

## **SERVICE OF PLEADINGS IN CONTESTED MATTERS**

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## SERVICE OF PLEADINGS IN CONTESTED MATTERS

**I. 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.

Nantucket Investors II v. Cal. Fed. Bank (In re Indian Palms Assocs., Ltd.), 61 F.3d 197, 204 n.11 (3rd 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 (B.A.P. 1st Cir. 1997).

This monograph is concerned with the problem of obtaining in personam jurisdiction over the respondent in a contested matter. Much of what is said here also applies to the service of a summons and complaint in an adversary proceeding. This paper also covers rules relating to service of Chapter 13 plans that include “embedded motions” and objections to claims, certificates of service, and proposed orders prepared by counsel.

Counsel should also review the Court’s website for additional service requirements. For example, some judges may have specific requirements for serving motions to extend and impose the automatic stay. Information about each judge can be found on the Bankruptcy Court’s website at <http://www.ganb.uscourts.gov/judges-information>.

## **II. 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.”

Bankruptcy Rule 7004 incorporates some, but not all, parts of Rule 4 of the Federal Rules of Civil Procedure:

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." 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.

### **III. 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).

With respect to Rule 7004, courts have observed that “nationwide service of process by first class mail is a rare privilege” that can drastically reduce the costs and delay of litigation. In re Pittman Mech. Contractors, Inc., 180 B.R. 453, 456 (Bankr. E.D. Va. 1995) (citing In re Schoon, 153 B.R. 48, 49 (Bankr. N.D. Cal.1993)). As a privilege, however, “it is not to be abused or taken lightly.” Id. at 456-57.

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 Bus. Machine Co., Inc. v. Otis, 190 B.R. 111, 115 (D. Colo.1995).

Note that certified mail is not required, and some courts have held that service sent via certified mail rather than by first class mail is improper (except as prescribed in Bankruptcy Rule 7004(h)). *See e.g.*, In re Ratliff, 2021 WL 976954, at \*2 (Bankr. S.D.W. Va. Mar. 15, 2021).

#### **IV. Methods of Service.**

##### **A. 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 (Bankr. N.D. Ga. 2013).

Rule 7004(b)(7) additionally permits service by mail to the entity upon whom service may be effected under any U.S. statute or the law of the state in which service is made when an action is brought against an individual in the court of general jurisdiction of that state.

**B. 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.

**C. Service on a Domestic or Foreign Corporation, Partnership or Other 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.

This rule requires that the corporate officer or agent be identified by name. In re Faulknor, No. 04-43921-PWB, 2005 WL 102970, \*2 (Bankr. N.D. Ga. Jan. 18, 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.”). Hence, mailing a motion to “ABC Finance, 125 Peachtree Street, Atlanta, Georgia 30303” or to “President, ABC

Finance, etc.” will not constitute good service. *But see In re Tudor*, 282 B.R. 546, 550 (Bankr. S.D. Ga. 2002) (mailing notice to the attention of “Managing Agent” was sufficient for compliance).

The easiest way to determine the name of an officer is to call the corporation and ask. If the respondent is a creditor with a judgment, one might enlist the help of the lawyer who represented that creditor in the lawsuit. The names of corporate officers may sometimes be found on the Internet. 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 Georgia Secretary of State maintains an online database of agents for service of process for both Georgia corporations and companies incorporated in another state. You can access the database online at the following internet address: <https://ecorp.sos.ga.gov/BusinessSearch>.

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 the 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.

**D. 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 or an officer or agency of the United States requires at least two mailings. One must be addressed to the civil clerk at the office of the United States Attorney for the district in which the action is commenced. The other must be addressed to the Attorney General of the United States.

Note that Fed. R. Civ. P. 4(i)(2) incorporated into Fed. R. Bankr. P. 7004 by R. 7004(a)(1) requires that service on an agency or corporation of the United States requires service on the United States and sending a copy of the materials to that agency or corporation. Thus, a litigant cannot effectively seek relief with regard to a matter involving the I.R.S by serving only the I.R.S. or by serving only the United States – both must be served. Current addresses for service in a proceeding in which the United States and the I.R.S. are parties are as follows:

Internal Revenue Service  
Centralized Insolvency Operation  
P.O. Box 7346  
Philadelphia, PA 19101-7346

Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

Internal Revenue Service  
401 W. Peachtree Street, N.W.  
Stop 334-D  
Atlanta, GA 30308

United States Attorney  
Attention: Civil Process Clerk  
Northern District of Georgia  
75 Ted Turner Drive SW, Suite 600  
Atlanta, Georgia 30303-3309

Department of Justice, Tax Division.  
Civil Trial Section, Southern Region  
P. O. Box 14198  
Ben Franklin Station  
Washington, D. C. 20044

**E. 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 Georgia, O.C.G.A. § 9-11-4(e)(5) provides for service:

If against a county, municipality, city, or town, to the chairman of the board of commissioners, president of the council of trustees, mayor or city manager of the city or to an agent authorized by appointment to receive service of process. If against any other public body or organization subject to an action, to the chief executive officer or clerk thereof[.]

