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Notice of Bar Date to Employees of a Multinational Corporation May Be Satisfied by Publication

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# Notice of Bar Date to Employees of a Multinational Corporation May Be Satisfied by Publication

**Naffie Lamin, J.D. Candidate 2017**

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## Introduction

Courts have frequently held that notice to employees of the final day to file a proof of claim (the "bar date"), for purposes of satisfying constitutional due process requirements, may be satisfied by publication.[1] To determine whether proper notice was served, bankruptcy courts distinguish between known and unknown creditors.[2] While a known creditor must be provided with actual notice of a bar date, notice to an unknown creditor is satisfied by constructive notice, for example publication in a newspaper.[3] In the context of the employer-employee relationship, it may seem counterintuitive that a creditor-employee would constitute an "unknown" creditor but pervasive case law, including the recent *In re Nortel* decision, makes evident that the existence

[1] *See* Brown v. Seaman Furniture Co., Inc., 171 B.R. 26, 27 (E.D.Pa.1994) (finding that publishing the claims bar date in both national and international publications satisfied the due process clause); *see also In re* Best Products Co., Inc., 140 B.R. 353, 359 (Bankr. S.D.N.Y.1992) (holding that notice by publication satisfied due process requirements).
[2] Tulsa Prof'l Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988) (noting that distinguishing between known and unknown creditors is necessary to establish whether actual notice to creditors is required by due process).
[3] *See, e.g.,* Greyhound Lines, Inc. v. Rogers (*In re* Eagle Bus Mfg., Inc.), 62 F.3d 730, 735 (5th Cir. 1995) (finding that because debtor mailed creditor notice of claims bar date, creditor's due process rights were not violated).

of an employment relationship between a debtor and a creditor is not sufficient to establish "known creditor" status upon an employee.[4]

This article examines discusses the requirements of Rule 3003(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the due process concerns the rule implicates. Part I-A discusses subsection (c)(3) Rule 3003, which generally prohibits the filing of proofs of claim subsequent to the expiration of a bar date. Part I-B outlines the distinction between "known creditors" and "unknown creditors" for purposes of providing constitutionally adequate notice. Part II provides a case study of the Virginia Bankruptcy Court's ruling in *In re U.S. Airways*, a case in which the debtor-employer was a multinational corporation, and where the court held that because the creditor-employee's claims were not "reasonably ascertainable," the creditor-employee was unknown for notice purposes.[5] Part III provides a case study of the Delaware Bankruptcy Court's more recent ruling in *In re Nortel*, a case also involving a multinational debtor-employee, but where the court held that because the creditor-employees identities were not reasonably ascertainable the creditor was unknown for notice purposes.[6] Finally, Part IV concludes by providing a comparison of the alternate applications of the reasonably ascertainable standard in *In re Nortel* and in *In re U.S. Airways*.

## I-A. Bankruptcy Rule 3003(c)(3) Implicates Due Process Concerns Because it Potentially Limits Parties' Opportunities to be Heard.

[4] *In re* Nortel Networks, Inc., 531 B.R. 53, 65 (Bankr. D. Del. 2015) ("The Canadian Employees were unknown creditors. The Court is satisfied [. . .] that the Published Notice satisfies the requirements of due process with respect to unknown creditors.").
[5] *See In re* U.S. Airways, Inc., 2005 WL 3676186, *6 (Bankr. E.D. Va. Nov. 21, 2005).
[6] *See In re* Nortel Networks, Inc., 531 B.R. at 65.

Rule 3003(c)(3) authorizes courts to establish a deadline or "bar date" by which proofs of claim in a bankruptcy case must be filed.[7] A failure to file a proof of claim before the bar date and without sufficient justification may prevent a claimant from receiving a distribution or otherwise being able to participate in the bankruptcy case.[8] The rule was designed to ensure the "[s]ecuring, within a limited time, the prompt and effectual administration and settlement of the debtor's estate."[9] The rule also prevents bankruptcy estates from being "[w]asted in profitless litigation."[10]

Setting an outside date after which parties are barred from being able to assert their claims in court necessarily implicates due process concerns, as "the fundamental requisite of due process of law is the opportunity to be heard."[11] To that end, constitutional due process requires that notice of a bar date be provided in a manner that is "reasonably calculated to reach all interested parties, reasonably conveys all the required information, and permits a reasonable time for a response."[12] Therefore, a creditor who did not receive adequate notice of the bar date is not

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[7] Fed. R. Bankr. P. 3003(c)(3) ("The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).").

