



DANA L. RASURE
U.S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA
THE FEDERAL BUILDING
224 SOUTH BOULDER AVENUE
TULSA, OKLAHOMA 74103-3015

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04-BK-E

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November 15, 2004

Mr. Peter G. McCabe
Secretary to the Rules Committee
Rules Committee Support Office
OJP-RCSO
Administrative Office of the United States Courts
Washington, DC 20544-0001

via facsimile and U.S. Mail

Re: Bankruptcy Rule 3002(c)(5)

Dear Mr. McCabe:

During the recent meeting of the Bankruptcy Judges Advisory Group to the Administrative Office held on November 4-5, 2004, the members discussed Bankruptcy Rule 3002(c)(5).

Pursuant to Rule 3002(c)(5):

If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within **90 days after mailing of the notice**.

Fed. R. Bankr. P. 3002(c)(5) (emphasis added). The court has no discretion to shorten the time during which creditors may file proofs of claim. See Fed. R. Bankr. P. 9006(c)(2). The court may enlarge the time for taking action under Rule 3002(c) "only to the extent and under the conditions" stated in that rule. Fed. R. Bankr. P. 9006(b)(3). Rule 3002(c)(5) sets forth no conditions permitting the notice to set forth a period of more than the prescribed "90 days after mailing of the notice."¹

¹ Although the other paragraphs of Rule 3002(c) set forth exceptions to Rule 3002(c)'s bar date rules, those exceptions, if they can be invoked to override a bar date set by a Rule 3002(c) notice, apply to only special types of claims, and operate independent of, or pursuant to a motion seeking an exception to, the date set forth in a Rule 3002(c)(5) notice. They thus are irrelevant to the topic this letter addresses: the bar date to be set forth in a Rule 3002(c)(5) notice.

(continued...)

Mr. Peter G. McCabe
November 15, 2004
Page 2

Thus, the court has no discretion to set forth in the notice a period larger than "90 days after mailing of the notice."

Currently, notices issued by the clerk under Rule 3002(c)(5) are transmitted to the Bankruptcy Noticing Center (the "BNC") for transmission to creditors, rather than being mailed by the clerk to the creditors. Typically, notices are mailed by the BNC two or three days after the notices are transmitted to the BNC by the clerk. If the clerk calculates the ninety day period from the date the notice is issued by the clerk, the creditors will not be afforded the full ninety-day claims-filing period to which they are entitled under Rule 3002(c)(5). Because it is difficult for the clerk to determine with any degree of certainty the date on which the BNC will transmit the notice to creditors, the clerk cannot ascertain which date will be the 90th day after mailing of the notice. A creditor does not receive a certificate of mailing of the notice; thus, a creditor does not have sufficient information to independently calculate the day that is "90 days after mailing of the notice."

Although the time during which creditors may file proofs of claim under Rule 3002(c)(5) commences after the notice is mailed, the BNC transmits certain notices electronically. Therefore, unless "mailing" is defined to include electronic transmission, tying the claims-filing deadline to the date of "mailing" creates additional difficulties in interpreting the rule.

Rule 9006(f) instructs that if a rule directs a party to take certain action within a time period "after service of a notice" and the notice is served by mail, then three days must be added to the specified time. If Rule 9006(f) is applicable to the notice described in Rule 3002(c)(5), the issue is further complicated because it is our understanding that the BNC serves notice to parties receiving electronic notice on the day the notice is received by the BNC, prior to the date that notice is served by conventional mail. Thus, for any particular notice issued by the clerk, the date of service by the BNC will vary depending on whether the notice is served by conventional mail or electronically.

Finally, putting aside the foregoing issues that arise from the use of the BNC, there is a basic issue of whether it is desirable to tie the bar date to a number of days "after the mailing of the

¹(...continued)

The special types of claims to which the exceptions of paragraphs (1) through (4) of Rule 3002(c) apply are claims of governmental units (Rule 3002(c)(1)); claims by an infant or incompetent person or the representative of either (Rule 3002(c)(2)); claims arising or becoming allowable as a result of a judgment (Rule 3002(c)(3)); and claims arising from the rejection of an executory contract or lease (Rule 3002(c)(4)). It is unclear whether a Rule 3002(c)(5) notice's bar date (when the notice does not specify that it applies to rejection claims) is to be treated as setting forth a bar date for rejection claims that arose prior to the issuance of the notice, but that is of no moment in deciding what bar date a Rule 3002(c)(5) notice must set forth.

