

VBA BANKRUPTCY LAW SECTION
BENCH-BAR BROWN BAG LUNCH MEETING
with Hon. Colleen A. Brown, U.S. Bankruptcy Judge

United States Bankruptcy Court, Rutland
Friday, November 16, 2018 ~ 12:00 - 1:00 PM
Dial-in number: (888) 398-2342. Access code: 846 68 72#
If you dial into the meeting, please use your “mute” function, unless speaking.

AGENDA

1. REQUIREMENT FOR MONTHLY STMTS FOR HELOC MTGES JEFF HARDIMAN
 - Shd monthly stmt req'ment apply to HELOC's? See Vt. LBR 3071-1(d) and Fed Rule 3002.1(b)
 - Attachment: In re Pillow, 2013 Bankr. LEXIS 5711
2. VBA BANKRUPTCY SECTION CHAIRS' UPDATE NANCY GEISE/DON HAYES
 - 18th Annual Holiday CLE
 - December 7, 2018 from 8:30-5:00 at Trader Duke's Hotel in South Burlington
 - Gen'l discussion of anticipated topics, need for speakers
 - Draft agenda attached
 - Bankruptcy – Higher Ed Law CLE re Student Loan Issues
 - In early planning stages
 - Set for 3/22/19 as part of VBA Midyear meeting at Lake Morey
 - Looking for speakers and fine-tuning of topics
3. SEMI-ANNUAL MTG W/ UST & T'S MTGS HELD MARCH AND SEPT JUDGE BROWN
 - Electronic signature of *pro se* debtors (when documents filed by mail) working fine
 - NABT Conference will be in Denver Aug 22-25, 2019 (RJO is outgoing President)
 - Annual Ch 12 Conference will be in Indianapolis July 16-19, 2019 (Jan S is VP)
 - Formulated some topics / practice pointers to include at Dec CLE
 - Verified construction project will not interfere with space needs for Bk Ct hearings or 341s
4. COURT CALENDAR 2019 JUDGE BROWN
 - All 2019 regular hearing and 341 mtg dates posted on website
 - Burlington hearings twice per month on Tuesday
 - Rutland hearings twice per month on Friday
5. CLERK'S OFFICE UPDATE JEFF EATON
 - Construction Update
6. TOPICS FOR NEXT BB? EVERYONE
 - to be held at the 12/7/18 CLE

Attachments: Vt. VLB 3071-1(d), Fed Bk Rule 3002.1, Pillow case, draft agenda for 12/7/18 CLE

These Bench-Bar lunch meetings are coordinated by the Bankruptcy Court.
They are free and no pre-registration is required. 1 CLE credit provided per meeting.
Contact Maria Dionne @ 802-657-6432 or maria_dionne@vtb.uscourts.gov with any questions.

Vt. LBR 3071-1. SECURED CREDITORS' OBLIGATION TO PROVIDE ACCOUNT INFORMATION & STATEMENTS TO DEBTORS POST-PETITION

- (a) **Purpose; Protection Assured to Secured Creditors.** This Rule has been implemented to ensure the post-petition, routine flow of information from secured creditors to debtors with respect to secured loans in each bankruptcy case where a debtor retains possession of the collateral and is required to make regular installment payments directly to the secured creditor; to ensure that secured creditors provide specific contact information to debtors so that debtors may obtain accurate, up-to-date information on the status of the secured loans as needed; and to clarify that a secured creditor who complies with or makes a good faith attempt to comply with this Rule shall not be found to have violated the automatic stay, provided that the secured creditor's communication with a debtor is not an attempt to collect pre-petition debt.
- (b) **Applicability of Rule Generally.** This Rule applies: (1) in cases filed under Chapters 7, 12, and 13; (2) to consumer loan relationships; and (3) as long as the debtor is protected by the automatic stay. It does not apply to debts evidenced by non-consensual liens (e.g., tax liens, restitution liens).
- (c) **Possible Further Applicability.** For cause shown and after proper notice and a hearing, the Court may direct parties to comply with this Rule with regard to commercial loans or in a Chapter 11 case.
- (d) **Applicability to Debt Secured by a Mortgage on Real Property.** For purposes of this Rule, the term "Mortgage Creditor" shall include any creditor who has a claim secured by a mortgage on real property. The Mortgage Creditor shall provide monthly statements to each Chapter 12 and Chapter 13 debtor who has expressed an intent in his/her plan to retain the Mortgage Creditor's collateral and has expressed an intent to pay the Mortgage Creditor directly (i.e., "outside the plan"), and to each Chapter 7 debtor who has expressed his/her intent in his/her statement of intent (which has been served on the Mortgage Creditor) to retain the Mortgage Creditor's collateral. The monthly statements shall contain at least the following information concerning post-petition mortgage payments to be made directly from the debtor to the Mortgage Creditor:
- (1) the date of the statement and the date the next payment is due;
 - (2) the amount of the current monthly payment and of the next payment due;
 - (3) the amount of the payment attributable to escrow, if any;
 - (4) the amount due for any post-petition arrears, and from what date;
 - (5) the amount of any outstanding post-petition late charges;
 - (6) the amount, date of receipt, and application of all payments received since the date of the last statement;