[8] *See* 11 U.S.C.A § 502 (b)(9) ("the court shall allow such claim . . . except to the extent that such proof of claim is not timely filed.").

[9] Katchen v. Landy, 382 U.S. 323, 328 (1966).

[10] Bailey v. Glover, 88 U.S. 342, 347 (1874).

[11] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (2004). *See* Mullane 339 U.S. at 317 ("[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *see also In re* Smidth & Co., 413 B.R. 161, 165 (Bankr. D. Del. 2009) (asserting that all courts must be cognizant of the due process concerns implicated by Rule 3003 (c)(3)).

[12] *In re* Eagle Bus Mfg., Inc., 62 F.3d at 735. *See also In re* Robintech, 868 F.2d 393, 396 (5th Cir. 1989) (explaining that due process requires notice that is (1) reasonably calculated to reach all interested parties; (2) reasonably conveys all of the required information; and (3) permits a reasonable time for response).

stopped from filing a tardy proof of claim.[13] What constitutes "proper" notice however varies according to whether the claimant qualifies as either a "known" or an "unknown" creditor.[14]

### I-B. Courts Distinguish between Known and Unknown Creditors for Purposes of Establishing Whether Notice Satisfies Due Process Requirements.

For notice purposes, courts have drawn a distinction between known and unknown creditors.[15] In *Mullane v. Central Hanover Bank*, the Supreme Court held that state actions adversely affecting the property rights of individuals must be accompanied by such notice as is reasonable under the particular circumstances after balancing the state's interests against the due process interests of individuals.[16] Courts have relied on *Mullane* for purposes of creating the notice rules because creditors' claims are considered property interests that are protected by the Due Process Clause of the Fourteenth Amendment of the Constitution,[17] and because a bankruptcy court's imposition of a bar date is properly considered a state action.[18]

Unknown creditors are those "[w]hose 'interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to

[13] *See In re* B.C. Enterprises, Ltd., 160 B.R. 827, 831 (Bankr. D. Ariz. 2012) (holding that creditor did not provide adequate notice, and therefore creditor was therefore not bound by bar date).
[14] Tulsa Prof'l Collection Serv., Inc., 485 U.S at 478 (noting that distinguishing between known and unknown creditors is necessary to establish whether actual notice to creditors is required by due process).
[15] *Id.; see also In re* Charter Co., 120 B.R. 650, 654 (M.D. Fla. 1991).
[16] Mullane, 339 U.S. at 306.
[17] Tulsa Prof'l Collection Serv., Inc., 485 U.S. at 478; *see* U.S. Const. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]").
[18] Tulsa Prof'l Collection Serv., Inc., 485 U.S. at 478 ("[t]he court's activation of a statute's time bar . . . is so pervasive and substantial that it must be considered state action.").

knowledge [of the debtor]."[19] As a result, constructive notice of a bar date, such as notice published in a newspaper, is sufficient to satisfy due process requirements.[20]

In contrast, a known creditor is one who is "reasonably ascertainable" by the debtor.[21] A debtor is "reasonably ascertainable" if "reasonably diligent efforts" would reveal their name and address.[22] The "reasonably ascertainable" standard was applied by the Supreme Court in *Mennonite Bd. of Missions v. Adams*, where the Court stated that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests ... if [the party's] name and address are reasonably ascertainable."[23] Therefore, according to the Supreme Court, a known creditor must be provided with actual notice, that is, notice in fact, of the bar date.[24]

However, courts have repeatedly recognized the "practical costs and difficulties" that would necessarily arise if actual notice were to be provided to all possible claimants.[25] As a result, the "reasonably diligent effort" standard does not require debtors to engage in unreasonable searches for claimants, or to search for and actively encourage all claimants to file

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[19] *Id.* (quoting Mullane, 339 U.S. at 317) (finding that notice to beneficiaries whose claims were "conjectural" or "future" are not necessary to address due process concerns).
[20] *See* Brown, 171 B.R. at 27 (finding that publishing the claims bar date in both national and international publications satisfied the due process clause); *see also In re U.S. Airways, Inc.*, 2005 WL 3676186, *6 (finding that defendant employees were not known creditors and consequently did not require actual notice of the claims bar date in order to satisfy due process requirements); *In re Best Products Co., Inc.*, 140 B.R. at 353 (holding that notice by publication satisfied due process requirements).
[21] *In re* Best Products Co., Inc., 140 B.R. at 353 (holding that if creditor was known or "reasonably ascertainable" by debtor, the Fourteenth Amendment requires that creditor be given actual notice).
[22] *Id.* at 804; *see generally* Small Engine Shop, Inc. v. Cascio, 878 F.2d 883, 878 (5th Cir.1989); *In re* Sharon Steel Corp., 110 B.R. 205, 206 (Bankr. W.D. Pa.).
[23] Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 802 (1983).
[24] *Id.*
[25] Mullane, 339 U.S. at 317.

