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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP Nos. CC-09-1155-PaHD
)	CC-09-1162-PaHD
ANTHONY JOHN HERRERA and)	CC-09-1184-PaHD
MARY ELLEN HERRERA,)	CC-09-1175 PaHD
)	(jointly briefed)
Debtors.)	
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)	Bk. Nos. SV 08-13212-KT
)	SV 08-14725-GM
In re:)	SV 09-11330-MT
)	LA 09-11321-VK
NORMAN LEFF and ROSITA BLONES LEFF,)	
)	
Debtors.)	

O P I N I O N

In re:)
)
CHRISTINE PAULETTE HANNON,)
)
Debtor.)

In re:)
)
ARTHUR DANIEL MONROY and)
LAURA MONROY,)
)
Debtors.)

GREENPOINT MORTGAGE FUNDING, INC.,)
)
Appellant,)
)
v.)
)
ANTHONY JOHN HERRERA and)
MARY ELLEN HERRERA,)
)
Appellees.)

1 DEUTSCHE BANK, NATIONAL TRUST CO.,)
2 AS TRUSTEE FOR FIRST FRANKLIN)
3 MORTGAGE LOAN TRUST 2006-FF5,)
4 MORTGAGE PASS-THROUGH CERTIFICATES,)
5 SERIES 2006-FF5,)

Appellant,)

v.)

6 NORMAN LEFF and ROSITA BLONES LEFF,)
7)

Appellees.)

8 _____)
9 U.S. BANK, N.A.,)

Appellant,)

v.)

12 CHRISTINE PAULETTE HANNON,)
13)

Appellee.)

14 _____)
15 HOME FUNDS DIRECT,)

Appellant,)

v.)

17 ARTHUR DANIEL MONROY and)
18 LAURA MONROY,)
19)

Appellees.)
20 _____)

21 Argued and submitted on November 19, 2009
22 at Pasadena, California

23 Filed - January 5, 2010

24 Appeals from the United States Bankruptcy Court
for the Central District of California

25 The Honorable Kathleen Thompson, Geraldine Mund, Maureen Tighe and
26 Victoria Kaufman, United States Bankruptcy Judges, Presiding

27 _____
28 Before: PAPPAS, HOLLOWELL and DUNN, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:

2
3 In each of these four appeals, the creditor holding the
4 mortgage on the debtors' primary residence challenges the order of
5 the bankruptcy court confirming the chapter 13¹ debt-repayment
6 plan. In each case, the debtors incorporated in the plan several
7 provisions taken from a form of optional provisions adopted by the
8 bankruptcy judges of the Central District of California. The
9 mortgage creditors presented common objections to those
10 provisions, and continue those objections in these four appeals.
11 Because the facts in each case are undisputed, and common legal
12 issues are raised, we ordered that the appeals be jointly briefed
13 and argued. This decision disposes of all four appeals. We
14 AFFIRM the bankruptcy courts' plan confirmation orders.

15 **FACTS**

16 We begin with a brief sketch of the relevant, undisputed
17 facts and the procedural history of these four bankruptcy cases.

18 Herreras', Leffs' and Hannon's Bankruptcy Cases

19 Anthony John Herrera and Mary Ellen Herrera ("Herreras")²
20 filed a chapter 13 petition on May 16, 2008, and a First Amended
21 Plan on July 8, 2008. The First Amended Plan provided that
22 Herreras would directly pay the secured creditor, Greenpoint
23 Savings ("Greenpoint"), all post-petition monthly payments on the
24

25
26 ¹ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

² BAP No. CC-09-1155 (Bankr. SV-08-13212-KT, Judge Kathleen
Thompson, presiding).

1 mortgage held by Greenpoint on their residence. They proposed to
2 cure the \$20,982.62 in mortgage arrearages they alleged they owed
3 on the date of bankruptcy by making payments "through the plan" to
4 the chapter 13 trustee for distribution to Greenpoint.

5 On July 9, 2008, Norman Leff and Rosita Blones Leff
6 ("Leffs")³ filed their chapter 13 petition and proposed plan. The
7 plan provided that Leffs would directly pay Deutsche Bank National
8 Trust Co. ("Deutsche Bank") post-petition monthly mortgage
9 payments on their residence, and would cure \$23,555.00 in
10 prepetition mortgage arrearages through the plan.

11 On February 6, 2009, Christine Paulette Hannon ("Hannon")⁴
12 filed her chapter 13 petition and proposed plan. Hannon proposed
13 to directly pay U.S. Bank Home Mortgage ("U.S. Bank")
14 post-petition monthly mortgage payments on her residence, and to
15 cure \$19,100.00 in prepetition mortgage arrearages through the
16 plan.

17 Herreras, Leffs and Hannon each incorporated in their
18 proposed plans an addendum known as "Local Form F 3015-1.1A" (the
19 "Addendum"). The Addendum is a collection of chapter 13 plan
20 provisions set forth in an optional form that had been approved by
21 the bankruptcy judges of the Central District of California for
22 use by debtors in chapter 13 cases who propose to repay debt
23 secured by a mortgage on their residential real property, or by a
24 lien on personal property the debtor occupies as the debtor's

25
26 ³ BAP No. CC-09-1162 (Bankr. SV-08-14725-GM, Judge Geraldine
27 Mund, presiding).

28 ⁴ BAP No. CC-09-1184 (Bankr. SV-09-11330-MT, Judge Maureen
Tighe, presiding).

1 principal residence. The terms of the Addendum impose certain
2 reporting and other obligations on the mortgage creditor during
3 the term of the chapter 13 plan. More details concerning the
4 Addendum are presented below.

5 Greenpoint objected to the First Amended Plan in Herreras'
6 case, Deutsche Bank objected to the plan in Leffs' case, and U.S.
7 Bank objected to the plan in Hannon's case. Although there were
8 slight variations in the arguments in the separate cases, the
9 mortgage creditors generally targeted the Addendum, arguing that
10 its terms imposing post-confirmation reporting and other duties
11 were inconsistent with the mortgage creditors' contractual rights,
12 violated federal law, and constituted an undue administrative
13 burden. The debtors in each case disputed the mortgage creditors'
14 positions. The parties filed additional pleadings in each case
15 regarding their positions on the Addendum.

16 On April 28, 2009, the presiding judges in the Herreras,
17 Leff, and Hannon bankruptcy cases issued a Joint Memorandum of
18 Opinion (the "Joint Memorandum"), together with an order
19 implementing the Joint Memorandum, addressing the inclusion of the
20 Addendum in the debtors' chapter 13 bankruptcy plans, and the
21 mortgage creditors' objections to those plans. The Joint
22 Memorandum generally overruled the creditors' objections,⁵ except
23 for the objection to one provision of the Addendum (known as
24 "subsection A7"), a requirement that mortgage creditors provide
25 advance notice to debtors before filing a motion for relief from
26 stay. The Joint Memorandum concluded that this term was

27
28 ⁵ There were also several challenges to non-Addendum provisions in the plans but they have not been appealed.

1 inconsistent with the provisions of § 362(d). The Joint
2 Memorandum directed the debtors in each case to file amended plans
3 deleting subsection A7 of the Addendum.

4 Even though the Joint Memorandum did not purport to confirm
5 the debtors' plans,⁶ on May 8, 2009, the mortgage creditors each
6 filed a notice of appeal in the respective bankruptcy cases from
7 the "Order Confirming Chapter 13 plan entered on April 28, 2009."⁷

8 As directed by the Joint Memorandum, Herreras, Leffs and
9 Hannon each filed amended plans generally consistent with their
10 original plans, but deleting subsection A7 of the Addendum. There
11 were no hearings on plan confirmation. Herreras' amended plan was
12 confirmed in an order entered May 20, 2009; Leffs' amended plan
13 was confirmed in an order entered May 13, 2009; and Hannon's
14 amended plan was confirmed in an order entered July 22, 2009.

15 On May 27, 2009, Greenpoint, Deutsche Bank and U.S. Bank
16 filed amended notices of appeal, again designating the Joint
17 Memorandum as the order on appeal in the three cases, instead of
18 the confirmation order.

19 The Monroys' Case⁸

20 The bankruptcy judge in Monroys' case did not participate in
21 the Joint Memorandum. However, the court came to similar

23 ⁶ Read liberally, nothing in either the Joint Memorandum or
24 the accompanying order can be construed to confirm the plans.

25 ⁷ Of course, no plan confirmation order was entered on April
26 28, only the order implementing the Joint Memorandum. Issues
27 relating to the filing of the notices of appeal in the Herrera,
28 Leff, and Hannon appeals are addressed in our Jurisdiction
statement below.

⁸ BAP No. CC-09-1175 (Bankr. LA-09-11321-VK, Judge Victoria
Kaufman, presiding).

1 conclusions and rulings.

2 On January 22, 2009, Arthur Daniel Monroy and Laura Monroy
3 ("Monroys") filed their chapter 13 petition and plan. The plan
4 provided that Monroys would directly pay the mortgage creditor
5 Home Funds Direct ("HFD") post-petition monthly mortgage payments,
6 and would cure \$454.08 in prepetition mortgage arrearages through
7 the plan. Monroys' plan incorporated the Addendum. HFD objected
8 to the plan, challenging the Addendum.

