SERVICE OF PLEADINGS IN CONTESTED MATTERS[1]

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United States Bankruptcy Judge

Southern District of Alabama

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TABLE OF CONTENTS

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Introduction

A bankruptcy case consists of a collection of discrete matters that may be divided into two broad categories. One category consists of routine administrative matters, such as an application to pay a filing fee in installments or an initial motion to extend the time for filing schedules for a short period of time. The relief sought by such motions normally would not adversely affect the rights of third parties.

The other category consists of those matters that are or could be disputed. This category has two subcategories, adversary proceedings and contested matters. Adversary proceedings consist of those types of disputes described in Rule 7001 of the Federal Rules of Bankruptcy Procedure. Contested matters consist of all other disputes in a bankruptcy case. The 1983 Advisory Committee Note to Bankruptcy Rule 9014 states that a contested matter is "an actual dispute, other than an adversary proceeding, before the bankruptcy court."

> [Contested matters] are generally initiated by motion and do not require a responsive pleading (unless the bankruptcy court directs that an answer be served). Only certain of the rules governing adversary proceedings apply to the resolution of contested matters and the court may direct that these rules will not apply in the litigation of a particular contested matter or that other rules will apply. See Fed.R.Bankr.P. 9014. The procedures governing

contested matters are thus less formal.

In re Indian Palms Associates, Ltd), 61 F.3d 197, 204 n. 11 (3d Cir. 1995).

A motion or objection that seeks to affect the rights of the respondent is a "contested matter," whether or not the respondent files a response or appears at a hearing to oppose the motion. "It is the existence of an unresolved dispute and a motion seeking relief, rather than formal opposition to the relief sought, that identify a contested matter." *U.S. v. Laughlin (In re Laughlin),* 210 B.R. 659, 661 (1st Cir. B.A.P. 1997).

This monograph is concerned with the problem of obtaining *in personam* jurisdiction over the respondent in a contested matter. However, much of what is said here also applies to the service of a summons and complaint in an adversary proceeding.

"In addition to the service methods authorized by Federal Rule 4, Bankruptcy Rule 7004(b) permits a party in a bankruptcy proceeding to serve process by first class mail. By allowing for nationwide service of process by first class mail, the Bankruptcy Rule makes service easier than the Federal Rules. In bankruptcy proceedings, parties therefore typically take advantage of the easier service method and do not serve in accordance with a state law or by personal service. In fact, where a party incurs process-server fees by serving process through personal service rather than through first class mail, the court may refuse to authorize reimbursement of the expense of the process server. 8 *Norton Bankr. L. & Prac*. 3d § 162:4.

"Certainly, the Bankruptcy Rules provide for a much easier method of serving process

than the Federal Rules of Civil Procedure. Accordingly, the question is whether the notice provided the served party satisfies constitutional due process requirements. The Sixth Circuit considered this question in *Matter of Park Nursing Center, Inc*., 766 F.2d 261, 263 (6th Cir. 1985). The court recognized the competing interests of ensuring proper notice to the party being served and promoting efficiency in bankruptcy proceedings. The court applied the standard that a rule governing service of process is adequate if it is reasonably calculated to achieve actual notice and if there is a procedure available to the party that fails to receive notice to avoid default judgment. Applying the standard to former Bankruptcy Rule 704(c)(1), which is virtually identical to current Bankruptcy Rule 7004(b), the court held that service by first class mail satisfies due process requirements in light of Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure. Under these rules, a party that fails to receive notice through no fault of its own may obtain relief from a default judgment." *Id.*

A. Service in Contested Matters Generally.

Bankruptcy Rule 9014 provides in relevant part:

> In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d) . . . .

Rule 9014 goes on to state which of the adversary proceeding rules apply in a contested matter "unless the court directs otherwise." Additionally, Bankruptcy Rule 7004 incorporates some, but not all, parts of Rule 4 of the Federal Rules of Civil Procedure stating in pertinent part:

> Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person. The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

Fed. R. Civ. P. 4(e)-(j) prescribes the methods for service on individuals found within a federal judicial district (subsection (e)), individuals in a foreign country (subsection (f)), infants and incompetent persons (subsection (g)), corporations, partnerships, and associations (subsection (h)), the United States and its agencies, corporations, officers, or employees (subsection (i)), and foreign, state, or local governments (subsection (j)). These sections for the most part require personal service. For example, as to individuals, subsection (e) requires service on an "individual personally; by leaving a copy of [the summons and complaint] at the individual's dwelling or usual place of abode with some person of suitable age and discretion

who resides there; or by delivering a copy of [the summons and complaint] to an authorized agent by appointment or by law to receive service of process." Unless federal law provides otherwise, service on a corporation also requires personal service on an officer or agent by delivery to that person.

Serving parties must further provide proof of service under Fed. R. Civ. P. 4(l), made applicable by Rule 7004(a). Rule 4(l) generally requires proof of service by the server's affidavit, though a certificate of service under penalty may be used in lieu of an affidavit under 28 U.S.C. § 1746. Proof of service does not affect the validity of service and the court may permit proof of service to be amended.

