## UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION 515 RUSK AVENUE, STE 4636 HOUSTON, TEXAS 77002



CHAMBERS OF MARVIN ISGUR UNITED STATES BANKRUPTCY JUDGE

November 25, 2008

Mr Peter G. McCabe Secretary of the Committee on Rules of Practice and Procedures Administrative Office of the United States Courts Washington, D.C. 20544

Dear Mr. McCabe and Members of the Committee:

Judges Isgur, Magner, and Bohm jointly propose the adoption of two new official bankruptcy forms designed to address problems related to claims secured by a debtor's principal residence The first form is proposed as an addendum to the proof of claim. The proposed addendum provides a full loan history and a calculation of the mortgage arrearage The second form is a payment change notice to be filed by mortgage holders during the course of a chapter 13 case. The payment change notice reflects changes in escrow payments or adjustments in interest rates.

The three of us have large chapter 13 dockets, each with well over 3,000 pending chapter 13 cases. In the course of administering our dockets, we have each written opmions explaining structural problems that commonly arise with chapter 13 home mortgage claims and payments. The proposed forms are our attempt to address some of the issues that we have observed.

We believe that the present proof of claim form inadequately addresses the claims asserted by mortgage companies because it can often result in the filing of claims that omit material information or that incorrectly calculate amounts due. In addition to providing a better understanding of the amount needed to cure a mortgage arrearage, we believe that the new addendum will provide necessary information on the types of charges incorporated into the claim and when they occurred. It is also designed to provide improved escrow accounting, a critical component in calculating both the allowed arrearage claim and the monthly installment amount due from a debtor postpetition. Moreover, the new form will expedite the claims objection process by setting forth the lender's claim and backup data in a standard form This standard form will obviate the need for substantial, expensive and time consuming discovery that now occurs in many chapter 13 cases.

Moreover, we have observed increasing difficulties in administering chapter 13 cases because of payment changes that arise in mortgage loans. Adjustable rate mortgages often have interest rate and payment adjustments during the course of a chapter 13 case. Escrow payment i

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adjustments arise in almost every case. Our experience is that these adjustments often generate issues that are time consuming and expensive for all parties to resolve.

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We believe that placing separate district-by-district demands on mortgage companies is unwieldy and expensive to implement. Since most mortgage servicing companies administer chapter 13 cases with centralized, national accounting computer systems, the use of national forms should result in a substantially improved accounting system to the court as well as provide a predictable cost for the mortgage servicing companies. We are told in public seminars that many mortgage servicing companies would welcome such standardization. Given the diverse treatment of chapter 13 mortgages throughout the nation, we believe that a uniform approach is most sensible. This will best "secure the just, speedy, and inexpensive determination" of chapter 13 mortgage matters. See FED. R BANKR. P. 1001.

The underlying accounting in chapter 13 mortgage cases is complex. Accordingly, we have designed forms that provide for computerized calculations based on standard input. The inputs to the forms are relatively simple. The complexities arise in the calculations that are automated within the forms.

An example may be helpful. Section 1322(b)(5) allows debtors to cure defaults on home mortgages. It is typical that a debtor has missed several mortgage payments prior to filing bankruptcy. These missed payments will often include amounts that (if timely made) would have been applied to principal, interest and escrow. When received, the mortgage servicing companies may apply the payments to pre-petition legal fees, appraisal costs and other charges that are not included in the principal, interest and escrow accounting. When mortgage servicing companies receive payments that are inadequate to cover outstanding fees and make a full application to the principal, accrued interest and escrow payments that are due, it is common for the payments to be held by the lender rather than applied to the loan as a partial payment. The funds are typically placed in a holding or suspense account until applied by the lender. Both prior to and following a bankruptcy, the amount held in suspense is often not apparent. The same is true of many of the fees and charges assessed against an account during its administration. Lenders do not always provide borrowers the following: (1) accountings disclosing payments received, (2) the application of the amounts received; or (3) the amount and date of fees, charges or expenses assessed against the account.