9 The bankruptcy court conducted a confirmation hearing on
10 March 18, 2009. At the conclusion of the hearing, the bankruptcy
11 judge ruled on the record that "the Court agrees with the majority
12 of courts as far as the notification provisions in [the Addendum]
13 that those are procedural mechanisms that are consistent with the
14 provisions of Chapter 13 and the Bankruptcy Code as a whole."
15 Hr'g Tr. 8:12-17 (March 18, 2009). The court, however, did rule
16 that subsection A7 impermissibly conflicted with § 362 and ordered
17 that provision be stricken from the plan.

18 As permitted by the bankruptcy court's decision, Monroys
19 submitted an amended plan on March 20, 2009, without subsection
20 A7. Ruling on the record at the May 6 continued hearing on plan
21 confirmation, the bankruptcy court confirmed the amended plan.
22 The court entered its order confirming the amended plan on May 18,
23 2009.

24 HFD filed a timely notice of appeal of the confirmation order
25 on May 21, 2009.

26 The Addendum

27 According to the chair of the ad hoc committee of Central
28 District of California bankruptcy judges that apparently crafted

1 the Addendum,⁹ it was designed and adopted in response to two
2 needs: overcoming the reluctance of secured creditors to
3 communicate with debtors in chapter 13, and preventing a secured
4 creditor from assessing additional fees and costs against the
5 debtor at the conclusion of the bankruptcy case that had not been
6 communicated to the debtor or approved by the bankruptcy court.
7 The committee originally proposed adoption of a general order by
8 the bankruptcy court that would require that provisions such as
9 those ultimately incorporated in the Addendum be included in all
10 chapter 13 plans. However, this proposal was rejected by the
11 district's board of judges, which preferred that such decisions be
12 made in each bankruptcy case, and not imposed on chapter 13
13 debtors by a general order. As a result, the committee ultimately
14 proposed a non-binding, optional form, the Addendum, the propriety
15 of which could be adjudicated on a case-by-case basis.

16 The Addendum was approved by majority vote of the bankruptcy
17 judges of the Central District of California, and the judges'
18 decision was implemented via "Local Form 3015-1.1A." The Addendum
19 provisions incorporated in each of the four confirmed plans and
20 implicated in these appeals read as follows:¹⁰

21
22 ⁹ This information is taken from comments made by the
23 chairperson of the ad hoc committee, the Honorable Meredith Jury,
24 in connection with proceedings in another chapter 13 case, In re
25 Bracks, Case No. RS-08-16954 (Bankr. C.D. Cal., August 4, 2008);
26 Hr'g Tr. 3:22-6:5. A transcript of these comments was submitted
by the appellees in these appeals, and the mortgage creditors did
not object to its inclusion as part of the record in these
appeals. We also note that the Joint Memorandum cites the In re
Bracks decision.

27 ¹⁰ Other subsections of the Addendum, A1, B1 and B2, were
28 also included in the debtors' plans, but have not been challenged
by the mortgage creditors in these appeals. Subsection A3,
dealing with cases where current monthly payments are to be made
(continued...)

1 A2. Except as provided in paragraphs (3) and (4) below,
2 if the Mortgage Creditor provided monthly statements to
3 the debtor pre-petition, the Mortgage creditor must
4 provide monthly statements to the debtor. The monthly
5 statements must contain at least the following
6 information concerning post-petition payments to be made
7 outside the Plan: (a) The date of the statement and the
8 date of the next payment due; (b) The amount of the
9 current monthly payment; (c) The portion of the payment
attributable to escrow, if any; (d) The post-petition
amount past due, if any, and from what date; (e) Any
outstanding late charges; (f) The amount and date of
receipt of all payments received since the date of the
last statement; (g) A telephone number and contact
information that the debtor or the debtor's attorney may
use to obtain reasonably prompt information regarding
the loan and recent transactions; and (h) The proper
payment address.

10 A4. If, pre-petition, the Mortgage Creditor provided
11 the debtor with "coupon books" or some other preprinted,
12 bundled evidence of payments due, the Mortgage Creditor
13 is not required to provide monthly statements under
14 subsection (2) of this section. However, the Mortgage
15 Creditor must supply the debtor with additional coupon
16 books as needed or requested in writing by the debtor.
If a Mortgage Creditor does send a monthly statement to
the debtor or the chapter 13 trustee and the statement
complies with subsection (B)(2) below, the Mortgage
Creditor is entitled to the protections set out in such
subsection.

17 A5. The Mortgage Creditor must provide the following
18 information to the debtor upon reasonable written
19 request of the debtor: (a) The principal balance of the
20 loan; (b) The original maturity date; (c) The current
interest rate; (d) The current escrow balance, if any;
(e) the interest paid to date; and (f) The property
taxes paid year to date, if any.

21 A6. The Mortgage Creditor must provide the following
22 information to the debtor, the debtor's attorney and,
23 when the debtor is making ongoing mortgage or arrearage
24 payments through the chapter 13 trustee, the chapter 13
trustee, at least quarterly, and upon reasonable written
request of the debtor or the chapter 13 trustee: (a) any

25 ¹⁰(...continued)

26 by the trustee "through the plan," is not listed among the issues
27 designated in the creditors' brief, or specifically argued in this
28 appeal, although this provision is occasionally listed in the
creditors' brief along with the other provisions that creditors
find objectionable. We express no opinion concerning the
propriety of any of these other Addendum provisions. We discuss
subsection A7 in n.11, infra.

1 other amounts due or proposed change in payments arising
2 from an adjustable interest rate, charges paid by the
3 Mortgage Creditor for taxes, insurance, attorney's fees
4 or any other expenses or fees charged or incurred by the
5 Mortgage Creditor, such as property inspection fees,
6 servicing fees or appraisal fees; (b) the nature of the
7 expense or charge; and (c) the date of the payment.

8 B3. As a result of a Mortgage Creditor's alleged non-
9 compliance with this Addendum, the debtor may file a
10 Motion for Order to Show Cause in compliance with Local
11 Bankruptcy Rule 9020-1 no earlier than sixty days after
12 the Mortgage Creditor's failure to comply with sections
13 (A) or (B). Before filing the motion, the debtor must
14 make good faith attempts in writing to contact the
15 Mortgage Creditor and to determine the cause of non-
16 compliance, and must indicate in the Motion for Order to
17 Show Cause the good faith steps taken, together with a
18 summary description of any response provided by the
19 Mortgage Creditor.

20 B4. If a Mortgage Creditor's regular billing system can
21 provide a statement to the debtor that substantially
22 complies with this Addendum, but does not fully conform
23 to all its requirements, the Mortgage Creditor may
24 request that the debtor accept such statement. If the
25 debtor declines to accept the non-conforming statement,
26 a Mortgage Creditor may file a motion, on notice to the
27 debtor, the debtor's attorney and the chapter 13
28 trustee, seeking a declaration of the Court that cause
exists to allow such non-conforming statements to
satisfy the Mortgage Creditor's obligations under this
Addendum. For good cause shown, the Court may grant a
waiver for purposes of this case and for either a
limited or unlimited period of time.

19 The Joint Memorandum

20 The Joint Memorandum addressed and rejected two primary
21 objections raised by the objecting mortgage creditors in the
22 Herreras, Leffs and Hannon bankruptcy cases: (1) that the Real
23 Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.
24 ("RESPA"), preempts the field of regulations concerning
25 information required to be provided to consumers in real estate
26 transactions, such that the imposition of additional reporting
27 requirements in a chapter 13 plan is prohibited; and (2) that the
28 Addendum's reporting requirements each violate § 1322(b)(2)'s

1 restriction on modification of the mortgage creditors' contractual
2 rights.

3 In overruling the mortgage creditors' objections, the Joint
4 Memorandum acknowledged that RESPA requires lenders to make
5 certain disclosures to consumers in connection with mortgage
6 loans. The Joint Memorandum, however, found that nothing in RESPA
7 prohibited the bankruptcy court, through plan confirmation, from
8 requiring lenders to make additional information available to
9 debtors in chapter 13 cases. In short, the bankruptcy courts held
10 that while RESPA provides minimum reporting requirements for
11 mortgage lenders, it does not conflict with RESPA for a chapter 13
12 plan to require additional account reporting.

13 As to the § 1322(b)(2) prohibition on contract modification,
14 the bankruptcy judges held that a mortgage creditor's exercise of
15 contractual rights was not without limits under chapter 13. The
16 Joint Memorandum cited to several cases in other districts where
17 the courts have approved plans containing additional reporting
18 requirements. The judges noted that undisclosed post-petition
19 charges assessed by mortgage creditors can potentially frustrate
20 the goals of a chapter 13 debtor's plan, and prevent a debtor who
21 successfully completes a plan from achieving the "fresh start"
22 intended by the Bankruptcy Code. For these reasons, the Joint
23 Memorandum concluded that the provisions in the Addendum imposing
24 account reporting obligations on mortgage lenders during the term
25 of a chapter 13 plan do not per se violate the anti-modification
26 provision of § 1322(b)(2) and are permissible.

27 The Joint Memorandum (as well as the bankruptcy judge in the
28 Monroys' case) did note, though, that the Addendum's subsection

1 A7, requiring that advance notice be given to a debtor of a
2 creditor's intention to seek relief from the automatic stay,
3 imposed an obligation on the creditor that was inconsistent with
4 the express requirements of § 362(d) and at odds with the
5 District's motion practice rules. Therefore, the four bankruptcy
6 courts ordered the exclusion of subsection A7 in any amended plan
7 as a condition for confirmation.

