



Bankruptcy e-Bulletin

November 24, 2009

Dear Insolvency Law Committee Constituency List Members:

Amendments to the Bankruptcy Rules Take Effect December 1

The following is a summary of the amendments to the Bankruptcy Rules which will take effect December 1, 2009. The complete text of the new rules, along with official reports, summaries and explanations, are available at:

<http://www.uscourts.gov/rules/newrules6.htm> .

A. Rule 9006: Changes to the Time Computation Rules

The most pronounced amendment to the bankruptcy rules is in Rule 9006 regarding time computation, *i.e.* the number of days or hours from a triggering event. All calendar days are now counted, not just “business days” — excluding the date of the event that triggers the period, but including weekends and holidays. If, at the end of the time period the deadline day is on a weekend or holiday, then the period is extended to the next day that is not a weekend or holiday, with a proviso for state holidays as discussed below. These same rules apply for calculation of hourly time periods, except if the hourly time period ends on a weekend or holiday, then the deadline for the hourly time period is automatically extended to the same time on the next day that is not a weekend or holiday.

The amended rules introduce a quirk involving state holidays that must be taken into account. First, if the deadline set by the rules *is on a state holiday that is not a federal holiday*, there is an automatic extension of the time period to the next day that is not a weekend or a holiday, *but only if the time period being counted is one that goes forward from the event that triggers the deadline*. For example, a rule requiring a filing 14 days after an order of relief would be extended to 15 days if the deadline day is a state, but not federal, holiday. This change is designed to prevent parties from missing deadlines because they incorrectly believed the courthouse was closed on the state holiday. However, if the rule requires the parties to count *backwards from the triggering event*, then the deadline is not extended if the final day is a state, but not federal, holiday. For example, a rule requiring objections to a proposed sale 7 days before the date of the sale would not be extended to 8 days if the deadline date is a state, but not federal, holiday. Thus the parties do not lose an extra day because the deadline date is a state holiday. Practitioners should take extra care counting backwards from deadlines because, if the deadline is extended by a weekend or federal holiday, then the time period to act is effectively shortened by the amended rules.

The amended rules continue the practice of extending deadlines in cases when the clerk’s office is inaccessible. The amended rules specifically provide that in cases of electronic filing, if the clerk’s office is inaccessible on the deadline day, then the filing date is midnight of the next day the office is open, presuming that day is not a

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weekend or holiday. For non-electronic filing, it is the normal period of closure on the next day. The committee notes clarify that interruptions in the electronic filing system are specifically considered as causing “inaccessibility” of the clerk’s office within the meaning of the rules.

The committee notes clarify that there are two exceptions to the new calculation rules. First, if a court ordered calendar date is specifically set by the order, *i.e.* “November 1st” rather than “7 days from the date of this order,” then November 1st is the hard date, regardless of the rules. Second, some statutes still require business days be used in calculation: these rules do not affect deadlines set by statute. *See, e.g.*, 11 U.S.C. § 527(a)(2) (debt relief agencies must provide a written notice to an assisted person “not later than 3 *business days*” after providing bankruptcy assistance services) (emphasis added).

Finally, the amended rules modify all the set periods in the rules in order to account for the fact that weekends are now included in time computation. The various deadlines are amended in the following manner:

- 5-day periods become 7-day periods
- 10-day periods become 14-day periods
- 15-day periods become 14-day periods
- 20-day periods become 21-day periods
- 25-day periods become 28-day periods

B. Additional Rule Changes

In addition to the time calculation measures, a variety of minor changes will be added to the rules. These are summarized briefly below.

Rule 4008: A requirement that a cover sheet be filed along with all reaffirmation agreements. The cover sheet will be included in the Official Forms.

Rule 7052, 7058, 9021: In order to clarify judgment requirements, Rule 58 of the Federal Rules of Civil Procedure is explicitly made applicable to adversary proceedings. This clarifies that the separate document requirements for recording judgments apply to adversary proceedings. All other recording requirements for judgments and orders are determined by Rule 5003(a), which does not have a separate document requirement.

Rule 7052, 9015, 9023: These rules are amended to change the deadline for filing certain post-judgment motions to 14 days, rather than the 28 day deadline in the 2009 Amendment to the Federal Rules of Civil Procedure (which are generally incorporated by reference into the Bankruptcy Rules). This is necessary because the deadline for filing a notice of appeal under Bankruptcy Rule 8002 is 14 days rather than the 30 days allowed under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

Rule 2016: The rule is updated to reflect the requirement of 2005 Amendments to the Bankruptcy Code that the declaration of compensation paid to the bankruptcy petition preparer as required by 11 U.S.C. § 110(b)(2) must be filed with the petition, rather than 10 days after the petition.

Rule 9006: Corrects a cross-referencing error in relation to the time requirements for service of process.

Official Form 9F, 10, and 23: Minor technical changes in these forms are made to comply better with the official language of the bankruptcy code.

