GETTING NOTICED: THE NEW NOTICE REQUIREMENTS OF SECTION 342

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Notice is the fulcrum upon which our bankruptcy system balances the interests of creditors and debtors. Getting accurate and detailed notice of anticipated and potential actions to creditors is not only a requirement of the statute and the rules, but it is a basic element of due process. Because bankruptcy affects so many entities and so many interests, the notices given and received have greater and broader impact than under most other areas of practice. While due process envisions an independent adjudicator to determine rights, at its heart is the opportunity for all affected parties to be heard on an issue.[1] Constitutional due process encompasses not only the opportunity to be heard but the opportunity to obtain adequate notice of the contemplated action.[2]

The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure are replete with instances where contract and property rights are modified, liens are adjusted, claims are eliminated, and ownership is severed.[3] Commercial and property rights of parties are forever altered by the bankruptcy process mandate that notice and an opportunity to be heard be provided to all parties.

Section 102(1) makes clear, however, that receiving notice and having an opportunity to be heard does not mandate the bankruptcy court to hold a hearing in every instance. The Bankruptcy Code contemplates and condones the use of "negative notice" where judicial action may be effected without the necessity of a hearing, so long as parties affected by the process are advised of the contemplated action and are permitted to raise issues before the court.[4] To make bankruptcy

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[1] "The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306, 314 (1950) (citation omitted); *see also* City of West Covina v. Perkins, 525 U.S. 234, 240 (1998) (stressing primary purpose of notice requirement is to ensure opportunity for hearing is meaningful); Schroeder v. City of New York, 371 U.S. 208, 212 (1962) (noting notice requirement is vital corollary to fundamental requisite of due process—right to be heard).

[2] "An 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." *Mullane*, 339 U.S. at 314; *see* Dusenbery v. United States, 534 U.S. 161, 168 (2002) (holding cash forfeiture notice to prisoner had been "reasonably calculated" to apprise prisoner of pendency of cash forfeiture); *see also* Greene v. Lindsey, 456 U.S. 444, 448–50 (1982) (holding posting on tenant's door did not satisfy *Mullane* standard).

[3] *See, e.g.*, 11 U.S.C. § 502(a) (2000) (allowing claim or interest unless party in interest objects); 11 U.S.C. § 727(a) (2000) (providing court shall grant debtor discharge of debt); 11 U.S.C. § 1327(a) (2000) (binding debtor and each creditor to provisions of confirmed plan).

[4] In some districts, this "negative notice" procedure has been identified with the colorful, but apt, descriptive name "scream or die," a procedure that admits of no independent judicial function if no party

actions effective, the system requires detailed and effective notice.

The Bankruptcy Rules have been prescribed to satisfy constitutional due process requirements and to prescribe the means by which creditors and other parties may receive the notice sufficient to protect their interests. Although the breadth of notice that is adequate to provide due process in a constitutional sense is flexible [5] the Bankruptcy Rules have been crafted to not simply satisfy minimal due process, but also to contribute predictability to the notice system employed. [6] The volume of notices emanating from the bankruptcy court is substantial. For every bankruptcy case there are numerous creditors, each of which are entitled to notice of certain activities taking place during the pendency of the case.[7] Creditors are entitled to receive notice of the commencement of the case including notice of the time and location of the debtor's meeting of creditors, any proposed sale, use, or lease of property of the estate, notice of any proposed compromise of claims or actions by the estate, notice of a proposed dismissal or conversion, notice of the

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raises an objection to a proposed act. *See* 11 U.S.C. § 102(1)(B) (2000) (stating "after notice and a hearing" may authorize act without actual hearing if notice is given properly); *see also In re* Fiorilli, 196 B.R. 83, 86 (Bankr. N.D. Ohio 1996) (indicating Bankruptcy Code provides if appropriate notice is given and no party requests hearing, then action may be taken without actual hearing); *In re* Stogsdill, 102 B.R. 587, 588 (Bankr. W.D. Tex. 1989) (asserting Bankruptcy Code provision obviates requirement of actual hearing, provided due notice and opportunity for hearing has been afforded to all interested parties).

[5] The level of notice to be given, however, depends upon the interest at issue because "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see* Ingraham v. Wright, 430 U.S. 651, 672 (1977) (providing two-stage due process analysis: first, ask whether asserted individual interests are encompassed within Fourteenth Amendment; second, if protected interests are implicated, then decide what procedures constitute "due process of law"); *see also* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) (asserting purpose of notice under Due Process Clause is "to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'").

