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The Intersection of New Rule 3002.1 with RESPA and the FDCPA: What Could Go Wrong?

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THE INTERSECTION OF NEW RULE 3002.1 WITH RESPA AND THE FDCPA: WHAT COULD GO WRONG?

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Congress passed the Fair Debt Collection Practices Act (FDCPA) to protect consumers from unscrupulous and abusive practices by debt collectors. The Real Estate Settlement Procedures Act (RESPA) establishes uniform escrow accounting procedures applicable nationwide, and it provides consumers with a formal process for communicating directly with mortgage servicers in order to correct servicing errors and obtain information about their mortgage loan accounts. The Truth in Lending Act (TILA) requires servicers to promptly credit borrowers' mortgage payments and provides a means for borrowers to identify the owner of their mortgage loans, among other things. Chapter 13 of the Bankruptcy Code allows debtors who have fallen behind on their home mortgages to cure their mortgage arrearages in a three-to-five year plan overseen by the Bankruptcy Court and administered by the Chapter 13 Trustee, while maintaining their post-petition monthly mortgage payments, and thereby emerge from bankruptcy with a current home mortgage.

While the purposes of each of these federal statutes and their implementing Rules and Regulations are aligned, they are distinguishable, including with respect to their remedies. As a result, insofar as these laws authorize remedies to consumers (and in particular, as relevant here, consumer debtors in Chapter 13 bankruptcy cases with mortgages), the remedies available to consumers when mortgage servicers violate these laws are different in their structure and purpose under each of the FDCPA, RESPA, and the Bankruptcy Code and Rules, as each remedial scheme was established to serve different goals and remedy misconduct for different reasons. Indeed, the difference in the purposes that animate the remedial provisions in each of these laws is harmonious and beneficial for the Americans they protect.

Perhaps most critical to the effectiveness of each of these laws, which are often applicable to issues facing the most financially vulnerable members of society, is the fact that each of these laws either authorize or require attorney fee shifting as a remedy for consumers who are harmed by their violation. However, all fee shifting is not created equal, and the fact that the FDCPA and RESPA make fee shifting mandatory when a debt collector and/or mortgage servicer is held liable for their violation reflects Congress's intent to ensure that aggrieved consumers have access to competent counsel when these laws are violated. Bankruptcy Rules 3001 and 3002.1, which help to implement Chapter 13 bankruptcy's process for bringing mortgage loan accounts current, also authorize fee shifting and other remedies, but none of these are mandatory. Yet, some bankruptcy courts have held, despite clear language to the contrary in the Supreme Court's decision in *Midland v. Johnson*, that the remedies and procedures in the Bankruptcy Code preclude application of the FDCPA as a remedy for debt collectors' misconduct within the Chapter 13 process, thereby depriving Chapter 13 debtors of the right to recovery for violations of the FDCPA, including the right to recover actual damages, mandatory statutory attorney fee shifting, and statutory damages. These decisions do not further the interests that animate any of the Bankrupty Code and Rules, the FDCPA, or RESPA, and instead they encourage creditor misconduct by exempting debt collectors from compliance with the FDCPA specifically and only when consumer debtors are in bankruptcy.

I. BANKRUPTCY RULES 3001 AND 3002.1: THEIR PURPOSE, STRUCTURE, AND HOW BANKRUPTCY COURTS HAVE INTERPRETED THEIR REMEDIAL PROVISIONS

Rule 3001:

Rule 3001 specifies the requirements for creditors filing proofs of claim in bankruptcy cases. As relevant here, Rule 3001(c) specifies the supporting information that creditors must include when filing claims secured by the debtor's principal residence in "individual debtor" (consumer) bankruptcy cases, which includes the writing on which the claim is based, i.e. the note and security instrument (mortgage or deed of trust, depending on the jurisdiction), and any modifications thereof, plus (a) the principal amount of the claim and an itemized statement of the interest, fees, expenses, or charges; (b) a statement of the amount necessary to cure any pre-petition default; (c) for claims secured by the debtor's principal residence, creditors must attach a specific official form for mortgage claims, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law (RESPA).[1]

Rule 3002.1

Rule 3002.1 was added to the Bankruptcy Rules, effective December 1, 2011, "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."[2] Because case law was not uniform on whether payments made directly by a consumer to their mortgage creditor qualified as payments "pursuant to the plan," the Rules Committee Notes (2011) clarify that Rule 3002.1 applies regardless of who disburses the debtor's postpetition mortgage payments. In establishing Rule 3002.1, the Rules Committee recognized that debtors and trustees must know the amount of the prepetition arrearage[3], as well as the amount of the debtor's postpetition mortgage payments[4], which regularly change due to escrow account adjustments and, for adjustable rate loans, when the applicable interest rate changes. Likewise, the Rules Committee recognized the need for debtors and trustees to have sufficient notice of and opportunity to review, object to, and/or pay post-petition fees, expenses, or other charges assessed to the debtor's mortgage loan account during their Chapter 13 case.[5] 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 ensure that the debtor has a completely current mortgage loan upon completion of their Chapter 13 bankruptcy plan.[6]

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*Partner, Kellett & Bartholow PLLC, Dallas, Texas. This paper has benefitted from, and I am deeply grateful for, the helpful feedback and research assistance of my work colleagues, Karen L. Kellett, Caitlyn N. Wells, Claude D. Smioth, and O. Max Gardner III. With respect to Rule 3002.1 in particular, I am indebted to John Rao of the National Consumer Law Center, who I thank for his generous assistance, brilliant insight, and his excellent work in National Consumer Law Center, CONSUMER BANKRUPTCY LAW AND PRACTICE (13TH ED. 2020), particularly § 11.6.2.8.2.1, updated at www.nclc.org/library, an invaluable and frequently updated resource with respect to Bankruptcy Rule 3002.1. I also thank Chief Bankruptcy Judge for the Northern District of Alabama, Jennifer H. Henderson and Glenn E. Glover of the Bradley Arant firm in Birmingham, Alabama for their thoughts and feedback related to the remedies in Rule 3002.1(i).

[1] Fed. R. Bankr. P. 3001(c).
[2] Committee Notes 2011.
[3] *see* Rule 3001(c)(2).
[4] Rule 3002.1(b)
[5] Rule 3002.1(c)
[6] The committee notes also indicate that "[c]ompliance 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

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