- (7) any other amount(s) due (e.g., for payment of taxes, insurance, attorney's fees, and/or other expenses), *together with an explanation* of the "other amount due" and, if the Mortgage Creditor has already made a payment on this "other amount due", the date of the payment;
- (8) a telephone number and contact information that the debtor or the debtor's attorney may use to obtain reasonably prompt information regarding the secured loan and recent transactions; and
- (9) the address to which the next payment shall be sent and, if the address has changed since the last statement, a conspicuous statement notifying the debtor of the changed address.

Further, upon reasonable written request of the debtor, the Mortgage Creditor shall provide the following additional information to the debtor:

- (10) the principal balance of the secured loan;
- (11) the original maturity date;
- (12) the current interest rate;
- (13) the current escrow balance, if any;
- (14) the interest paid year-to-date;
- (15) the property taxes paid year-to-date, if any; and/or
- (16) any other amount(s) due (e.g., for payment of taxes, insurance, attorney's fees, and/or other expenses), *together with an explanation* of the "other amount due" and, if the Mortgage Creditor has already made a payment on this "other amount due", the date of the payment.

Mortgage Creditors are not required to send monthly statements to Chapter 12 and Chapter 13 debtors who make their post-petition mortgage payments via the case trustee (i.e., "through the plan"). However, to the extent they choose to do so, and such monthly statements comply with this paragraph, Mortgage Creditors shall be entitled to the protection articulated in paragraph (a), above.

- (e) **Applicability to Other Secured Debts.** For the purposes of this Rule, (1) the term "Creditor" shall include any creditor who holds a claim secured by personal property and any lessor of assumed leases on personal property; (2) "other secured debt" shall include all debts secured by property other than as provided for by paragraph (d) above, and assumed leases on personal property. The Creditor shall provide monthly statements or other forms of invoicing (e.g., a coupon book) to each Chapter 12 and Chapter 13 debtor who has expressed an intent in his/her plan to retain the Creditor's collateral and/or assume the lease, and has expressed an intent to pay the Creditor directly (i.e., "outside the plan"), and to each Chapter 7 debtor who has expressed his/her intent in his/her statement of intent (and served a copy of that statement on the Creditor) to retain the Creditor's collateral and/or assume the lease. The monthly statements or other forms of invoicing shall contain the same or substantially similar information as that provided pre-petition.

Creditors are not required to send monthly statements or other forms of invoicing to Chapter 12 and Chapter 13 debtors who make their post-petition mortgage payments via the case trustee (i.e., “through the plan”). However, to the extent they choose to do so, and such monthly statements or other forms of invoicing contain the same or substantially similar information as that provided pre-petition, the Creditors shall be entitled to the protection articulated in paragraph (a), above.

