

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of :  
PAULA SUE FLOWERS, : Case No. 94-03044-C J  
Debtor. : Chapter 7  
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**MEMORANDUM OF DECISION AND ORDER**

On December 2, 1994 the above named debtor filed for relief under Chapter 7 of the United States Bankruptcy Code. On December 5, 1994 the Bankruptcy Clerk's Office (Clerk) filed a Notice of Commencement of Case under Chapter 7 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates. The notice indicated the 11 U.S.C. section 341 meeting of creditors would be on December 19, 1994. It did not specify the calendar date deadline for filing complaints objecting to discharge, pursuant to 11 U.S.C. section 727, and complaints to determine dischargeability of certain debts, in accordance with 11 U.S.C. section 523(c). That is, the space on the form notice for that date was left blank. Near the bottom of the form, the following instruction was given:

DISCHARGE OF DEBTS. The debtor is seeking a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under Sec. 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under Sec. 523(a)(2), (4), or (6)<sup>1</sup> of the Bankruptcy Code, timely action must be taken in the

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<sup>1</sup> 11 U.S.C. section 523(c) was amended by section 304(e) of the Bankruptcy Reform Act of 1994, Public L. 103-394 (October 22, 1994) to include section 523(a)(15).

bankruptcy court by the deadline set forth above labeled "Discharge of Debts". Creditors considering taking such action may wish to seek legal advice.

To date, no discharge or dischargeability complaints have been filed. No order granting the general discharge has been entered. The Chapter 7 trustee has fully administered the case. Apparently, the United States Trustee's Office brought the omission of the deadline to the attention of the Clerk who, in turn, requested the assigned judge to advise whether a calendar date deadline should be noticed now and, if so, what deadline should be given.

The relevant statutes, rules and caselaw suggest the Clerk should enter the discharge and close the case now. However, the mere entry of the general discharge order without explanation might cause confusion and jeopardize the finality of the case for the parties in interest. Accordingly, the undersigned enters this memorandum of decision and order, as permitted by 11 U.S.C. section 105(a).<sup>2</sup>

#### DISCUSSION

Should the failure to provide notice of the specific discharge and dischargeability calendar date deadline in a Chapter 7 case

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<sup>2</sup> 11 U.S.C. Section 105(a) states:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provisions of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

suspend the running of the 60-day limitation period established by Federal Rules of Bankruptcy Procedure 4004(a) and 4007(c)?

The undersigned judge concludes the answer is no.

First of all, Federal Rule of Bankruptcy Procedure 2002 provides in relevant part:

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. . . .the clerk. . .shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of (1) the meeting of creditors pursuant to § 341 of the Code;. . .

. . . .

(f) OTHER NOTICES. . . .the clerk. . .shall give the debtor, all creditors and indenture trustees notice by mail of. . .(4) the time fixed for filing a complaint objecting to the debtor's discharge pursuant to § 727 of the Code as provided in Rule 4004; (5) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4007;. . .

With respect to objections to the general discharge, Federal Rule of Bankruptcy Procedure 4004(a) provides:

(a) TIME FOR FILING COMPLAINT OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). In a chapter 11 reorganization case, such complaint shall be filed not later than the first date set for the hearing on confirmation. Not less than 25 days notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's

attorney.<sup>3</sup>

Then Federal Rule 4004(b) states:

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time has expired.

With respect to complaints to determine the dischargeability of a debt, Federal Rule of Bankruptcy Procedure 4007(c) provides:

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, AND CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.<sup>4</sup>

With respect to enlargement and reduction of time periods, Federal Rule of Bankruptcy Procedure 9006 provides in relevant part:

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<sup>3</sup> The 25-day notice period is in keeping with that found in Federal Rule 2002(b)(2) regarding notice of the plan objection deadline and the Chapter 11 confirmation hearing.

<sup>4</sup> With respect to Chapter 13 cases, Federal Rule of Bankruptcy Procedure 4007(d) requires the court to give 30 days notice of the time fixed for complaints to determine dischargeability of debt when the debtor seeks a hardship discharge under 11 U.S.C. section 1328(b). A time period may be extended upon motion of a party in interest as long as the motion is made before the time has expired and cause is established after hearing on notice.

(b) ENLARGEMENT.

. . . .

(3) ENLARGEMENT LIMITED. The court may enlarge the time for taking action under Rules. . .4004(a), 4007(c),. . .only to the extent and under the conditions stated in those rules.

