

## Writing Sample (Memo) – Carron Nicks

Memo to: Managing Partner and Bankruptcy Department Attorneys

Re: Fee Recoverability Guidelines

Date: X/XX/20XX

### **I. The Issue:**

The Bankruptcy Department has been relying on old and inapplicable case law to determine whether the fees we charge clients are recoverable from Chapter 13 debtors. This has caused inconsistencies, like invoices that mark the fee for the Form 410 payment history as recoverable but the fee for the POC itself as *not* recoverable.

### **II. Recommendations**

1. Review and approve these guidelines
2. Provide guidance to bankruptcy and accounting staff who handle invoices regarding which items are not recoverable.
3. For the items that can be recoverable, the decision will require a Section 506 analysis and determining if the case has been confirmed. The attorneys, who are in the best position to know, need to note in DART whether fees for the following are recoverable: POC, APOC, plan review, amended plan review, and review of a TRCC (if we bill for those).
4. Revise the schedule for these items so that the attorneys must choose whether the item is or is not recoverable when we complete our steps.

### III. The Fundamental Question

Most of the cases that discuss these issues were decided in the Southern District of Texas. I also reviewed other jurisdictions and included relevant cases. Rule 3002.1 is a recent addition, and there are not many cases yet that discuss what fees are reasonable. Most of the cases concern the sanctions a court can impose when the lender fails to abide by the rule.

The basic inquiry in both Chapter 7 and Chapter 13 cases is this:

- Do the mortgage documents allow for attorney fees and other fees?<sup>1</sup>
- Is the fee reasonable?<sup>2</sup>
  - To determine whether a fee is reasonable, courts consider the amount and the nature of the fee, usually distinguishing between whether the item required legal expertise or whether it was a “ministerial” act that could have been accomplished without an attorney.
- Section 506: Is there equity in the property?
  - If there is equity in the property, the fee can be recovered from the borrower

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<sup>1</sup> Standard documents used for Fannie Mae, Freddie Mac, and VA loans all include paragraphs in the deed of trust and other security instruments that the courts have concluded allow the lender to assess fees to preserve the property in the event of default. That has been interpreted to include attorney’s fees.

<sup>2</sup> *In re Harrell*, 2016 Bankr. LEXIS 3864 (SD Tx) Judge Isgur considered the debtor’s offer of the Fannie Mae bankruptcy attorney fee guidelines as acceptable evidence of reasonable attorney fee amounts.

- If there is no equity in the property, the fee cannot be recovered from the borrower
- In a Chapter 13, once the plan has been confirmed, Section 506 no longer applies.<sup>3</sup>

#### IV. Applying Rule 3002.1 to Specific Fees

This chart summarizes my research results. For further explanation, read on.

Plan Review	Recoverable
Proof of Claim	Recoverable
Form 410A Payment History	Recoverable
Trustee's Reconciliation (TRCC)	Recoverable
Response to Final Cure (opposed)	Recoverable
Notice of Appearance	Not Recoverable
Payment Change Notice	Not Recoverable
Postpetition Fee Notice	Not recoverable
Response to Final Cure (unopposed)	Not Recoverable
Transfer of Claim	Not Recoverable
Reaffirmation	Not Recoverable

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<sup>3</sup> *In re Fuentes*, 509 B.R. 832 (Bankr. SD Tx 2014) (section 506 applies before confirmation; section 1322(b)(2) applies after confirmation); *In re Martinez*, 08-40986 (Bankr. SD Tx 2009).

## **1. RECOVERABLE: Plan Review, Proof of Claim, Form 410A Payment History**

The plan review, proof of claim, and Form 410A are usually treated similarly or are subsumed into the fee for the proof of claim.