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Bankruptcy Code’s “Homestead Cap” May Not Apply To Property Acquired More Than 1215 Days Pre-Petition Even If Debtor Established Residency More Recently
In *Greene v. Savage (In re Greene)*, 09 C.D.O.S. 12414 (9th Cir. October 2, 2009), the court ruled that a debtor who acquires real property more than 1215 days before filing bankruptcy but moved onto the property within the period is not subject to the homestead exemption cap under Bankruptcy Code Section 522(p)(1). The court analyzed the issue under Nevada law and the Bankruptcy Code and held that the 1215-day period in Section 522(p)(1) runs from the time of acquisition, not the time of residency.

In *Greene*, the debtor purchased a parcel of undeveloped land in Nevada in 1994. In August, 2004, Greene moved onto the property and was living in a trailer, and he recorded a homestead exemption the same month. On August 11, 2005, Greene was cited by Washoe County for illegally using the trailer as a dwelling, and he told authorities that he slept on the property in a tent. On October 15, 2005, Greene filed a voluntary chapter 7 petition and claimed the property as fully exempt under Nevada's homestead exemption at a value of \$240,000. A creditor objected to the claim of exemption and contended that it should be reduced to \$125,000 because the debtor moved onto the property and declared his homestead within the 1215-day period provided in Section 522(p)(1). The bankruptcy court agreed, and the district court affirmed. The Ninth Circuit reversed in part and ruled that the debtor was entitled to claim the full amount of the homestead exemption.

Section 522(p)(1) limits the claim of homestead exemption upon a residence acquired during the 1215-day period preceding the petition date, as follows:

Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$136,875 [the amount was raised in 2007] in value in —

(A) real or personal property that the debtor or a dependent

of the debtor uses as a residence;

(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(C) a burial plot for the debtor or a dependent of the debtor;
or

(D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

Section 522(p) was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), and the court held that its purpose is to close the so-called “mansion loophole” in which a wealthy debtor may shield assets by purchasing a lavish home in a state with an unlimited homestead exemption such as Texas or Florida shortly before filing bankruptcy.

Following the recent 5th Circuit case of *Wallace v. Rogers*, 513 F.3d 212 (5th Cir. 2008), the court held that the first step in the analysis is to consider the homestead laws of the state. The Nevada homestead exemption, which derives from the state's constitution, provides that the homestead shall be exempt from any process of law, and it has been held to be absolute with few exceptions. The Nevada Supreme Court case of *Savage v. Pierson*, 157 P.3d 697, (Nev. 2007) held that a debtor must hold some form of equity in real property in order to claim the exemption, which “contemplates more than a general ‘interest’ in the property or the right to possession, it contemplates ownership.” *Id.* at 700-701. Therefore, the court held that although the Nevada the homestead exemption is a broad legal protection, it is not a property interest itself.

Turning to the language of Section 522(p)(1), the court carefully considered the meaning of the terms “interest,” and “acquire” and “amount.” Black's Law Dictionary defines “interest” as “a legal share in something; all or part of a legal or equitable claim to or right in property.” Black's Law Dictionary 885 (9th ed. 2009). The court cited “possessory interests, leasehold interests, and ownership interests” as examples of interests in real property, and it noted that such interests “run with the land” in that they pass from one purchaser to another. To the contrary, the court held that a homestead is a “personal right or privilege” that does not “run with the land.”

Furthermore, the term “acquire” is at odds with the language used to refer to homesteads, the court held. For example, the verb used to refer to a homestead exemption in Section 522(p) is “claim,” as follows: “real or personal property that the debtor or dependent of the debtor *claims* as a homestead.” 11 U.S.C. § 522(p)(1)(D) (emphasis added). Furthermore, Black's Law Dictionary provides that “acquire” means “[t]o gain possession or control of; to get or obtain.” Black's Law Dictionary 26 (9th ed. 2009). Therefore, the court held that Congress intended a substantive difference by its use of distinct terms and that the term “acquire” refers to gain possession or control “by purchasing or gaining

an ownership interest” in property.

Finally, the court explained that the term “amount of interest” refers to an interest capable of quantification. In particular, the exception provided in Section 522(p)(2)(B) provides that the homestead cap does not apply to an “interest transferred from a debtor’s previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor’s current principal residence, if the debtor’s previous and current residences are located in the same State.” Since the residence itself is not transferred, the court held that the exception refers to a monetary value or equity transferred from the previous residence. In accord with the Massachusetts case of *In re Lyons*, 355 B.R. 387 (Bankr. D. Mass. 2006), the homestead is not a quantifiable interest; it is a classification of property under state law.” *Id.* at 390.

In light of Nevada law and the language of Section 522(p)(1), the court ruled that the 1215-day period runs from the time the debtor acquired ownership of real property, even if the debtor moved onto the property within the period. *Greene* has the potential to aid debtors with investment properties in states with generous homestead exemptions similar to Nevada's in that debtors may file bankruptcy relatively soon after establishing residency, notwithstanding the homestead cap in Section 522(p)(1).

The foregoing case summary was prepared by Reno Fernandes and Iain Macdonald of the law firm Macdonald & Associates.

Thank you for your continued support of the Committee.

The Insolvency Law Committee of the Business Law Section of the California State Bar provides a forum for interested bankruptcy practitioners to act for the benefit of all lawyers in the areas of legislation, education and promoting efficiency of practice. For more information about Business Law Standing Committees, please see the standing committees page: www.calbar.org/buslaw/insolvency.

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