY DAWN ARMSTRONG** Case number *(if known)* **16-00270**
Name

History Of Payments

Part 2 - b

Claim ID	Name	Creditor Type	Date	Check #	Posting Description	Amount
76	CALIBER HOME LOANS	Mortgage - Arrears	05/30/2018	0878722	Principal (System Check)	199.21
76	CALIBER HOME LOANS	Mortgage - Arrears	06/28/2018	0879882	Principal (System Check)	807.98
76	CALIBER HOME LOANS	Mortgage - Arrears	07/30/2018	0880921	Principal (System Check)	500.79
76	CALIBER HOME LOANS	Mortgage - Arrears	08/31/2018	0881995	Principal (System Check)	807.98
76	CALIBER HOME LOANS	Mortgage - Arrears	09/28/2018	0883050	Principal (System Check)	193.60
76	CALIBER HOME LOANS	Mortgage - Arrears	10/31/2018	0884083	Principal (System Check)	500.79
76	CALIBER HOME LOANS	Mortgage - Arrears	11/30/2018	0885173	Principal (System Check)	1,115.18
76	CALIBER HOME LOANS	Mortgage - Arrears	12/21/2018	0886239	Principal (System Check)	193.60
76	CALIBER HOME LOANS	Mortgage - Arrears	01/31/2019	0887162	Principal (System Check)	1,116.09
76	CALIBER HOME LOANS	Mortgage - Arrears	02/27/2019	0888243	Principal (System Check)	193.60
76	CALIBER HOME LOANS	Mortgage - Arrears	03/29/2019	0889245	Principal (System Check)	500.79
76	CALIBER HOME LOANS	Mortgage - Arrears	04/29/2019	0890326	Principal (System Check)	807.98
76	CALIBER HOME LOANS	Mortgage - Arrears	05/31/2019	0891358	Principal (System Check)	807.98
76	CALIBER HOME LOANS	Mortgage - Arrears	06/26/2019	0892420	Principal (System Check)	193.60
76	CALIBER HOME LOANS	Mortgage - Arrears	07/31/2019	0893433	Principal (System Check)	807.98
76	CALIBER HOME LOANS	Mortgage - Arrears	08/28/2019	0894443	Principal (System Check)	500.79
76	CALIBER HOME LOANS	Mortgage - Arrears	09/30/2019	0895457	Principal (System Check)	807.98
76	CALIBER HOME LOANS	Mortgage - Arrears	10/31/2019	0896449	Principal (System Check)	807.98
76	CALIBER HOME LOANS	Mortgage - Arrears	11/26/2019	0897458	Principal (System Check)	193.60
76	CALIBER HOME LOANS	Mortgage - Arrears	12/30/2019	0898325	Principal (System Check)	775.42
76	CALIBER HOME LOANS	Mortgage - Arrears	01/29/2020	0899320	Principal (System Check)	468.23
76	CALIBER HOME LOANS	Mortgage - Arrears	02/27/2020	0900307	Principal (System Check)	775.42
76	CALIBER HOME LOANS	Mortgage - Arrears	03/24/2020	0901313	Principal (System Check)	161.04
76	CALIBER HOME LOANS	Mortgage - Arrears	04/29/2020	0902237	Principal (System Check)	764.04
76	CALIBER HOME LOANS	Mortgage - Arrears	12/29/2020	0909543	Principal (System Check)	80.53
76	CALIBER HOME LOANS	Mortgage - Arrears	02/26/2021	0911299	Principal (System Check)	431.32
76	CALIBER HOME LOANS	Mortgage - Arrears	06/14/2021	0911299	Principal (Void)	-431.32
76	CALIBER HOME LOANS	Mortgage - Arrears	06/29/2021	0914870	Principal (System Check)	431.32
					Total for Part 2 - b:	**14,513.50**

Part 2 - f

Claim ID	Name	Creditor Type	Date	Check #	Posting Description	Amount
77	CALIBER HOME LOANS	Mortgage - Post Petition Gap	11/22/2016	0858213	Principal (System Check)	727.97
77	CALIBER HOME LOANS	Mortgage - Post Petition Gap	12/22/2016	0859295	Principal (System Check)	727.97
77	CALIBER HOME LOANS	Mortgage - Post Petition Gap	01/30/2017	0860496	Principal (System Check)	18.06
83	CALIBER HOME LOANS	Mortgage - Post Petition Gap	11/25/2020	0908673	Principal (System Check)	311.02
83	CALIBER HOME LOANS	Mortgage - Post Petition Gap	12/29/2020	0909543	Principal (System Check)	422.42
					Total for Part 2 - f:	**2,207.44**

CERTIFICATE OF SERVICE

I, Helen M. Morris, Chapter 13 trustee, do hereby certify that service of the foregoing **TRUSTEE'S NOTICE OF FINAL CURE** was served upon the following parties in interest on the date that this document was filed with the Court by the method shown below. Service by mailing a true copy via U.S. First Class mail with postage pre-paid:

KIMBERLY DAWN ARMSTRONG
JOSEPH ALLEN ARMSTRONG
199 TIPPERARY TRAIL
GERRARDSTOWN, WV 25420

BRIAN J. MCAULIFFE
LAW OFFICE BRIAN J. MCAULIFFE
142 N. QUEEN STREET.
MARTINSBURG, WV 25401

CALIBER HOME LOANS, INC.
13801 WIRELESS WAY
OKLAHOMA CITY, OK 73134-2500

CALIBER HOME LOANS, INC.
PO BOX 24330
OKLAHOMA CITY, OK 73124

Those parties who requested electronic service by filing notice with the Clerk's office were served by electronic transmission.

/s/Helen M. Morris
Helen M. Morris, Trustee
State Bar NO. 2637
Meagan McClure, Staff Attorney
State No. No. 13249
Chapter 13 Trustee
P.O. Box 8535
South Charleston, WV 25303
(304) 744-6730

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:
KIMBERLY DAWN ARMSTRONG
JOSEPH ALLEN ARMSTRONG

CASE NO. 16-00270
CHAPTER 13

ORDER FINDING LONG TERM DEBT WITH CALIBER HOME LOANS TO BE CURRENT AND ALL DEFAULTS ARE CURED

This day came the Trustee and pursuant to 11 U.S.C. §§1328(a), 1322(b) (5) and Rule 3002.1 and gave notice that the debtors' mortgage with **CALIBER HOME LOANS,** hereinafter referred to as "Creditor" is current. In support of the notice, the Trustee attached documentation consisting of check registers showing payments made to **CALIBER HOME LOANS** in the sum of **$49,335.17** on the on-going mortgage obligation. The Trustee has paid pre-petition arrearages in the amount of **$14,513.50** which represents the full amount of pre-petition arrears from CALIBER HOME LOANS' proof of claim. The Trustee's notice further asserted that she made, with available funds on hand a final payment in the amount of **$2,229.63** on the on-going as the arrearage claim has been paid in full. The Trustee asserts that said payments bring all payments on the long-term debt current and cure all defaults.