- (f) **Additional Communication a Secured Creditor May Have With a Debtor Without Violating the Automatic Stay.** A secured creditor contacting a debtor to inquire or request proof as to the status of insurance coverage on property that is collateral for the secured creditor’s claim does not violate the automatic stay, unless, in its communication with the debtor, the secured creditor also seeks to collect a debt.
- (g) **Forms of Communication Generally.** A secured creditor is considered to have complied with this Rule when it has transmitted the requisite monthly statements, other forms of invoicing, or additional requested information to the debtor in the manner normally utilized by the secured creditor. However, the secured creditor and debtor may agree to a form of communication not routinely used by the secured creditor (e.g., e-mail versus U.S. mail) to transmit documents to the debtor. See also, e.g., Bankruptcy Rule 9036. It is the debtor’s duty to provide the secured creditor with his/her current address and such contact information as is necessary to facilitate receipt of any document(s) transmitted by the secured creditor.
- (h) **Waiver of Strict Compliance.** If a Mortgage Creditor’s, or Creditor’s, billing system provides monthly statements or other forms of invoicing that substantially comply with this Rule, but does not fully conform to all of its requirements, the Mortgage Creditor, or Creditor, may request that the debtor accept such monthly statements or other forms of invoicing, and the debtor may do so. If the debtor declines to accept the non-conforming monthly statements or other forms of invoicing, a Mortgage Creditor, or Creditor, may file a motion, on notice to the debtor and the debtor’s attorney, if any, requesting a determination from the Court that cause exists to allow such non-conforming monthly statements or other forms of invoicing to satisfy the Mortgage Creditor’s, or Creditor’s, obligations under this Rule. For cause shown, the Court may grant a waiver for an individual case or for multiple cases, and for either a limited or unlimited time period. However, no waiver will be granted unless the proffered monthly statements or other forms of invoicing substantially comply with this Rule and the Mortgage Creditor, or Creditor, has demonstrated that it would be an undue hardship for it to strictly comply with the Rule.
- (i) **Motion to Compel Compliance.** A debtor may file a motion to compel a secured creditor’s compliance with this Rule where the debtor has evidence that a secured creditor has not complied with the Rule for at least 30 days. However, the debtor must first make a good faith effort to contact the offending secured creditor to determine the cause for non-compliance, including inquiring on the status of the secured creditor’s efforts to provide statements in compliance with this Rule. Debtor’s motion to compel must include a description of (1) the debtor’s pre-motion good faith effort(s), (2) any response by the secured creditor, and (3) any harm the debtor has suffered as a result of the secured creditor’s non-compliance.

PART IV

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

(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.** 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.

(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 the debtor or trustee 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.



Cited

As of: September 10, 2018 4:05 PM Z

In re Pillow

United States Bankruptcy Court for the Western District of Michigan

March 18, 2013, Decided

Case No. DK 11-11688

Reporter

2013 Bankr. LEXIS 5711 *

In re: COLLENE MAE PILLOW, Debtor.

Core Terms

notice, changes, monthly, twenty-one, modify, obligations, reporting, parties, lender, interest rate, adjustments, days, documents, enlarge, reporting requirements, time period, interval, mortgage, orders, costs

Case Summary

Overview

HOLDINGS: [1]-In place of the requirement under *Fed. R. Bankr. P. 3002.1* that a creditor report payment changes not later than 21 days before the change takes effect, for purposes of a home equity line of credit, the creditor bank was permitted by the court to adhere to a six month reporting interval; [2]-Taking into account the purpose of *Fed. R. Bankr. P. 3002.1* and the clerical and legal expenses associated with preparing, filing, and serving monthly payment change notices for nominal or negative adjustments supported the bank's position that the notice requirement imposed a unique burden in this particular case; [3]-Enlarging the reporting periods under *Fed. R. Bankr. P. 9006* mitigated the burden and expense of complying with the time periods that would otherwise apply under *Fed. R. Bankr. p. 3002.1(b)* and (c).

Outcome

Creditor motion granted.

LexisNexis® Headnotes

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

[HNI](#) **Proof of Claim, Effects & Procedures**

See *Fed. R. Bankr. P. 3002.1(b)*.

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

[HN2](#) **Proof of Claim, Effects & Procedures**

Like all rules, *Fed. R. Bankr. P. 3002.1* imposes burdens on the parties in interest, including residential mortgage lenders.

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

[HN3](#) **Proof of Claim, Effects & Procedures**

The purpose of *Fed. R. Bankr. P. 3002.1* is to permit debtors to cure and maintain under [11 U.S.C.S. § 1322\(b\)\(5\)](#) during their bankruptcies, and avoid unhappy surprises when their plan terms

come to an end.