8 **JURISDICTION**

9 The bankruptcy courts had jurisdiction under 28 U.S.C.
10 §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C.
11 § 158. However, because of the procedural approach taken by the
12 mortgage creditors in the Herrera, Leff and Hannon appeals, we
13 shall comment further about our jurisdiction.

14 First, we must consider the manner in which the mortgage
15 creditors attempted to perfect their appeals. In each of these
16 cases, the original notice of appeal by the respective mortgage
17 creditor was premature, having been filed after issuance of the
18 April 28 Joint Memorandum, but prior to the debtors' amendment of
19 their chapter 13 plans as prescribed in the Joint Memorandum, and
20 the bankruptcy courts' entry of a final order confirming those
21 amended plans. In other words, at the time the original notices
22 of appeal were filed, no final order had been entered from which
23 the mortgage creditors could appeal.

24 Even so, since the plan amendments in these cases were
25 accomplished merely to comply with the bankruptcy courts' orders,
26 and the amended plans were confirmed shortly after they were
27 filed, we think the creditors' original notices of appeal of the
28 plan confirmations were effective, albeit early. Rule 8002(a)

1 provides that a "notice of appeal filed after the announcement of
2 a decision or order, but before entry of the judgment, order or
3 decree, shall be treated as filed after such entry on the date
4 thereof." Under these circumstances, we deem the original notices
5 of appeal timely filed and effective.

6 We also decline to reject these appeals because the amended
7 notices of appeal, filed after the amended plans were confirmed in
8 these three cases, purported to appeal not from the confirmation
9 orders but from the orders entered implementing the Joint
10 Memorandum. In our view, the orders implementing and entered at
11 the same time as the Joint Memorandum were clearly interlocutory,
12 and merged into the confirmation orders thereafter entered in each
13 case after the debtors' plans were amended. Any dispute the
14 mortgage creditors have with the contents of the Joint Memorandum
15 can be brought before us in our consideration of the four plan
16 confirmations. In other words, we consider the amended notices of
17 appeal to be superfluous.

18 The mortgage creditors, as appellants in the three cases
19 covered by the Joint Memorandum, are not prejudiced by this
20 decision. According to their statements of the issues on appeal,
21 the creditors seek review of the Joint Memorandum's approval of
22 the provisions in the Addendum incorporated in each plan, to which
23 each creditor had objected. Their objections to those provisions
24 are properly before us in the appeal of the confirmation orders.
25 As explained in Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364
26 (9th Cir. 1981):

27 [T]he rule is well settled that a mistake in designating
28 the judgment appealed from [in a notice of appeal]

1 should not result in loss of the appeal as long as the
2 intent to appeal from a specific judgment can be fairly
3 inferred from the notice and the appellee is not misled
4 by the mistake. 9 Moore's Federal Practice, para.
5 203.18, at 3-76-77 (2d ed. 1980). Furthermore, an
6 appeal from the final judgment draws in question all
7 earlier non-final orders and all rulings which produced
8 the judgment. Id. at 3-80. See also United States v.
9 Walker, 601 F.2d 1051, 1058 (9th Cir. 1979).

6 Here, the mortgage creditors have always made clear in their
7 submissions to the Panel that they challenge the ruling in the
8 Joint Memorandum approving the Addendum's provisions and
9 overruling their objections, which decision ultimately resulted in
10 the confirmation of the three plans. We therefore elect to
11 overlook technical issues with the notices of appeal and consider
12 the merits of these appeals.

13 A second procedural question is more problematic. For relief
14 in all four appeals, the mortgage creditors ask the Panel either
15 to direct the bankruptcy judges of the Central District of
16 California to ban the use of the Addendum, or to direct those
17 judges to adopt a plan form that permits continuation of
18 prepetition accounting statements and compliance with RESPA. The
19 creditors offer us no case law or statutory grounds to support
20 this expansive view of the Panel's authority, and we know of no
21 grounds for banning an optional form nor directing the District's
22 bankruptcy judges to create a new one. Instead, our statutory
23 role is limited to review of discrete orders as an appellate
24 tribunal. See 28 U.S.C. § 158(a)(1), (2) (providing for appeals
25 from final, or in some cases interlocutory, judgments, orders and
26 decrees). In this instance, the Panel's review is limited to the
27 orders confirming the debtors' amended plans. We decline the
28

1 **STANDARD OF REVIEW**

2 There are no issues of fact raised in these appeals. We
3 review issues of federal statutory construction, including
4 interpretation of provisions of the Bankruptcy Code, de novo.
5 Einstein/Noah Bagel Corp. v. Smith (In re BCE W., L.P.), 319 F.3d
6 1166, 1170 (9th Cir. 2003); Mendez v. Salven (In re Mendez), 367
7 B.R. 109, 113 (9th Cir. BAP 2007).

8 **DISCUSSION**

9 **I. Inclusion of the challenged Addendum provisions in the**
10 **debtors' confirmed plans does not conflict with RESPA.**

11 A.

12 The mortgage creditors argue that Congress intended that
13 RESPA occupy the field requiring reports from mortgage creditors
14 to debtors regarding loans on primary residences, to the exclusion
15 of the states and other branches of the federal government,
16 including the courts. In their view,

17 RESPA's scheme is so pervasive as to make reasonable the
18 inference that Congress has neither left room for the
19 states, nor other branches of the Federal Government, to
20 supplement it: Local Form F 3015-1:1A not only
21 duplicates RESPA but is fatally inconsistent with the
22 federal statute. . . . By enacting RESPA, Congress has
23 acted to occupy the scope of the field in regards to
24 real estate disclosures and a reasonable expectation is
25 thus created that other Federal branches will not impose
26 duplicative or inconsistent reporting requirements in
27 violation of Bankruptcy Rule 9029(a)(1). §§ (A)(4),
28 (A)(5) and (A)(6) of Local Form F 3015-1.1A usurp
Congress' authority by legislating and mandating
reporting requirements that not only duplicate Federal
Law but are inconsistent, and more burdensome, than
those created by RESPA.

26 Appellants' Open. Br. at 20-22.

27 It is the creditors' position that RESPA effectively prevents
28 chapter 13 debtors from including provisions in their proposed

1 debt-repayment plans increasing a mortgage creditor's obligation
2 to provide account status reports and other information to the
3 debtor or trustee during the term of the plan. Unfortunately, the
4 mortgage creditors make their conclusory arguments without
5 reference to the particular provisions of RESPA that they allege
6 are violated by the plan provisions, nor do they cite to relevant
7 case law interpreting RESPA in such fashion.

8 As discussed below, we conclude that the creditors' argument
9 is neither supported by the plain language of RESPA nor was it the
10 clear intent of Congress in enacting RESPA that chapter 13 debtors
11 be prohibited from proposing enhanced mortgage account reports in
12 their plans.

13 B.

14 Only a brief comment is required to dispatch the mortgage
15 creditors' concerns that inclusion of the offensive provisions in
16 the debtors' confirmed chapter 13 plans somehow violates the
17 doctrine of separation of powers. They apparently contend that
18 when a majority of the Central District's bankruptcy judges
19 approved an optional local form containing provisions that could
20 be included in the District's chapter 13 plans, several of which
21 provisions creditors contend run afoul of RESPA, those judges
22 somehow usurped the prerogative of Congress to enact laws
23 regulating residential mortgages.

24 The mortgage creditors' argument is a non-starter because it
25 ignores the bankruptcy judges' decision to make use of the
26 Addendum optional, such that the incorporation of its provisions
27 in debtors' plans was subject to review by bankruptcy courts on a
28 case-by-case basis. Indeed, the instructions on Local Form

1 3015.1.1A state that "[a] chapter 13 debtor may attach this
2 addendum to his/her chapter 13 plan." This a not a situation
3 where the local bankruptcy court has, through a local rule or
4 general order, mandated the terms of a debtor's proposed plan and
5 treatment of a creditor's claim. As a result, the propriety of
6 the plan provisions arising from incorporation of the Addendum
7 into the debtors' plans was freely subject to challenge in each of
8 these cases, and the mortgage creditors' argument that the
9 bankruptcy courts somehow violated the separation of powers
10 doctrine misses the point.

11 C.

12 A variation of the creditors' separation of powers argument
13 is that the provisions of the Addendum directly conflict with the
14 intent of Congress that RESPA be the exclusive regulatory
15 authority governing reporting requirements imposed on mortgage
16 creditors to borrowers on their primary residence. We disagree
17 with this assertion.

18 In addition to mandatory plan provisions, § 1322(b)(11)¹²
19 provides that a chapter 13 debtor's plan may "include any other
20 provision not inconsistent with [title 11]." This grant gives
21 debtors considerable discretion to tailor the terms of a plan to
22 their individual circumstances. Bankruptcy courts have endorsed a
23 broad range of provisions under § 1322(b)(11).¹³ Besides enhanced

24

25 ¹² BAPCPA did not amend the substance of this Code provision,
26 previously numbered § 1322(b)(10).

27 ¹³ As a leading treatise has observed about this provision,

28 "There are few limits in the Code on other possible plan
provisions. For example, the debtor's payments into the
plan may be varied to take into consideration seasonal

(continued...)