It is **ORDERED** that the debtors' long-term debt to **CALIBER HOME LOANS** is current and that all defaults have been cured including, but not limited to pre-petition arrearage, all payments which became due post- petition, all post-petition defaults and all post-petition advances, charges, expenses and fees including late fees, attorney fees, unpaid interest, inspection fees, escrow deficiencies or other costs or charges. It is further

ORDERED that the debtors are now responsible for the on-going monthly payments beginning with the November 2021 payment.

Prepared for entry by:

/s/Helen M. Morris

Helen M. Morris, Trustee
State Bar No. 2637
Meagan McClure, Staff Attorney
State Bar No. 13249
Chapter 13 Trustee
P O Box 8535
South Charleston, WV 25303
(304)744-6730

Fill in this information to identify the case:

Debtor 1 Kimberly Dawn Armstrong

Debtor 2 (Spouse, if filing) Joseph Allen Armstrong

United States Bankruptcy Court for the: Northern District of WV (State)

Case number 16-00270

Form 4100R

Response to Notice of Final Cure Payment

10/15

According to Bankruptcy Rule 3002.1(g), the creditor responds to the trustee's notice of final cure payment.

Part 1: Mortgage Information

Name of creditor: The Bank of New York Mellon, the successor to JPMorgan Chase Bank, as Trustee for CIT Home Equity Loan Trust 2002-1

Court Claim no. (if known): 7-2

Last 4 digits of any number you use to identify the debtor's account 8880

Property Address: 13 Oak Forest Trail
Number Street

Gerrardstown WV 25420
City State ZIP Code

Part 2: Prepetition Default Payments

Check one:

[X] Creditor agrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim

[ ] Creditor disagrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim. Creditor asserts that the total prepetition amount remaining unpaid as of the date of this response is: $ _____

Part 3: Postpetition Mortgage Payment

Check one:

[X] Creditor states that the debtor(s) are current with all postpetition payments consistent with §1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

The next postpetition payment from the debtor(s) is due on: December 1, 2021

[ ] Creditor states that the debtor(s) are not current on all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

Creditor asserts that the total amount remaining unpaid as of the date of this response is:

a. Total postpetition ongoing payments due: (a) $ _____

b. Total fees, charges, expenses, escrow, and costs outstanding (b) $ _____

c. **Total**. Add lines a and b: (c) $ _____

Creditor asserts that the debtor(s) are contractually obligated for the postpetition payments(s) that first became due on: _____
MM / DD / YYYY

Part 4: Itemized Payment History

Debtor 1 Kimberly Dawn Armstrong
First Name Middle Name Last Name

Case number (if known) 16-00270

If the creditor disagrees in Part 2 that the the prepetition arrearage has been paid in full or states in Part 3 that the debtor(s) are not current with all postpetition payments, including all fees, charges, expenses, escrow, and costs, the creditor must attach an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response.

- ☐ all payments received;
- ☐ all fees, costs, escrow, and expenses assessed to the mortgage; and
- ☐ all amounts the creditor contends remain unpaid,

Part 5: Sign Here

The person completing this response must sign it. The response must be filed as a supplement to the creditor's proof of claim.

Check the appropriate box:

- ☐ I am the creditor
- ☒ I am the creditor's authorized agent

I declare under penalty of perjury that the information provided in this response is true and correct to the best of my knowledge, information, and reasonable belief.

Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this response applies.

X /s/ David C Nalley
Signature

Date 10/21/2021

Print David C Nalley Title Attorney for Creditor
First Name Middle Name Last Name

Company Reisenfeld & Associates LLC

If different from the notice address listed on the proof of claim to which this response applies:

Address 3962 Red Bank Road
Number Street

Cincinnati OH 45227
City State ZIP Code

Contact Phone 1-513-322-7000 Email wvbk@rslegal.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Response to Notice of Final Cure Payment has been served on this 21st day of October, 2021 by regular U.S. Mail, postage prepaid, or by electronic filing upon the following:

Electronically via ECF Mail:

Brian J. McAuliffe, Debtor`s Counsel
mcalaw2000@aol.com

Helen M. Morris, Bankruptcy Trustee
ch13trustee@wvtrustee.org

U.S. Trustee
(Registered Address)@usdoj.gov

Via Regular U.S. Mail:

Joseph Allen Armstrong, Debtor
199 Tipperary Trail
Gerrardstown, WV 25420

Kimberly Dawn Armstrong, Debtor
199 Tipperary Trail
Gerrardstown, WV 25420

/s/ David C Nalley
David C Nalley

Federal Rules of Bankruptcy Procedure, Rule 3002.1

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

Currentness

(a) In general

This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

(b) Notice of payment changes; objection

(1) Notice

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) Objection

A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

(c) Notice of fees, expenses, and charges

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) Form and content

A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) Determination of fees, expenses, or charges

On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) Notice of final cure payment

Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) Response to notice of final cure payment

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. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) Determination of final cure and payment

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.

(i) Failure to notify

If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, 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 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.

CREDIT(S)

(Added Apr. 26, 2011, eff. Dec. 1, 2011; amended Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 26, 2018, eff. Dec. 1, 2018.)

ADVISORY COMMITTEE NOTES
2011 Adoption

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a). Subdivision (a) specifies that this rule applies only in a chapter 13 case to claims secured by a security interest in the debtor's principal residence.

Subdivision (b). Subdivision (b) requires the holder of a claim to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount at least 21 days before the new payment amount is due.

Subdivision (c). Subdivision (c) requires an itemized notice to be given, within 180 days of incurrence, of any postpetition fees, expenses, or charges that the holder of the claim asserts are recoverable from the debtor or against the debtors' principal residence. This amount might include, for example, inspection fees, late charges, or attorney's fees.

Subdivision (d). Subdivision (d) provides the method of giving the notice under subdivisions (b) and (c). In both instances, the holder of the claim must give notice of the change as prescribed by the appropriate Official Form. In addition to serving the debtor, debtor's counsel, and the trustee, the holder of the claim must also file the notice on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to any notice given under subdivision (b) or (c), and therefore the notice will not constitute prima facie evidence of the validity and amount of the payment change or of the fee, expense, or charge.

Subdivision (e). Subdivision (e) permits the debtor or trustee, within a year after service of a notice under subdivision (c), to seek a determination by the court as to whether the fees, expenses, or charges set forth in the notice are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (f). Subdivision (f) requires the trustee to issue a notice to the holder of the claim, the debtor, and the debtor's attorney within 30 days after completion of payments under the plan. The notice must (1) indicate that all amounts required to cure a default on a claim secured by the debtor's principal residence have been paid, and (2) direct the holder to comply with subdivision (g). If the trustee fails to file this notice within the required time, this subdivision also permits the debtor to file and serve the notice on the trustee and the holder of the claim.