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. Fla., 517 U.S. 44 (1996). But the Eleventh Amendment is not always a bar to jurisdiction over a state. *See, e.g.*, Tenn. 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”); Ga. 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). Note that lawsuits to avoid preferential transfers in bankruptcy court against states and state agencies are not barred by the doctrine of sovereign immunity established by the Eleventh Amendment. Cent. Va. Cmty. College v. Katz, 126 S. Ct. 990 (2006).

When serving the Georgia Department of Revenue, only the Commissioner or his/her designee may accept service on behalf of the Georgia Department of Revenue at the following address:

State Revenue Commissioner  
Georgia Department of Revenue  
1800 Century Boulevard, Suite 15300  
Atlanta, Georgia 30345

**F. 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 Georgia, O.C.G.A. § 9-11-4(e)(7) would also permit service on “an agent authorized by appointment or by law to receive service of process.” That feature is contained in paragraph (8) of Rule 7004(b) and is quoted below.

Rule 7004(b)(3) is concerned in part with service on corporations. If the corporation to be served is a Georgia corporation or is a foreign corporation authorized to transact business in this state, service can also be made on “the president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof, provided that when for any reason service cannot be had in such manner, the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served.” O.C.G.A. § 9-11-4(e)(1). Some lawyers stop reading there and assume incorrectly that serving the Secretary of State is the only action necessary to effect proper service on a corporation not registered with the Secretary of State. But section 4(e)(1) goes on to state that if service is made on the Secretary of State,

the plaintiff or the plaintiff’s attorney shall certify in writing to the Secretary of State that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered office or registered agent listed on the records of the Secretary of State, that service cannot be effected at such office, and that it therefore appears that such corporation or foreign corporation has failed either to maintain a registered office or appoint a registered agent in this state. Further, if it appears from such certification that there is a last known address of a known officer of such corporation or foreign corporation outside this state, the plaintiff shall, in addition to and after such service upon the Secretary of State, mail or cause to be mailed to the known officer at the address by registered or certified mail or statutory overnight delivery a copy of the summons and a copy of the complaint.

Id. Using the procedure of serving the Secretary of State makes sense only if the party serving the motion or summons and complaint cannot determine the identity of or find a current officer or other agent. And it is effective only if the corporation was required to register with the Secretary

of State but did not. *See In re Dobbs*, Case No. 18-50813-PWB, 2018 WL 1363450 (Bankr. N.D. Ga. Mar. 15, 2018) (explaining that O.C.G.A. § 9-11-4(e)(1) contemplates that a corporation has (at least at some time) been registered with the Secretary of State and allows for service upon the Secretary of State only where the corporation is incorporated under the laws of Georgia or a foreign corporation authorized to transact business in the state and service cannot be effected upon the last registered office or agent listed in the Secretary of State's records). Debtors are as likely to have moved around as the next person. If the debtor did business with a creditor in another state and that creditor does not transact business in Georgia, it does not take a law professor to figure out that the Georgia Secretary of State will have nothing to do with serving that creditor.

Paragraph (8) of Rule 7004(b) provides for service:

(8) 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.

#### **G. Service on the Debtor.**

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

(9) 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. 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. *See e.g., In re Cantrell*, No. 17-62952-JWC, 2019 WL 2323772 (Bankr. N.D. Ga. May 29, 2019).

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, Georgia

"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. *See In re Hollis*, No. 15-40141-MGD, 2016 WL 908049, at \*2 (Bankr. N.D. Ga. Feb. 3, 2016) (Rule 7004(g) requires service on the debtor's attorney "[r]egardless of which method of service is used.").

#### **H. 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.

### **I. Service 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.

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](http://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).