B. The Distinguishing Features of Rule 7004 – Service By Mail and Service Nationwide.

Rule 7004(b) begins:

> **Service by First Class Mail**. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

Service by mail is a salient departure and less sure method of service than that required under Rule 4 of the Federal Rules of Civil Procedure. A similar striking departure from Rule 4 is the provision in Bankruptcy Rule 7004(d) that "[t]he summons and complaint and all other process except a subpoena may be served anywhere in the United States." Courts have held

that the privilege of using the less certain method of mail carries with it a greater burden of complying strictly with the provisions of Bankruptcy Rule 7004(b). For instance, courts have observed that "nationwide service of process by first class mail is a rare privilege . . . that is not to be abused or taken lightly" *In re Carlos*, 392 B.R. 920 (M.D. Fla. 2008) (citing *In re Schoon*, 153 B.R. 48, 49 (Bankr. N.D. Cal.1993)); *see also*, *In re Pittman Mechanical Contractors, Inc.,* 180 B.R. 453, 456 (Bankr. E.D. Va.1995).

> An essential requirement of due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). In light of the comparatively lenient procedure in bankruptcy, persons effecting service must provide correct notice in accord with the Rules. *In re Pittman* at 457 (applying Rule 7004(b)(3) and citing *In re Braden*, 142 B.R. 317 (Bankr. E.D. Ark.1992) and *Schoon*). Thus, strict compliance with Rule 7004 serves to protect due process rights as well as to assure bankruptcy matters proceed expeditiously.

In re M & L Business Machine Co., Inc. v. Otis, 190 B.R. 111, 115 (D. Colo.1995).

C. Service On An Individual.

Paragraph (1) of Rule 7004(b) provides for service:

> (1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's

> dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

As Paragraph (1) states, to serve an individual by mail effectively, the envelope containing the summons and complaint, or motion in a contested matter, must be addressed to the individual's residence - dwelling house or usual place of abode - or to the individual's regular business address. Note that the Rule 7004(b)(1) does not include a mailing to a post office box. *In re Tyler*, 493 B.R. 905, 911 (Bankr. N.D. Ga. 2013).

Rule 7004(b)(7) further provides that service upon an individual (other than an infant or incompetent), domestic of foreign corporation, partnership or other unincorporated association, is also sufficient "if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state."

D. Service on An Infant or an Incompetent Person.

Paragraph (2) of Rule 7004(b) provides for service:

> (2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and

> complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

This Paragraph is similar to Paragraph 1 dealing with individuals.

E. Service On A Domestic or Foreign Corporation, Partnership or Unincorporated Association.

Paragraph (3) of Rule 7004(b) provides for service:

> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

There is split in authority on whether the corporate officer or agent must be identified by name. First, an "agent authorized by appointment" means any agent implicitly or explicitly authorized by the corporation. *See* 8 Norton Bankr. L. & Prac. 3d § 162:4 n. 15. Second, the rationale behind directing the mail to an officer or agent rather than to the corporation itself is to decrease the risk of improper handling of process, and rigid formalism is not required. *Id.* at n. 16. Thus the Advisory Committee Note to former Bankruptcy Rule 704(c), which is substantially similar to current Rule 7004(b), provides that service is sufficient if the envelope

is addressed to the corporation and directed to the attention of an officer or agent, *id.* at n. 17, although some courts require the actual name of an officer or agent be used, and some hold that an envelope addressed to the corporation alone is sufficient service where the officer or agent receives actual notice of the summons.

In this Circuit, 7004(b)(3) requires that the corporate officer or agent be identified by name. *See In re HRN Group, LLC,* 2020 WL 426048(Bankr. N.D. Ga. 2020)(citing, *In re Faulknor,* 2005 WL 102970, *2 (Bankr. N.D.Ga. 2005) (". . . Debtors' service of the motion to redeem to the attention of an officer, without specifically naming the individual, fails to comply with Rule 7004 and the constitutional requirements of due process."); *see also, In re Carlo*, 392 B.R. 920 (Bankr. S.D. Fla. 2008) (service not effective unless a personally named officer, a managing or general agent is on the envelope); *In re Schoon*, 153 B.R. 48, (Bankr. N.D. Cal. 1993). Hence, mailing a motion to "ABC Finance, 125 Mobile Street, Mobile, AL 36602" or to "President, ABC Finance, etc." will not constitute good service

Potential ways to determine the name of a corporate officer are: (1) contact the corporation and inquire by phone call or e-mail; (2) reach out to counsel who has represented or obtained a judgment on behalf of such entity to request such information; (3) search the internet for corporate websites or (4) search other public databases maintaining such information. Oftentimes, the names of registered agents for service of process may be obtained from the secretary of state in a state where the company is incorporated or has registered to do business, and that information is often available on the Internet. The Alabama Secretary of

State maintains an online database of agents for service of process searchable by entity name; entity number; officer, agent or incorporator. Access is to the business records is free and accessible at: www.sos.alabama.gov. Under the Government Records tab, click Business Entity Records.

