

## **Cure and Maintain Payments under § 1322(b)(5) and Discharge** *For Cases Assigned to Judge Waites Only*

This Court's holding in *In re Dowey*, 580 B.R. 168 (Bankr. D.S.C. 2017) stated that the failure to make maintenance payments to a residential creditor under a cure and maintain plan under § 1322(b)(5) was a failure to make "payments under the plan" according to § 1328(a) and prohibited the receipt of a discharge under that section.<sup>1</sup>

Under the procedures implemented by Bankruptcy Rule 3002.1, creditors are required to report such failure to pay through a response filed within 21 days after the Chapter 13 Trustee's filing of a Notice of Final Cure Payment (which the Trustee must file within 30 days of the completion of the debtor's payments to the Trustee under the plan).

### **NOT CONTESTING THE CURE AMOUNT**

According to Bankruptcy Rule 3002.1(a), the notice requirements for the rule, including the Trustee's Notice of Final Cure Payment, cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to residential property. *See* Fed. Bankr. R. P. 3002.1(a) (2020) ("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.").

Furthermore, in this District, under the local form chapter 13 plan as adopted by SC LBR 3015-1, the Trustee ceases cure payments under a § 1322(b)(5) provision when relief from the

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<sup>1</sup> The Court in *Dowey* followed the majority approach regarding what constitutes payments under the plan for purposes of a discharge under § 1328(a). *See* 8 Collier on Bankruptcy ¶ 1328.02 (2020 Lexis) ("Most courts have held that "completion by the debtor of all payments under the plan" also includes current mortgage payments the debtor was to make directly to a creditor under a plan providing that the debtor would cure a default and maintain current payments pursuant to section 1322(b)(5).")

automatic stay is granted.<sup>2</sup> Therefore, if an order granting relief from the automatic stay has been entered and effective before the time of filing of the Notice of Final Cure Payment, the Trustee does not file a Notice of Final Cure Payment, and in that instance, the § 1328(a) discharge is not called into question by such a notice.<sup>3</sup>

### **CONTESTING THE CURE AMOUNT**

In the instance of a debtor's disagreement with or challenge to the correctness of the creditor's Response to Notice of Final Cure Payment, according to Rule 3002.1(h), the debtor shall file a Motion to Determine Final Cure and Payments within 21 days of the Response. In such an event, the Court determines the cure amount, if any. This requirement would apply if the debtor challenges the correctness of any part of the Response's stated amount due.

### **PAYING OR OTHERWISE ADDRESSING CURE AMOUNT**

In instances where the debtor does not contest the remaining obligation or amount stated in the Response to Notice of Final Cure Payment, the Court allows alternatives to resolve the amount owed in order to obtain a debtor's §1328(a) discharge.

### **AMOUNT TO BE PAID**

The post-petition cure amount is set by the Response to Notice of Final Cure Payment or by court order. *See* Fed. R. Bankr. P. 3002.1(g) (2020) ("The statement [filed by the creditor] shall itemize the required cure or post-petition amounts, if any, that the holder contends remain unpaid as of the date of the statement."). Therefore, payment of future monthly payments or attorney's

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<sup>2</sup> The local form chapter 13 plan specifically provides that "[a]ny creditor holding a claim secured by property that is removed from the protection of the automatic stay by order, surrender, or through operation of the plan will receive no further distribution from the chapter 13 trustee on account of any secured claim."

<sup>3</sup> As a separate requirement in the local bankruptcy rules in this District, the debtor must file a Certification of Plan Completion and Request for Discharge as a prerequisite to receiving a discharge under § 1328(a). This process provides for any party to object to the debtor's request for a discharge. This is an independent process separate from the issues addressed herein.

fees, expenses or charges that are not included in the amounts stated in the Response to Notice of Final Cure Payment or which do not arise until after the date of the Response are not required to obtain a § 1328(a) discharge. Future additional payments that become due after the filing of but before a hearing on the Response are not required to be cured to meet the plan requirements for discharge purposes.