Subdivision (g). Subdivision (g) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (f). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and also whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code. If the holder of the claim contends that all cure payments have not been made

or that the debtor is not current on other payments required by § 1322(b)(5), the response must itemize all amounts, other than regular future installment payments, that the holder contends are due.

Subdivision (h). Subdivision (h) provides a procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. Within 21 days after the service of the statement under (g), the trustee or debtor may move for a determination by the court of whether any default has been cured and whether any other non-current obligations remain outstanding.

Subdivision (i). Subdivision (i) specifies sanctions that may be imposed if the holder of a claim fails to provide any of the information as required by subdivisions (b), (c), or (g).

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i).

2016 Amendments

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor’s home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor’s principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor’s principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

2018 Amendments

Subdivision (b) is subdivided and amended in two respects. First, it is amended in what is now subdivision (b)(1) to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, what is now subdivision (b)(2) is amended to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under subdivision (b)(1). The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter--subject to a contrary court order--that if no motion has been filed on or before the day before the change is to take effect, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b)(2), leading to a suspension of the payment change, a determination that the payment change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge.

Notes of Decisions (12)

Fed.Rules Bankr.Proc. Rule 3002.1, 11 U.S.C.A., FRBP Rule 3002.1
Including Amendments Received Through 4-1-22

End of Document

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 3002.1. Chapter 13 ~~— Notice Relating to~~ Claims ~~Secured~~ Secured by a Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to a claim~~s~~ ~~(1)~~ that ~~are~~ is secured by a security interest in the debtor's principal residence~~,~~ and ~~(2)~~ for which the plan ~~provides that either~~ requires the trustee or debtor ~~will~~ to make contractual ~~installment~~ payments. Unless the court orders otherwise, the ~~notice~~ requirements of this rule cease ~~to apply~~ when an order terminating or annulling the automatic stay related to that residence becomes effective ~~with respect to the residence that secures the claim~~.

(b) NOTICE OF A PAYMENT CHANGE~~S~~; EFFECT OF AN UNTIMELY NOTICE; HOME-EQUITY LINE OF CREDIT; OBJECTION.

[1] New material is underlined in red; matter to be omitted is lined through.

(1) *Notice by the Claim Holder*. The claim holder ~~of the claim~~ shall file ~~and serve on the debtor, debtor's counsel, and the trustee~~ a notice of any change in the payment amount~~,~~ — including any change ~~that results~~ resulting from an interest-rate or escrow-account adjustment~~, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order~~. At least 21 days before the new payment is due, the notice must be filed and served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

(2) *Effect of an Untimely Notice.* If the claim holder does not timely file and serve the notice required by (b)(1), the effective date of the new payment is as follows:

(A) when the notice concerns a payment increase, on the first payment due date that is at least 21 days after the untimely notice was filed and served, or

(B) when the notice concerns a payment decrease, on the date stated in the untimely notice.

(3) *Notice of a Change in a Home-Equity Line of Credit.*

(A) *Deadline.* If the claim arises from a home-equity line of credit, the notice of a payment change shall be filed and served within one year after the bankruptcy petition was filed and then at least annually.

(B) *Contents of the Annual Notice.* The annual notice shall:

(1) state the payment amount due for the month when the notice is filed; and

(2) include a reconciliation amount to account for any overpayment or underpayment during the prior year.

(C) *Amount of the Next Payment.* The first payment due after the effective date of the annual notice shall be increased or decreased by the reconciliation amount.

(D) *Effective Date.* The new payment amount stated in the annual notice (disregarding the reconciliation amount) shall be effective on the first payment due date that is at least 21 days after the annual notice is filed and served and shall remain

effective until a new notice becomes effective.

(E) *Payment Changes Greater Than $10.* If the monthly payment increases or decreases by more than $10 in any month, the claim holder shall file and serve (in addition to the annual notice) a notice under (b)(1) for that month.

(~~2~~4) *Party in Interest's Objection*. A party in interest who objects to ~~the~~ a payment change may file a motion to determine whether the change is required to maintain payments ~~in accordance with~~ under § 1322(b)(5) of the Code. ~~If~~ Unless the court orders otherwise, if no motion is filed ~~by~~ before the day the new ~~amount~~ payment is due, the change goes into effect~~,~~ immediately ~~unless the court orders otherwise~~.

(c) ~~NOTICE OF~~ FEES, EXPENSES, AND CHARGES INCURRED AFTER THE CASE WAS FILED; NOTICE BY THE CLAIM HOLDER. The claim holder ~~of the claim~~ shall file ~~and serve on the debtor, debtor's counsel, and the trustee~~ a notice itemizing all fees, expenses, ~~or~~ and charges ~~(1)~~ that ~~were~~ the claim holder has incurred ~~in connection with the claim~~ or imposed after the ~~bankruptcy~~ case was filed~~, and (2)~~ that the claim holder asserts are recoverable against the debtor or ~~against~~ the debtor's principal residence. ~~The notice shall be served within~~ Within 180 days after ~~the date on which~~ the fees, expenses, or charges are incurred or imposed, the notice shall be served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

(d) ~~FORM AND CONTENT~~ FILING NOTICE AS A SUPPLEMENT TO A PROOF OF CLAIM. A notice ~~filed and served~~ under ~~subdivision~~ (b) or (c) ~~of this rule~~ shall

be ~~prepared as prescribed by the appropriate Official Form, and~~ filed as a supplement to ~~the holder's~~ a proof of claim and be prepared using the appropriate Official Form. The notice is not subject to Rule 3001(f).

(e) ~~DETERMINATION OF~~ DETERMINING FEES, EXPENSES, OR CHARGES. On ~~motion of~~ a party in ~~interest~~ interest's motion ~~filed within one year after service of a notice under subdivision (c) of this rule~~, the court shall, after notice and a hearing, determine whether ~~payment of~~ paying any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments ~~in accordance with~~ under § 1322(b)(5) of the Code. The motion shall be filed within one year after the notice under (c) was served, unless the party has requested and the court orders a shorter period.

~~(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder~~

~~of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.~~

(f) TRUSTEE'S MIDCASE NOTICE OF THE STATUS OF A MORTGAGE CLAIM.

(1) *Timing; Content and Service.* Between 18 and 24 months after the bankruptcy petition was filed, the trustee shall file a notice about the status of any mortgage claim. The notice shall be prepared using the appropriate Official Form and be served on:

- the debtor;

- the debtor's attorney; and
- the claim holder.