Proofs of claim provide only the total amount due separated into broad categories of components. As a result, it is difficult to determine from a proof of claim how payments have been applied, what charges might have been assessed against an account, if any payments have been placed in suspense, and whether or not the escrow account has been properly handled. Even assuming the accuracy of the lender's accounting, it is usually not possible for a debtor or his counsel to understand the basis of the calculations used by the lender. Without this understanding, one cannot verify the amount demanded to cure a default.

In our proposed forms, the loan's history is provided in a simple and understandable format designed to answer the initial questions any debtor's counsel would pose. Through a simple loan history, all interested parties can verify the amounts paid by a borrower on a loan Letter to Peter G. McCabe From Judges Isgur, Magner and Bohm Page 3

and the application of the payments by the lender to fees and expenses charged including the date of charge and type of charge imposed, and the calculation of escrow. Because the forms are based off of the lender's own loan history, it is information that the lender should have readily available. The information supplied is also the minimum necessary for a debtor or trustee to review the claim for accuracy. Since these home mortgage claims are usually the largest in the case, it is critical to the success of a debtor's rehabilitation that the information be accurate and timely. By requiring the loan history in a standardized format, challenges that are incorrect but that are filed because of the inadequacy of current proofs of claim can be avoided. ;

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The calculations that are required to arrive at the statutorily mandated result are too complex to expect proofs of claim and mortgage payment changes to be correct without providing a form that incorporates the appropriate methodology. One of the more difficult concepts is the proper calculation of the total amount of the principal and interest cure claim. In the form, the principal and interest cure amount is calculated by determining the contractual principal balance on the mortgage as if the debtor had made all required principal and interest payments in accordance with the terms of the mortgage contract. The form separately calculates the actual principal balance based on the lender's actual application of the funds. The difference between these two amounts is the amount required to cure a principal and interest payment default. These calculations are done automatically. Of course, the lender's application of the funds may be challenged by the debtor, but the form will allow that challenge to be made when it is appropriate. Similar calculations are required for mortgage payment changes.

Separate portions of the calculations are provided for escrow accounting. Those calculations determine the escrow balance as of the petition date and also calculate the required RESPA<sup>1</sup> reserve amount. See Campbell v Countrywide, ---F.3d --- 2008 WL 4542843 (5th Cir. Oct. 13, 2008) (holding that pre-petition escrow deposits that were contractually collectible by the lender constitute a pre-petition claim). Although different districts may allow for different treatment of these pre-petition claims in plans, the form will allow a uniform method of documenting the amounts that must be treated.

The forms are divided into two pages Page 1 is a general input form. Section 1 is for data regarding the case. Section 2 is for data regarding the mortgage contract itself (i.e., the original amount of the loan, the date of the loan, and the last date on which payments are due). Section 3 requires the lender to forecast escrow disbursements. These forecasts are necessary to do a RESPA cushion calculation on the amount of escrow reserves that must be established. Section 4 is for a signature.

Page 2 is a loan history form. It is intended to draw information from a data base or to allow manual input from a loan history. Our experience is that loan histories are usually difficult to understand. This form takes all of the data for each month of the loan. The number of months that will appear will be the number of months that have lapsed from the origination date of the loan (data taken from page 1) and the petition date (also taken from page 1). The background calculations on page 2 are imbedded in the forms and therefore not visible to the user. The

<sup>&</sup>lt;sup>1</sup> See 12 U S C § 2601 *et seq.* 

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calculations can be reviewed by the Committee and public with some modest instructions. Most importantly, the loan history captures all of the economic data and is in a readable form.

Although we assume that a professional forms designer will redesign the form, you may wish to test the form by starting on page 1 and tabbing through the sections. When page 1 is completed, please go to page 2 and also tab through the sections.

Copies of the forms are attached with sample data in PDF for printing and review. A working copy of the forms is also attached. We also attach a brief set of instructions on use of the forms and a set of forms with accessible formulae.

