

**COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544**

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June 12, 2020

Honorable Dennis Dow  
United States Bankruptcy Court  
Charles Evans Whittaker  
United States Courthouse  
400 East Ninth Street, Room 6562  
Kansas City, MO 64106

Dear Judge Dow:

I write on behalf of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) to request that the Advisory Committee on Bankruptcy Rules (Rules Committee) consider an amendment to Rule 3011 of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules).

In December 2017, the Bankruptcy Committee established an Unclaimed Funds Task Force (Task Force) to explore options for improving the judiciary's management of unclaimed funds attributable to the bankruptcy system. The Task Force developed several proposals and made recommendations to the Bankruptcy Committee at its December 2018 meeting,<sup>1</sup> including a recommendation approved by the Bankruptcy Committee that the Judicial Conference seek legislation to set a statute of limitations for the filing of an application to withdraw unclaimed funds attributable to bankruptcy courts

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<sup>1</sup> Among other recommendations, the Bankruptcy Committee approved a Task Force recommendation to request that the Rules Committee consider amendments to Bankruptcy Rules 3011 and 9006(b) that would set a deadline for the filing of an application to withdraw unclaimed funds. At its April 2019 meeting, the Rules Committee considered the request but declined to endorse the recommended changes to the Bankruptcy Rules. The Rules Committee took the position that such amendments would abridge substantive statutory rights and therefore did not fall within the scope of the Rules Enabling Act for the adoption of bankruptcy rules.

and expressly eliminate any liability borne by the United States or any officer or employee of the United States for failure to make payment on a request for payment of unclaimed funds after the statute of limitations has run.<sup>2</sup> The Judicial Conference adopted the Bankruptcy Committee's recommendation at its March 2019 session. JCUS-MAR 19, p. 11. The proposed legislation and supporting materials were delivered to Congress on April 18, 2019. The Administrative Office's (AO) Office of Legislative Affairs (OLA) began Congressional outreach in support of the proposed legislation.

Congressional staffers initially raised concerns with OLA staff regarding whether the proposed legislation would survive a due process challenge. OLA referred the question to the AO's Office of General Counsel (OGC) to provide authoritative analysis on the legal issues. On January 21, 2020, and February 14, 2020, OGC provided guidance in informal memoranda to OLA and the Task Force, respectively.

As set forth in the OGC memoranda, if the legislation were enacted, there could be a procedural due process challenge in a case in which an Application for Unclaimed Funds is denied by the court as untimely, and the claim holder subsequently argues that s/he did not receive notice of the bankruptcy case or deposit of the unclaimed funds.<sup>3</sup> The concern is that a court may have knowledge that mail is undeliverable or returned in a case (i.e., through BNC technology), yet a claim holder's rights would be terminated without the court taking any additional reasonable steps to notify the individual or entity. *See Jones v. Flowers*, 547 U.S. 220, 225 (2006) ("[W]hen mailed notice of a tax sale is

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<sup>2</sup> Specifically, an amendment to 11 U.S.C. § 347(a) would provide that unclaimed funds remain in the bankruptcy court account for five years, at which time the rightful owner (and all other parties) would be barred from asserting any claim against any party to retrieve those funds, thereby eliminating the clerks' (and any other party's) liability exposure.

<sup>3</sup> At the time a voluntary bankruptcy petition is filed, a debtor must file a list of creditors with their names and addresses. Fed. R. Bankr. P. 1007. Mail to an address on that list may be undeliverable or returned. While the BNC will notify the debtor's attorney (or debtor, if pro se) of undeliverable or returned mail processed from the list of creditors, it is incumbent upon the debtor to update the list of creditors with the court. If this does not occur, there may be creditors on the list who do not receive notice of the case. One safeguard is that a creditor in chapter 7, 12, and 13 cases, including secured creditors, must file a proof of claim in order to have an allowed claim in the case with noted exceptions. Fed. R. Bankr. P. 3002. One exception is Bankruptcy Rule 3004, which allows a debtor or trustee to file a proof of claim on behalf of a creditor, if the creditor fails to do so in a timely manner. Fed. R. Bankr. P. 3004. Likewise, Bankruptcy Rule 3005 allows an entity that may be liable on the debt of a debtor (e.g., surety, guarantor, endorser) to file a proof of claim on behalf of a creditor, if the creditor fails to do so in a timely manner. Fed. R. Bankr. P. 3005. Thus, there could be a creditor who has a claim filed on its behalf but is unaware of the case.