(2) *Response; Motion to Compel a Response; Objection to the Response; Court Determination.*

(A) *Deadline; Content and Service.* The claim holder shall file a response to the trustee's notice within 21 days after it is served. The response shall be prepared using the appropriate Official Form and be served on:

- the debtor;
- debtor's counsel; and
- the trustee.

(B) *Motion for an Order Compelling a Response.* If the claim holder does not timely file a response, a party in interest may move for an order compelling one.

(C) *Objection.* A party in interest may file an objection to the claim holder's response.

(D) *Court Determination.* If a party in interest objects to the response, the court shall, after notice and a hearing, determine the status of the mortgage claim and enter an appropriate order.

~~(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. 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. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the~~

~~statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).~~

(g) TRUSTEE'S END-OF-CASE MOTION TO DETERMINE THE STATUS OF A MORTGAGE CLAIM.

(1) *Timing; Content and Service.* Within 45 days after the debtor completes all payments under a chapter 13 plan, the trustee shall file a motion to determine the status of a mortgage claim, including whether any prepetition arrearage has been cured. The motion shall be prepared using the appropriate Official Form and be served on:

- the claim holder;
- the debtor; and
- debtor's counsel.

(2) *Response; Motion to Compel a Response; Objection to the Response.*

(A) *Deadline; Content and Service.* The claim holder shall file a

response to the motion within 28 days after service of the motion. The response shall be prepared using the appropriate Official Form and be served on:

- the debtor;
- debtor's counsel; and
- the trustee.

(B) *Motion for an Order Compelling a Response.* If the claim holder does not timely file a response, a party in interest may move for an order compelling one.

(C) *Objection.* Within 14 days after service of a response, a party in interest may file an objection to the response.

~~(h) DETERMINATION OF FINAL CURE AND PAYMENT. 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.~~

(h) ORDER DETERMINING THE STATUS OF A MORTGAGE CLAIM.

(1) *No Response.* If the claim holder fails to comply with an order under (g)(2)(B) to respond to the trustee's motion, the court may enter an order determining that:

(A) as of the date of the motion, the debtor is current on all payments that the plan requires to be paid to the claim holder—including all escrow amounts; and

(B) all postpetition legal fees, expenses, and charges incurred or imposed by the claim holder have been satisfied in full.

(2) *No Objection.* If the claim holder timely responds and no objection is filed, the court may, by order, determine that the amounts stated in the claim holder's response reflect the status of the claim as of the date the response was filed.

(3) *Contested Motion.* If an objection is filed, the court shall, after notice and a hearing, determine the status of the mortgage claim and issue an appropriate order.

(4) *Contents of the Order.*

(A) *Issued Under (h)(2) or (h)(3).* An order issued under (h)(2) or (h)(3) shall include the following information, current as of the date of the claim holder's response or such other date that the court may determine:

(i) the principal balance owed;

(ii) the date that the debtor's next payment is due;

(iii) the amount of the next payment—separately identifying the amount due for principal, interest, mortgage insurance, taxes, and other escrow amounts, as applicable;

(iv) the amounts held in any escrow, suspense, unapplied-funds, or similar account; and

(v) the amount of any fees, expenses or charges properly noticed under (c) that remain unpaid.

(B) *Issued Under (h)(1).* An order issued under (h)(1) may include any of the information described in (A) and may address the treatment of any payment that

becomes delinquent before the court grants the debtor a discharge.

(i) CLAIM HOLDER'S FAILURE TO ~~NOTIFY~~ GIVE NOTICE OR RESPOND. If the ~~holder of a~~ claim holder fails to provide any information ~~as~~ required by ~~subdivision (b), (c), or (g) of~~ this rule, the court may, after notice and a hearing, ~~take either or both~~ do one or more of the following ~~actions~~:

(1) preclude the holder from presenting the omitted information~~,~~ in any form~~,~~ as evidence 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; and

(3) take any other action authorized by this rule.

Committee Note

The rule is amended to encourage a greater degree of compliance with its provisions and to provide a more straight-forward and familiar procedure for determining the status of a mortgage claim at the end of a chapter 13 case. It also provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred.

Subdivision (a), which describes the rule's applicability, remains largely unchanged. However, the word "installment" in the phrase "contractual installment payment" was deleted here and throughout the rule in order to clarify the rule's applicability to reverse mortgages, which are not paid in installments.

In addition to stylistic changes, subdivision (b) is amended to add provisions about the effective date of late payment change notices and to provide more detailed provisions about notice of payment changes for home-equity lines of credit ("HELOCs"). Subdivision (b)(2) now provides that late notices of a payment increase do not go into effect until the required notice period (at least 21 days) expires. There is no delay, however, in the effective date of an untimely notice of a payment decrease.

The treatment of HELOCs presents a special issue under this rule because the amount owed changes frequently, often in small amounts. Requiring a notice for each change can be overly burdensome. Under new subdivision (b)(3), a HELOC claimant only needs to file annual payment change notices—including a reconciliation figure (net overpayment or underpayment for the past year)—unless the payment change in a single month is for more than $10. This

provision also ensures at least 21 days' notice before a payment change takes effect.

Only stylistic changes are made to subdivisions (c) and (d). Stylistic changes are also made to subdivision (e). In addition, the court is given authority, upon motion of a party in interest, to shorten the time for seeking a determination of the fees, expenses, or charges owed. Such a shortening, for example, might be appropriate in the later stages of a chapter 13 case.

Subdivision (f) is new. It provides the procedure for a midcase assessment of the status of the mortgage, which allows the debtor to be informed of any deficiencies in payment while there is still time in the chapter 13 case to become current before the case is closed. The procedure begins with the trustee providing notice of the status of the mortgage. An Official Form has been adopted for this purpose. The mortgage claim holder then has to respond, again using an Official Form to provide the required information. If the claim holder fails to respond, a party in interest may seek an order compelling a response. A party in interest may also object to the claim holder's response. If an objection is made, the court determines the status of the mortgage claim.

As under the former rule, there is an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure is changed, however, from a notice to a motion procedure that results in a binding order, and time periods for the trustee and claim holder to act have been lengthened.

Under subdivision (g), the trustee begins the procedure by filing—within 45 days after the last plan

payment is made—a motion to determine the status of the mortgage. An Official Form has been adopted for this purpose. The claim holder then must respond within 28 days after service of the motion, again using an Official Form to provide the required information. If the claim holder fails to respond, a party in interest may seek an order compelling a response. A party in interest may also object to the response.

This process ends with a court order detailing the status of the mortgage (subdivision (h)). If the claim holder fails to respond to an order compelling a response, the court may enter an order stating that the debtor is current on the mortgage. If there is a response and no objection to it is made, the order may accept as accurate the amounts stated in the response. If there is both a response and an objection, the court must determine the status of the mortgage. Subdivision (h)(4) specifies the contents of the order.