Bankruptcy Law > Administrative
Powers > General Overview

[HN4](#) [↓] **Bankruptcy Law, Administrative Powers**

[Fed. R. Bankr. P. 9029](#) does not permit any court to modify any national rule. However, [Fed. R. Bankr. P. 9006\(b\)](#) grants the court authority to enlarge deadlines prescribed in the rules or by court order, subject to enumerated exceptions or conditions.

Bankruptcy Law > Administrative
Powers > General Overview

[HN5](#) [↓] **Bankruptcy Law, Administrative Powers**

See [Fed. R. Bankr. P. 9006\(b\)\(1\)](#).

Bankruptcy Law > Administrative
Powers > General Overview

[HN6](#) [↓] **Bankruptcy Law, Administrative Powers**

The language in [Fed. R. Bankr. P. 9006](#) is inescapably broad and flexible, using such phrases as "at any time," "in its discretion," "with or without a motion," and "for cause." These phrases echo other signals in the rules directing the court to apply the rules in a practical way to secure the just, speedy, and inexpensive determination of every case and proceeding. [Fed. R. Bankr. P. 1001](#).

Bankruptcy Law > Claims > Proof of
Claim > Effects & Procedures

Bankruptcy Law > Administrative
Powers > General Overview

[HN7](#) [↓] **Proof of Claim, Effects & Procedures**

Until the parties devise a practical solution, or the Supreme Court includes a safety valve within *Fed. R. Bankr. P. 3002.1* itself, or excludes the new rule from the scope of [Fed. R. Bankr. P. 9006](#), the United States Bankruptcy Court for the Western District of Michigan will continue to apply [Fed. R. Bankr. P. 9006](#) to motions seeking relief from the time periods under *Fed. R. Bankr. P. 3002.1*, insisting each time, of course, that the movant establish cause.

Counsel: [*1] For Collene Mae Pillow, Debtor: Roger J. Bus, Debt Relief Law Center, Kalamazoo, MI.

Trustee: Barbara P. Foley, Chapter 13 Trustee's Office, Kalamazoo, MI.

Judges: PRESENT: HONORABLE SCOTT W. DALES, United States Bankruptcy Judge.

Opinion by: SCOTT W. DALES

Opinion

OPINION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES

United States Bankruptcy Judge

Fifth Third Bank (the "Bank") filed a motion for an order relaxing the mortgage payment reporting requirements that would otherwise apply under *Rule 3002.1(b)* (the "Bank's Motion," DN 39).¹ After the notice period under [LBR 9013\(c\)\(2\)](#) passed without objection, the court entered its order granting the Bank's Motion under [Rule 9006](#) (the "Order," DN 42). The United States Trustee ("UST") timely filed a motion for reconsideration of the Order pursuant to [Rule 9024](#) (the "UST's

¹ In this Opinion and Order, each reference to a "Rule" or "the rules" is a reference to one or more of the Federal Rules of Bankruptcy Procedure, unless otherwise indicated.

Motion," DN 43), arguing that the UST did not receive notice of the Bank's Motion, and challenging the court's authority to modify the reporting requirements under *Rule 3002.1*. Although not a party with a financial stake in this case, the UST has statutory authority to raise and be heard on any issue.² Therefore, the court announced its intention at the March 6, 2013 hearing to reconsider the Order and review the Bank's Motion *de novo*, keeping in mind [*2] the UST's position.

After reviewing the authorities that the parties called to the court's attention and considering the arguments advanced during the March 6, 2013 hearing, the court stands by its original decision to relax the reporting requirements under the circumstances of this case, with a minor revision described below.

I. JURISDICTION

The court has jurisdiction over the chapter 13 bankruptcy case of Collene Mae Pillow (the "Debtor") pursuant to 28 U.S.C. § 1334(a), and the case and this contested matter have been referred to the bankruptcy [*3] court under *LCivR. 83.2(a)* (W.D. Mich.) and 28 U.S.C. § 157(a). The contested matter concerns the administration of the case, and is therefore a "core" proceeding. 28 U.S.C. § 157(b)(2)(A).