We urge the Committee to adopt standard forms for home mortgage calculations in chapter 13 bankruptcy cases. If the Committee has any questions about anything set forth in this letter, please do not hesitate to contact us. We would be happy to discuss any issue with you.

Sincerely, 1/~

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Elizabeth Magner (by permission)

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Jeff Bohm Jeff Bohm@txs.uscourts.gov 713-250-5470

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## Instructions for Completion of Proof of Claim Addendum

1 Download the Excel file to your computer and save the file before using it

2. To move through the areas on the form, please complete the requested information and then press TAB You need only complete the shaded areas Other areas of the form will be automatically completed by the computer

3 Complete page one of the form first

4. When completing section 3, please include only forecast disbursements for the requested time period set forth on the form. Do NOT include a RESPA reserve. The form will calculate a RESPA reserve. Include all forecast escrow disbursements, whether or not cash is available in the escrow account.

5 When page one is complete, click on the green Excel worksheet tab at the bottom of the page The tab reads "Loan History". Clicking on this tab will take you to page 2.

6. Page 2 is a loan history. The date ranges on the loan history are automatically created based on the information completed on page 1. When placing data onto the loan history, it should be placed in the time period in which the transaction actually occurred. For example, if a payment was received by the lender on April 15, but applied by the lender to a payment due on February 1, the payment should be shown only in the April 15 date range and should not be shown on February 1. The entire loan history must be completed from the commencement of the loan If no data is placed in a field, the computer will treat the amount as \$0.00 Accordingly, you need not place \$0.00 in a field if there was no activity

7. When completing the loan history, the form will require you to state the initial interest rate and the initial contractual payment amount. For convenience, the computer will assume that these amounts do not change. However, you should change these amounts as appropriate to reflect the contracts between the parties

8 The data from page 2 is used by the computer to complete the calculations on page 1.

9. When the loan history is completed, click on the red Excel worksheet tab at the bottom of the page. The tab reads "Cover Sheet" Clicking on this tab will take you to page 1.

10 The form is now complete You may print the form or review it on your screen Print page 1 from page 1. Print page 2 by clicking on the green tab and then printing.

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## Instructions for Completion of Notice of Mortgage Payment Change

1 Download the Excel file to your computer and save the file before using it.

2. To move through the areas on the form, please complete the requested information and then press TAB. You need only complete the shaded areas. Other areas of the form will be automatically completed by the computer.

3 Complete page one of the form first

4 When completing section 2, please complete section 2B only if the payment change is based solely on an escrow payment adjustment If you complete section 2B, the form will instruct you NOT to complete sections H and I.

5. When completing section 3, please include only forecast disbursements for the requested time period set forth on the form. Do NOT include a RESPA reserve The form will calculate a RESPA reserve. Include all forecast escrow disbursements, whether or not cash is available in the escrow account

6. When page one is complete, click on the green Excel worksheet tab at the bottom of the page. The tab reads "Loan History". Clicking on this tab will take you to page 2

7 Page 2 is a loan history. The date ranges on the loan history are automatically created based on the information completed on page 1. When placing data onto the loan history, it should be placed in the time period in which the transaction actually occurred. For example, if a payment was received by the lender on April 15, but applied by the lender to a payment due on February 1, the payment should be shown only in the April 15 date range and should not be shown on February 1. The entire loan history must be completed from the commencement of the loan. If no data is placed in a field, the computer will treat the amount as \$0.00 Accordingly, you need not place \$0.00 in a field if there was no activity.

8. When completing the loan history, the form will require you to state the initial interest rate and the initial contractual payment amount. For convenience, the computer will assume that these amounts do not change. However, you should change these amounts as appropriate to reflect the contracts between the parties.

9. The data from page 2 is used by the computer to complete the calculations on page 1.

10. When the loan history is completed, click on the red Excel worksheet tab at the bottom of the page The tab reads "Cover Sheet". Clicking on this tab will take you to page 1.

11. The form is now complete. You may print the form or review it on your screen. Print page 1 from page 1 Print page 2 by clicking on the green tab and then printing

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