Subdivision (*i*) has been amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule. Stylistic changes have also been made to the subdivision.

case is converted to chapter 11 or chapter 12 but not if the case is converted to a chapter 7. Congress added this section in 2005 to overrule "a line of cases holding that plan confirmation constitutes an implied valuation that applies in the Chapter 7 case upon conversion."[108] Section 348(f)(1)(B) allows the chapter 7 trustee to "be heard on the accuracy of the values scheduled in Chapter 13."[109] As provided in section 348(f)(1)(B), a chapter 7 trustee who believes there is substantial equity in property is not bound by any valuations that might have been made in the chapter 13 case prior to conversion. Under the Commission's recommendation, if the debtor disputes the chapter 7 trustee's valuation of the property, the court will make a new valuation of the property for the chapter 7 but decide the question of fact regarding valuation as of the petition date.

Finally, the Commission discussed cases in which a mortgage on the debtor's principal residence includes other collateral. This situation occurs if the debtor has incurred debt secured by a multi-unit building in which the debtor resides in one of the units.[110] *Collier on Bankruptcy* gives other examples: the security interest includes personal property, other real property, or incidental property such as easements or mineral rights.[111] Because section 1322(b)(2) prevents modification of a claim secured "*only* by a security interest in real property that is the debtor's principal residence" (emphasis added), the question has arisen as to whether antimodification applies where the security interest includes the debtor's residence and other property.[112] The Commission takes no position on this issue and believes it should continue to develop through the usual appellate process.

§ 2.07 Improvements to Federal Rule of Bankruptcy Procedure 3002.1 — Payment Change Notices and Notices of Final Cure

(a) Payment Change Notices. Federal Rule of Bankruptcy Procedure 3002.1(b) should be amended to:

(1) specify the effective date of any payment change when the creditor fails to timely file the required notice of payment change, and

(2) require that payment change notices for home equity lines of credit (HELOCs) be filed and served annually rather than monthly, provided that the monthly payment amount does not increase or decrease by more than $10 in any single month.

108 Samuel K. Crocker & Robert H. Waldschmidt, *Impact of the 2005 Bankruptcy Amendments on Chapter 7 Trustees*, 79 Am. Bankr. L.J. 333, 346 (2005); *see also* Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 309, 119 Stat. 23, 82 (adding section 348(f)(1)(B)).

109 Crocker & Waldschmidt, *supra* note 108, at 347.

110 *Compare, e.g.*, Scarborough v. Chase Manhattan Corp. (*In re* Scarborough), 461 F.3d 406 (3d Cir. 2006) (antimodification rule does not apply to a multi-unit building that also contains the debtor's principal residence) *with, e.g.*, Wages v. J.P. Morgan Chase Bank (*In re* Wages), 508 B.R. 161, 165-66 (B.A.P. 9th Cir. 2014) (rejecting *Scarborough* and applying antimodification rule to real estate the debtor occupied as a principal residence, although it also included a home office and parking for commercial vehicles used in the debtor's business).

111 8 Collier on Bankruptcy, *supra* note 27, at ¶ 1322.06.

112 *See, e.g.*, *In re* Lister, 593 B.R. 587 (Bankr. S.D. Ohio 2018) (concluding that mortgage on mixed-use property could not be modified, court identified three approaches: 1) "bright-line only" approach, protecting against modification *only* if the property is debtor's principal residence; 2) "bright-line includes" approach, preventing modification if property *includes* use as principal residence; and 3) case-by-case approach, considering factors such as parties' intentions for use).

(b) Reverse Mortgages. FRBP 3002.1 should be amended to clarify that reverse mortgages are subject to the requirements of FRBP 3002.1 except for the payment change notice requirements in FRBP 3002.1(b).

(c) Notices of Final Cure.

(1) The requirement of a notice of final cure payment under Federal Rule of Bankruptcy Procedure 3002.1(f) should be amended to:

(A) change the current notice process to a motion practice under Federal Rules of Bankruptcy Procedure 9013 and 9014,

(B) require the motions to include a warning that a creditor may be sanctioned for failing to respond, and

(C) add a midcase status review.

(2) Federal Rule of Bankruptcy Procedure 3002.1(g) should be amended to:

(A) indicate clearly that the creditor's statement is mandatory and must include (i) the principal balance owed; (ii) the date when the next installment payment is due; (iii) the amount of the next installment payment, separately identifying the amount due for principal, interest, mortgage insurance and escrow, as applicable; and (iv) the amount, if any, held in a suspense account, unapplied-funds account or any similar account;

(B) add a means for the debtor or trustee to object to the creditor's statement and request a hearing; and

(C) provide that an objection commences a contested matter.

(3) Federal Rule of Bankruptcy Procedure 3002.1(h) should be amended to allow the court to enter an order determining the status of the mortgage claim that includes all of the same information as in the proposed amendment to subsection (g).

(4) Federal Rule of Bankruptcy Procedure 3001.1(i) should be amended to allow the debtor or trustee to file a motion to compel a creditor's statement and for appropriate sanctions. If the motion is granted, the court should be required to order the mortgage creditor to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees, unless the circumstances make such an award unjust. The failure of the mortgage creditor to obey a motion to compel a statement should be treated as contempt of court.

Background — Payment Change Notices. Federal Rule of Bankruptcy Procedure 3002.1(b) requires that mortgage creditors file and serve "a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than twenty-one days before a payment in the new amount is due." Notice must be given on Official Form 410S1, the Notice of Mortgage Payment Change.

Form 410S1 requires the creditor to state the basis for the changed payment amount, the current and new payment amounts, and the date when the change will take effect. The two most common payment changes on mortgage accounts result from interest rate and escrow account adjustments. These changes are subject to disclosure requirements under the Truth in Lending Act (TILA) for adjustable-rate mortgages and the Real Estate Settlement Procedures Act (RESPA) for escrow accounts, and Form 410S1 instructs the creditor to attach to the form a rate-change notice or escrow account statement that is prepared under nonbankruptcy law (TILA and RESPA) with respect to the payment change.

The Advisory Committee Note indicates that rule 3002.1(b) is intended to assist the debtor and trustee in complying with the requirement under section 1322(b)(5) to maintain current mortgage payments:

> [The Rule] is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. . . . In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any pre-petition arrearage, see Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust post-petition mortgage payments to cover any undisputed claimed adjustment.

Over time, three distinct problems have arisen that the Commission believes can be resolved by amendments to rule 3002.1(b): (1) payment change notices that fail to give at least twenty-one days' notice; (2) frequent payment changes of small amounts in home equity lines of credit (HELOCs); and (3) the extent to which the rule applies to reverse mortgages.

