



Who Will Even Notice?

*A Discussion About the Various Players in
Bankruptcy Court and the Importance of Notice*

A Word from the Courts

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Bankruptcy Seminar 2022

- ▶ The 40th annual seminar is set for February 10-12 at the Coeur d'Alene Resort in warm and sunny Northern Idaho



Tecla Druffel, attorney in Lewiston, Idaho, focused on debtor-side Chapter 7 and Chapter 13 cases in the District of Idaho and EDWA.

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A Constitutional RIGHT ... to file *BANKRUPTCY*?

- ▶ The United States Constitution (Article 1, Section 8, Clause 4) authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States".
- ▶ Congress has exercised this authority several times since 1801, including through adoption of the
- ▶ Bankruptcy Reform Act of 1978, as amended, codified in Title 11 of the United States Code and the
- ▶ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

Types of Bankruptcy

Chapters
correspond with
Chapter of
Bankruptcy Code

- ▶ 7
- ▶ 9
- ▶ 11
- ▶ 12
- ▶ 13
- ▶ 15
- ▶ 20-slang



Who Goes There?

- ▶ Who are the Players (in order of importance):
 - ▶ Judges
 - ▶ Debtors
 - ▶ Creditors
 - ▶ Other interested parties (non creditor)
 - ▶ The Office of the United States Trustee
 - ▶ Trustees

Judges

- ▶ Chief Judge Joseph M. Meier
- ▶ Judge Noah G. Hillen
- ▶ Judge Jim D. Pappas (Senior Status)
- ▶ Chief Judge Benjamin P. Hursch (Montana)



What kind of Judge are they?

- ▶ Bankruptcy Judges are **Article I Judges** whose offices are created under U.S. Const. art. 1, § 8, which authorizes Congress to constitute tribunals inferior to the Supreme Court.
- ▶ Article III Judges are the Supremes, Federal District and Circuit Judges that are appointed.

The Debtor

- ▶ Individuals
- ▶ Individuals and Spouses
- ▶ Defined in the Code 11 USC 101
- ▶ Persons-this term encompasses other non human debtors such as entities 11 USC 41

Other Debtors:



Entities



Involuntary Cases



Municipalities



Non Profits



Farms



Creditors

- ▶ Secured
- ▶ Unsecured
- ▶ Priority/Non Priority
- ▶ Pre-petition or Post petition

Other interested Parties

- ▶ Uncle Joe-The unfortunate preference defendant
- ▶ Defendants in claw back actions
- ▶ Administrative claims
- ▶ Post Petition pre conversion creditors.

The Office of the United State Trustee

- ▶ The United States Trustee Program is the component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees We are a national program with broad administrative, regulatory, and litigation/enforcement authorities whose mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public.
- ▶ Oversight of application and compensation of professionals.
- ▶ Jason Naess is our local Assistant United State Trustee
- ▶ Idaho is in Region 18.