The courts in Texas generally consider work to produce and file a POC to entail “legal” work and will approve a reasonable fee. See, e.g., *In re Herman*, 2016 Bankr LEXIS 410 (SDTx) (Judge Paul concluded that \$415 for preparing a POC is reasonable); *In re Perez*, 2014 Bankr. LEXIS 4101 (SD Tx) (Judge Brown concluded that \$300 to file a POC and \$350 for other attorney’s fees, as stipulated by the parties, were not unreasonable). See also *In re Harrell*, 2016 Bankr. LEXIS (SD Tx) wherein Judge Isgur looked with favor on the Fannie Mae bankruptcy fee guidelines as evidence of reasonable attorney fees.

But see *In re Raygoza*, 556 B.R. 813 (Bankr. SDTx 2016), in which Judge Rodriguez concluded that a POC can entail “legal” work, but most of it is ministerial, like gathering figures and putting them into the form. Ministerial functions are not billable as attorney fees or otherwise. He reduced the attorney’s fee from \$825 to \$250 (which represented an hour of the attorney’s time).

Other jurisdictions will generally approve a reasonable fee for a POC. See, e.g., *In re Lightly*, 513 B.R. 489 (Bankr D SC 2014) (allowing an attorney’s fee for

preparing a POC); *In re Formosa*, 2018 Bankr LEXIS 3124 (ED Mich) (\$750 for POC and review of plan and \$500 to object to plan were not unreasonable); *In re Yotis*, 2016 Bankr. LEXIS 463 (ND Ill) (\$941 for preparing POC was not excessive).

## **2. RECOVERABLE: Contested Matters**

Contested matters, like filing objections to claims and motions for relief from stay, have not generated any controversy under Rule 3002.1, probably because they usually reach the court by way of a fee application or agreed order. We know from practice that with respect to agreed orders in motions for relief from stay we can often provide that our fee be paid by the debtor.

As pointed out above, the court in *In re Carr* suggested that a fee for handling a contested notice of in cure might be recoverable.

## **3. NOT RECOVERABLE: Notice of Appearance, Payment Change Notice, Postpetition Fee Notice, Response to Final Cure, Reaffirmation**

Texas courts consider these notices to be “ministerial” and not recoverable from the debtor. See *In re Roife*, 2013 Bankr LEXIS 5005 (SD Tx)(Judge Isgur) (notice of post-petition fees not recoverable); (*In re Boyd*, 2013 Bankr LEXIS 1770 (SD Tx)(Judge Paul)(PCN not recoverable); *In re Ortega*, 2013 Bankr LEXIS 1967 (SD Tx)(Judge Paul)(PCN not recoverable); see also *In re Carr*, 468 B.R. 806 (Bankr ED

Va 2012)(creditor cannot recover a fee for responding to a notice of final cure); *In re Adams*, 2012 Bankr LEXIS 1943 (ED NC) (no fee for a PCN because it is a ministerial act); *In re Hunt*, 2012 Bankr LEXIS 2981 (MD NC)(fee for PPFN disallowed); *In re Barnes*, 2012 Bankr LEXIS 2080 (MD NC)(fee for PPFN disallowed).

But see *In re Susanek*, 2014 Bankr LEXIS 4264 (WD Pa) (notices required by Rule 3002.1 are not ministerial because they are required by the Bankruptcy Rules which impose sanctions for the creditor who fails to properly file them).

The court in *In re Carr*, cited above, did leave the door open a bit, suggesting that the result might be different for a fee that results when a notice of final cure is contested.

With respect to reaffirmations, long before Rule 3002.1, Judge Akard ruled that the creditor cannot recover a fee for a reaffirmation from the debtor. See *In re Allen*, 215 BR 503 (Bank ND Tx 1997).

#### **4. MAY BE RECOVERABLE: Transfers of Claim; Reviewing the TRCC**

I can find no cases that discuss transfers of claim or fees for reviewing the trustee's claim reconciliation process. From the perspective of whether these

require legal work, I would accept that a TOC is the type of form a client could file on its own without the help of an attorney.

The trustee's reconciliation process, though, is similar to a plan review. I would argue that is legal work and recoverable. I would recommend that until we're told otherwise by the courts, that we consider this recoverable.