Not finding the respondent's name in the Secretary of State's database does not relieve the movant and his attorney from obtaining proper service in accordance with Bankruptcy Rule 7004. There are a number of possibilities that might account for not finding a corporate name and registered agent in the Secretary of State's database. Be careful that the name being searched is spelled correctly. If a company does not transact business in the state whose database is being searched, it probably will not be registered with the Secretary of State. Information on public companies may be available on the SEC's EDGAR web portal. In preparing a motion, pay careful attention to the name of a business entity and include the full name of the entity in both the motion and the certificate of service. The name of a business will almost always have "Co.," "Company," "Incorporated," "Inc.," "Corp.," "Corporation," or "LLC" at the end of the name. A common error made by careless attorneys is filing a motion using just a part of a corporation's name such as "Beneficial." There are perhaps dozens of corporations with the word "Beneficial" in their names. Serving the wrong "Beneficial," may well mean that the order or judgment obtained is worthless.

F. Service On The United States, its Officers and Agencies.

Paragraphs (4) and (5) of Rule 7004(b) provide for service:

> (4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought *and* by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.
>
> (5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States *as prescribed in paragraph (4) of this subdivision and also to the officer or agency*. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General

> of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

These rules mean what they say. Service on the United States requires *at least* two mailings, one of which will be addressed to the civil clerk at the office of the U.S. attorney for the district in which the action is commenced, and the other to the Attorney General of the United States at Washington, District of Columbia. Fed. R. Bankr. P. 7004(b)(4); *see also In re Ochab,*271 B.R. 673, 676 (Bankr. S.D. AL. 1999)(holding that since the Debtors only served the IRS office, their motion was not properly served as a result, the judgment obtained was void). Service on any officer or agency of the United States requires the extra step of service as prescribed by paragraph (4), *and* by serving the officer or agency. A litigant in the Bankruptcy Court thus cannot effectively sue or seek by motion relief against the Internal Revenue Service by serving only the I.R.S. *Id.* For example, a debtor who seeks to avoid a tax lien held by the IRS, to comply with Rule 7004(b)(5), must serve the three governmental entities: United States Attorney for the district where the action is brought, the Attorney General of the United States in Washington, D.C., and the IRS.

Information regarding addresses for the Internal Revenue Service and United States Attorney General can be found on the Bankruptcy Court websites for the Northern and Southern Districts of Alabama. The Southern District website provides the list entitled

"Register of Federal and State Government Units" under the "General Information" tab and a similar list entitled "Governmental Units Register" is available on the Northern District's website under the "Understanding Bankruptcy" using the "Resources" link. Although these lists are provided as a courtesy, the duty to use the correct address when serving these governmental units remains with the practitioner.

G. Service On A State, Municipal Organization or Other Governmental Organization.

Paragraph (6) of Rule 7004(b) provides for service:

> (6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

Note that the identity of the official to be served under Paragraph (6) is a function of the law of the state in which service is to be made. In Alabama, effective July 1, 2016, Rule 4(c) states in pertinent part:

> (7) *State.* Upon this state or any one of its departments, agencies, offices, or institutions, by serving the officer responsible for the administration of the department, agency, office, or institution,

[*and*] by serving the attorney general of this state;

(8) Local Governments and Other Governmental Entities. Upon a county, municipal corporation, or any other governmental entity not previously mentioned, or an agency thereof, by serving the chief executive officer or the clerk, or other person designated by appointment or by statute to receive service of process, or upon the attorney general of the state if such service is accompanied by an affidavit of a party or the party's attorney that all such persons described herein are unknown or cannot be located.

Remember that unless waived, the Eleventh Amendment to the U. S. Constitution limits access to federal courts, including the bankruptcy court, when the defendant is a State or State agency. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56 (1996). But the Eleventh Amendment is not always a bar to jurisdiction over a state. *See, e.g.*, *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440, 445, (2004) (holding that "a bankruptcy court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity"); *Georgia Dept. of Revenue v. Burke (In re Burke),* 146 F.3d 1313 (11th Cir. 1998) (state waived defense of sovereign immunity by filing proof of claim with regard to objection to that claim).