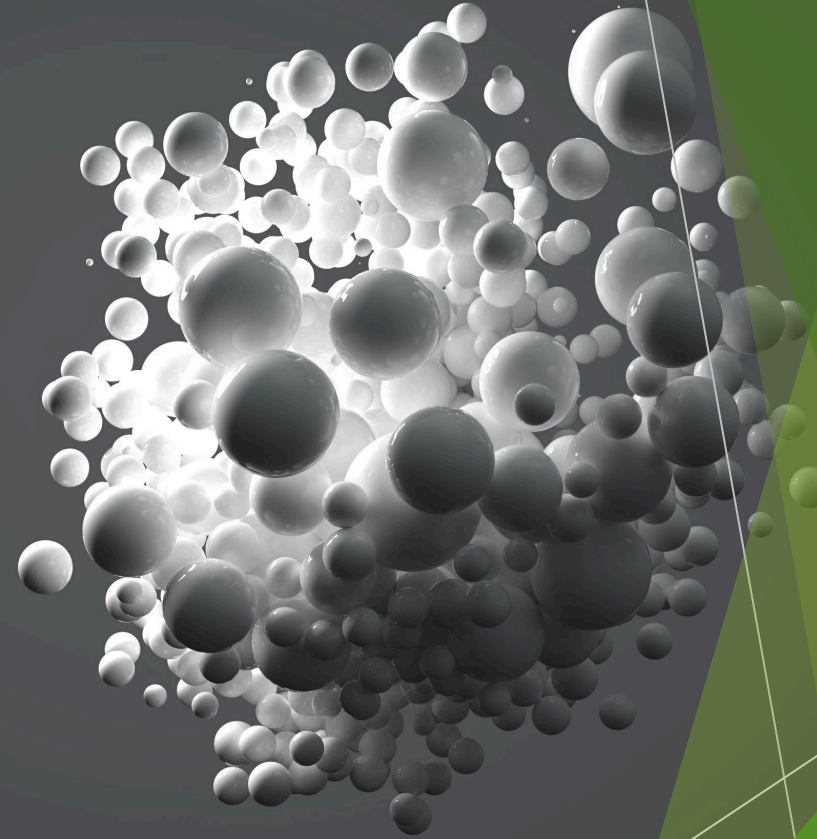
Types of Trustees

- ▶ Chapter 7-Liquidation
- ▶ Chapter 12-Family Farmer reorganization
- ▶ Chapter 13-Wage earner reorganization
- ▶ Sub Chapter V-The Great Facilitators
- ▶ Chapter 11 When the case goes really sideways

Trustees

- ▶ Ford Elsaesser
- ▶ Barry Zimmerman
- ▶ Kathleen McCallister
- ▶ Gary Rainsdon
- ▶ David P Gardner
- ▶ Tim Kurtz
- ▶ Patrick Geile
- ▶ John Munding
- ▶ Matt Grimshaw
- ▶ Christy L Brandon
- ▶ Kevin O'Rourke
- ▶ You can find all the contact information for the trustees at:

www.id.uscourts.gov/bankruptcy/general/Court_Information.cfm



Noticing Rules



- ▶ Notice is a fundamental aspect of the bankruptcy practice
- ▶ Per the U.S. Supreme Court in Mullane v. Central Hanover Bank & Trust Corp., the due process clause of the Fifth Amendment bars a court from acting with finality unless notice is given that is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.”
- ▶ Complying with that constitutional mandate of prior notice can raise practical problems in a bankruptcy case because of the large number of persons who are potentially affected, directly or indirectly, by court action in the case.
 - ▶ The COST of giving notice all of the parties of all the proposed actions in the bankruptcy case could be prohibitive....
 - ▶ So, the practical question arises....





Must notice be given to all parties in interest of all proposed actions or can notice be limited to those persons who are most likely to be affected by the proposed action?

- ▶ The Bankruptcy Rules answer this question by providing for different notification procedures, according to the Mullane “reasonable under the circumstances” standard.
 - ▶ Sometimes ALL parties need to be notified;
 - ▶ In certain circumstances, the Bankruptcy Rules give the court authority to limit notice to certain types of creditors, and
 - ▶ In other circumstances, the Rules direct the court to determine whom should be given notice.

Bankruptcy Rule 2002 is the principal rule dealing with notice. Bankruptcy Rule 2002(a) requires the debtor, the trustee, all creditors and indenture trustees be given as least 21 days notice of NINE specific events.

| | |
|------------|---|
| 2002(a)(1) | Meeting of creditors under 341 or 1104b of the Code; states Debtor's SSN, EIN or TIN needs to be on the notice. |
| 2002(a)(2) | Proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice |
| 2002(a)(3) | The hearing on approval of compromise or settlement other than the approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent |
| 2002(a)(4) | Ch. 7, 11, 12 hearing on dismissal of the case or conversion of case to another chapter |
| 2002(a)(5) | Accept or reject a proposed modification of a plan |
| 2002(a)(6) | The hearing on any entity's request for compensation or reimbursement of expenses if the request > \$1,000. |
| 2002(a)(7) | The time fixed for filing proofs of claims pursuant to Rule 3003(c) |
| 2002(a)(8) | The time fixed for filing objections and the hearing to consider confirmation of a Ch. 13 plan |
| 2002(a)(9) | The time fixed for filing objections to confirmation of a Ch. 13 plan |