timely proofs of claim.[26] Rather, the search for claimants is limited to a careful examination of the debtor's "[o]wn books and records".[27] Only creditors who are identifiable through a diligent search of these records are "reasonably ascertainable" and hence "known" creditors.[28]

It may seem that the creditors who satisfy the "reasonably ascertainable" standards may simply be those creditors whose identities a debtor can ascertain without devoting too many resources to the search. Therefore, while the reasonable ascertainable standard may exist to protect debtors from having to engage from an endless and limitless search for potential creditors and claims,[29] the standard may be exploited by debtors seeking to limit the claims of their creditors.

## II. The Court in *In Re U.S. Airways* Finds that the "Reasonably Ascertainable" Standard is an Inquiry as to Whether the Claims of Potential Creditors Are Reasonably Ascertainable.

In *In re U.S. Airways*, the court was tasked with deciding whether a creditor-employee was "reasonably ascertainable" and therefore entitled to actual notice of a bar date.[30] In that case, U.S. Airways and its affiliates (the "debtor-employer") filed a voluntary petition for relief under title 11 of the United States Code (the "Bankruptcy Code").[31] The court entered an order establishing a bar date of February 3, 2005, for non-governmental creditors.[32] The court further ordered the debtor to provide notice to all unknown creditors through publications in national edition of *The New York Times*, the national and European editions of *The Wall Street Journal*,

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[26] *Id.*
[27] Chemetron Corp. v. Jones, 72 F.3d 341, 347 (3rd Cir. 1995).
[28] *Id.*
[29] *Id.*
[30] *See generally In re* U.S. Airways, Inc., 2005 WL 3676186 at *1.
[31] *Id.*
[32] *Id.*

and the worldwide edition of *USA Today*.[33] The creditors in this case were a husband and wife, and the husband was a furloughed employee of the debtor-employer (the "creditor-employee") who also owned U.S. Airways stock.[34] The creditors did not file proofs of claim until August 2005, nearly six months after the bar date.[35] In support of the creditors' motion seeking leave to file proofs of claim after the bar date, the creditors asserted that they did not see the bar date in any publication.[36]

The court found that the creditor-employee was not a known creditor and consequently did not require actual notice of the bar date in order to satisfy due process requirements.[37] The court reached this conclusion after applying the "reasonably ascertainable" standard and finding that the creditors' claims were not reasonably ascertainable.[38] The court reasoned that the creditor-employee's cause of action[39] was novel and consequently, the debtor was under no obligation to treat every furloughed employee as a potential creditor based on such an abstract claim.[40] The court noted that "[a] debtor is not constitutionally required to broadly speculate as to the identity and theory of recovery of each conceivable or possible creditor"[41] and that "U.S.

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* The creditors did not attach to the motion the claims that he sought leave to file. However, the court was able to deduce based on statements made at the hearing that the creditors' claims were two-fold: the first was a securities fraud claim related to U.S. Airways Group stock the creditors had purchased at the company's urging. The second was that the creditor-employee was entitled to lost wages as a furloughed employee because the cancellation of his stock and furlough were caused by "gross mismanagement that drove a fundamentally viable company into insolvency." *Id.*
[37] *Id.* at *6.
[38] *Id.* at *5.
[39] *Id.*
[40] *Id.*
[41] *Id.* at *5.

Airways was not required to give notice by mail to those creditors with merely conceivable or speculative claims."[42] The court found that notice by publication was sufficient.[43]

## III. The Court in *In Re Nortel* Finds that the "Reasonably Ascertainable" Standard is an Inquiry as to Whether the Identities of Potential Creditors Are Reasonably Ascertainable.