Where an issue arises as to whom to serve if the official named in the complaint is no longer in office, the court in *Matter of Reserves Development Corp.,* 78 B.R. 951 (W.D. Mo. 1986) held that pursuant to Rule 25 of the Federal Rules of Civil Procedure, which is incorporated by Bankruptcy Rule 7025, successor public officials are automatically substituted for former officials when a party serves the former officials in their official capacity. Current

addresses for the Alabama Department of Revenue and the Alabama Attorney General are:

State of Alabama Department of Revenue, Legal Division
P.O. Box 320001
Montgomery, Al 36132-0001

Alabama Revenue Commissioner
50 North Ripley Street
Montgomery, AL 36104

Alabama Attorney General
501 Washington Avenue
Montgomery, Alabama 36104

H. General Rules Applicable to More Than One Type of Entity.

Paragraph (7) of Rule 7004(b) provides for service:

> (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

If service is made on an individual in Alabama, Ala. R. Civ. P. 4(c)(1) would also permit service on "some person of suitable age and discretion then residing therein or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to

receive service of process." That feature is contained in paragraph (8) of Rule 7004(b), which states:

> (2) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

Rule 7004(b)(3) is concerned in part with service on corporations. If the corporation to be served is a domestic or foreign corporation, or is "a partnership, limited partnership, limited liability partnership, limited liability company, or unincorporated organization or association," service may be effected "by serving an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process." Ala. R. Civ. P. 4(c)(6). Under Alabama Rule of Civil Procedure 4(g), the fact that there are alternative or dual modes of service of process available by law or under the Alabama Rules of Civil Procedure is not objectionable. "[S]ervice of notice perfected in any one manner or mode that is provided for by law or under these rules shall be deemed sufficient, notwithstanding that other modes or manner of service and notice are provided by law or under these rules." Ala. R. Civ. P. 4(g).

I. Service On The Debtor.

Paragraph (9) of Rule 7004(b) provides for service:

> (3) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.

Debtors (and their counsel) frequently trip up in the Bankruptcy Court because they forget the command of Bankruptcy Rule 4002(a)(5) to "file a statement of any change of the debtor's address." The debtor's address for purpose of notice and service of process is the one stated in the petition, unless the debtor files a statement of a change of address. Given this requirement, and because Rule 7004(b)(9) does not require proof of actual receipt, a number of courts have held that service is effective on a debtor even if mailed to the wrong address, if the address to which it is mailed is the last listed by the debtor in a filed writing. *In re Cantrell*, 2019 WL 2323772 (Bankr. N.D.Ga.) (citing *Coggin v. Coggin (In re Coggin)*, 30 F.3d 1443, 1450 (11th Cir. 1994), abrogated on other grounds by *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004); *Attorneys' Title Ins. Fund, Inc. v. Zecevic (In re Zecevic)*, 344 B.R. 572, 576 (Bankr. N.D. Ill. 2006); *Katz v. Araujo (In re Araujo)*, 292 B.R. 19, 23 (Bankr. D. Conn. 2003)). A debtor's duty to provide the Court with updated address information, however, does not extend beyond the closing of the case. *In re Coggin,* at 3

(citing *In re Martinez*, 232 B.R. 458, 461 (Bankr. C.D. Cal. 1999).

Keep in mind, however, that if a debtor moves and does not notify the Clerk of the change of address and if a plaintiff or movant knows the debtor's correct address but serves the address stated in the petition, a court might hold that the service was still constitutionally defective because it was not calculated to reach the debtor. As such, some courts permit a trustee or party-in-interest to seek an order re-designating the debtor's address. *In re Weems*, 359 B.R. 919 (Bankr. N.D. Ind. 2007).

In a joint case, there are two debtors and two separate estates. Each debtor is entitled to separate service. Suppose, for example, a motion or summons and complaint are mailed to:

John Smith Mary Smith
321 First Street
Anytown, AL.

"The common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee . . . upon proof that the item was properly addressed, had sufficient postage, and was deposited in the mail." *In re Farris*, 365 Fed.Appx. 198, 199 (11th Cir. 2010) (quoting *Konst. v. Fla. E. Coast Ry. Co.*, 71 F.3d 850, 851 (11th Cir. 1996)). But because, in this hypothetical, the envelope is addressed first to John Smith, the presumption that John received it may preclude a presumption that Mary also received it, even if Mary is John's wife. Each respondent or defendant should be served separately. If a debtor is represented by counsel, Rule 7004(g) requires that the debtor's attorney be served by any

means authorized under Rule 5(b) F. R. Civ. P. anytime service is made upon the debtor.

J. Service On The Bankruptcy Administrator.

The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 ("the 1986 Act") permanently established the United States trustee program on a nationwide basis. This result was based on the codification of the 1978 Code's pilot U.S. trustee program, which sought to separate judicial functions from administrative functions in bankruptcy cases. *See* 11 U.S.C. §307. The United States trustee program is now operational in all but six of the ninety-four judicial districts. Those six districts are located in Alabama and North Carolina where the bankruptcy administrator program performs similar estate administration oversight functions. *See* § 302(d)(3) of the 1986 Act, 100 Stat. at 3121-22.

Likewise, § 317 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (Dec. 1, 1990), contained a provision regarding standing, which mirrors § 307 regarding the authorities of the U.S. trustee:

> (b) STANDING.—A bankruptcy administrator may raise and may appear and be heard on any issue in any case under title 11, United States Code, but may not file a plan pursuant to section 1121(c) of such title.

Judicial Improvement Act 1990, PL 101–650, December 1, 1990, 104 Stat 5089.