(C) REDUCTION.

. . . .

(2) REDUCTION NOT PERMITTED. The court may not reduce the time for taking action under Rules. . .4004(a), 4007(c). . . .

As can be seen from the above quoted material, Rules 4004(a) and 4007(c) clearly link their 60-day deadlines to the first date set for the section 341 meeting in a Chapter 7 case. (In this case, the deadlines fell on February 17, 1995.) Rule 9006(c)(2) reiterates that those 60-day time periods may not be reduced under any circumstances. Rule 9006(b)(3) instructs that the 60-day time periods may only be enlarged as those Rules permit, meaning on motion by a party in interest before the 60-day time period has expired.

Though the term "party in interest" is not defined in the Bankruptcy Code or Rules, it should not be construed to include an assigned judge or the Clerk. Even if it could be, the court could not have extended the time in this case because the omission of the calendar date deadline was discovered long after the 60-day time period had passed. Further assuming the omission had been noted in time, the court would have had to equate "cause" with the omission



of the deadline from the original notice. Whether such a finding would ever be appropriate is doubtful given the history of the rules under consideration.

The 1983 Advisory Committee Note for Rule 4004(a) and (b) provides the following background:

This rule is adapted from former Bankruptcy Rule 404.

Subdivisions (a) and (b) of this rule prescribe the procedure for determining whether a discharge will be granted pursuant to § 727 of the Code. The time fixed by subdivision (a) may be enlarged as provided in subdivision (b).

The notice referred to in subdivision (a) is required to be given by mail and addressed to creditors as provided in Rule 2002.

An extension granted on a motion pursuant to subdivision (b) of the rule would ordinarily benefit only the movant, but its scope and effect would depend on the terms of the extension.

The following comments found in the recent Edition of Norton Bankruptcy Rules Pamphlet explain the major difference between Rule 4004 and its predecessor:

**(a) Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed.**

. . . .

Code § 727 is silent as to when a complaint objecting to a debtor's discharge must be filed. Former Rule 404(a) prescribed a flexible time frame whereby the court was required to enter an order fixing a time for the filing of a complaint objecting to the debtor's discharge. The time was stated as not less than thirty days nor more than ninety days after the first date set for the meeting of creditors. In those cases where the court gave notice that no dividend appeared likely,

the time for filing complaints objecting to the debtor's discharge could be fixed by the court as early as the first date set for the meeting of creditors. This procedure resulted in a lack of uniformity in the bankruptcy courts as to the precise date for filing complaints objecting to discharge. Some courts fixed the deadline as thirty days after the first date for the creditors' meeting; others used a forty-five-day period and some courts might use a sixty-day period. This variance was eliminated by Rule 4004. Under the present Rule, the court is not required to fix a time for filing complaints objecting to the discharge. The time is fixed by the Rule itself.

Chapter 7 cases: Paragraph (a) prescribes a sixty-day deadline following the first day set for the meeting of creditors for filing complaints objecting to discharges in Chapter 7 liquidation cases. This procedure is uniformly applied in all Bankruptcy Courts. The fixed sixty day period after the first date for the creditors' meeting contrasts with the flexible period allowed under Rule 2003 for the convening of creditors' meetings between twenty and forty days after the order for relief. However, once the first date for the creditors' meeting is set, the sixty day requirement under paragraph (a) comes into play and applies from that date without variation in all Chapter 7 cases.

. . . .

Notice of Time Fixed: In order to satisfy requirements of due process interested parties must be apprised of their opportunity to present their objections. Accordingly, paragraph (a) establishes a notice provision of not less than thirty days [sic] and refers to the method for notice stated in Rule 2002(a), namely notice by mail. A notice requirement with respect to the filing of complaints objecting to discharges was previously contained in former Rules 203(c)(4) and 404(b). The minimum twenty-five-day notice requirement under Rule 4004(a) is five days less than the thirty-day period set forth in former Rule 404(b).

The two crucial time requirements for notices that must be observed upon the filing of a petition for relief are (a) the twenty-days' notice requirement under Rule 2002(a)(1) for calling a meeting of creditors and (b) the thirty-days' [sic] notice under Rule 4004(a) for the filing of complaints objecting to a debtor's discharge. As a practical matter these two notices are usually combined in one mailing, in which case both Rules are satisfied if not less than twenty-five days' notice is given for both items.