Recommendation — Untimely Notices of Payment Changes. At times, creditors file payment change notices that give less than twenty-one days' notice of the date the new payment amount will be due. If the payment increases, it is unfair to debtors and trustees to make the payment change effective when the parties have not been given the required notice. Conversely, if the payment decreases but the creditor gave less than twenty-one days' notice, it is unfair to make the debtor or trustee wait at least twenty-one days before the change becomes effective.

Therefore, rule 3002.1(b) should be amended to provide a special effective date for payment changes when the creditor fails to timely file the notice. If the payment is scheduled to increase and the creditor fails to give at least twenty-one days' notice of the new payment amount, the payment change will be effective on the first payment due date that is at least twenty-one days from the filing date of the notice. For example, if the due date for mortgage payments falls on the first day of the month and the creditor files a notice of payment change on January 29th purporting to be effective on February 1, the payment

increase would not be effective until March 1, which is the first due date that is at least twenty-one days after January 29.

If the notice of payment change reflects a payment decrease and is filed and served without providing the required twenty-one days' notice, the effective date of the changed payment would be the later of the date of the filing of the notice or the date specified in the notice. This gives the debtor the benefit of the reduced payment as soon as possible.

Through its proposed amendments, the Commission does not intend any changes in the power of the court to take any of the actions permitted under subdivision (i) of rule 3002.1 for the creditor's failure to timely file the payment-change notice. Establishing an effective date of late payment-change notices offers certainty and uniformity for all parties while preserving the power to sanction the creditor's failure to file the notice when appropriate.

Recommendation — HELOC Payment Changes. Mortgage servicers have suggested that compliance with the payment-change notice requirements is burdensome with respect to a home equity line of credit (HELOC), because the payments on such mortgages may change monthly and in small amounts. Servicers have in some cases requested that courts exempt such loans from rule 3002.1. One court refused to grant such a request, finding that compliance with the rule is mandatory and that the court lacks discretion to extend the time deadlines or excuse performance.[113] Another court modified the payment-change notice requirement for a HELOC loan, requiring that notices be filed every six months until the last year of the debtor's plan, at which time quarterly filings were required.[114]

On September 19, 2012, the Advisory Committee on Rules of Bankruptcy Procedure conducted a roundtable discussion with representatives of the mortgage-servicing industry, consumer debtors, chapter 13 trustees and others to discuss ways to improve Federal Rule of Bankruptcy Procedure 3002.1. One of the discussion topics was the treatment of HELOCs, and various proposals for amending rule 3002.1(b) were considered. Following the roundtable and further consideration by the Advisory Committee, an amendment to rule 3002.1(b) was published for comment. This amendment was finalized and became effective on December 1, 2018. It adds the following sentence at the end of amended rule 3002.1(b)(1): "If the claim arises from a home-equity line of credit, this requirement may be modified by court order."

The Advisory Committee Note related to this change states:

> Subdivision (b) is subdivided and amended in two respects. First, it is amended in what is now subdivision (b)(1) to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan

113 *In re* Adkins, 477 B.R. 71 (Bankr. N.D. Ohio 2012).

114 *In re* Pillow, 2013 WL 10252924 (Bankr. W.D. Mich. 2013).

> apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

A uniform procedure for addressing HELOC payment change notices should be adopted.[115] Bankruptcy rules that establish uniform procedures for the treatment of claims secured by home mortgages generally further the objective of economical and efficient administration of bankruptcy cases. The approach permitted under the 2018 amendment will detract from this objective by making it difficult for mortgage servicers to comply with myriad local rules or orders in individual cases.

The Commission believes that an annual notice should suffice with respect to HELOCs, provided that the monthly changes are less than $10 and the annual notice explains the monthly changes and includes a reconciliation amount to account for any overpayment or underpayment received during the prior year. The monthly payment specified in the annual notice would be adjusted upward or downward to account for the reconciliation amount.

Background and Recommendation — Reverse Mortgages. Reverse mortgage loans are a form of credit secured by first mortgages on single-family residences and are available to borrowers 62 years of age and older. Two types of reverse-mortgage products are generally available: reverse mortgages offered under the home equity conversion mortgage (HECM) program insured by the Federal Housing Administration (FHA), and proprietary reverse-mortgage products offered by lenders. Instead of borrowing a lump sum and repaying it over time, borrowers may receive loan proceeds not only in the form of a lump sum, but also as a line of credit or regular monthly advances. The loan proceeds are not required to be repaid until the borrower (or survivor if joint loan) dies or moves, or there is a default on other obligations. Lenders are repaid the loan proceeds and interest out of the proceeds from the sale of the home.[116]

While there are no monthly loan payments required of the borrower, reverse mortgages are not "payment-free." Rather, the loan documents require reverse-mortgage borrowers, like traditional mortgage borrowers, to pay for "property charges." These charges include real estate taxes and hazard insurance premiums and, if applicable, condominium association fees, ground rents, or other special assessments. If sufficient funds are not set aside or the funds run out, then the borrower is responsible for making these payments directly.

Default occurs when the borrower is responsible for, but fails to pay, the property charges. After giving the borrower notice and an opportunity to cure the default, and after obtaining approval from HUD, the creditor may accelerate the debt, making all sums due under the loan immediately payable. The homeowner's failure to pay the property charges is an event of default and can trigger a foreclosure. Alternatively, and more commonly, the creditor will pay the outstanding property charges by withholding

115 The Commission believes nonuniform practices in the bankruptcy system generally are a problem and recommends that courts adopt local rules, standing orders, and practices that promote uniformity. *See* § 4.02 Nonuniform Court Practices. The Commission's recommendation for a uniform procedure to address HELOC payment-change notices addresses these concerns.

116 An explanation of reverse mortgages appears at Tara Twomey, *Reverse Mortgages in Bankruptcy*, Am. Bankr. Inst. J., Aug. 2014, at 18.

amounts from monthly payments or by charging amounts to a line of credit. In this situation, the payment is considered a distribution of available loan proceeds and the borrower is not considered delinquent. This solution works so long as loan funds remain available to draw. When the available credit on the reverse mortgage is insufficient to cover the outstanding property charges (i.e., the principal limit has already been reached), HUD generally requires lenders to advance their own funds, known as "loan advances" or "corporate advances," to pay the property charges. Once there are no longer sufficient funds in the available credit, the loan is then in default and servicers will submit a due-and-payable request to HUD, which will lead to acceleration of the debt and foreclosure.

When rule 3002.1 first went into effect on December 1, 2011, it applied to principal residence loans that were "provided for under Code section 1322(b)(5) in the debtor's plan." Based on this language, the debtor's curing of a default on a reverse mortgage under section 1322(b)(5) was clearly covered by rule 3002.1. Thus, the holder of the mortgage claim was required to provide notice of postpetition fees under rule 3002.1(c).