[6] Creditors Comm. of Park Nursing Ctr. v. Samuels (*In re* Park Nursing Ctr., Inc.), 766 F.2d 261, 263 (6th Cir. 1985):

> A rule of notice in bankruptcy proceedings is adequate if it meets the following conditions in addition to cost effectiveness. The rule must reasonably be calculated to achieve actual notice, and there must be an available procedure, either as part of the rule, or as part of the general rules of civil procedure under which a person who fails to receive notice, through no fault of his own, has some available remedy for setting aside the judgment of default entered against him.

Id.; *see* Schwab v. Assocs. Commercial Corp. (*In re* C.V.H. Transport, Inc.), 254 B.R. 331, 334 (Bankr. M.D. Pa. 2000) (proposing notice should be likely to achieve actual notice, but not overly expensive or time consuming); *see also In re* Toth, 61 B.R. 160, 166 (Bankr. N.D. Ill. 1986) (stating notice requirement in bankruptcy met when "party not receiving formal notice does receive actual notice and has some available remedy to set aside judgment.").

[7] Chapter 13 cases in the author's district contain an average of 23 creditors per case. Extrapolated nationally to non-business cases, this would result in more than 34 million initial notices in a year. *See* FED. R. BANKR. P. 2002(a) (stating all creditors must be given 20 days notice by mail); *see also* Sheftelman v. Standard Metals Corp., 839 F.2d 1383, 1386 (10th Cir. 1987) (providing "[n]otice must be given to 'all creditors' under Rule 2002(a) of the time set for filing proofs of claim."); Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620, 622 (10th Cir. 1984) (asserting creditor, who has knowledge of debtor's reorganization proceeding, has "right to assume" he will receive all notices required by statute before his claim is barred).

terms of a chapter 11, 12, or 13 plan and the means to accept or reject it, and notice of the deadline to file proofs of claim.[8] It is not unusual, therefore, for a creditor to receive multiple notices involving the same case dealing with different actions as to which the creditor may or may not have a direct interest. This abundance of bankruptcy activity has been referred to as a "deafening legal background noise" and this cacophony of legal "noise" mandates that some matters be given greater weight than others.[9]

Adherence to the procedures defined by statute or by official rule thus becomes elemental to the consideration of the process that is due to parties in interest in a bankruptcy case.[10] Practitioners have come to rely on certain methods of effecting notice and look upon these procedures—mail to a local office, facsimile to an attorney, phone call to a known agent—as adequate to effect notice and make the bankruptcy procedure effective.

Amid this abundance of required notices, debtors and creditors have provided addresses to the court for use of the clerk in providing notices. The addresses provided, however, may be the mailing address of a creditor's home office, the address of its attorney,[11] or the payment address used by a particular creditor.[12] After filing, the debtor or the court may employ the address on a proof of claim instead of the agent or officer of the creditor.[13]

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[8] *See* FED. R. BANKR. P. 2002(a).

[9] Ruehle v. Educ. Credit Mgmt. Corp. (*In re* Ruehle), 412 F.3d 679 (6th Cir. 2005):

> The quantity of 'notice' that is issued by the bankruptcy system is so overwhelming that it is necessary to have clear rules in order for creditors to know what notices to notice as opposed to the notices that are deafening legal background noise. The Code and the Rules set forth those clear standards and it is up to the courts to ensure that the lines are not blurred.

Id. at 684.

[10] *See* Banks v. Sallie Mae Serv. Corp. (*In re* Banks), 299 F.3d 296, 302 (4th Cir. 2002) ("Where the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to the entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect."); *see also In re* Hanson, 397 F.3d 482, 487 (7th Cir. 2005) ("'[W]here the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.'" (quoting *Banks*, 299 F.3d at 302)); Cen-Pen Corp. v. Hanson, 58 F.3d 89, 93 (4th Cir. 1995) (holding Hansons failed to initiate adversary proceeding as required by Bankruptcy Rules).