1 creditor account reporting requirements, other provisions approved
2 by bankruptcy courts under § 1322(b)(11) include, for example: (1)
3 authorizing the debtor to exercise a trustee's avoiding powers,
4 Hearn v. Bank of New York (In re Hearn), 337 B.R. 603 (Bankr. E.D.
5 Mich. 2006); (2) establishing reserve funds to pay utilities in
6 event of default, In re Epling, 255 B.R. 549 (Bankr. S.D. Ohio
7 2000); (3) paying taxes in a particular order, In re Klaska, 152
8 B.R. 248 (Bankr. C.D. Ill. 1993).

9 Here, the mortgage creditors challenge the debtors' inclusion
10 of the Addendum provisions in their plans, arguing that those
11 provisions are in conflict with, and preempted by, RESPA.
12 However, based upon our review of the purpose of RESPA, we fail to
13 see any conflict with these plan provisions.

14 "The purpose of statutory construction is to discern the
15 intent of Congress in enacting a particular statute." United
16 States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999). "The first
17 step in ascertaining congressional intent is to look to the plain
18 language of the statute." Id. "The plain meaning of the statute
19 controls, and courts will look no further, unless its application
20 leads to unreasonable or impracticable results." Id. "In
21 ascertaining the plain meaning of the statute, the court must look
22 to the particular statutory language at issue, as well as the
23 language and design of the statute as a whole." K Mart Corp. v.

24
25 ¹³(...continued)
26 income, as long as the plan is feasible. The plan may
27 provide for a temporary moratorium on certain types of
28 payments; or it may delay the vesting of property until
some time after confirmation. [It may even] include a
provision providing for injunctive or equitable relief."

8 COLLIER ON BANKRUPTCY ¶ 1322.14[4] at 1322-56 (Alan N. Resnick &
Henry J. Sommer, eds., 15th ed. rev., 2007) (footnotes omitted).

1 Cartier, Inc., 486 U.S. 281, 291 (1988) (quoted in Nadarajah v.
2 Gonzales, 443 F.3d 1069, 1076 (9th Cir. 2006)).

3 While divining the intent of Congress in enacting a statute
4 can be a daunting task for courts, RESPA is that fortunate statute
5 in which the plain meaning and Congress's intent are one and the
6 same. The introductory sections of RESPA express in unambiguous
7 terms Congress's intent that RESPA be viewed as a consumer
8 protection statute promoting the flow of "greater and more timely
9 information" between mortgage creditors and debtors:

10
11 The Congress finds that significant reforms in the real
12 estate settlement process are needed to insure that
13 consumers throughout the Nation are provided with
14 greater and more timely information on the nature and
costs of the settlement process and are protected from
unnecessarily high settlement charges caused by certain
abusive practices that have developed in some areas of
the country.

15 12 U.S.C. § 2601(a).

16 It is the purpose of this chapter to effect certain
17 changes in the settlement process for residential real
18 estate that will result - (1) in more effective advance
disclosure to home buyers and sellers of settlement
costs[.]

19 12 U.S.C. § 2601(b)(1).

20 Although the "settlement process" referred to in RESPA at the
21 time of its enactment in 1974 was restricted to the procedures
22 culminating in the execution of the mortgage contract, Congress
23 expanded the scope of the statute in 1990 to include servicing of
24 mortgage loans during the term of the contract:

25 The term "servicing" means receiving any scheduled
26 periodic payments from a borrower pursuant to the terms
27 of any loan, including amounts for escrow accounts
28 described in section 10 [12 U.S.C. § 2609], and making
the payments of principal and interest and such other
payments with respect to the amounts received from the
borrower as may be required pursuant to the terms of the
loan.

1 12 U.S.C. § 2605(i)(3), added Nov. 28, 1990, P.L. 101-625, Title
2 IX, Subtitle C, § 941, 104 Stat. 4405.

3 Courts analyzing this statute have found that "Congress
4 intended RESPA to be a remedial consumer-protection statute" and
5 that the statute is therefore "construed liberally in order to
6 best serve Congress' intent." Rawlings v. Dovenmeuhle Mortg.,
7 Inc., 64 F.Supp.2d 1156, 1165 (M.D. Fla. 1999); Thorian v. Baro
8 Enters., LLC (In re Thorian), 387 B.R. 50, 68-69 (Bankr. D. Idaho
9 2008); accord Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703,
10 707 (11th Cir. 1998) (holding that remedial consumer protection
11 statutes are to be construed liberally). We agree that, simply
12 put, Congress intended RESPA to promote full and timely exchange
13 of information between mortgage creditors and borrowers to combat
14 "unnecessarily high settlement charges caused by certain abusive
15 practices that have developed in some areas of the country." 12
16 U.S.C. § 2601(a).

17 This congressional intent does not conflict, but instead is
18 consistent, with the rationale expressed in the Joint Memorandum
19 for approving the inclusion of the Addendum provisions in the
20 debtors' confirmed plans:

21 . . . the Addendum seeks to address Chapter 13 issues,
22 specifically the increasing problem of undisclosed and
23 sometimes questionable post-petition mortgage charges
24 assessed by lenders during the course of a chapter 13
proceeding, which are neither addressed nor remedied by
the provisions of RESPA.

25 Joint Memorandum at 2. Consistent with RESPA, as discussed above,
26 the purpose for the creation and approval of the Addendum
27 provisions by the Central District's bankruptcy judges was to be
28 one means of "preventing a secured creditor from springing

1 additional fees and costs on the debtor at the conclusion of the
2 bankruptcy case that had not been communicated to the debtor or
3 approved by the court." In re Bracks, Hr'g Tr. 5:21-6:4 (August
4 4, 2008).

5 The plain language of RESPA not only supports a finding that
6 RESPA is consistent with the Addendum provisions, but also
7 explicitly disproves the mortgage creditors' argument that
8 Congress intended that RESPA "occupy the field" when it comes to
9 the mortgage creditor's obligations to provide reports to debtors
10 to the exclusion of other law, state or federal. Indeed, RESPA
11 requires, for example, that where state law provides greater
12 consumer protection to debtors regarding mortgages on their
13 principal residence, state law prevails:

14 This chapter does not annul, alter, or affect, or exempt
15 any person subject to the provisions of this chapter
16 from complying with, the laws of any State with respect
17 to settlement practices, except to the extent that those
18 laws are inconsistent with any provision of this
19 chapter, and then only to the extent of the
20 inconsistency. The Secretary is authorized to determine
21 whether such inconsistencies exist. The Secretary [of
HUD] may not determine that any State law is
inconsistent with any provision of this chapter if the
Secretary determines that such law gives greater
protection to the consumer. In making these
determinations, the Secretary shall consult with the
appropriate Federal agencies.

22 12 U.S.C. § 2616 (emphasis added).

23 Likewise, RESPA cannot be seen to occupy the field of
24 mortgage creditor reports to debtors to the exclusion of other
25 federal laws. One such law, the Truth in Lending Act ("TILA"),
26 imposes greater, potentially more intrusive and administratively
27 burdensome reporting requirements on mortgage creditors than does
28 RESPA. One provision of TILA empowers the Board of Governors of

1 the Federal Reserve System (the "Board") to "prohibit acts or
2 practices in connection with - (A) mortgage loans that the Board
3 finds to be unfair, deceptive, or designed to evade the provisions
4 of this section[.]" 15 U.S.C. § 1639(1)(2)(A). In 2008,
5 exercising its TILA authority, the Board expressed concern about
6 deceptive practices in the servicing of home mortgages.

7 The Board shares concerns about abusive servicing
8 practices. Before securitization became commonplace, a
9 lending institution would often act as both originator
10 and collector - that is, it would service its own loans.
11 Today, however, separate servicing companies play a key
12 role: they are chiefly responsible for account
13 maintenance activities, including collecting payments
14 (and remitting amounts due to investors), handling
15 interest rate adjustments, and managing delinquencies or
16 foreclosures. Servicers also act as the primary point
17 of contact for consumers. . . .

18 A potential consequence . . . is the misalignment of
19 incentives between consumers, servicers, and investors.
20 Servicers contract directly with investors, and
21 consumers are not a party to the contract. The investor
22 is principally concerned with maximizing returns on the
23 mortgage loans. So long as returns are maximized, the
24 investor may be indifferent to the fees the servicer
25 charges the borrower. Consumers do not have the ability
26 to shop for servicers and have no ability to change
27 servicers (without refinancing). As a result, servicers
do not compete in any direct sense for consumers. Thus,
there may not be sufficient market pressure on servicers
to ensure competitive practices. . . . [S]ervicers may
not timely credit, or may misapply, payments, resulting
in improper late fees. Even where the first late fee is
properly assessed, servicers may apply future payments
to the late fee first, making it appear future payments
are delinquent even though they are, in fact, paid in
full within the required time period, and permitting the
servicer to charge additional late fees - a practice
commonly referred to as "pyramiding" of late fees. The
Board is also concerned about the transparency of
servicer fees and charges, especially because consumers
may have no notices of such charges prior to their
assessment. Consumers may be faced with charges that
are confusing, excessive, or cannot easily be linked to
a particular service. In addition, servicers may fail
to provide payoff statements in a timely fashion, thus
impeding consumers from refinancing existing loans.

28 73 FED. REG. 1672, 1702 (January 9, 2008). To remedy these abuses,

1 the Board proposed a new regulation prohibiting a loan servicer
2 "from failing to provide, within a reasonable time after receiving
3 a request from a consumer or any person acting on behalf of the
4 consumer, an accurate statement of the full amount required to pay
5 the obligation in full as of a specified date." Id. at 1703.