The reference to section 1322(b)(5) led some courts to conclude that rule 3002.1 applied only if the debtor's plan clearly "provided for" the claim under that section, and only if the debtor had a prepetition arrearage that was being cured under the plan. Responding in part to these decisions, the Rules Committee in 2016 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 trustee or the debtor will make contractual installment payments." The Advisory Committee's Note issued with the rule amendment states that the "reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured."

The 2016 amendment arguably makes reverse mortgages no longer subject to rule 3002.1 because the debtor does not make "contractual installment payments." While payment of property charges is a contractual payment, the requirement that it be an "installment" payment could lead courts to conclude that a chapter 13 plan providing for the curing of past payment charges and the maintenance of future payment charges is not subject to rule 3002.1. The Commission believes that a simple fix would ensure that the 2016 amendment does not work an unintended change. Deleting the word "installment" would make clear that rule 3002.1 applies to reverse mortgages. The language would then provide: "This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual payments." An Advisory Committee's Note should explain that the change is intended to make clear that reverse mortgages are covered by the rule and that there is an obligation to send notices of postpetition fees and notices, as well as motions and responses related to the status of the mortgage.

Because reverse mortgages do not require the debtor to make installment payments, the payment-change notice requirements under rule 3002.1(b) are generally not applicable, but the rule does apply to attorney fees and other charges under defaulted reverse mortgages being cured though the plan. It would be helpful if this distinction was also stated in the Advisory Committee's Note.

Background — Notices of Final Cure. Subsections (f), (g), (h) and (i) of Federal Rule of Bankruptcy Procedure 3002.1 provide the procedure for determining the status of a mortgage claim at the end of the case. This procedure, known as a notice of final cure, includes detailed requirements for the creditor's response to the notice filed by the trustee or the debtor. The provisions permit the debtor or trustee to file a motion for the court to determine whether the default has been cured and all required postpetition amounts have been paid. The consequences for failing to timely provide information are also established by these provisions.

The notice of final cure process needs expansion and improvement. The process should be familiar and streamlined, and it should produce the precise information needed by the parties. This process should occur midcase to give the debtor, trustee, and creditor an opportunity to address any issues while time remains in the case. The process should also occur at the end of the case to provide the information needed just prior to case closing so that the loan can be properly serviced and so that debtors can know exactly what obligations remain. The process needs to be effective in both conduit and nonconduit jurisdictions[117] and also for both large and smaller servicers. Finally, any new rule needs to provide more robust consequences for failing either to respond or to provide the required data.

Under section 1322(b)(5), a debtor is permitted to cure any default and maintain home mortgage payments over the life of the bankruptcy plan. To be successful, the debtor and trustee must know the amount needed to cure the pre-petition default and must be informed about postpetition payment changes and postpetition fees, expenses and charges incurred during the plan. Federal Rule of Bankruptcy Procedure 3002.1 was enacted to require this information.

The intent was both for the trustee to file a notice of final cure in every case containing a mortgage on the debtor's principal residence and for the debtor to have the opportunity to file a notice of final cure if the trustee failed to do so. But, in the experience of the Commission, there are many cases in which neither the trustee nor the debtor files a notice of final cure. Although the rule mandates a response, there are also many cases in which the trustee files a notice of final cure, but the creditor does not file a response or makes an incomplete response. As a result, there are many cases in which the creditor does not report the status of the loan at the end of the case. In such cases, debtors with home mortgages complete their chapter 13 cases without certainty as to the status of their mortgages. Even when the notice and response procedure in rule 3002.1 works as intended, the end-of-case timing is often too late for plan modification to address postpetition payment changes, fees, expenses, charges and defaults. Conversely, there are some trustees and debtors who not only file a notice of final cure, but file additional motions or requests for information not provided for in rule 3002.1. These include "qualified written requests" under RESPA,[118] requests for full payment histories, and motions to deem the account current. These

117 For a discussion of the concept of "conduit" plans and the Commission's recommendations on the subject, see § 4.06 Conduit Mortgage Payments.

118 A "qualified written request" is written correspondence from a borrower to a loan servicer requesting information relating to the servicing of the loan and that meets certain criteria. Typically, a qualified written request will identify errors the borrower believes have been made in the servicing of the loan. If the borrower makes a qualified written request, the loan servicer must respond within thirty days either correcting the error (including crediting the borrower's account, if appropriate) or stating the servicer has investigated and providing the reasons the servicer believes the account is correct. *See* 12 U.S.C. § 2605(e). A discussion of RESPA's

additional requests fill some of the voids in rule 3002.1 practice, but cause uncertainty and expense for creditors needing to prepare multiple responses and to gather information in addition to that required by rule 3002.1. The absence of procedural uniformity has impaired efforts by creditors to reliably automate the management of rule 3002.1 notices in chapter 13 cases. The Commission determined that a single, mandatory, motion-driven process would be more efficient and effective for all parties.

Recommendations — Midcase Status Process and Motion Practice. The Commission recommends amending rule 3002.1 to add a midcase status process to complement the existing final cure process. Both procedures would include data points required to be included in the creditor's response and in the resulting court orders. The proposed amendments also provide more robust consequences for failing to provide required information.

The current notice process should be replaced with the motion-and-order practice familiar under Federal Rules of Bankruptcy Procedure 9013 and 9014, with a standardized style for the motion to improve automation and to increase the efficiency of PACER/ECF searches.[119] The motions should include an additional warning that a creditor may be sanctioned under rule 3012.1(i) for failing to respond.

Recommendation — Creditor's Response and Amendments to Federal Rule of Bankruptcy Procedure 3002.1(g). The Commission recommends amending rule 3002.1(g) to emphasize and clarify that the creditor's response to a notice of final cure is mandatory. The response must include the principal balance owed; the date when the next installment payment is due; the amount of the next installment payment, separately identifying the amounts due for principal, interest, mortgage insurance and escrow, as applicable; and the amount, if any, held in a suspense account, unapplied funds account, or any similar account. The rule as amended would add a means for the debtor or trustee to object and request a hearing and provide that an objection would commence a contested matter.

Recommendation — Court Action and Amendment to Federal Rule of Bankruptcy Procedure 3002.1(h). The Commission also recommends amending rule 3002.1(h) to provide for the court to enter an order determining the status of the mortgage claim. The order would include the same data points listed in the response in the proposed amendment to rule 3002.1(g).