II. ANALYSIS

In their papers and again during oral argument, the parties referred the court to *Rule 3002.1* and *Rule 9006*. They agree that the Bank holds a claim falling within the ambit of *Rule 3002.1* because it is secured by the Debtor's principal residence and the Debtor has provided for the claim under *11 U.S.C.*

§ 1322(b)(5). See *Fed. R. Bankr. P. 3002.1(a)*. As a result, the parties agree that the Bank is subject to the reporting obligations prescribed in *Rule 3002.1(b)*. Accordingly, without the relief granted in the Order, the Bank would be obligated to file a notice of payment change every month, and do so no later than twenty-one days before the payment change takes effect. The UST, however, does not agree that *Rule 9006* authorizes the court to modify the twenty-one day notice requirement under *Rule 3002.1(b)* as the court did in the Order. At oral argument, the UST's counsel suggested that extending the deadline to file the reports in response to the Bank's Motion "is a different animal" than the enlargement contemplated under *Rule 9006*, and effectively re-writes *Rule 3002.1(b)*. See Transcript of hearing held March 6, 2013 ("Tr.") at 14:23.

By way of background, the Bank's [*4] claim arises from a home equity line of credit ("HELOC") which is a revolving or "open end" credit arrangement secured by residential real estate. See Bank's Motion at Exh. A. Under the loan documents, the interest rate on the HELOC, and therefore the Debtor's payment obligation, changes monthly, though not necessarily dramatically. More specifically, as the Wall Street Journal's published "Prime Rate" fluctuates on "the business day immediately preceding the first business day of each month," the Debtor's payment obligation changes. See Bank's Motion at Exh. A (Equity Flexline Credit Agreement, Security Agreement and Federal Truth in Lending Initial Disclosure at ¶ 8). Every time the payment changes, regardless of the frequency, the Bank concedes it is obligated to give notice of this change to the Debtor, her lawyer and the chapter 13 trustee. The applicable rule provides as follows:

HNI [↑] 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

² See *11 U.S.C. § 307*. The docket in this matter establishes that the Bank did not serve the Bank's Motion upon the UST, contrary to the representation in the applicable certificate of service. The Bank evidently assumed, incorrectly, that the UST receives electronic service in all cases. By local rule, however, there is no general, mandatory service on the UST in chapter 13 cases. See *LBR 5005-3*. Given the volume of cases, automatic, electronic service on the UST would impose a substantial burden on his office.

new amount is due.

Fed. R. Bankr. P. 3002.1(b). Under the [*5] circumstances of this case, the Bank would have approximately nine days to calculate the payment change and communicate that information to counsel in time for counsel to prepare and file the payment change notice with the court no later than twenty-one days before the change takes effect in the next billing cycle. This is an exceedingly small window.

The Advisory Committee Note to this relatively new rule explains the drafters' purpose in imposing the notification requirements:

In order to be able to fulfill the [cure and maintain] 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.

See Fed. R. Bankr. P. 3002.1 (Advisory [*6] Committee Note (2011)). Ultimately, the drafters hoped that by requiring lenders to give periodic notice of payment changes, debtors could avoid the shock that some have experienced at the end of their plan terms upon discovering that, despite having made all payments in good faith, their mortgage arrears quietly grew -- in some instances, substantially. The culprits usually were tax and insurance escrow changes, interest rate adjustments, late payments, appraisal fees, and collection costs. Some debtors who complied with their plan obligations and received a chapter 13

discharge nevertheless found themselves facing foreclosure because they were not aware that their plan payments were inadequate to cure and maintain the very defaults and obligations that prompted them to seek bankruptcy protection in the first place. *Rule 3002.1* addresses this problem in several ways, principally by requiring periodic disclosures. [HN2](#)³ Like all rules, *Rule 3002.1* imposes burdens on the parties in interest, including residential mortgage lenders.

Citing the "unique burden" that the rule imposes on it as the holder of a HELOC loan with frequent payment adjustments, the Bank filed its motion seeking relief from what would, in effect, [*7] amount to giving monthly notices. In place of the requirement to report payment changes not later than twenty-one days before the change takes effect, the Bank proposed, and the court approved, a six month reporting interval, citing its authority to enlarge deadlines under [Rule 9006](#). *See* Order at (unnumbered) ¶¶ 3 and 5.³

At the March 6, 2013, hearing, counsel for the UST argued that the Bank has in fact filed two notices under *Rule 3002.1*, contradicting the Bank's argument that the notification requirements are "virtually impossible" to meet. *See* Bank's Motion at p. 4 (supporting brief at p. 2). Putting aside the Bank's hyperbole, however, the thrust of its argument is that giving notice is impractical. Stated differently, the Bank argues that giving notice every month for *de minimis* changes is burdensome, taking into account the purpose of *Rule 3002.1*.