### **PROCEDURES TO RESOLVE A RESPONSE TO NOTICE OF FINAL CURE**

Recognizing that a discharge is favored if the requirements of the Bankruptcy Code are met, this Court will accept the following procedures to resolve a Response to Notice of Final Cure Payment.<sup>4</sup>

1. **Payment by the Debtor.** This Court accepts uncontradicted proof of payments made after the filing of the creditor's Response to Notice of Final Cure Payment by documentary and/or testimonial evidence to determine that the post-petition arrearage stated in the Response has been cured.
  - a. **Curing within a Reasonable Time without an Amendment:** The Court will permit a debtor to propose a cure of the amounts indicated in a Response over a short period of time to be set by the Court without an amendment of a plan, including in certain circumstances where the 60-month period under § 1322(d) has expired.<sup>5</sup>
  - b. **Curing through an Amended Plan:** If timing permits, debtor may formally amend the plan to provide for a cure of the missed payments. Section 1329(c) of the Bankruptcy Code expressly prohibits a modification of a plan to provide for payments after the 60-month maximum stated by § 1322(d). According to *West v. Costen*, 826 F.2d 1376 (4th Cir. 1987) and this Court in *In re Stroud*, C/A No. 07-04502-W, slip op. (Bankr. D.S.C. Mar. 5, 2008), the first payment for purposes of

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<sup>4</sup> This procedure may be separate and apart from objections to the debtor's Certification of Plan Completion and Request for Discharge.

<sup>5</sup> Many courts have allowed, by order, the cure of payment defaults beyond the end of the 60-month period. *See, e.g., In re Klaas*, 858 F.3d 820 (3d Cir. 2017); *In re Morris*, 2014 WL 3818947 (Bankr. E.D.N.C. 2014). The granting of time beyond 60 months for a cure shall require the meeting of factors stated in *In re Klaas*, 858 F.3d 820 (3d Cir. 2017):

(1) whether the debtor substantially complied with the plan, including the debtor's diligence in making prior payments; (2) the feasibility of completing the plan if permitted, including the length of time needed and amount of arrearage due; (3) whether allowing a cure would prejudice any creditors; (4) whether the debtor's conduct is excusable or culpable, taking into account the cause of the shortfall and the timeliness of notice to the debtor; and (5) the availability and relative equities of other remedies, including conversion and hardship discharge.

§ 1322(d) is when the Trustee makes his first disbursement payment after confirmation. Therefore, amendments to the plan filed before the 60-month deadline and which provide for cure payments are allowable.

2. **Creditor's Withdrawal or Amendment of Response.** Issues related to a Response to Notice of Final Cure Payment may be resolved by the creditor's withdrawal of the Response to Notice of Final Cure Payment or amendment to it to indicate that a debtor is current.
3. **Surrender.** A debtor may surrender the Residence by the confirmation of an amended plan.
4. **Entry of a LM/MM Agreement.** A debtor may enter a LM/MM agreement with a creditor that waives or postpones the amount stated in the Response to Notice of Final Cure Payment (i.e. an agreement that makes debtor contractually current) through the Court's portal program or a non-portal process.<sup>6</sup> Parties must submit evidence of the successful completion of a trial period plan or modification before an order granting discharge is entered.
5. **Consent Order.** A debtor may agree to a consent order in which creditor waives or postpones obligations cited in the Response to Notice of Final Cure Payment **to the end of the loan.**
6. **362 Settlement Orders entered prior to the filing of the Notice of Final Cure Payment.** A discharge under § 1328(a) may be granted in circumstances where the debtor is current on the terms of a § 362 settlement order that was entered prior to the filing of the Notice of Final Cure Payment and where the settlement order provides for a cure of a post-petition arrearage beyond the date of the filing of the Response to the Notice of Final Cure Payment. The Court accepts the § 362 settlement as an indication of the creditor's prior agreement to postpone the amounts being cured therein. However, parties should be aware that the Court may not be able to enforce the terms of the § 362 settlement order after the entry of a discharge.
7. **Request for Hardship Discharge.** If the debtor satisfies the requirements to obtain a discharge under § 1328(b), the debtor may be entitled to a hardship discharge after the creditor's filing of a response to notice of final cure payment.
8. **Conversion to Chapter 7.** If a debtor converts the case to chapter 7 after the filing of the creditor's Response to Notice of Final Cure Payment, § 1328(a) conditions are mooted.

#### **WHAT IS INSUFFICIENT:**

The following procedures are insufficient to resolve a Response to Notice of Final Cure Payment indicating a post-petition arrearage:

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<sup>6</sup> The Court has found that in some instances efforts pursuant to non-portal LM/MM may require a hearing, including documents and testimony of the completion of any trial payment period.

1. **Relief from Stay by consent after filing of Notice of Final Cure** (i.e. consent orders granting relief from the stay entered after the date of the Notice of Final Cure Payment).
2. **Certification by Counsel of Payment:** Mere certification/statements by the debtor's counsel that the amount has been paid is not adequate. Evidence is necessary, including proof of payment or testimony by the debtor with the details of when the payments were made.
3. **Pursuing LM/MM pursuant to a confirmed plan without successfully completing the trial period plan payments or receiving a modification.**