An application of the "reasonable ascertainable" standard to the multinational employer-employee relationship can also be found in *In re Nortel Inc*. In that case, the Delaware bankruptcy court denied a motion filed by former Canadian employees of the debtor Nortel Networks' Canadian affiliates (the "Canadian Employees") seeking leave to file proofs of claim after the expiration of the bar date.[44] On January 14, 2009, the United States Nortel affiliates (the "U.S. Debtors") filed voluntary petitions of relief under title 11 of the Bankruptcy Code.[45] On the same day, the Canada affiliates (the "Canadian Debtors") filed insolvency proceedings under Canada's Companies' Creditors Arrangement Act.[46]

On August 4, 2009, the bankruptcy court entered an order establishing September 30, 2009 as the bar date for filing claims against the U.S. Debtors.[47] The U.S. Debtors consequently served notice of the bar date on all known creditors.[48] The U.S. Debtors also published notice of the bar date in the national and global editions of *The Globe*, *Mail*, and *The Wall Street Journal*.[49] The notice stated that "[a]ll persons and entities ... who have a claim or a potential claim against the [U.S.] Debtors that arose prior to January 14, 2009 … MUST FILE A PROOF

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[42] *Id.*
[43] Id. at *6.
[44] *In re* Nortel Networks, Inc., 531 B.R. at 57.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

OF CLAIM so as to be actually received ... on or before September 30, 2009[.]"[50] On August 14, 2009, the Canadian Court recognized the bar date order.[51] This "recognition order" was mailed to the parties representing the interests of the former employees of the Canadian Debtors, including its legal counsel Koskie Minsky.[52] Additionally, notice of the bar date was published in weekly news bulletins issued by Koskie Minsky to the former employees of the Canadian Debtors, publicly filed documents in Canada, and posted to a LinkedIn group where former employees of the Canadian Debtors received information on the insolvency proceedings.[53]

The Canadian Employees did not timely file proofs of claim against the U.S. Debtors before the bar date.[54] Consequently, they filed a motion with the bankruptcy court seeking leave to file proofs of claim after the bar date.[55] According to the Canadian Employees, they did not receive actual or constructive notice of the bar date, which amounted to a denial due process.[56] The court held that because the Canadian Employees were employed by Nortel Inc.'s Canadian subsidiaries and did not receive any benefits or have any substantial contact with the U.S. Debtor they did not qualify as known creditors and therefore were not entitled to actual notice of the bar date.[57] Instead, the court found that the Canadian Employees were unknown creditors who were entitled to constructive notice.[58]

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[50] *Id.* at 57–58.
[51] *Id.* at 58.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 59. The Canadian Employees had all been terminated from employment by means of a termination letter from the Canadian affiliates, which provided that Nortel Networks Corporation "shall … pay" a severance package to each terminated employee. *Id.* The Canadian Employees' proofs of claims sought to compel the severance payments referenced in their termination letters. *Id.*
[55] *Id.* at 60.
[56] *Id.* at 62.
[57] *Id.* at 63.
[58] *Id.* at 64.

**Conclusion**

The *In re Nortel* decision serves as an important reminder to creditors to be mindful of public notices and publications pertaining to a chapter 11 bankruptcy filing.[59] The decision made evident that the existence of an employment relationship between a debtor and a creditor was not sufficient to establish "known creditor" status upon the creditor for the purposes receiving actual notice of a bar date.[60] The holding in *In re Nortel* is consistent with courts' well established recognition of the practical difficulties and expenses of making actual notice available to all potential creditors.[61] In the context of multinational corporations that may employ thousands of people worldwide, this problem may be exacerbated.

However, *In re Nortel* may have also expanded the "reasonably ascertainable" standard beyond previous bounds. In *In re U.S. Airways*, although the court reached the same holding as the *In re Nortel* court, each court's basis for reaching that holding was critically different. In *In re U.S. Airways*, the court noted that "[a] debtor is not constitutionally required to broadly speculate as to the identity and theory of recovery of each conceivable or possible creditor."[62] By limiting its analysis to whether the creditor-employee's theory of recovery was reasonably ascertainable, the court implied that the identity of the creditor-employee did not require such "broad speculation" and was reasonably ascertainable to the debtor-employer. Therefore, while *In re U.S. Airways* analyzes the substance of creditors' potential claims, the *In re Nortel* court

[59] *In re* Nortel Networks, Inc., 531 B.R. at 65 ("The Canadian Employees were unknown creditors. The Court is satisfied [. . .] that the Published Notice satisfies the requirements of due process with respect to unknown creditors.").
[60] *Id.*
[61] Mullane, 339 U.S. at 317.
[62] *In re* U.S. Airways, Inc., 2005 WL 3676186 at *5.

makes the more incredulous assertion that the large multinational debtor-employer was unable to ascertain the identities of its own employees.