Moreover, the Bank's notices, filed after the UST [*8] filed its motion, actually fortify the Bank's contention that the requirement is burdensome: the Bank's first notice shows that between January and February, the monthly

³ Artlessly and somewhat inconsistently, the Order purported to "excuse" the Bank from the notice requirement of *Rule 3002.1*. Fairly construed, rather than excusing the Bank from giving notice of payment changes under the rule, the Order substituted a six month reporting interval for each monthly period that otherwise would apply.

payment changed from \$117.72 to \$120.40 -- a mere \$2.68. At the hearing, Bank's counsel stated without contradiction that in other months the payment has changed by as little as thirty-two cents. *See* Tr. at 9:25. Giving monthly notice of these small changes does not materially advance [HN3](#)^[↑] the purpose of *Rule 3002.1*, which (as noted above) is to permit debtors to "cure and maintain" under [§ 1322\(b\)\(5\)](#) during their bankruptcies, and avoid unhappy surprises when their plan terms come to an end.

In addition, the clerical and legal expenses associated with preparing, filing, and serving monthly payment change notices for nominal or negative adjustments support the Bank's position that the notice requirement imposes a "unique burden" in this particular case. During the hearing, despite concurring in the UST's Motion, counsel for the chapter 13 trustee (the "Trustee") nevertheless stated that the Bank's monthly reporting would impose a burden on his client. *See* Tr. at 12:3 (acknowledging burden on the Bank, and noting that the reporting is "also really [[*9](#)] burdensome on the trustee"). Furthermore, under most consumer loan documents, including the HELOC documents in this case, the borrower is ultimately responsible for the lender's collection costs. *See* Bank's Motion at Exh. A, ¶¶ 22-23. In other words, for HELOC loans like this one with foreseeably modest monthly payment changes, the creditors, debtors, and trustees will bear the cost of compliance with *Rule 3002.1*. Significantly, none of these parties opposed the Bank's Motion, at least not initially.⁴ It seems safe to assume that the lender who incurs collection costs for complying with *Rule 3002.1(b)* will seek to pass along the costs to the borrower under the loan documents. If so, *Rule 3002.1(c)* will require the lender to give another notice within

180 days after incurring the expense. Assuming monthly payment adjustments lead to monthly notices (and monthly charges), in six months the lender will be giving two monthly notices, one under *Rule 3002.1(b)* for the interest rate change, and one under *rule 3002.1(c)* for the cost of giving the first monthly notice. Over a five year plan period, a debtor could be required to pay substantial additional collection costs to compensate her HELOC lender for giving notice of payment changes in the range of \$1.00-\$3.00 [[*10](#)] per month, all in the name of transparency. Enlarging the reporting periods under [Rule 9006](#) mitigates the burden and expense of complying with the time periods that would otherwise apply under *Rule 3002.1(b)* and *(c)*.

In its Motion, the Bank cited general orders from bankruptcy courts in other districts that attempt to address the problem of revolving or open-end credit agreements and postpetition arrears. It also cited [Rule 9006](#), governing calculation of, and relief from, various time periods in bankruptcy cases.

The court does not regard the Bank's citation to other courts' general orders as particularly persuasive because the orders do not apply in this district and, in any event, have generally been abrogated. At most, they show that these courts have attempted to create disclosure obligations without the burdens that *Rule 3002.1(b)* imposes on HELOC lenders. Even if the general orders were not abrogated [[*11](#)] by the courts themselves, [HN4](#)^[↑] [Rule 9029](#) does not permit any court to modify any national rule. Because of this limitation, the court is more receptive to the Bank's reliance on [Rule 9006](#) and the "case by case" safety-valve provided under that rule.