Rule 9034 of the Federal Rules of Bankruptcy Procedure sets out an enumerated list of

pleadings, motions, objections and similar papers which must be served on the U.S. trustee. It is important to note that this list is not exclusive by virtue of subsection (k) which includes "any other matter in which the United States trustee requests copies of filed papers or the court orders copies transmitted to the United States."

Making the same service requirements applicable to the U.S. trustee applicable to the bankruptcy administrator, Rule 9035 states, "[i]n any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not inconsistent with any federal statute effective in the case." Thus, rules for effecting service on the U.S. trustee apply to serving the bankruptcy administrator.

Paragraph (10) of Rule 7004(b) provides for service on the United States Trustee:

> (4) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

K. Service by Publication.

Bankruptcy Rule 7004(c) provides:

> If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court

> may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

Although Rule 7004(c) provides a mechanism for service by publication, it is rarely employed in bankruptcy courts because it requires additional efforts such as first-class mail to the party's last known address and court involvement as to the manner and form of publication. Courts have long recognized that publication is only appropriate when it is supplemental to other action which in itself may reasonably be expected to convey a warning or in cases which persons have abandoned property or are missing or unknown and "employment of an indirect and even a probably futile means of notification is all that the situation permits." *Mullane v. Central Hanover Bank and TrustCo.339 U.S.306,314, 70 S.Ct.652,* 94 L.Ed. 865 (1950). The Supreme Court noted in *Mulane* that, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314,647 (citations omitted).

The Third and Sixth Circuit Court of Appeals have recently considered the effectiveness of service by publication. *See Sweeney v. Alcon Laboratories*, 70 BCD 29, 2021 WL 1546031 (3d Cir. 2021); *In re HNRC Dissolution Co*., 2021 WL 2910528 (6th Cir. 2021). *Sweeney* involved a post-petition lawsuit against the Debtor arising from a pre-petition injection of a medical imaging dye. They dye manufactured by the Debtor was linked to

Plaintiff's post-petition diagnosis of a severely debilitating condition. Notice of the Debtor's bankruptcy and the deadline for filing claims as well as notice of the confirmation were published in the National Edition of the *New York Times* and in the *Democrat* and *Chronicle* in the location of the Debtor's home office. The District Court held that Plaintiff's suit against the Debtor must be dismissed because the Plaintiff was an unknown Creditor at the time of the bankruptcy and therefore notice by publication was sufficient to satisfy due process.

The Third Circuit Court of Appeals affirmed explaining that: (1) with regard to the manner and content of notice, reasonableness is the touchstone of the due process analysis; (2) publication of notice is permissible where it is not reasonably possible or practicable to give more adequate warning; (3) reasonable diligence is required on the part of the debtor to carefully search its records; and (4) whether a particular claim has been discharged by a plan of reorganization depends on factors applicable to the particular case as best determined by the appropriate court. Since the allegations in the personal injury claim did not allege the Debtor had actual or constructive notice of the claims or that Debtor's reasonably diligent efforts and examination of its records would have revealed the existence of the claims pre-petition, the Third Circuit agreed that the publication notice provided was constitutionally sufficient. 2021 WL 1546031 at 4.

The facts in *HNRC Dissolution Co.* differed from *Sweeney* as it involved an interest in real property. The Debtor, Old Ben Coal Company ("Old Ben") conveyed rights to methane gas in coal reserves it held to Illinois Methane ("Methane") and such conveyance was

memorialized by a recorded deed. The transaction required the owner of the coal estate to pay rent to Methane while it mined coal in areas not yet exploited. A few years later, Old Ben filed bankruptcy and purported to sell its interest in the coal estate, free and clear of all encumbrances to Lexington Coal Company ("Lexington"). The notice of the bankruptcy sale was published in several regional and national newspapers; however, the Debtor did not provide or attempt to provide direct notice to Methane. Presumably unaware of Methane's interest, the bankruptcy court approved the sale.

Upon Lexington's subsequent efforts to mine the coal, Methane sought to collect over $11,000,000.00 in accumulated rentals from the bankruptcy sale purchaser pursuant to its pre-petition conveyance from the Debtor. Hence, a dispute arose as to whether the notice by publication of the bankruptcy sale was sufficient to convey the Debtor's interest "free and clear" of Methane's interest. Upon a motion of Lexington's successor in interest, Alliance, seeking to enjoin Methane's state court action, the bankruptcy court concluded that the notice by publication did not satisfy due process as to Methane, which had a "known" interest in the Old Ben coal reserves. Therefore the sale order had no effect on Methane's interest. The district court affirmed.