6 The Board published the Final Rule and Official Commentary on
7 July 30, 2008. 73 FED. REG. 44522 (July 30, 2008). The Official
8 Commentary acknowledged that the regulation was applicable in
9 bankruptcy proceedings, and further stated that "reasonable time"
10 in most cases would be five days to provide the information. Id.
11 at 44573. The Official Commentary noted that the five-day
12 deadline for providing the information was supported by national
13 lenders, who argued during the comment period that the originally
14 proposed three-day period for providing the requested report was
15 not reasonable but that five days would be sufficient. Id.

16 As authorized by TILA, on October 1, 2009, new 12 C.F.R.
17 § 226.36(c)(1)(iii) went into effect (also known as part of
18 "Regulation Z")¹⁴:

19 (c) Servicing practices. (1) In connection with a
20 consumer credit transaction secured by a consumer's
21 principal dwelling, no servicer shall. . . - (iii) Fail
22 to provide, within a reasonable time after receiving a
23 request from the consumer or any person acting on behalf
24 of the consumer, an accurate statement of the total
25 outstanding balance that would be required to satisfy
26 the consumer's obligation in full as of a specified
27 date.

24 As can be clearly seen, then, RESPA was not intended by
25 Congress to occupy the field of account reporting by creditors to

27 ¹⁴ The Federal Reserve Board of Governors was authorized to
28 promulgate Regulation Z under 15 U.S.C. § 1604 (a). The
information collection requirements were approved by the Office of
Management and Budget under 44 U.S.C. § 3501 et seq. and were
assigned OMB number 7100-0199.

1 borrowers regarding their residential mortgage loans to the
2 exclusion of all other federal law. Regulation Z, enacted
3 pursuant to TILA, and available to bankruptcy debtors, provides a
4 substantially more intrusive reporting requirement on mortgage
5 creditors than RESPA's requirements.

6 RESPA imposes two significant reporting requirements on
7 mortgage lenders or loan servicers. Under 12 U.S.C. § 2609(c)(2),
8 RESPA requires an annual report be made to debtors regarding
9 details of escrow accounts maintained by the servicer. Under 12
10 U.S.C. § 2605(e)(1), the servicer must provide on written request
11 information demanded by the debtor within 60 days. Regulation Z
12 requires the servicer to provide a final payout report, which
13 would require the servicer to have access to information on all
14 costs and balances, not only those specified by the Addendum, and
15 to provide that payout report on five days' notice.

16 There is nothing in RESPA that leads us to believe that the
17 reporting duties it imposes on creditors were intended to exclude
18 other laws or regulations. Moreover, in our view, the new federal
19 regulation casts doubt on the mortgage creditors' argument that
20 the Addendum is unduly burdensome, by forcing them

21 to bear unanticipated administrative and systematic
22 costs of collecting, correctly monitoring for and
23 differentiating pre-petition and post-petition payments,
24 late charges and escrow balances on a monthly basis.
Mandating that Appellants must develop a new system in
order to abide by a local form clearly abridges
Appellants' substantive rights.

25 Appellants' Opening Br. at 16.

26 Although the mortgage creditors insist that the Addendum's
27 reporting requirements are unduly burdensome and expensive, they
28 provided no evidence to the bankruptcy court (or to this Panel) to

1 demonstrate the extent of the alleged burden of complying with the
2 Addendum on a monthly or quarterly basis. In response to repeated
3 questions at oral argument, counsel for the mortgage creditors
4 acknowledged that no such information was presented to the
5 bankruptcy courts.¹⁵

6 Contrary to the mortgage creditors' view, Regulation Z
7 requires a mortgage creditor to be prepared to produce a payout
8 report, which necessarily includes information about all costs and
9 expenses related to the mortgage contract, on only five days'
10 notice. Although there may well be some expense to provide the
11 detailed reports required by the Addendum, in the absence of any
12 evidence from the mortgage creditors as to the extent of that
13 expense and its corresponding burden, especially in light of
14 Regulation Z's requirement that a payout report be available on
15 five days' notice, we decline to simply assume that the Addendum
16 provisions adversely impact the mortgage creditors' substantive
17 rights.

18 We conclude that the mortgage creditors' argument that RESPA
19 occupies the field of reports required by mortgage creditors such
20 that chapter 13 debtors are precluded from crafting additional
21 reporting rules in their chapter 13 plans lacks merit and is
22 directly contradicted by the plain language of RESPA. As stated
23

24 ¹⁵ At argument before the Panel, after admitting that
25 Appellants had no evidence on the burden and expense of the
26 reporting requirements, the mortgage creditors' counsel asked the
27 Panel to take "judicial notice" that implementation of changes in
28 accounting procedures to comply with the Addendum would be
expensive. The Panel declines this request because it assumes a
fact that is subject to reasonable dispute and that it is neither
generally known nor capable of accurate and ready determination by
resort to sources whose accuracy cannot reasonably be questioned.
See FED. R. EVID. 201(b).

1 in the Joint Memorandum, RESPA provides a floor, a minimum set of
2 disclosures required of mortgage creditors to borrowers. The
3 Addendum seeks to address chapter 13 issues which are neither
4 addressed nor remedied by the reporting provisions of RESPA.
5 Specifically, the debtors and the court need to know the amount of
6 default so as to implement § 1322(b)(5), which provides that

7 [n]otwithstanding paragraph (2) of this subsection, [the
8 plan may] provide for the curing of any default within a
9 reasonable time and maintenance of payments while the
10 case is pending on any unsecured claim or secured claim
11 on which the last payment is due after the date on which
12 the final payment under the plan is due.

13 The bankruptcy court and debtors need the information targeted by
14 the Addendum to implement § 1322(b)(5), and are hampered in that
15 task by, as the Joint Memorandum describes it, "the increasing
16 problem of undisclosed and sometimes questionable post-petition
17 mortgage charges assessed by lenders during the course of a
18 chapter 13 proceeding." Indeed, even the Federal Reserve Board
19 recognized the inadequacy of RESPA in its comments proposing the
20 imposition of additional, and more intrusive, reporting
21 requirements on mortgage servicers for their "abusive practices."

22 **II. The provisions of the Addendum incorporated in the**
23 **debtors' confirmed plans do not violate § 1322(b)(2).**

24 A.

25 The mortgage creditors argue that the Addendum's subsections
26 A2, A4, and A5 "ignore [the mortgage creditors'] contractual
27 rights by modifying the terms of the Deed of Trust and Note in
28 violation of § 1322(b)(2)." Appellants' Open. Br. at 15. This
29 provision of the Code instructs that a chapter 13 plan may,

30 modify the rights of holders of secured claims, other
31 than a claim secured only by a security interest in real

1 property that is the debtor's principal residence, or of
2 holders of unsecured claims, or leave unaffected the
3 rights of holders of any class of claims[.]

4 11 U.S.C. § 1322(b)(2) (emphasis added). As can be seen, the Code
5 bans the modification of a mortgage creditor's "rights." As a
6 result, there is a potential ambiguity in the statute relating to
7 the meaning ascribed to that term.

8 Ostensibly, the word "rights" has a plain meaning. For
9 example, leading treatises on contract law define a right under
10 contract law as the correlate of a duty.

11 When we say that one party has a "right" to performance
12 which the other party has a duty to render, we mean that
13 our organized society of people commands one party's
14 performance for the benefit of the other party, and
15 provides some remedy in accordance with a stated
16 procedure in case of non-performance. This is the
17 "legal relation" of right and duty.

18 8 CORBIN ON CONTRACTS § 30.4 at 4 (Joseph M. Perillo, ed., rev. ed.
19 1999). See also E. Allen Farnsworth, CONTRACTS § 3.4 at 114 n.3
20 (Foundation Press 3d ed. 1999) ("Right and duty are therefore
21 correlatives, since in this sense there can never be a duty
22 without a right.").

23 California law also distinguishes between contractual rights
24 and duties. Cal. Code Civ. Proc. § 1060 (Declaratory Relief: Any
25 person interested under a . . . contract . . . may, in cases of
26 actual controversy relating to the legal rights and duties of the
27 respective parties . . . ask for a declaration of rights or duties
28 . . . and the court may make a determination of these rights or
29 duties").

30 Counsel for the mortgage creditors was repeatedly asked at
31 oral argument before the Panel to identify which "rights" under
32 the mortgage instruments that the challenged Addendum provisions

1 impermissibly modify. Counsel cited to Covenants 9 and 14 in the
2 deeds of trust. Covenant 9 provides:

3 Protection of Lender's Interest in the Property and
4 Rights Under this Security Instrument. If (a) Borrower
5 fails to perform the covenants and agreements contained
6 in this Security Instrument, (b) there is a legal
7 proceeding that may significantly affect Lender's
8 interest in the Property and/or rights under this
9 Security Instrument (such as a proceeding in bankruptcy,
10 probate, for condemnation or forfeiture, for enforcement
11 of a lien which may attain priority over this Security
12 Instrument or to enforce laws or regulations), or (c)
13 Borrower has abandoned the Property, then Lender may do
14 and pay for whatever is reasonable or appropriate to
15 protect Lender's interest in the Property and rights
16 under this Security Instrument, including protecting
17 and/or assessing the value of the Property, and securing
18 and/or repairing the Property. Lender's actions can
19 include, but are not limited to: (a) paying any sums
20 secured by a lien that has priority over this Security
21 Instrument; (b) appearing in court; and (c) paying
22 reasonable attorneys' fees to protect its interest in
23 the Property and/or rights under this Security
24 Instrument, including its secured position in a
25 bankruptcy proceeding. Securing the Property includes,
26 but is not limited to, entering the Property to make
27 repairs, change locks, replace or board up doors and
28 windows, drain water from pipes, eliminate building or
other code violations or dangerous conditions, and have
utilities turned on or off. Although Lender may take
action under this Section 9, Lender does not have to do
so and is not under any duty or obligations to do so; it
is agreed that Lender incurs no liability for not taking
any or all actions authorized under this Section 9.