Bankruptcy Rule 2002(b) requires that the same categories of persons be given 28 days notice by mail of three specific events:

- ▶ (1) For filing objections and the hearing to consider approval of a disclosure statement or, under 1125(f) to make a final determination whether the plan provides adequate information so that a separate disclosure statement is not necessary;
- ▶ (2) for filing objects and the hearing to consider confirmation of a chapter 9 or chapter 11 plan; and
- ▶ (3) for the hearing to consider confirmation of a chapter 13 plan.

Bankruptcy Rule 2002(f)
requires that the debtor,
all creditors and
indenture trustees be
given notice by mail of
11 other enumerated
events in the case, but
does not prescribe the
time for giving notice.

Read the Local
Bankruptcy Rules!

Keep updated
versions at your
desk & your staff's
desks!



A few important LBRs re: notice....

- ▶ LBR 1007.1: Master Mailing List
- ▶ LBR 1009.1: Amendments of Petitions, Lists, Schedules and SOFA (how to add creditors and properly provide notice)
- ▶ LBR 2002.1: Sale of Property of the Estate (what needs to be included in notice of sale)
- ▶ LBR 2002.2: Notice and Hearing
- ▶ LBR 2002.3: Filing and Service of Plans
- ▶ LBR 2002.4: Filing and Service of Ch. 12 Plan
- ▶ LBR 2002.5: Filing and Confirmation of Chapter 13 Plan

Magic words: “after notice and a hearing”



Pursuant to 11 USC 102(1)(B) and Bankruptcy Rule 9001, where the Bankruptcy Code or the Bankruptcy Rules use the phrase “after notice and a hearing,” or a similar phrase, an act may be taken without an actual hearing if such notice is given properly and if such a hearing is not requested timely by a party in interest or there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.



This is because, as stated in 11 USC 102(1)(A), the phrase means after such notice as is appropriate in the particular circumstances and such opportunity for a hearing as is appropriate in the particular circumstances.

Common example... service rules on FDICs

- ▶ Bankruptcy Rule 7004(h) states that service on an insured depository institution in a contested matter or adversary proceeding must be made by certified mail and addressed to an officer of the institution, unless
 - ▶ (1) the institution's attorney has filed a notice of appearance (in which case the attorney shall be served by first class mail instead),
 - ▶ (2) the court orders otherwise (after service upon the institution of an option application), or
 - ▶ (3) a designated officer of the institution waived in writing service by certified mail.

FDICs - how my office does it...

- ▶ Use www.fdic.gov then locate the “BankFind Suite” to search for an institution.
- ▶ Use the BankFind tool to search for your suspected FDIC institution.
- ▶ This tool will not give you the names of the officers so what I like to do is one of the following:
 - ▶ Go to the website of the institution and look for names of officers or leaders. Example, I might Google “USAA officers”
 - ▶ The first item on the search is Wayne Peacock and I click to verify that the website is current, etc.
 - ▶ Because I am paranoid, I will usually also try to find a recent filing on Idaho’s Secretary of State’s website or the SOS website of the state where the institution is located, i.e. Texas.
 - ▶ Because corporate officers change, I verify the identity of the officers for every new pleading/case, even if I just checked a month ago.
- ▶ Remember, CERTIFIED mail is required. Nothing less unless an exception applies!

“Do I really have to include my ex wife on my schedules? Will she get notice?”