Upon appeal, the Sixth Circuit recognized that as a general rule, notice by publication is not enough with respect to [an entity] whose name and address are known and very easily ascertainable and whose legally protected interests are directly affected by the proceedings. The Court noted that pursuant to appliable Illinois law, Methane had a vested property interest

and that the Debtor should have known of Methane's interest because: (1) the parties had a direct relationship and knowingly entered into a transaction worth $2,600,000.00; (2) the conveyance was less than five years prior to the bankruptcy; (3) the conveyance contained a continuing obligation and was memorialized in a deed; (4) Methane's interest was reasonably ascertainable from Old Ben's records; and (5) the bankruptcy record, with reference to Debtor's interests in Hamilton County and Methane as a Lessee, should have triggered further review. Therefore, the Sixth Circuit upheld the lower courts' findings that Methane's interest was reasonably ascertainable, the publication notice to Methane was constitutionally inadequate, and Alliance was not entitled to an injunction of the state court action. 2021 WL 2910528 at 10.

L. Service of Process on an Insured Depository Institution.

The rules for service on corporations set out in Bankruptcy Rule 7004(b)(3) do not apply to depository institutions insured by the F.D.I.C. such as national banks. Bankruptcy Rule 7004(h) provides:

> Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding *shall be made by certified mail addressed to an officer of the institution unless*--
> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

This rule is frequently violated by bankruptcy attorneys, even though courts have consistently held that a party must strictly comply with Bankruptcy Rule 7004(h) in effectuating service of process on an insured depository institution."

In re HRN Grp., LLC, 2020 WL426048 (Bankr. N.D. Ga).

Finding out the name of an officer of a bank or other insured institution should not be too difficult. Some credit card issuers, however, are member banks of the F.D.I.C. but have no branch offices. The F.D.I.C. publishes a list of their member institutions on its web site at www.fdic.gov. Here, one can find the address of the corporate office, if a local branch office cannot be found. To determine the name of an officer, call the corporate office and ask. The office of the general counsel of a large institution is a likely source of needed information. A subsidiary of an insured institution, however, does not fall within the bounds of 7004(h). Service on a subsidiary of an insured financial institution by first class mail is thus sufficient. *In re Tudor*, 282 B.R. 546 (Bankr. S.D. Ga. 2002).

M. Objections To Claims.

Bankruptcy Rule 3007(a)(2) specifies how to serve objections to claims. It provides in pertinent part:

> **(A)** The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notices, at the address so indicated; and
>
> > **(i)** if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or
> >
> > **(ii)** if the objection is to a claim of an insured depository institution, in the manner provided by Rule 7004(h).
>
> **(B)** Service of the objection and notice shall also be made by first-class mail or other permitted means on the debtor or debtor in possession, the trustee, and, if applicable, the entity filing the proof of claim under Rule 3005.

Official Form 410 (proof of claim) contains a block in subsection 3 of Part 1, which is labeled "Where should notices and payments to the creditor be sent?" Is notice directed to the claimant at the address stated on the proof of claim sufficient to give the Court jurisdiction over the claimant with respect to an objection to that claim? Some courts say "yes." *E.g., In re Barker*, 306 B.R. 339, 347 (Bankr. E.D.Cal. 2004) ("The requirement that notice be "mailed or otherwise delivered to the claimant" implicates the address that the claimant provided on

the proof of claim."). Others say "no." *E.g.*, *In re Levoy*, 182 B.R. 827, 833-34 (9th Cir. B.A.P. 1995). The safe course is to serve the claimant pursuant to Bankruptcy Rule 7004, as well as at the notice address in the proof of claim. The penalty for being wrong about whether an objection to a proof of claim must be served in the manner specified in Rule 7004 is that the order disallowing that claim will be void.

N. Service by Electronic Mail

Bankruptcy Rule 9036 provides:

> Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to--or serve the paper on--a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consented to in writing. In either of these events, service or notice is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004.

Technological advancements have greatly affected bankruptcy practice, most notably in the electronic filing of documents and in the electronic communication and sharing of information among parties. Notwithstanding these advancements, Bankruptcy Rule 7004 generally does not recognize electronic mail as an authorized manner of service of a summons and complaint, and, by virtue of Bankruptcy Rule 9014, of motions in contested matters. There may be some confusion regarding service by electronic means because the terms of the

Electronic Case Filing Procedures and the provisions applicable to Registered Users of the Bankruptcy Court's Electronic Case Filing Program allow for electronic service in certain circumstances. Whenever a pleading or other document is filed electronically, the Electronic Case Filing Program automatically generates a notice of electronic filing at the time of the docketing. By participating in the Bankruptcy Court's ECF Program, Registered Users agree to receive notice and service by electronic means. This form of service does *not* apply to debtors and other non-Registered Users, and a party should not assume that the service of a notice of electronic filing of a document is adequate and sufficient for purposes of due process. Bankruptcy Rule 7004 still places an affirmative duty upon a moving party to serve the document upon the affected party in the manner so required.

Although some courts may have local rules providing that an unlimited notice of appearance constitutes a waiver of the right to receive service by first class mail or personal delivery, 2016 WL 2944561 (Bankr. E.D. N.C. 2016)(citing E.D.N.C. LBR 5005-4(2)), that seems to be the exception rather than the rule. Nonetheless, attorneys are reminded that the service must be reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

As a matter of best practice, attorneys should strictly adhere to the requirements of Rule 7004 at the onset rather than risk the potential consequences of ineffective service including delays, duplicative work or subsequent nullification of orders.