Any amount disbursed by Lender under this Section 9
shall become additional debt of Borrower secured by this
Security Instrument. These amounts shall bear interest
at the Note rate from the date of disbursement and shall
be payable, with such interest, upon notice from Lender
to Borrower requesting payment.

Read fairly, this covenant purportedly grants a mortgage
creditor rights designed to protect its security interest. In
particular, it provides that additional disbursements made by the
creditor become part of the secured debt which must be repaid by
the debtor.

However, there is nothing in the Addendum that limits or

1 modifies these rights. A mortgage creditor may, if necessary,
2 make protective disbursements after confirmation of a plan. For
3 example, if a chapter 13 debtor fails to make current payments,
4 the mortgage creditor may be required to advance payment for
5 property taxes. The creditor may also be compelled to seek relief
6 from the stay to enforce the mortgage. If these occur, this
7 covenant provides that the tax payments and its reasonable
8 attorneys fees thus incurred be reimbursed by the debtor. Under
9 questioning by the Panel, counsel for the mortgage creditors
10 conceded that the creditors' right to seek recovery of all post-
11 petition charges under this covenant was not impacted by the
12 debtors' confirmed plans or the Addendum provisions.¹⁶

13 More significantly, our own review of the mortgage
14 instruments in all four bankruptcy cases confirms there is no
15 provision that grants the creditors a "right" to decline to
16 provide accountings and reports to the debtors or a trustee beyond
17 those prescribed by the mortgage contracts, or any sort of
18 bargained for prohibition on modification of duties under the
19 contract. On the other hand, the contracts do acknowledge that
20 RESPA imposes duties on the creditors to provide account reports.
21 We therefore conclude that, while the mortgage creditors'
22 contracts impose a duty upon them concerning account reporting, it
23 is not a right, and consequently, § 1322(b)(2)'s anti-modification
24 provision is not applicable in this dispute.

25 In their briefs, the mortgage creditors appear to argue that
26

27 ¹⁶ Covenant 14 likewise purportedly grants the mortgage
28 creditors certain rights to charge debtors for services performed
in the event of debtors' default. Again, we find nothing in the
Addendum that in any way limits or modifies those rights.

1 they have a right under California law not to have their duties
2 modified. In their only citation to authority for this argument,
3 the mortgage creditors rely upon the California Supreme Court's
4 decision in Dreyfuss v. Union Bank of Cal., 11 P.3d 383 (Cal.
5 2000). The creditors assert that, in this decision, the court
6 concluded that the California legislature's enactment of anti-
7 deficiency legislation was evidence that the California
8 legislature had addressed the relative burdens of a mortgage
9 creditor and debtor and intended that the burdens of the mortgage
10 creditor not be modified.

11 Dreyfuss does not stand for the proposition that a mortgage
12 creditor has a right under state law not to have its duties
13 modified. In Dreyfuss, a borrower defaulted on a loan secured by
14 separate deeds of trust on three real estate parcels. The
15 mortgage creditor conducted a nonjudicial foreclosure sale on one
16 property, and then proceeded with serial foreclosure sales of the
17 remaining properties. The borrowers argued on appeal that
18 foreclosing on the second and third properties without a judicial
19 determination of the fair market value of the first property, and
20 crediting that amount to the secured debt, was "the functional
21 equivalent of a deficiency judgment" in violation of Cal. Code
22 Civ. Proc. §§ 580a and 580d.¹⁷

23
24 ¹⁷ Cal. Code Civ. Proc. § 580a, in pertinent part, provides:
25 "Whenever a money judgment is sought for the balance due upon an
26 obligation for the payment of which a deed of trust or mortgage
27 with power of sale upon real property . . . was given as security,
28 following the exercise of the power of sale in such deed of trust
or mortgage, the plaintiff shall set forth in his or her complaint
the entire amount of the indebtedness which was secured by the
deed of trust or mortgage at the time of sale, the amount for
which the real property or interest therein was sold and the fair
market value thereof at the date of sale and the date of that
sale. . . . Before rendering any judgment the court shall find the
fair market value of the real property . . . sold, at the time of
(continued...)

1 The Dreyfuss court rejected the borrower's argument, finding
2 that the California code provisions were irrelevant, and that a
3 mortgage creditor may proceed seriatim in foreclosing against
4 multiple items of collateral without intervening judicial actions.
5 11 P.3d at 386. In other words, Dreyfuss deals with the
6 relationship between mortgage creditor and borrower following a
7 foreclosure. Discussing that relationship, the state supreme
8 court commented,

9 The nonjudicial foreclosure provisions evince the
10 legislative intent to establish an equitable trade-off
11 of protections and limitations affecting the defaulting
12 borrower and his or her creditor. In a nonjudicial
13 foreclosure, the borrower is protected, inter alia, by
14 notice requirements and a right to postpone the sale, in
order to avoid foreclosure either by redeeming the
property from the lien before the sale or finding
another [] purchaser. . . . For its part, the creditor
gains the certainty of a "quick, inexpensive and
efficient remedy."

15 Id. at 390 (emphasis added). This is the only reference in
16 Dreyfuss to legislative intent and clearly refers to the trade-off
17 of protections and limitations following a foreclosure. Nothing
18 in Dreyfuss or any California law argued to this Panel supports an
19 argument that the California legislature intended as either law or
20 public policy that a mortgage creditor's burdens outside the
21 foreclosure process should not be modified.¹⁸

23 ¹⁷(...continued)
24 sale."

25 Cal. Code Civ. Proc. § 580d, in pertinent part, provides: "No
26 judgment shall be rendered for any deficiency upon a note secured
27 by a deed of trust or mortgage upon real property or an estate for
years therein hereafter executed in any case in which the real
property or estate for years therein has been sold by the
mortgagee or trustee under power of sale contained in the mortgage
or deed of trust."

28 ¹⁸ The mortgage creditors apparently recognize that Dreyfuss
only concerns the relationship of mortgage creditor and borrower
in a foreclosure. Their summary argument on this point in their
(continued...)

1 In the four cases before us, we cannot discern whether the
2 mortgage loans were in the process of being foreclosed when the
3 debtors chapter 13 petitions were filed. We are confident,
4 though, that even if the foreclosure process had commenced, it had
5 certainly not been completed. Consequently, there was no
6 theoretical transformation in the relationship of debtor and
7 creditor, and the mortgage creditor did not acquire some alleged
8 right not to have its burdens modified.

9 Even if by some creative route we could transform the
10 mortgage creditors' contractual and statutory duty to provide
11 reports into a "right" not to have those duties modified, we
12 conclude it is not the sort of right that Congress intended to
13 protect under § 1322(b)(2). Courts that have examined the meaning
14 of modification of rights of mortgage creditors in bankruptcy have
15 held that only a mortgage creditor's rights to payment are
16 protected from modification under § 1322(b)(2). Grubbs v. Houston
17 First Am. Sav. Ass'n, 730 F.2d 236, 246-47 (5th Cir. 1984) (en
18 banc) (holding that § 1322(b)(2) was only intended to ensure that a
19 plan preserved the size and periodicity of the monthly payments
20 originally contemplated under the terms of the debt); In re
21 Larkins, 50 B.R. 984, 986 (W.D. Ky. 1985) (" 'Modify' [in

22 _____
23 ¹⁸(...continued)
24 opening brief states, "The legislature has clearly considered the
25 burdens imposed upon secured creditors to balance them with the
26 borrower's rights in order to find the statutes equitable. The
27 entire Local Form F 3015-1.1A conflicts with California law by
28 shifting additional burdens contrary to Appellants' state rights
and contract rights and should be stricken." Appellants' Op. Br.
at 23 (emphasis added). The statutes Appellants refer to here are
Cal. Code Civ. Proc. §§ 580a and 580d, which only refer to
foreclosures. And as the California Supreme Court cautions in
Dreyfuss, "both provisions [§§ 508a and 508d] apply only when a
personal judgment is sought against the debtor after a
foreclosure." Id. at 387.

1 § 1322(b) (2)] means to change the amount of the debt.”); Capital
2 Resources Corp. v. McSorley (In re McSorley), 24 B.R. 795, 798
3 (Bankr. D.N.J. 1982) (“There is no modification of a creditor’s
4 claim if he is receiving 100% of what he is due plus accruing
5 interest up until the time of payment.”).