Mr. Peter G. McCabe
November 15, 2004
Page 3

notice," thereby possibly invoking Rule 9006(f) and complicating the calculation of the actual bar date based on Rule 9006(f)'s requirement to add three additional days.² It would be much simpler to direct the clerk to give "90 days' notice by mail" of the bar date, thereby eliminating the possible applicability of Rule 9006(f).³

The members of the Bankruptcy Judges Advisory Group concluded that it may be appropriate for the Rules Committee to review Rules 3002(c)(5) and 9006 to address the issue regarding the calculation of the claims-filing deadline when the notice is served by the BNC.⁴ We believe the

² Regardless of how the extra three days are required to be added under Rule 9006(f), it is easy to make mistakes in calculating the resultant deadline. Moreover, by making Rule 9006(f) applicable, an extra layer of uncertainties regarding the proper interpretation of Rule 9006(f) is injected.

Finally, if Rule 9006(f) applies, and if Rule 9006(f) is interpreted as adding on the three days only after the bar date is hypothetically determined without adding the three days (as set forth in pending proposed amendments to Rule 9006(f) that are awaiting Supreme Court approval), this would make it difficult to tell creditors the precise date on which their claims are due. For example, assume the 90th day expires on Monday January 5. Ordinarily, by adding three days under Rule 9006(f), the bar date would be Thursday January 8, and it would be desirable to tell creditors that January 8 is the bar date (unless that date is a day on which weather or other conditions make the clerk's office inaccessible). However, intervening events may prevent January 8 from being the actual bar date. Assume that on Tuesday January 6 the court and the clerk's office are closed due to an extreme blizzard, and that they reopen on Wednesday January 7. If the three extra days required by Rule 9006(f) are added starting on Wednesday January 7, the bar date would then be Friday January 9, not Thursday January 8.

³ In this regard, Rule 2002(a)(7) requires the giving of "at least 20 days' notice by mail" of the bar date set in chapter 9 and chapter 11 cases for the filing of proofs of claim, thereby making Rule 9006(f) inapplicable to bar date notices in chapters 9 and 11. Similarly, other notice requirements in Rules 2002(a) and 2002(b) are not tied to a date "after the mailing of the notice," such that Rule 9006(f) does not apply.

⁴ The Rules Committee should be aware of an additional and related issue raised by the clerk's use of the BNC that arises when the clerk transmits judgments or orders to the affected parties through the BNC. The issue (previously brought to the Rules Committee's attention at least informally) is whether the use of the BNC for that purpose complies with Rule 9022(a)'s requirement that "[i]mmediately on the entry of a judgment or order the clerk shall serve a notice of

(continued...)

Mr. Peter G. McCabe
November 15, 2004
Page 4

answer to this question could have an impact on both substantive due process rights and policy decisions regarding what benefits, if any, a party should enjoy if it agrees to accept service by electronic means.

The Bankruptcy Judges Advisory Group authorized me (in consultation with other members of a subcommittee formed to address the issue) to write this letter on the Advisory Group's behalf. Thank you for your assistance in bringing these concerns of the Advisory Group to the attention of the Rules Committee. Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,



Dana L. Rasure
United States Bankruptcy Judge

DLR/bn

cc: Rule 3002(c)(5) Subcommittee:
Honorable Colleen A. Brown
Honorable S. Martin Teel, Jr.

⁴(...continued)

the entry in the manner provided in Rule 5(b) F. R. Civ. P. on the contesting parties” That issue has budgetary implications because using the BNC for transmissions is much more cost-effective than having the clerk manually mail out orders and judgments, but in light of Rule 9006(b)(1) (restricting the court's ability to enlarge the ten-day period for filing a notice of appeal from certain orders) there are concerns as well regarding fairness (to those parties who rely on regular mail to receive orders) when the mailing of the order or judgment occurs often three days after entry of the order or judgment.