Recommendation — Motion to Compel and Amendment to Federal Rule of Bankruptcy Procedure 3002.1(i). Finally, the Commission proposes adding a provision for the debtor or trustee to file a motion to compel a response and for appropriate sanctions. If the motion is granted, the court must require the mortgage creditor to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees, unless the circumstances make such an award unjust. The failure of the mortgage creditor to file a response would be treated as contempt of court. These changes are modeled after similar provisions in

application in bankruptcy, including the role of qualified written requests, appears at John Rao, *Servicing of Home Mortgages in Bankruptcy: When Worlds Need Not Collide*, Am. Bankr. Inst. J., Feb. 2009, at 1.

119 The Commission has recommended a uniform set of naming conventions for pleadings, events, and party names generally; *see* § 5.07 Case Management (CM)/Electronic Case Filing (ECF) & Docketing Improvements.

Federal Rule of Civil Procedure 37, including amendments to rule 37 that were made after the Advisory Committee on Rules of Bankruptcy Procedure first promulgated rule 3002.1(i).

Appendix to Section 2.07

Formally, the Commission voted to approve the recommendations that appear at the beginning of this section. At the time of the vote, the Commission had before it specific amendatory language to Federal Rule of Bankruptcy Procedure 3002.1 that would implement the Commission's recommendations. Because of the technical nature of these recommendations, the Commission decided that it would be helpful to include the amendatory language as an appendix to this discussion of the recommendations.

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor

* * * *

(b) *Notice of Payment Changes; Objection*

(1) *Notice*. Except as provided in paragraph (3), the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due.

(2) If the holder of the claim fails to timely file and serve the notice required by paragraph (1), the following shall apply:

(A) *Payment Increase*: In the event that the holder of a claim files and serves a Notice of Payment Change that reflects an increase in the total new payment amount without providing the required 21 days' notice, then the payment change shall be effective on the first payment due date that is at least 21 days from the filing date of the Notice of Payment Change.

(B) *Payment Decrease*: In the event that the holder of a claim files and serves a Notice of Payment Change that reflects a decrease in the total new payment amount without providing the required 21 days' notice, then the payment change shall be effective as of the later of the Date of the Notice or the date specified in the Notice.

(C) Nothing in subparagraph (A) or (B) shall limit the power of the court to take any of the actions permitted under subdivision (i) for any failure to timely file and serve the notice of payment change.

(3) If the claim arises from a home equity line of credit, the notice of any payment change shall be filed and served on the debtor, debtor's counsel, and the trustee no later than one year after the entry of the order for relief, and not less frequently than annually thereafter.

(A) The annual notice shall state the monthly payment amount due for the month in which the notice is filed. The payment amount shall be effective on the first payment due date that is at least 21 days from the filing date of the annual notice and shall remain effective until a new notice is filed with the court. The holder shall also include in the annual notice a reconciliation amount to account for any over- or under-payment received during the prior year. This amount shall be accounted for in the first payment due to the holder after the effective date of the notice, and shall be adjusted upward or downward to account for the reconciliation amount.

(B) Notwithstanding subparagraph (A) above, should the monthly payment increase or decrease by more than $10 in any single month, the holder shall file a notice consistent with subdivision (b)(1), and this notice shall be filed and served in addition to the annual notice requirement.

(4) *Objection.* A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code.

* * * *

(f) *Motion to Determine Status of Mortgage Claim.*

(1) *Mandatory Motion to Determine Status of Mortgage Claim.* Both during the period between 18 and 22 months after the petition date and no later than 45 days after the trustee receives all payments due the trustee under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a motion to determine status of mortgage claim. The motion shall be styled as prescribed by the appropriate Official Form. The motion shall inform the holder of its obligation to timely file and serve a response under subdivision (g) and warn that failure to timely respond may be sanctioned under subdivision (i).

(2) *Permissive Motion to Determine Status of Mortgage Claim.* The debtor may file the motion required under subdivision (f)(1) of this Rule.

(g) *Mandatory Response to Motion to Determine Status of Mortgage Claim; Objection.*

(1) Within 28 days after service of the motion under subdivision (f) of this rule, the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a response indicating (i) that the debtor has paid all amounts required by the plan to be paid to the

holder on account of its claim; or (ii) that the debtor is in default of an amount required by the plan to be paid to the holder on account of its claim. The response shall include the following information, current as of the date of the response: the principal balance owed; the date when the next installment payment from the debtor is due; the amount of the next installment payment that is due from the debtor, separately identifying the components of that payment, including the amounts due for principal, interest, mortgage insurance, and taxes, as applicable; and the amount, if any, held in a suspense account, unapplied funds account or any similar account. If the response states the debtor is in default under the plan, the response shall itemize the amount(s) that the holder contends is unpaid as of the date of the response.

(2) The debtor or the trustee shall have 14 days from the date of service of a timely response filed under subdivision (g)(1) within which to file an objection and request a hearing. The filing of an objection commences a contested matter for purposes of Fed. R. Bankr. P. 9014.

(h) *Order Determining Status of Mortgage Claim.*

(1) If the holder of the claim fails to timely respond under subdivision (g)(1), the trustee shall submit and, without further hearing, the court may enter an order declaring as of the date of the motion that the debtor is current on all payments required by the plan with respect to the debtor's obligations to the holder, including all escrow amounts, and that all postpetition legal fees, expenses and charges imposed by the holder are satisfied in full.

(2) If the holder timely responds under subdivision (g)(1) and no objection is filed under subdivision (g)(2), the trustee shall submit and without further hearing the court may enter an order determining that the amounts stated in the holder's response filed under subdivision (g)(1) reflect the status of the claim as of the date of the filing of the holder's response.

(3) If an objection is filed under subdivision (g)(2), the court shall, after notice and a hearing, determine the status of the mortgage claim and enter an appropriate order.

(4)

(A) An order entered under subdivision (h)(2) or (h)(3) shall include the following information, current as of the date of the holder's response under subdivision (h)(2) or such other date as the court may determine: the principal balance owed; the date when the next installment payment from the debtor is due; the amount of the next installment payment that is due from the debtor, separately identifying the components of that payment, including the amounts due for principal, interest, mortgage insurance, and taxes, as applicable; and the amount, if any, held in a suspense account, unapplied-funds account or any similar account.

(B) An order entered under subdivision (h)(1) may include any of the information described in paragraph (A) as may be appropriate.

(i) *Failure to Notice or Respond*.

(1) If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and a hearing, take either or both of the following actions:

(A) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or harmless; or

(B) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(2) If the holder of the claim fails to timely respond under subdivision (g)(1), in addition to any action the court may take under subdivisions (h)(1) and (i)(1), the debtor or the trustee may move to compel a response and for appropriate sanctions.

(A) If the motion is granted—or if the response is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the holder to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(B) If the court orders the holder to file a response under subdivision (g)(1) and the holder fails to obey, the failure may be treated as contempt of court. In addition to any order the court enters as a sanction for contempt, the court must order the holder to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.