A debtor under the Small Business Reorganization Act (subchapter V of chapter 11) could include a bad address for a particular creditor on its list of creditors, yet schedule the debt owed to that creditor. Pursuant to Bankruptcy Rule 3003, it is unnecessary for a creditor to file a proof of claim in a chapter 11 case (unless the claim is not scheduled or scheduled as disputed, contingent or unliquidated). Thus, the creditor could be part of the distribution, and the trustee could deposit funds under section 347(a) in the creditor's name without the creditor's knowledge of the case.

returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.”<sup>4</sup> To address this concern, the OGC memoranda suggested that the Task Force consider how notification to claim holders will be addressed in a case before rights are terminated. The OGC memoranda also noted that regardless if the statute of limitations is enacted, improving notification would be beneficial to the system. The OGC memoranda suggested that notification could be addressed in the Bankruptcy Rules and/or in the *Guide to Judiciary Policy (Guide)*.

The Task Force considered the guidance from OGC and agreed that even if the statute of limitations is not enacted, improving notification to claim holders would be beneficial to the system and would help achieve the goal of reducing unclaimed funds balances and getting unclaimed funds to their rightful owners. The Task Force recommended that the Bankruptcy Committee request that the Rules Committee consider amending Bankruptcy Rule 3011 to provide that notice of the unclaimed funds will be published on the court’s website, as follows:

- (a) The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.
- (b) Unless the court orders otherwise, the clerk shall publish notice of the funds deposited pursuant to § 347(a) on the court’s website.

Task Force staff are working with the appropriate AO office to amend the *Guide*, Vol. 13, Ch. 10, § 1050.10(c), to provide further detail regarding how courts can provide notice of unclaimed funds on their websites (and which would comport with and allow courts to comply with Bankruptcy Rule 3011, if amended as proposed), as follows:

Unless a bankruptcy court orders otherwise, the clerk must publish unclaimed funds data free of charge in a manner that is easily accessible to the public, by either: (1) participating in and providing a link to the U.S. Bankruptcy Unclaimed Funds Locator on the court’s website; or (2) providing the unclaimed

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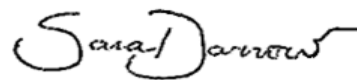
<sup>4</sup> See also *Taylor v. Yee*, 780 F.3d 929 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 929 (2016) (holding that California’s unclaimed property law meets due process requirements where state provides pre-escheat notice to the property owner at the address on record, seeks an updated address for the owner through its Franchise Tax Board if a social security number is provided, and publishes notice in a paper of general circulation that provides the state’s website for searching unclaimed funds data); *Garcia-Rubiera v. Fortuno*, 665 F.3d 261, 263 (1st Cir. 2011) (holding that Puerto Rico’s insurance reimbursement law did not meet due process where the government did not publish the reimbursement procedures in hard copy or online and did not notify the vehicle owners that their duplicate payments would escheat to Puerto Rico after five years).

funds data in a local, searchable format on the court's website. The court's website must also provide easily accessible instructions on how to apply for the withdrawal of unclaimed funds.

While the amended provision in the unclaimed funds *Guide* chapter will help to accomplish the goal of providing claim holders notice where to find unclaimed funds data, the Committee and the Task Force believe that amending the *Guide along with an accompanying rule change* is preferable. First, the unclaimed funds *Guide* chapter is not publicly available, rather it only provides internal guidance to the courts. Second, while the *Guide* provision itself would require courts to post unclaimed funds data on their website, the Bankruptcy Rules are often the first place an attorney or a pro se claimant looks to determine how to locate and request disbursement of unclaimed funds. A rule change would inform the public where to find unclaimed funds data.

I am available should you have any questions or wish to discuss further.

Sincerely,

A handwritten signature in cursive script that reads "Sara Darrow". The signature is written in black ink and is positioned below the word "Sincerely,".

Sara Darrow, Chair

cc: Ms. Sheryl L. Walter  
Mr. William T. Barto  
Ms. Rebecca Womeldorf  
Mr. David A. Levine  
Ms. Dana Yankowitz Elliott  
Ms. Bridget M. Healy  
Mr. Daniel J. Isaacs-Smith  
Ms. Meredith V. Mathis  
Mr. Scott Myers