6 More recently, the Fourth Circuit examined the meaning of
7 “modification” in § 1322(b) (2) and ruled that this proscription
8 only applied to “fundamental” aspects of a claim, i.e., the
9 payment terms. As the Fourth Circuit explained:

10 The bankruptcy courts have consistently interpreted the
11 nomodification provision of § 1322(b) (2) to prohibit any
12 fundamental alteration in a debtor’s obligations, e.g.,
13 lowering monthly payments, converting a variable
14 interest rate to a fixed interest rate, or extending the
15 repayment term of a note. See, e.g., In re Schum, 112
16 B.R. 159, 161-62 (Bankr. N.D. Tex. 1990) (concluding
17 that plan was impermissible modification because it
18 proposed to reduce monthly payments and secured
19 valuation). In In re Gwinn, 34 B.R. 936, 944-45 (Bankr.
20 S.D. Ohio 1983), the court approved a plan as a
21 permissible cure under § 1322(b) (5), because the plan
22 did not propose to lower monthly payments, extend the
23 repayment period, or make the obligation conditional. It
24 instead sought only to reinstate the original contract
with a minor delay in payment. Id.; see also In re
Cooper, 98 B.R. 294 (Bankr. W.D. Mich. 1989) (finding
impermissible modification where plan proposed new
payment schedule). Along similar lines, another
bankruptcy court concluded that confirmation of a
Chapter 13 plan would have constituted an impermissible
modification because the plan proposed to alter
fundamental aspects of the debtor’s obligations, i.e.,
the nature and rate of interest, and the maturity
features of the loan. In re Coffey, 52 B.R. 54, 55
(Bankr. D.N.H. 1985). As these decisions have
emphasized, § 1322(b) (2) prohibits modifications that
would alter at least one fundamental aspect of a claim.

25 Litton v. Wachovia Bank (In re Litton), 330 F.3d 636, 643-44 (4th
26 Cir. 2003) (emphasis added).

27 The approach taken in Grubbs and Litton appears consistent
28 with the Supreme Court’s analysis in Nobelman v. Am. Sav. Bank,

1 508 U.S. 324 (1993):

2 The term "rights" is nowhere defined in the Bankruptcy
3 Code. In the absence of a controlling federal rule, we
4 generally assume that Congress has "left the
5 determination of property rights in the assets of a
6 bankrupt's estate to state law," since such "property
7 interests are created and defined by state law." Butner
8 v. United States, 440 U.S. 48, 54-55, 59 L.Ed.2d 136, 99
9 S.Ct. 914 (1979). See also Barnhill v. Johnson, 503
10 U.S. 393, 398, 118 L.Ed.2d 39, 112 S.Ct. 1386 (1992).
11 Moreover, we have specifically recognized that "the
12 justifications for application of state law are not
13 limited to ownership interests," but "apply with equal
14 force to security interests, including the interest of a
15 mortgagee." Butner, supra, at 55. The bank's "rights,"
16 therefore, are reflected in the relevant mortgage
17 instruments, which are enforceable under Texas law. They
include the right to repayment of the principal in
monthly installments over a fixed term at specified
adjustable rates of interest, the right to retain the
lien until the debt is paid off, the right to accelerate
the loan upon default and to proceed against
petitioners' residence by foreclosure and public sale,
and the right to bring an action to recover any
deficiency remaining after foreclosure. . . . See
Record 135-140 (deed of trust); id., at 147-151
(promissory note); Tex. Prop. Code Ann. §§ 51.002-51.005
(Supp. 1993). These are the rights that were "bargained
for by the mortgagor and the mortgagee," Dewsnup v.
Timm, 502 U.S. 410, 417, 112 S.Ct. 773, 116 L.Ed.2d 903
(1992), and are rights protected from modification by
§ 1322(b)(2).

18 Nobelman, 508 U.S. at 329-30 (emphasis added).

19 Nobelman states that the rights referenced in § 1322(b)(2)
20 "include" the payment terms described in that opinion. We are
21 aware that the Supreme Court teaches us that, "[i]n definitive
22 provisions of statutes and other writings, 'include' is
23 frequently, if not generally, used as a word of extension or
24 enlargement rather than as one of limitation or enumeration." Am.
25 Sur. Co. v. Marotta, 287 U.S. 513, 517 (1933). To determine
26 whether the Supreme Court meant "include without limitation" or
27 "is limited to the following" in its Nobelman decision, we look to
28 the context. Id.

1 At the end of the quoted material from Nobelman, the Supreme
2 Court provides an explanation for the list, stating that "these
3 are the rights that were 'bargained for by the mortgagor and the
4 mortgagee,' Dewsnup v. Timm, 502 U.S. 410, 417 (1992), and are
5 rights protected from modification by § 1322(b)(2)." The Supreme
6 Court links the rights protected from modification to those rights
7 bargained for by the mortgagor and the mortgagee. In other words,
8 only those rights that were "bargained for" by the mortgage
9 creditors are protected from modification by § 1322(b)(2).

10 There is no indication in the record that the reporting
11 provisions in the mortgage instruments were ever specifically
12 bargained for. Indeed, California law recognizes that mortgage
13 deeds of trust (the documents which here include the covenants)
14 are generally adhesion contracts. Fischer v. First Int'l Bank,
15 109 Cal. App. 4th 1433, 1446 (Cal. Ct. App. 2003) ("Standardized
16 deeds of trust are contracts of adhesion.").

17 Moreover, the explicit language of Covenant 3 of the mortgage
18 instruments indicates that, not only were the notice provisions
19 not bargained for, they were imposed by external law, RESPA. The
20 mortgage creditors strongly argue that changing the annual
21 reporting requirements in the mortgage instruments to a quarterly
22 or monthly basis somehow modifies their rights under the
23 instrument. But Covenant 3 provides, in part,

24 Lender shall give to Borrower, without charge, an annual
25 accounting of the [escrow] funds as required by RESPA.
26 If there is a surplus of Funds held in escrow, as
27 defined under RESPA, Lender shall account to Borrower
28 for excess funds in accordance with RESPA. If there is
a shortage of funds in escrow, as defined under RESPA,
Lender shall notify Borrower as required by RESPA, and
Borrower shall pay to Lender the amount necessary to
make up the shortage in accordance with RESPA
If there is a deficiency of Funds held in escrow, as

1 defined under RESPA, Lender shall notify Borrower as
2 required by RESPA, and Borrower shall pay to Lender the
3 amount necessary to make up the deficiency in accordance
4 with RESPA.

4 (Emphasis added).

5 In short, the principal reporting requirement¹⁹ in the
6 mortgage instruments was not a bargained for element of the
7 contracts. It was imposed on the parties to the contract by
8 federal law. It neither added, enlarged nor reduced the
9 respective rights and duties bargained for by the parties to the
10 contract and, in fact, neither party had the power to change the
11 annual reporting provision.

12 As explained by the Supreme Court and courts of appeal, the
13 mortgage creditors' rights protected by § 1322(b)(2) all deal with
14 the terms of payment of, the security for, and the ability to
15 enforce the mortgage loan contracts. We find nothing in the case
16 law that compels the conclusion that enhanced reporting duties by
17 mortgage lenders in chapter 13 cases are barred by the anti-
18 modification provision of § 1322(b)(2). Indeed, there is ample
19 case law that supports an opposite position.

20 In Ameriquet Mortg. Co. v. Nosek (In re Nosek), 544 F.3d 34
21 (1st Cir. 2008), the First Circuit admonished the bankruptcy court
22 for failing to require additional accounting and reporting by the
23 creditor and that such additional reporting would not have been a
24

25 ¹⁹ There are other minor notice provisions in the mortgage
26 instruments, such as the requirement in Covenant 15 that there be
27 only one address for the borrower to which the mortgage creditor
28 sends notices. As with the principal annual notice requirement,
there is no evidence that this was a bargained for provision. And
as we have discussed elsewhere, Appellants have admitted that they
have provided no evidence to the bankruptcy court or this Panel
demonstrating how this or any notice provision is burdensome.

1 prohibited modification under § 1322(b)(2):

2 [E]ven if the Payment History could somehow be construed
3 as a threat to her right to cure, the proper response of
4 the bankruptcy court would have been an amendment to the
5 Plan specifying the accounting practices necessary to
6 eliminate that threat. See In re Watson, 384 B.R. 697,
7 705 (Bankr. D. Del. 2008) (holding that Chapter 13 plans
8 "containing procedures for timely notice of fees and
9 charges, proper allocation of payments and adjudication
10 by [the bankruptcy court] of disputes over assessed
11 fees, costs and charges under a mortgage may be
12 confirmed without running afoul of section 1322(b)(2));
13 see also In re Collins, No. 07-30454, 2007 Bankr. LEXIS
14 2487, 2007 WL 2116416, at *11 (Bankr. E.D. Tenn. July
15 19, 2007) ("[L]anguage in a Chapter 13 plan burdening
16 mortgagees with procedural obligations over the life of
17 the plan does not, per se, violate § 1322(b)(2)'s
18 anti-modification provision and is permissible and even
19 desirable."). Only with such an Amendment in place
20 would the Plan support the imposition of remedies
21 pursuant to § 105(a) if Ameriquest failed to comply with
22 its terms. Absent that specificity, the court had no
23 authority to order the award it did.

24 544 F.3d at 48-49.

25 The mortgage creditors cite to Nosek for support of their
26 position that a bankruptcy court should not require the mortgage
27 creditor to change its accounting practices:

28 In saying that the Plan would have to be amended to
prescribe the accounting practices necessary to protect
Nosek's right to cure before Ameriquest could be
sanctioned for a violation of an order of the bankruptcy
court, we do not suggest that the bankruptcy court
should have engaged in a company-wide revision of
Ameriquest's corporate accounting practices. Under the
facts of this case, a simple amendment to the Plan
clarifying how Ameriquest must account for short, late,
or missed pre- and post-petition payments from Nosek or
the trustee during the course of the repayment period
would have sufficed.

