SERVICE OF PROCESS IN BANKRUPTCY PROCEEDINGS IT'S DIFFERENT

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Service of process in bankruptcy cases and in litigation commenced in Bankruptcy Court can be different and daunting for practitioners unfamiliar with the particularities of the Federal Rules of Bankruptcy Procedure. Though the Bankruptcy Rules, in many places, make the Federal Rules of Civil Procedure applicable, there are important differences particularly in the area of service — a foundational hurdle practitioners must tackle correctly in order to obtain relief for their clients in Bankruptcy Court. Whether an attorney is new to bankruptcy practice or a seasoned practitioner, reviewing the nuances of the rules governing service of process in Bankruptcy Courts is helpful to avoid some of the common pitfalls associated with obtaining proper service.

Pitfall Number 1 – Overlooking the applicability of Rule 7004 to Contested Matters

Generally speaking, Rule 7004 of Federal Rules of Bankruptcy Procedure provides the bedrock for the service of process in Bankruptcy litigation. In fact, the whole of Part VII of the Bankruptcy Rules, which starts with Rule 7001 defining what an adversary proceeding is, is focused on the various procedural aspects of litigation in Bankruptcy Court. Most practitioners find their way to Part VII of the Bankruptcy Rules when involved in an adversary proceeding that usually takes the form of the traditional "complaint, answer, discovery,…" process. Many overlook, however, the applicability of provisions of Part VII of the Bankruptcy Rules to motion practice outside of an adversary proceeding. Bankruptcy Rule 9014, governing contested matters, makes Rule 7004 applicable and requires that motions commencing contested matters be served in the same manner as a summons and complaint commencing an adversary proceeding. So, this means, for instance, motions for relief from stay, motions to assume or reject contracts, and many other motions must be served in the same fashion as a summons and complaint.

Pitfall Number 2 – Assuming your client cannot be hauled into a Bankruptcy Court in a different state

One of the first civil procedure concepts we likely all learned in law school is that in order to grant relief against an individual or an entity, the court must have *in personam* jurisdiction over the affected individual or entity. For any litigator, whether the court has *in personam* jurisdiction over a defendant is also likely one of the first questions asked and answered in litigation. For the non-bankruptcy litigator, the focus will be on minimum contacts and the test articulated many years ago by the Supreme Court in *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945). In *International Shoe*, the Supreme Court held that the exercise of jurisdiction over a foreign person or entity required the defendant to have certain minimum contacts with the forum such that the maintenance of the suit does not "offend 'traditional notions of fair play and substantial justice.'" *Id.*

For the bankruptcy litigator, however, the question is different because Bankruptcy Rule 7004 and its provisions allow for nationwide service of process. In fact, Bankruptcy Rule 7004(f) specifically provides that following the process set forth in Rule 7004(b), and if consistent with the Constitution and laws of the United States, "is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code." In *Bash v. The Sydney Jackson Williams, Jr. Irrevocable Trust, et al.* (*In re Fair Finance Co.)*, 2016 WL 11408398, at *2 n.3 (Bankr. N.D. Ohio Adv. No. 14-1169, Feb. 3, 2016), the defendants argued that the bankruptcy court lacked personal jurisdiction over them because they had no contacts with Ohio—a traditional bar to personal jurisdiction in civil actions. However, the Bankruptcy Court for Northern District of Ohio noted that Rule 7004(d)'s provision for nationwide service of process means that service under the Bankruptcy Rules is effective to establish specific, case-linked personal jurisdiction so long as it affords due process. Where authority exists for national service of process, the question is whether the party has minimum contacts with the United States, rather than with a particular state. *See Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567-68 (6th Cir. 2001) and Rule 7004(f). Of course, there are exceptions to every rule, and this article is only focused on the general concepts; but it is important to be aware so that you avoid pitfall number 2 that, generally speaking, a bankruptcy court can obtain personal jurisdiction over a defendant located outside of the state in which it sits.

Another noteworthy distinction on service of process in bankruptcy litigation is the

ability to complete service of the summons and complaint, or motion commencing a contested matter, by dropping the documents in ordinary first-class U.S. mail as allowed by Bankruptcy Rule 7004, which is in contrast to the rules governing methods of service in most other courts. This doesn't mean that you cannot serve a summons and complaint or motion commencing a contested matter by other means, as Rule 7004 does incorporate certain of the provisions of Federal Rule of Civil Procedure 4 on methods of service; but it does mean you have the option, in most cases (note the exception mentioned below with respect to Federally Insured Depository Institutions), to simply place the documents in the regular U.S. mail (postage prepaid, of course).

Pitfall Number 3 – Service upon a domestic or foreign corporation has to be sent to the attention of an officer

Rule 7004(b) allows service within the United States to be made by first class mail postage prepaid upon a domestic or foreign corporation, "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." Ohio Bankruptcy Courts routinely hold that the failure to direct service to an officer or agent of a corporation is fatal to its acquisition of personal jurisdiction over that corporation. Easy enough, right? Not exactly. The nuance behind this seemingly simple rule is that it may require more than just addressing the envelope to "Attention Officer." Some bankruptcy courts have required, given the relatively unique privilege of being able to obtain personal jurisdiction using ordinary first-class mail, that the officer has to be identified with specificity, by name. Thus, best practice dictates that the mail be specifically addressed to that individual, in his or her capacity as an officer of the corporation. In circumstances where officers cannot be identified despite best efforts, perhaps the more generic description will pass muster, but it may be a better choice to instead find the name of the statutory agent authorized to accept service by law or statute. In Ohio and many other states, the Secretary of State's Office maintains an easily searchable online database where the statutory agent for any corporation registered to do business in that state can be identified.

Pitfall Number 4 – A bank is not a corporation for the purpose of service under the Bankruptcy Rules

Closely related to pitfall number 3 is this pitfall 4 - Banks have their own service requirements and many practitioners overlook them. Rule 7004(h) requires "service on an insured depository institution" to be made by certified

mail "addressed to an officer of the institution." There are, of course, exceptions to the certified mail requirement in certain circumstances, but the general rule practitioners would be wise to follow is that banks are required to be served by certified mail in bankruptcy court.

The nuance to this rule is found in a determination of whether the entity is or is not "an insured depository institution." Section 3 of the Federal Deposit Insurance Act defines "insured depository institution" as "any bank or savings association the deposits of which are insured by the [FDIC] pursuant to this Act." *See In re Bever*, 300 B.R. 262, 268 (6th Cir. B.A.P 2003) (finding that a subsidiary of a holding company failed to establish that it was a federally insured institution, and therefore certified mail service was not required); *In re Grimminger*, No. 12-60521, 2012 WL 5341381, at *3 (Bankr. N.D. Ohio Oct. 29, 2012) (noting that a bank and its servicer required certified mail service of a motion to determine the amount in arrears owed by the debtor only if they were "federally insured depository institution[s]"). In *In re Grimminger*, Judge Kendig vacated an earlier order reducing the bank's arrearage claim in part because of the movant's failure to serve the bank by certified mail. Practitioners should heed this decision and do their best to identify whether the entity on whom they are serving process is an insured depository institution requiring service by certified mail.

Words of Advice

When you find yourself in bankruptcy cases and related litigation, understanding the nuances within the Bankruptcy Rules on service of process will help streamline the case for your client and the court. Whether you are just starting your bankruptcy practice or are an experienced practitioner, refreshing yourself on the ins and outs of these rules will save you from the headache of having your client's relief overturned and help you stand out as an efficient and effective lawyer.

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