(b) Extension of Time. The first requirement expressed in paragraph (b) for obtaining an extension of time to file a complaint objecting to the granting of a discharge is that the request must be made in the form of a motion. This procedure departs from the practice authorized under former Rule 404(c) where the judge could extend the time on his or her own initiative. Paragraph (b) is consistent with the concept that the judge is not directly involved in the administration process in bankruptcy cases and that sua sponte judicial conduct is not favored. The requirement that an extension of time to object to a discharge must be requested by motion also reverses the practice prescribed in former Rule 906(b), dealing with enlargements, where for cause shown the court could "with or without application or notice order the period enlarged" for taking certain action, including the filing of complaints objecting to discharge. Prior to the adoption of Rule 4004(b) it was held that "the court may extend a creditor's time to object to the debtor's discharge or dischargeability of claims with or without application and with or without notice."

Norton Bankruptcy Rules Pamphlet 1995-1996 Edition, 285-87 (footnotes omitted).

With respect to Rule 4007(c), the same Commentator states:

(c) Time for Filing Complaints. . . .The sixty-day deadline commences with the day following the first date set for the meeting of creditors pursuant to Code § 341(a). This time frame is identical with the sixty-day deadline in Rule 4004(a) for filing a



complaint objecting to the debtor's discharge.

The fixing of a uniform sixty-day limitation period within which to file complaints based on the improper conduct of a debtor described in Code § 523(a)(2), (4) and (6) represents a change from the previous practice, where former Rule 409(a)(2) provided a limitations period of not less than thirty days nor more than ninety days after the first date set for the meeting of creditors. As in the case of the fixed sixty-day period for filing complaints objecting to the debtor's discharge discussed in the Editors' Comment under Rule 4004(a), the sixty-day deadline in Rule 4007(c) establishes a uniform period applicable in all bankruptcy courts.

The dischargeability complaints under Code § 523(a)(2), (4) and (6) require separate treatment because the courts have traditionally imposed a deadline to file complaints to determine the issue of dischargeability of debts covered by these three categories of improper debtor conduct. Section 14b(1) of the former Bankruptcy Act required the court to fix a time for the filing of the discharge in bankruptcy and for objections to the dischargeability of the debts now included in the categories described in Code § 523(a)(2), (4) and (6). Rule 4007(c) parallels this practice but uses a fixed sixty-day cutoff period instead.

As to notice of time fixed, paragraph (c) requires thirty-days' notice to all creditors of the deadline date for filing complaints to determine dischargeability of debts referred to in Code § 523(c), namely the categories listed in Code § 523(a)(2), (4) and (6) [sic]. This thirty-day period exceeds by five days the twenty-five-day notice required by Rule 4004(a) as the deadline for filing complaints objecting to the debtor's discharge. Thus, while complaints objecting to discharge or the dischargeability of specific debts must be filed within a sixty-day period, the notice of this deadline must be given by not less than twenty-five days for complaints under Code § 727 and by not less than thirty days for complaints under Code § 523(c). As a practical matter, a single notice that meets the

thirty-day requirement will satisfy the notice mandate under both Rule 4004(a) and Rule 4007(c).

The manner in which such notice must be given is governed by Rule 2002. Thus, notice by mail is authorized under Rule 2002(f). The addresses for use in connection with the required notice are identified in Rule 2002(g). The reference to Rule 2002 is the same as in Rule 4004(a) because it is contemplated that the manner for giving notice will be identical under both Rules.

Similar to the practice under Rule 4004(b), the court may not ex parte or sua sponte grant an extension of time for the filing of dischargeability complaints. This procedure reverses the authorization given to the court under former Rule 409(a)(2) to extend, ex parte or on its own initiative, for cause shown, the time to file dischargeability complaints.

Norton Bankruptcy Rule Pamphlet 1995-1996 Edition, 302-303.