O. Methods of Service That Are NOT Effective.

Serving a motion in a contested matter on the lawyer who represented a respondent in prior litigation is not effective unless that lawyer is an officer of a corporate respondent or the registered agent for service of process or is otherwise authorized to accept service of process on behalf of the respondent in the bankruptcy case. Bankruptcy Rule 9010(b) provides that "[a]n attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record." But experience shows that notices of appearance may be worded in very different ways. A notice of appearance merely asking for service of notices in the case by the Clerk would hardly prove that the attorney's client authorized the attorney to accept service of process.

> An attorney, solely by reason of his capacity as an attorney, does not thereby become his client's agent authorized by "appointment ... to receive service of process." Nor is the fact that an attorney represents his client in a completely unrelated litigation sufficient to establish the requisite authority. What is necessary is that it appear that the attorney was authorized, either expressly or impliedly, to receive service of process for his client. And if such agency is to be implied, it must be implied from all the circumstances accompanying the attorney's appointment which

indicate the extent of authority the client intended to confer.

United States v. Bosurgi, 343 F.Supp. 815, 817-18 (S.D.N.Y.1972) (Footnotes omitted).

An attorney who files a notice of appearance demanding service of pleadings and who actively participates in the case, however, may thereby be deemed to have been authorized by his client to accept service of process. *In re Hurt*, 2007 WL 7141217, *2 (Bankr. N.D. Ga. 2007) ("Ordinarily, it would be necessary to serve the corporation. . . however, service upon the attorney who has appeared for the corporation in the relevant bankruptcy case is adequate service under Bankruptcy Rule 7004"). If a respondent is a partnership, serving the corporate general partner by mail without naming an officer or registered agent is no more effective than the same service would have been had the corporation been the respondent. *In re Archer*, 2012 WL 5205823 (Bankr. N.D. Ga. 2012).

If the post office returns as undeliverable, mail containing a motion, the red flag should go up and prompt the question of what to do about it. Depending on the facts, the service may or may not have been effective. In any event, however, the party should file with the court a statement stating the facts about the returned mail. Under some circumstances, failure to do so might be viewed as a fraud on the court.

P. The Certificate of Service.

Local Rule 9013-3 of the Bankruptcy Court for the Northern District of Alabama provides that "Any certificate of service filed in this Court must list the names and addresses

of all parties served." Local Rule 9014-1 of the Bankruptcy Court for the Southern District of Alabama goes even further to set out the essential components of an appropriate certificate of service. It provides:

> The person serving process in an adversary proceeding or serving a motion initiating a contested matter or notice with regard to which the Bankruptcy Rules require service on an opposing party shall make proof of service thereof promptly to the Bankruptcy Court in accordance with the Bankruptcy Rules. The Certificate of Service must include the name and address of all parties and attorneys served, the dates of service, and the manner of service.

As a matter of best practices, the certificate of service should (1) indicate that the person doing the service is 18 years of age or older, (2) state the date of service, which may or may not be the date of the certificate of service, (3) describe each document served (not simply "the foregoing") (4) describe the method or methods of service used (in the case of service by mail, it should state that the service was made by First Class U.S. Mail with adequate postage prepaid), and (5) state the name of each person served, the address at which service was made on that person and, if the person served is an agent, the capacity of the agent (officer, registered agent, etc.). The certificate of service should be dated and signed by the person who effected the service, together with that person's address and telephone number. If pleadings related to one matter are filed as separate documents (such as a motion and a notice of hearing on that motion), a certificate of service should be attached to each one.

Q. Proposed Orders Prepared by Counsel.

Attorneys sometimes submit proposed orders granting unopposed motions stating that the court "finds" that service of the motion was proper. That sort of language is not an insurance policy against bad service. If a party was not served correctly so that the court lacks jurisdiction over that party, a self-serving declaration that service was proper will not make the order bullet-proof. If a motion or summons and complaint are not served properly, the court will lack jurisdiction over the respondent or defendant, and any order entered by default will be void, regardless of what it says about service.

R. Conclusion.

Attorneys would be well advised to review the bankruptcy rules regarding service of process from time to time and remain familiar therewith. The expression coined by Benjamin Franklin centuries ago, curiously has application in this context, as surely, " *an ounce of prevention is worth a pound of cure*" when it comes to insuring proper service. It is pointless to file a motion that has not been properly served because at a minimum it will interpose delay and require remedial action and it could even result in outright denial of a motion or an order or judgment being vacated.