In re Nosek, 544 F.3d at 50 n.16. The mortgage creditors are
correct that the First Circuit cautioned that its position was not
a license to the bankruptcy courts to require a mortgage creditor
to implement company-wide revised accounting procedures. The

1 court, however, clearly would allow the bankruptcy court to
2 require that mortgage creditors generate information beyond what
3 they are obliged to keep or report by the mortgage instruments and
4 that such enhanced reporting requirements do not violate
5 § 1322(b) (2).²⁰

6 Several bankruptcy courts have also approved enhanced
7 creditor account reporting requirements, rejecting the creditors'
8 contention that such provisions violated § 1322(b) (2). For
9 example, in In re Wilson, 321 B.R. 222 (Bankr. N.D. Ill. 2005),
10 the debtor proposed a model plan which the Northern District of
11 Illinois requires to be used by all chapter 13 debtors. The model
12 plan contained a provision requiring the objecting mortgage lender
13 to provide an itemized notice to the debtor of any outstanding
14 payment obligations, and outlined a procedure for resolving any
15 disputes over the amounts listed in the notice. The mortgage
16 creditor argued that this plan provision constituted a prohibited
17 modification of its rights under the mortgage contract. The
18 bankruptcy court rejected this argument, noting that "by providing
19 a procedure for the parties to use to definitively ascertain what
20 a debtor owes to this home lender, the Model Plan does not modify
21 a mortgage holder's rights in violation of § 1322(b) (2)." Rather,

23 ²⁰ The First Circuit's warning to the bankruptcy court not to
24 engage in company-wide revisions of a mortgage creditor's
25 accounting system should be read literally – a praiseworthy
26 caution against unnecessary meddling in a mortgage creditor's
27 business practices. However, the mortgage creditors here have not
28 shown either in the bankruptcy court or before the Panel that any
substantial, company-wide modification of their accounting
procedures would be required to comply with the Addendum.
Moreover, even were that the case, subsection B4 of the Addendum
provides the mortgage creditor with the opportunity to request a
waiver of its requirements when in "good faith" the creditor,
through its accounting system, cannot fully comply with the
Addendum's reporting requirements.

1 the bankruptcy court explained, the model plan "merely provides a
2 framework within which to enforce those rights according to the
3 loan document terms." Id. at 225.

4 As discussed in In re Nosek, the bankruptcy court in In re
5 Collins ruled that "language in a Chapter 13 plan burdening
6 mortgagees with procedural obligations over the life of the plan
7 does not, per se, violate § 1322(b)(2)'s anti-modification
8 provision and is permissible and even desirable." 2007 WL 2116416
9 at *11. The Collins court endorsed reporting requirements beyond
10 those required in the mortgage instruments, including notification

11 to the trustee, the Debtors, and the attorney for the
12 Debtors in writing of any changes in the interest rate
13 for any non-fixed rate or any adjustable rate mortgages
14 and the effective date of any such adjustment or
15 adjustments not less than 60 days in advance of such
16 change or at such time as the change becomes known to
17 the holder if the change is to be implemented in less
18 than 60 days [and] [t]o notify the trustee, the Debtors,
19 and the attorney for the Debtors in writing of any
20 change in the property taxes and/or the property
21 insurance premiums that would either increase or reduce
22 the escrow portion, if any, of the monthly mortgage
23 payments and the effective date of any such adjustment
24 or adjustments not less than 60 days in advance of such
25 change or at such time as the change becomes known to
26 the holder if the change is to be implemented in less
27 than 60 days.

20 Id.²¹

21 In In re Watson, 384 B.R. 697, 705 (Bankr. D. Del. 2008), the

23 ²¹ Other bankruptcy courts have cited to or tracked the
24 reasoning in In re Collins. See, In re Patton, 2008 WL 5130096 *4
25 (Bankr. E.D. Wisc. 2008) ("While there does not seem to be a
26 concern with additional notice requirements, the plan should not
27 impose affirmative duties upon creditors to protect their rights,
28 which duties do not otherwise exist under the applicable contract,
nor under state or federal law."); In re Hudak, 2008 WL 4850196
(Bankr. D. Colo. 2008) ("a change in notification, in this Court's
opinion, does not substantively modify the rights of the Creditor
any more than the filing of the bankruptcy itself."); In re
Armstrong, 394 B.R. 794, 800 (Bankr. W.D. Pa. 2008); In re Emery,
387 B.R. 721, 724 (Bankr. E.D. Ky. 2008); but see In re Booth,
399 B.R. 316 (Bankr. E.D. Ark. 2009) (rejecting additional notice
requirements as modification of rights under § 1322(b)(2).)

1 debtors proposed procedures for providing notice to the debtor of
2 charges and fees assessed or accruing under a mortgage during the
3 plan term. Mortgage creditors opposed this under the anti-
4 modification provision of § 1322(b)(2), insofar as the notice
5 requirements differed from those provided in the mortgage
6 contracts. The bankruptcy court ruled that "plans containing
7 procedures for timely notice of fees and charges . . . under a
8 mortgage may be confirmed without running afoul of section
9 1322(b)(2)." Id.

10 In In re Anderson, 382 B.R. 496 (Bankr. D. Ore. 2008), the
11 bankruptcy court considered the application of its General Order
12 requiring changes in some reporting requirements during a chapter
13 13 bankruptcy. One particular provision was hotly contested. The
14 creditor's trust deed required that notice of changes in escrow
15 accounts be sent to the debtor. However, the chapter 13 plan
16 provision changed this requirement to dictate that the debtor's
17 attorney and the trustee also receive the notice. The creditor
18 challenged the provision on grounds that it was not required in
19 the deed of trust. The bankruptcy court ruled that "additional
20 notice is more in the nature of a procedural requirement to aid
21 Chapter 13 administration, than a modification and is therefore
22 permissible." Id. at 504.

23 Subsections A2, A4, A5 and A6 of the Addendum are all
24 designed to provide necessary information concerning the status
25 of, and any additional charges to, the debtors' mortgage loans
26 during the term of their plan. The basis for inclusion of such
27 provisions in the plans is justified by the need for chapter 13
28 debtors to emerge from bankruptcy with their mortgage loans

1 current, a laudable goal which is completely consistent with the
2 fresh start policies of the Code. While mortgage loan account
3 reporting requirements may be enhanced by these plan provisions,
4 they do not modify any of the basic rights of the mortgage
5 creditors. A plan's inclusion of the enhanced reporting
6 requirements is authorized by § 1322(b)(11), and such provisions
7 do not violate § 1322(b)(2).

8 B.

9 The mortgage creditors' objections to inclusion of the
10 provisions of subsections B3 and B4 of the Addendum in the
11 debtors' plans are also without merit.

12 These two provisions impose no particular obligations on the
13 mortgage creditors. As the debtors point out, if the provisions
14 of section A of the Addendum are appropriate, subsection B3 simply
15 provides a procedure for enforcement of those provisions. In
16 other words, if a plan is confirmed that includes the subsection A
17 reporting provisions, under subsection B3, a violation of those
18 plan provision can be enforced via issuance of an order to show
19 cause by the bankruptcy court.²² Moreover, subsection B3 provides
20 a noncomplying creditor with significant due process rights before
21 it can be found to have violated the plan, something that hardly
22 amounts to a prohibited modification of any of its contract
23 rights.

24 Similarly, subsection B4 does not modify a mortgage
25 creditors' rights in violation of § 1322(b)(2). If a mortgage

26
27 ²² The bankruptcy court could likely employ such a procedure
28 to address alleged creditor violations of a confirmed plan even
where the plan does not expressly so provide. Subsection B3, in
this sense, merely expressly incorporates such procedure as the
required approach.

1 creditor, for whatever good reason, is unable to comply with a
2 reporting requirement, subsection B4 provides an optional
3 opportunity for that creditor to avert any adverse consequences by
4 requesting a waiver of the reporting requirements, beyond its
5 initial opportunity to object to chapter 13 plan provisions prior
6 to confirmation. This option does not modify the mortgage
7 creditors' rights in any respect. If anything, it likely enhances
8 their rights.

9 C.

10 None of the challenged provisions of the Addendum
11 incorporated in the debtors' chapter 13 plans amount to prohibited
12 modifications to the creditors' contractual rights in violation of
13 § 1322(b)(2). Enhancing the mortgage creditors' account reporting
14 duties under subsections A2, A4, A5 and A6 of the Addendum does
15 not impair any of their contractual rights, as that term is
16 understood in this context. The mortgage creditors provided no
17 evidence in any of the bankruptcy courts or before this Panel that
18 the additional reporting requirements create such an
19 administrative burden as to jeopardize their fundamental
20 contractual rights.

21 The provisions of subsections B3 and B4 also do not modify
22 the creditors' rights - indeed, in some respects, these provisions
23 provide additional rights and protections to them.

24 **CONCLUSION**

25 The mortgage creditors' challenges to the provisions of the
26 Addendum incorporated in the debtors' confirmed chapter 13 plans
27 lack merit. We therefore AFFIRM the bankruptcy courts' orders
28 confirming the plans.