Specifically, [Rule 9006\(b\)](#) grants the court authority to enlarge deadlines prescribed in the rules or by court order, subject to enumerated exceptions or conditions:

[HN5](#)^[↑] Except as provided in paragraphs (2) and (3) of this subdivision, when an act is

⁴Indeed, the Trustee has agreed in at least one other case to substitute a six month interval for the twenty-one day notice that otherwise would apply. *See* Stipulation Resolving Creditor Fifth Third Bank's Motion to Be Excused from Filing a Notice of Payment Change (DN 33) at ¶ 2, filed May 23, 2012 in *In re Prestly*, Case No. 10-13560-SWD.

required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1). The court notes that paragraphs (2) and (3) of Rule 9006(b) do not mention *Rule 3002.1*, and therefore the relief that Rule 9006 affords may apply to the time periods prescribed in *Rule 3002.1*.

Moreover, HN6^[↑] the language in Rule 9006 is inescapably broad and flexible, using such phrases as "at any [*12] time," "in its discretion," "with or without a motion," and "for cause." These phrases echo other signals in the rules directing the court to apply the rules in a practical way to secure the "just, speedy, and inexpensive determination of every case and proceeding." Fed. R. Bankr. P. 1001.

Viewing the Bank's Motion through the lens of Rule 9006, giving twenty-one days advance notice of payment changes under *Rule 3002.1(b)* is an act "required . . . to be done at or within a specified period by these rules or by a notice given thereunder," and therefore within the scope of Rule 9006(b)(1). The Bank sought relief from this time period by filing a motion, and as "cause" articulated the "unique burden" associated with the twenty-one day period, given the nature of the HELOC loan with its nominal but monthly interest rate adjustment. In response to the motion, which drew no objection from the only parties with a concrete stake in the matter and the only parties entitled under the rules to notice of payment changes,⁵ the

court entered its Order relaxing the reporting requirements, concluding that the Bank's Motion established cause to modify the twenty-one day period in this case under Rule 9006(b).

The UST, however, takes a different view, arguing that Rule 9006 does not authorize the court to modify the reporting requirements of *Rule 3002.1*. The court respectfully disagrees. In its Order, the court did not intend to excuse the Bank from reporting, but simply modified the deadlines for doing so, after taking into account the cause associated with HELOC loans. The UST's citation to In re Adkins, 477 B.R. 71, 74 (Bankr. N.D. Ohio 2012), is not particularly instructive. The court does not quarrel with that decision to the extent it stands for the proposition that *Rule 3002.1* itself provides no safety valve to address burdensome or impractical application. The *Adkins* court, however, did not consider whether another rule, such as Rule 9006, might provide relief.

As for Judge Gregg's bench ruling in another case withholding similar relief,⁶ the UST's citation to the resulting order is similarly unpersuasive. First, without the benefit of the transcript of the oral ruling, the court cannot determine what factors influenced the decision. Second, the court doubts that Judge Gregg intended his oral ruling on this new and important issue to have precedential effect, at least [*14] not before he issues a published opinion setting forth his reasoning. The court hesitates to rely on Judge Gregg's unwritten ruling in *May*, and doubts that he intended it as the last word on this issue in our district.

On reconsideration, the court recognizes that it might have done a better job of balancing the burdens the Bank described against the concerns the UST expressed in his motion (and that motivated the drafters of *Rule 3002.1(b)*), namely preventing the Debtor from unwittingly falling way

the rule [*13] omits the UST, for practical reasons. See also LBK 5005-3 (Service of Documents on the United States Trustee).

⁵ *Rule 3002.1* requires the Bank to notify the Trustee and the Debtor;

⁶ *In re May*, Case No. 12-07004-JDG.

behind on her mortgage debt. Although the court doubts that there will be significant payment changes resulting from the interest rate adjustments under the HELOC in this case, there may nevertheless be payment changes that the Debtor will need time to account for before exiting bankruptcy. Therefore, the court will adhere to its decision to permit six month reporting intervals, but will require quarterly reporting in the last year of the Debtor's plan term. This should give the Debtor ample time to address the impact of any modest payment changes before she concludes her case. Moreover, if developments in the case persuade the Debtor or the Trustee that cause exists to [*15] revisit the reporting interval, the court will consider readjusting the period in response to a motion under [Rule 9006](#).