[11] *See* Vicenty v. Sandoval, 327 B.R. 493, 508–09 (B.A.P. 1st Cir. 2005) (providing notice to counsel is sufficient); Curtis v. LaSalle Nat'l Bank (*In re* Curtis), 322 B.R. 470, 482 (Bankr. Mass. 2005) (recognizing notice to party's counsel satisfies due process); *In re* Glow, 111 B.R. 209, 219 (Bankr. N.D. Ind. 1990) (stating notice provided to attorney representing creditor is sufficient notice to satisfy due process requirement).

[12] *See In re* King, 290 B.R. 641, 645 (Bankr. C.D. Ill. 2003) ("[A] notice of filing mailed to mortgagee's payment address is sufficient."); *In re* Kleather, 208 B.R. 406, 410–12 (Bankr. S.D. Ohio 1997) (indicating forwarding notice to processing address as opposed to service address was sufficient for due process purposes); DaShiell v. Ohio Citizens Bank (*In re* DaShiell), 124 B.R. 242, 249 (Bankr. N.D. Ohio 1990) (holding service of process was proper because debtor made his loan payments to post office box).

[13] *See* Teitelbaum v. Equitable Handbag Co. (*In re* Outlet Dep't Stores, Inc.), 49 B.R. 536, 540 (Bankr.

Against this "background noise" of notices, a stated purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[14] (hereinafter "BAPCPA") includes the creation of clear statutory mechanisms "to ensure that creditors received proper and timely notice of important events and proceedings in a bankruptcy case."[15] In so doing, Congress supplanted the existing rules and the somewhat relaxed method of providing notice and established a detailed mechanism to provide notice by courts and debtors, constructing a higher bar to satisfy due process.[16]

Notice to parties is an integral step to virtually every process involved in a consumer bankruptcy case. From the meeting of creditors, the valuation of property, the confirmation of a plan, and the notice of a discharge, parties are entitled to receive notice that gives them the opportunity to participate in the process and, where appropriate, oppose actions proposed. Thus, when Congress enacts specific provisions dealing with how notice is to be provided, attention must be paid.

Section 342, prior to the enactment of BAPCPA, made a modest effort to put structure in how notice would be provided. The statute "required" that notice by a debtor to a creditor include the name, address and taxpayer identification number of the debtor. Enigmatically, the statute made such notice requirements optional by adding "the failure of such notice to contain such information shall not invalidate the legal effect of such notice."[17] That "required" notice applied to notices given to creditors by debtors and was broad in application. The notice requirements referenced in section 342(c) were and are all notices provided by a debtor to a creditor "under this Title, any rule, any applicable law, or any order of the court." Following the amendments of BAPCPA, the notice must still provide the name and address of the debtor. The notice must also include only the last four digits of the

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S.D.N.Y. 1985) (finding since Equitable provided address in proof of claim, service of process at this address was proper); *see also DaShiell*, 124 B.R. at 249 (stating Bank used post office box address on its proof of claims so service of process at that address was proper); *see generally* Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972) ("The standards set in Rule 4(d) for service on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in which the party has received actual notice.").

[14] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 11 Stat. 23 (2005) [hereinafter BAPCPA] (amending title 11 of United States Code).

[15] H.R. REP. NO. 109-31, at 16 (2005).

[16] *See* Green Tree Fin. Serv. Corp. v. Karbel (*In re* Karbel), 220 B.R. 108, 112 (B.A.P. 10th Cir. 1998) ("Service of process must satisfy the statute under which service is effectuated and constitutional due process."); *see also* Banks v. Sallie Mae Serv. Corp. (*In re* Banks), 299 F.3d 296, 302 (4th Cir. 2002) ("Where the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to the entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be given preclusive effect."); Piedmont Trust Bank v. Linkous (*In re* Linkous), 990 F.2d 160, 162 (4th Cir. 1993) (asserting notice must convey required information to be considered adequate).

[17] 11 U.S.C. § 342(c) (2000). BAPCPA has removed this provision, demonstrating Congressional intent that failure to comply with the noticing requirements of amended section 342 would impact the legal effect of such notice.

taxpayer identification number of the debtor.[18] Note that the requirements of notice under section 342(c)(1) apply to any notice given by a debtor to a creditor not only under the Bankruptcy Code, but also under the rules, court orders, or other applicable law. It certainly appears to be intended to apply to any notice provided to a creditor by a debtor.