- ▶ Yes, it is almost inevitable that a former spouse will be notified of a bankruptcy filing.
 - ▶ If there's an active support obligation, the notice rules are triggered anyway by the DSO form.
 - ▶ Schedule H is going to grab the address of the ex-spouse & incorporate that person on the matrix.
 - ▶ Even if the above two scenarios do not apply, I feel that it's a good practice to send notice to a former spouse-- isn't the point of bankruptcy to bring up all the potential issues and deal with them? (And bind that person by the discharge, assuming no 523(a)(5) or 523(a)(15) exceptions apply?)

My office gets
a TON of
returned mail
from cases.
Can't I just
throw away
returned mail?

- ▶ No, do not throw it away or ignore it.
 - ▶ The Court has a relatively simple procedure for updating a party's address.
 - ▶ Why expose yourself or your client to an omitted creditor issue?
 - ▶ Debtors are required to provide notice:
 - ▶ Bankruptcy Rule 4002 (Duties of Debtor)
 - ▶ 11 USC 521 ("Debtor's Duties")
 - ▶ LBR 1007.1(c) Error on MML shall be deemed an error or omission on debtor's schedules
 - ▶ LBR 1007.1(c) puts duty on debtor/debtor's attorney to provide court with current address of creditors whose mail was undeliverable & to notice out 341(a) notice to those creditors and provide proof that notice was sent.
- ▶ Practice Tip 1: Using CIN (Stretto product) helps minimize returned mail because part of the service provides up-to-date creditor addresses
- ▶ Practice Tip 2: Clean up your Best Case address bank for common creditors... when you file an address change, take the three extra minutes to update your BK software.

Tecla's Practice Tips for Small Offices

- ▶ Use a P.O. Box and limit who is allowed to pick up mail.
- ▶ Identify and stick with a procedure as far as who opens the mail and what happens to the mail once received.
 - ▶ Calendar management
 - ▶ Copies to client
 - ▶ “Attention needed” table
- ▶ Practice management is an elegant balance between efficiency and redundancy. In my office, there are three pairs of trained eyes on all ECF emails.
- ▶ My senior paralegal is charged with saving all ECF documents in the appropriate place but it is my job to review every ECF event.

PACER and CM/ECF

► What is PACER

- The Public Access to Court Electronic Records (PACER) service provides electronic public access to federal court records. PACER provides the public with instantaneous access to more than 1 billion documents filed at all federal courts.

► What is CM/ECF

- Case Management/Electronic Case Files (CM/ECF) is the federal Judiciary's system that allows case documents, such as pleadings, motions, and petitions, to be filed with the court online. CM/ECF is most often used by attorneys in cases, U.S. Trustees, and bankruptcy trustees. Some courts permit bankruptcy claimants and pro se litigants to file using CM/ECF.

What about third party noticing companies?

- ▶ Stretto/BestCase
- ▶ The Noticing Center/BAE
- ▶ BK Attorney Services, LLC
- ▶ **For a full list of approved partners:**
 - ▶ <https://www.uscourts.gov/services-forms/bankruptcy/approved-bankruptcy-notice-providers>

What is the BNC?

- ▶ This website allows you to sign up to receive all of your bankruptcy notices electronically through the National Creditor Registration Service (NCRS) or consolidate all U.S. Postal Service notices at one address. This is a free service provided by the U.S. Bankruptcy Courts to give recipients more convenient delivery options for their bankruptcy notices. You can have notices delivered either:
 1. Electronically - Faster, more reliable and convenient
 2. To a designated mail address - Redirects U.S. Mail delivery to a preferred address

Additional Resources

- ▶ <https://www.uscourts.gov/forms/bankruptcy-forms>
- ▶ Bankruptcy List Serve
- ▶ National Association of Consumer Bankruptcy Attorneys (NACBA)
- ▶ Commercial Law and Bankruptcy Board Members
 - ▶ Bob Faucher
 - ▶ Tecla Druffel
 - ▶ Patrick Geile
 - ▶ Jeff Andrews
- ▶ Brian Tucker
- ▶ Matt Christensen
- ▶ Reed Cotton