III. CONCLUSION AND ORDER

If the drafters of the rules intended to make the twenty-one day time period impregnable, they could have included *Rule 3002.1* among the rules listed in [Rule 9006\(b\)\(2\)](#) or [\(b\)\(3\)](#). They did not. [HN7](#)⁷ Until the parties devise a practical solution,⁷ or the Supreme Court includes a safety valve within *Rule 3002.1* itself,⁸ or excludes the new rule from the scope of [Rule 9006](#), the court will continue to apply [Rule 9006](#) to motions seeking relief from the time periods under *Rule 3002.1*, insisting each time, of course, that the movant establish cause. The UST's position gives too little weight to the court's authority under [Rules 1001](#) and [9006\(b\)](#) and the finding of cause in the context of this case involving the inevitably

frequent and predictably modest payment changes associated with the HELOC loan.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The UST's Motion (DN 43) is GRANTED only to the extent it seeks reconsideration, and on reconsideration, the court's Order (DN 42) is VACATED;
2. The Trustee's concurrence (DN 51), to the extent it requests relief, is DENIED;
3. The Bank's Motion (DN 39) is GRANTED as provided herein:
 - a. The Trustee shall continue to pay the monthly amount indicated in the Bank's last payment change notice and notices filed thereafter; and
 - b. The Bank shall file a notice of payment change on or about the date that is six months after entry of the last payment change notice, and every six months thereafter, provided, however, that during the last year of the Debtor's plan, the Bank shall file quarterly notices of any payment changes.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Opinion and Order pursuant [*17] to [Fed. R. Bankr. P. 9022](#) and [LBR 5005-4](#) upon the Debtor, Debtor's counsel, Panayiotis Marselis, Esq., Dean T. Rietberg, Esq., and Manish Joshi, Esq.

IT IS SO ORDERED.

Dated March 18, 2013

/s/ Scott W. Dales

Scott W. Dales

United States Bankruptcy Judge.

⁷Modifying the twenty-one day period is not the only possible solution to the problem. It is conceivable, for example, that the Bank and the Debtor might mitigate the hardships imposed by the rule by agreeing to modify the payment provisions of the HELOC. The court, however, does not have the authority to order the modification, nor may the Supreme Court "abridge, [*16] enlarge, or modify any substantive right" of the Bank by promulgating any rule, including *Rule 3002.1*. See [28 U.S.C. § 2075](#); cf. [11 U.S.C. § 1322\(b\)\(2\)](#). Nothing in this Opinion and Order modifies the rights or obligations of the Bank or the Debtor under their loan documents.

⁸Inserting the phrase "Unless the court, for cause, orders otherwise," at the beginning of *Rule 3002.1(b)* would probably suffice.

BANKRUPTCY BAR HOLIDAY CLE

December 7, 2018

9:00AM TO 5:00PM

Time	Topic	Description	Presenter(s)
8:30 a.m. to 9:00 a.m.	REGISTRATION		
9:00 a.m. to 10:00 a.m.	Ethics - Succession Planning – Part 2	Roundtable discussion: sale of practice, mentoring, contract employees, and ethics of all	Michael Kennedy
10:00 a.m. to 10:30 a.m.	State of the Court	Filing statistics summary, pro bono, court updates and musings from Judge Brown	Judge Brown
10:30 a.m. to 10:45 a.m.	BREAK		
10:45 a.m. to 12:15 p.m.	Case Summaries		Renee Calabro Samantha Henchen
12:30 p.m. to 1:15 p.m.	LUNCH		
1:15 p.m. to 1:45 p.m.	Bench Bar Meeting		Judge Brown
1:45 p.m. to 2:45 p.m.	Bankruptcy for Seniors	Bankruptcy as estate planning tool; Estate planning and bankruptcy pitfalls	Holly Lemieux (TBD)
2:45 p.m. to 3:00 p.m.	BREAK		
3:00 p.m. to 4:00 p.m.	Lease Reaffirmations?	How to handle leases in a Chapter 7 bankruptcy	Martin Mooney David Lynch
BREAKOUT SESSIONS			
4:00 p.m. to 5:00 p.m.	Session A: Chapter 13 Practice – Post December 1, 2017	How to complete the new plan form, CMPs, Means Test issues, interest rate changes, (talking points from Lisa P.)	Michelle Kainen Jan Sensenich Margaret Katucki
	Session B: Creditor Issues – Proof of Claim Rule Changes	Local practice changes re POC deadlines, need for mortgage statements, notice of embedded motions;	Alex Edelman Derek Castello