I. NOTICES REQUIRED TO BE GIVEN BY THE DEBTOR

BAPCPA adds additional noticing requirements on the debtor. Addresses to be used by a debtor in providing notices to a creditor must be the address provided by the creditor to the debtor in at least two communications sent to the debtor within ninety days of the filing of the petition.[19] Where the notice includes an account number, the notice sent by the debtor to the creditor under this section must also include the account number.[20]

Note the contrast in application to the notice requirements of section 342(c)(1) and section 342(c)(2)(A). Where notices sent by the debtor to a creditor under (c)(1) are those notices provided under the Code, the Rules, or orders of the court, the mandatory addresses to be used by the debtor and the requirement to include an account number on the notice is applicable only to notices required "by this title to be sent by the debtor to such creditor . . . ."[21]

Very few notices are required to be sent by a debtor to a creditor "by this title." Thus, the actual impact of this provision may be minimal, contrary to the stated purpose of the drafters.[22] Since most notices are not sent to creditors directly by debtors, an examination of title 11 must be made to determine which notices are required by the Bankruptcy Code to be sent by the debtor to a creditor. The list is not extensive.[23]

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[18] BAPCPA § 234 (to be codified at 11 U.S.C. § 342(c)(1)) (amending Code to state "debtor shall include only the last 4 digits of the taxpayer identification number in the copy of the notice filed with the court.").

[19] 11 U.S.C. § 342(c)(2)(A) will provide:

> If, within the ninety days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

BAPCPA § 315(a)(2) (to be codified at 11 U.S.C. § 342(c)(2)(A)).

[20] *See id*.

[21] *Id*. (emphasis added).

[22] H.R. REP. NO. 109-31, at 3–4 (2005).

[23] Section 524(c)(4) requires a debtor to send notice to a creditor of a rescission of a reaffirmation agreement. *See* 11 U.S.C. § 524(c)(4) (2000). Additionally, BAPCPA has now added two additional notice requirements. Section 365(p)(2)(A) requires a chapter 7 debtor who is an individual to notify a lessor of the debtor's desire to assume a lease. *See* BAPCPA § 309 (to be codified at 11 U.S.C. § 365(p)(2)(A)) (amending Code to state "[i]f debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease."). Section 1121(e)(3)(A) requires a debtor who

The provisions of section 342(c)(2)(A) become effective and require the debtor to use a specific address only when a creditor "supplies" the address in two "communications" sent to the debtor. There is no guidance in BAPCPA to assist in determining what constitutes a "communication" under section 342. Written communications may have been supposed, but oral or telephonic communications are not per se excluded.[24] Left unanswered is whether this "correspondence" address is the same as a billing inquiry address or an address for disputes as might be included for other legal purposes.[25]

If non-bankruptcy law prohibits a creditor from communicating with a debtor within the ninety day period prior to the filing of the bankruptcy petition,[26] section 342(c)(2)(B) requires the debtor to utilize the address supplied by the creditor in the actual last two communications to the debtor, if the creditor provided the addresses and the account number. Again, the provisions of section 342(c)(2)(A) require such communications to include "the current account number of the debtor" and "the address at which such creditor requests to receive correspondence . . . ."

Enigmatically, section 342(c) contains a "hanging paragraph," that is a provision which was appended to section 342(c) without specifying a particular subsection of that section to which the amendment adhered.[27] The hanging

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is a small business to provide notice to parties in interest that it is seeking an extension of time to confirm a small business chapter 11 plan. No other statutorily required notice by a debtor to a creditor is readily apparent. *See* BAPCPA § 437 (to be codified at 11 U.S.C. § 1121(e)(3)(A)) (amending Code to allow debtor in small business case to extend time period for filing a plan if "notice to parties in interest" is provided).

[24] The utilization of the term "sent" may preclude the application of section 342(c)(2)(A) to oral or telephonic communications since it is difficult to imagine such a communication being "sent." It is, however, entirely possible that e-mail or facsimile transmissions can be "sent" and therefore comply with the requirements of section 342(c)(2)(A). *See* BAPCPA § 315(a)(1) (to be codified at 11 U.S.C. § 342(c)(2)(A)) (amending Code to state "a creditor supplies the debtor in at least 2 communications sent to the debtor . . . .").

[25] *See, e.g.*, 15 U.S.C. § 1637(b)(10) (2000) (stating creditors must designate contact address for billing inquiries).