SERVICE OF PROCESS CHECKLIST[i]

OBJECTIONS TO CLAIMS

- Governed by Rules 3007(a)(2) and 7004

(1) For everyone EXCEPT federal government (including agencies and officers) and insured depository institutions, the objection "shall be served on a claimant by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notices, at the address so indicated"

(2) For federal government (including agencies such as the IRS and Dept. of Education, as well as officers) – serve both address on claim form AND under Rule 7004(b), which requires service by first class mail on

- The civil process clerk at the U.S. attorney's office for this district,
- The Attorney General in Washington, D.C., and
- The agency or officer, as applicable (most common is IRS)

(3) For insured depository institutions – serve both address on claim form AND under Rule 7004(h), which requires service by **certified mail** addressed to **an officer of the institution** (*There is a split of authority as to whether you can simply serve the bank addressed to "President, ABC Bank" or if you need to identify the name of an actual officer. The better course of action is to identify a named officer*.)

- Exception – if the institution's attorney has filed a notice of appearance, you can serve the attorney by first-class mail to satisfy the second prong (C*reditor request for notices on behalf of a bank is not the same as filing an actual notice of appearance. Only use this rule if the bank's attorney has filed an actual notice of appearance in the bankruptcy.)*

- Check FDIC.gov (under "Deposit Insurance" and then "BankFind") to determine whether a bank is an insured depository institution

SERVICE IN APS, CONTESTED MATTERS (INCLUDING LIEN AVOIDANCE), AND PLAN CRAMDOWNS OF SECURED CLAIMS

- Governed by Rule 7004 (APs), 9014 (contested matters, but the rule says to serve in accordance with Rule 7004 so service is the same for both APs and contested matters), and 3012(b) (plan cramdowns, but the rule says to serve in accordance with Rule 7004)
- Service by first class mail is permissible EXCEPT on a federally-insured depository institution, which must be by certified mail

- PITFALL (particularly re: lien avoidance) – service on the attorney listed on the judgment is NOT sufficient; service must also be made on the creditor itself.

(4) Corporation, partnership, or unincorporated association

- First class mail addressed to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process – Rule 7004(b)
- Certified mail addressed to an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process – FRCP 4(h)(1)(A) and Ala. R. Civ. P. 4(c)(6)
- Delivering a copy to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process – FRCP 4(h)(1)(B)

(5) Insured depository institution

- By **certified mail** addressed to **an officer of the institution** – Rule 7004(h)
  - Exception – if the institution's attorney has noticed an appearance,then serve the attorney by first-class mail (there are other rare exceptions)
  - Check FDIC.gov (under "Deposit Insurance" and then "BankFind") to determine whether a bank is an insured depository institution

(6) Federal government (including agencies and officers)

- First class mail on the civil process clerk at the U.S. attorney's office for this district, the Attorney General in Washington, D.C., AND on the agency or officer as applicable (most common is IRS) – Rule 7004(b)
- Alternatively, for the United States, by delivering a copy to the U.S. attorney's office for this district or sending by registered or certified mail thereto AND by sending a copy to the Attorney General in Washington, D.C. by registered or certified mail – FRCP 4(i)(1)
- Alternatively, for an agency or officer sued in official capacity, by serving the U.S. as discussed immediately above AND by sending a copy by registered or certified mail to the agency or officer – FRCP 4(i)(2). There are separate rules if officer is sued in individual capacity.
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(7) State or municipal corporation or other governmental organization

- By first class mail to the person or office upon whom process is prescribed to be served by Alabama state law or, in the absence of the designation of any such person or office, then the chief executive officer thereof – Rule 7004(b)
  - For the state or any of its departments, agencies, officers, or institutions – by serving the officer responsible for the administration of the department, agency, office, or institution, and by serving the attorney general of the state. Most common is Department of Revenue. Note that service is required on both the Revenue Commissioner and the AG – Ala. R. Civ. P. 4(c)(7)
  - For a county, municipal corporation, or any other governmental entity not previously mentioned – by serving the chief executive officer or the clerk, or other person designated by appointment or by statute to receive service of process (can also serve attorney general if such persons are unknown or cannot be located, but case law requires quite a lot before an affidavit saying this is accepted). – Ala. R. Civ. P. 4(c)(8).
- By delivering a copy to the state or local government's chief executive officer – FRCP 4(j)

(8) Competent adult individual within U.S.

- First class mail addressed to individual's residence – Rule 7004(b)
- First class mail addressed to individual's business address (not PO Box) – Rule 7004(b)
- Following Alabama state law for serving a summons – FRCP 4(e)(1)
- Personal service on the individual – FRCP 4(e)(2)(A)
- Leaving a copy at the individual's residence with someone of suitable age and discretion who resides there – FRCP 4(e)(2)(B)
- Delivering a copy to an agent authorized by appointment or by law to receive service of process – FRCP 4(e)(2)(C)

¡ This checklist was prepared by Jennifer Morgan, Career Law Clerk to the Honorable Henry Callaway, United States Bankruptcy Judge for the Southern District of Alabama. It is provided as a courtesy and does not reflect any official policy or rulings of that court or absolve counsel from its independent duty to comply with applicable law.