There was a split in case law about whether credit unions need to be served pursuant to Bankruptcy Rule 7004(h). The Bankruptcy Code includes insured credit unions in its definition of insured depository institutions. 11 U.S.C. § 101(35)(B). Bankruptcy Rule 7004(h), however, applies only to insured depository institutions “as defined in section 3 of the Federal Deposit Insurance Act.” Thus, the institution must have deposits that are insured by the FDIC under the Federal Deposit Insurance Act. Although Bankruptcy Rule 7004(h)’s definition excludes credit unions, some courts had concluded otherwise. *Compare* In re Cornejo, No. 10-00351-DMB, 2010 WL 7892449 (Bankr. D. Alaska Aug. 2, 2010) (concluding Rule 7004(h) does not apply to a federal credit union), *with* In re Fisher, No. 08-80111-JAC-13, 2008 WL 4280388 (Bankr. N.D. Ala. Sep 12, 2008) (concluding service under Bankruptcy Rule 7004(h) was required upon the federal credit union by certified mail addressed to an officer of the credit union). Amended Bankruptcy Rule 3007(a)(2)(A)(ii) (effective December 2021) clarifies that the special service method required by Bankruptcy Rule 7004(h) only applies to insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act and does not apply to credit unions.

#### **J. 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.

U.S. 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 be deemed to have been authorized by his client to accept service of process. In re Hurt, Case No. 01-61881-MHM, 2007 WL 7141217, \*2 (Bankr. N.D. Ga. Apr. 18, 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, Case No. 11-44317-MGD, Adv. No. 12-4055-MGD, 2012 WL 5205823 (Bankr. N.D. Ga. Oct. 1, 2012).

Serving a corporation by serving a Secretary of State but without doing anything else is not effective. Nor is serving an individual by mail at a post office box effective. 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.

**K. Service by Electronic Mail.**

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 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. Pursuant to the Bankruptcy Local Rules, 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. Thus, while other rules may generally allow service by electronic means, BLR 5005-8 and Bankruptcy Rule 9036, and electronic service generally, do *not* apply to pleadings and other documents required to be served in accordance with Bankruptcy Rule 7004. Bankruptcy Rule 7004 places an affirmative duty upon a moving party to serve the document upon the affected party in the manner so required.

Further, while courts have recognized the availability of alternative service by electronic mail upon an individual in a foreign country in limited circumstances based on Federal Rule of Civil Procedure 4(f)(3), *see In re Int'l Telemedia Assocs.*, 245 B.R. 713 (Bankr. N.D. Ga. 2000), such exceptions are narrowly tailored and not generally available in the typical proceeding and contested matter.

#### **V. Service of Chapter 13 Plan that Includes “Embedded Motions.”**

Pursuant to Rule 3015.1 of the Federal Rules of Bankruptcy Procedure, the Bankruptcy Court for the Northern District of Georgia requires use of a local form for a plan filed in a case under Chapter 13 of the Bankruptcy Code (“the Local Form”).<sup>1</sup> Unlike previous iterations of the Chapter 13 plan, the Local Form permits a debtor to request determination and valuation of the amounts of secured claims (Local Form § 3.2) and avoidance of liens on exempt property pursuant to 11 U.S.C. § 522(f) (Local Form § 3.4). These requests are referred to, generally, as “embedded motions” because they seek relief against a respondent that previously was done through motions practice.

General Order 41-2020, “Order Requiring Local Form for Chapter 13 Plan and Establishing Related Procedures,” sets forth the service requirements with respect to “embedded motions.”<sup>2</sup> Paragraph 2.2 of General Order No. 41-2020 provides that if the debtor’s Chapter 13 plan contains requests for determination of the amounts of secured claims (Local Form § 3.2) or for avoidance of liens on exempt property (Local Form § 3.4), the debtor must serve the plan on each creditor affected by such a request in the manner provided by Bankruptcy Rule 7004. For example, if the debtor seeks to avoid the judicial lien of “Jane Doe,” the debtor must serve a copy

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<sup>1</sup> The Local Form can be found on the Court’s website at: [https://www.ganb.uscourts.gov/sites/default/files/chapter\\_13\\_plan\\_version\\_1-4\\_december\\_2020.pdf](https://www.ganb.uscourts.gov/sites/default/files/chapter_13_plan_version_1-4_december_2020.pdf).