Neither the United States Supreme Court nor the Eighth Circuit Court of Appeals has addressed the issue under consideration. The Fifth Circuit Court of Appeals has addressed a case on point. In re Neeley v. Murchison, 815 F.2d 345 (5th Cir. 1987). The Clerk set the date for the creditors' meeting in the official notice but left the space for the calendar date deadline for filing complaints to determine nondischargeability blank. A creditor in the case filed a section 523(c) complaint ten days after the 60-day limitation had expired. The debtor in the case filed a motion to dismiss the complaint. The bankruptcy court granted the motion. The district court affirmed. The circuit court affirmed. After discussing the development of Rule 4007, the Fifth Circuit put the omission in perspective:

Moreover, § 523(c) of the Code, which Rule 4007 is designed to implement, places a heavy burden on the creditor to protect his rights: a debt of the type presented here is automatically discharged unless the creditor requests a determination of dischargeability. The one narrow exception to this rule incorporates a duty-to-inquire approach to notice issues. Under § 523(a)(3)(B), a debt is not automatically discharged if the debtor fails to schedule the creditor **and** the creditor had no notice or **actual knowledge** of the case in time to file a claim and a request for determination of dischargeability. Thus, in cases such as this one, it would be inconsistent with the scheme of § 523 to require technical compliance with the notice provision of Rule 4007: this would place the creditor who has written notice of the bankruptcy (albeit deficient notice under the Rule) in a better position than the unlisted creditor whose debt is discharged under § 523(c) if he merely learns of the bankruptcy proceedings in time to protect his rights.

Neeley, 815 F.2d 347.<sup>5</sup> The Neeley court pointed out that the case before it was not one in which the Clerk had committed an affirmative error, such as putting a calendar date deadline beyond the 60-day period in the blank on the notice that sets the first meeting of creditors. Id. at 347.<sup>6</sup>

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<sup>5</sup> Failure to take timely action upon acquiring actual knowledge of a pending bankruptcy proceeding, regardless of not receiving any official notice of specific deadlines, is fatal to objections to discharge and complaints to determine nondischargeability brought after the 60-day deadline. In re Alton, 837 F.2d 457 (11th Cir. 1988); In re Price, 871 F.2d 97 (9th Cir. 1989); In re Walker, 927 F.2d 1138 (10th Cir. 1991); and In re Medaglia, 52 F.3d 451 (2nd Cir. 1995).

<sup>6</sup> An affirmative error does not appear to extend to the Clerk's verbal assurances that deadlines have not been set. Neeley v. Murchison, 815 F.2d 345, 346 (5th Cir. 1987). Moreover, a notice setting the first meeting of creditors that specifically indicates the deadline for objections to discharge and complaints to determine nondischargeability of debt is "to be set" does not relieve a creditor from its duty to file within the time frames

Since the Neeley decision was written, the United States Supreme Court rendered Pioneer Investment Services Co. v. Brunswick Associates, 507 U.S. 380; 113 S. Ct. 1489; 123 L.Ed. 2d 74 (1993).

Noting that the calendar date deadline for filing proofs of claim in the Chapter 11 case was inconspicuous and not accompanied by any explanation of its significance, the Supreme Court held the attorney's inadvertent failure to file the proof of claim by the bar date was excusable neglect within the meaning of Federal Rule of Bankruptcy Procedure 9006(b)(1).<sup>7</sup> Despite the Supreme Court's stated concern regarding prominent calendar date deadlines, the Neeley case is distinguishable because Federal Rule 9006(b)(3) explicitly excepts Rules 4004 and 4007 from the excusable neglect standard. Neeley, 815 F.2d 346. See also Taylor v. Freeland &

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established by Rules 4004 and 4007. In re Williamson, 15 F.3d 1037 (11th Cir. 1994).

<sup>7</sup> Federal Rule of Bankruptcy Procedure 9006(b)(1) states:

**(b) Enlargement**

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Kronz, 503 U.S. 638; 112 S. Ct. 1644; 118 L.Ed. 2d 280 (1992) (trustee's failure to object promptly to a claim of exemption as required by Federal Rule 4003(b) of Bankruptcy Procedure precluded challenging the exemption after the expiration of the time period permitted by the Rule).

#### CONCLUSION

WHEREFORE, based on the foregoing discussion, the court finds that the Clerk's omission of February 17, 1995 as the deadline for filing objections to discharge and complaints to determine nondischargeability of debt did not suspend the running of the 60-day limitation established by Federal Rules of Bankruptcy Procedure 4004(a) and 4007(c).

ORDER

THEREFORE, IT IS ORDERED that the Clerk of the Bankruptcy Court shall enter the general discharge of debt and close the case.

Dated this 14<sup>th</sup> day of March, 1996.

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LEE M. JACKWIG  
U.S. BANKRUPTCY JUDGE