<sup>2</sup> General Orders are available for review on the Court’s website at: <http://www.ganb.uscourts.gov/court-info/local-rules-and-orders/general-orders>.

of the plan on Jane Doe in the manner prescribed by Bankruptcy Rule 7004(b)(1). Similarly, if the debtor requests the Court determine the value of the secured claim of “ABC Corporation” in Local Form § 3.2, the debtor must serve a copy of the plan on ABC Corporation in the manner prescribed by Bankruptcy Rule 7004(b)(3).

As evidence of proper service, paragraph 2.3 of General Order No. 41-2020 requires the debtor “promptly” file a Certificate of Manner of Service of Plan Under Bankruptcy Rule 7004 that (A) is signed by the person serving the plan, (B) states the date and method of service for each creditor served, and (C) sets forth the name and address of each creditor served.

Two exceptions to this procedure exist with respect to an affected creditor identified in Local Form § 3.2. Pursuant to that section, the debtor may instead elect to request the determination of the amount of secured claim by motion. Second, in the case of governmental units as required by Bankruptcy Rule 3012, the debtor *must* request the determination of the amount of a secured claim by motion. In either case, paragraph 3.4 of General Order No. 41-2020 requires that the debtor serve the motion and the notice of hearing on the creditor in the manner required by Bankruptcy Rule 7004. The debtor must also promptly file a certificate of service that (A) is signed by the person serving the motion; (B) states the date and method of serve upon the creditor; and (C) sets forth the name and address of the creditor served.

If a creditor identified in Local Form § 3.2 or § 3.4 is an insured depository institution, the certified mail requirements of Bankruptcy Rule 7004(h) are applicable.

If a debtor files a pre-confirmation modification of the plan and the debtor was required to serve the original plan upon a creditor in the manner required by Bankruptcy Rule 7004, the same service requirements are applicable, unless the modified plan does not materially and adversely affect that creditor. General Order No. 41-2020 ¶ 4.2.3. The debtor also must file a Certificate of

Manner of Service Under Bankruptcy Rule 7004 of the Modified Plan or Modification Statement, if necessary. General Order No. 41-2020 ¶ 4.4.

In all circumstances, if an attorney has entered an appearance upon behalf of a creditor, the plan and any modified plan must also be served on the attorney.

#### **VI. Service of Objections to Claims.**

Official Form No. 10 (proof of claim) contains a block entitled “Name and address where notices should be sent.”

A party objecting to a claim should consult Bankruptcy Rule 3007(a)(2), which addresses the manner of service of objections to claims. The rule provides 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 POC as the person to receive notices, at the address so indicated. Thus, notice directed to the claimant at the address stated on the proof of claim is sufficient to give the Court jurisdiction over the claimant with respect to an objection to that claim. In the case of objections to claims filed by the United States and insured depositories, Bankruptcy Rule 3007(a)(2) requires service in accordance with, respectively, Bankruptcy Rules 7004(b)(4) and (b)(5) and 7004(h). With respect to the I.R.S., that means service must be made at the I.R.S. address in the proof of claim and the addresses set forth on page 10 above.

Bankruptcy Rule 3007(a)(2)(A)(ii) (effective December 2021) clarifies that the special service method required by Bankruptcy Rule 7004(h) must be used for service of objections to claims only on insured depository institutions, as defined in section 3 of the Federal Deposit Insurance Act, and not on credit unions, which are insured by the National Credit Union Administration. A credit union, therefore, may be served with an objection to a claim according

to Bankruptcy Rule 3007(a)(2)(A), which provides for first-class mail sent to the person designated for receipt of notice on the credit union's proof of claim.

BLR 3017-1 also governs service of objections to claims. The local rule provides the objection and notice must also be served on an attorney for the creditor who has appeared in the case. An objection to the claim of a governmental entity must be served in accordance with Bankruptcy Rule 7004. And, finally, a party objecting to a proof of claim must promptly file a Certificate of Service of the objection and notice of hearing.

## **VII. The Certificate of Service.**

The person serving process in an adversary proceeding or serving a motion initiating a contested matter must provide proof of service thereof promptly in accordance with the Bankruptcy Rules. *See* BLR 5005-8 and 7005-1.

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. Note that the Local Rules require certificates of service to be filed "promptly" with respect

to a motion initiating a contested matter. BLR 7005-1. If service is of a notice, the certificate of service must be filed within three days of service. BLR 9007-2.

### **VIII. 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 may be void, regardless of what it says about service.

### **IX. Conclusion.**

It behooves the careful lawyer to reread and think about these rules from time to time in order to be thoroughly familiar with them. It is pointless to file a motion that has not been properly served.