[26] For example, a creditor's agent may have been precluded from communicating with the debtor represented by counsel pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(a)(2). *See* 15 U.S.C. § 1692c(a)(2) (2000) ("[I]f the debt collector knows the consumer is represented by an attorney . . . [a debt collector may not communicate with consumer] unless the attorney consents to direct communication with the consumer."); *see also* Hubbard v. Nat'l Bond and Collection Assoc., 126 B.R. 422, 426 (D. Del. 1991) (explaining plaintiff can recover under 15 U.S.C. § 1692c if it can be established plaintiff was represented by counsel at time defendant contacted plaintiff and defendant had knowledge of plaintiff's representation); Powers v. Prof'l Credit Serv., Inc., 107 F. Supp. 2d 166, 168 (N.D.N.Y. 2000) ("[Section] 1692c(a)(2)[] require[s] that the debt collector may not communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt.").

[27] This "hanging paragraph" phenomenon is present elsewhere in the Bankruptcy Code as a result of BAPCPA. For example, section 1325(a) contains a hanging paragraph proverbially known as the "no cram down" provision and the "hanging paragraph" of section 522(b)(3), a provision affording some transitory debtors the opportunity to elect federal exemptions. *See* BAPCPA § 306 (to be codified at 11 U.S.C. § 1325(a)) (amending Code to state "section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim . . . [and] collateral for that debt consists of a motor vehicle . . . ."); BAPCPA § 307 (to be codified at 11 U.S.C. § 522(b)(3)) (amending Code to state "[i]f the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property . . . ."); *see also*

paragraph requires that any notice by the debtor that concerns an amendment adding a creditor to the schedules of liabilities must contain the full social security number in the notice that is given to the creditor but again requires that only the last four digits of this taxpayer identification number be filed on the notice copy filed with the court.

The provisions of the hanging paragraph highlight the limits of the scope of section 342(c)(2). Rule 1009 of the Federal Rules of Bankruptcy Procedure requires a debtor to give notice of an amendment to schedules and statements to the trustee and "to any entity affected thereby."[28] Again, however, the service of this notice is not "required by this title" but, in fact, required by rule. Although section 521(a)(1)(A) is a statutory requirement that the debtor file a list of creditors, nothing in the title requires the debtor to serve this copy on the creditors affected.

II. NOTICES TO BE GIVEN BY DEBTORS AND THE COURT

It is fairly routine for creditors to file with a court notice of a preferred address to be used in connection with communications to the creditor in a particular case. The Bankruptcy Rules specifically provide for this type of registered address.[29] Most often, this designation of a preferred address is included on a proof of claim. The official suggested proof of claim form contains a box whereby a creditor can designate an address for purposes of receiving notice. Courts have not been hesitant to enforce the application of this requirement mandating that clerks and debtors utilize the addresses included on a proof of claim.[30] BAPCPA now codifies this rule requirement but does so only in cases under chapter 13 or chapter 7 initiated by an individual.[31]

Henry E. Hildebrand, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 386 (2005) ("[T]he ability of a debtor to treat secured claims in a Chapter 13 plan has been severely limited by the 'hanging paragraph' at the end of § 1325(a) . . . [which] provides that '§ 506 shall not apply' to a claim . . . if the creditor holds a PMSI in a motor vehicle . . . .").

[28] FED. R. BANKR. P. 1009(a) ("The debtor shall give notice of the amendment to the trustee and to any entity affected thereby.").

[29] FED. R. BANKR. P. 2002(g)(1) provides:

> Notice required to be mailed under Rule 2002 to a creditor . . . shall be addressed as such entity or an authorized agent has directed in its last request filed in a particular case. For purposes of this subdivision – (A) a proof of claim filed by a creditor . . . that designates a mailing address constitutes a filed request to mail notices to that address . . . .

Id.

[30] *See* Miller v. Farmers Home Admin. (*In re* Miller), 16 F.3d 240, 243 (8th Cir. 1994) (reiterating Debtor must send notice to address on creditor's proof of claim); *see also In re* Johnson, 274 B.R. 445, 448 (Bankr. D. S.C. 2001) ("[i]f creditor has submitted proof of claim, all notices . . . should be sent to the address provided in the proof of claim."); Teitelbaum v. Equitable Handbag Co., 49 B.R. 536, 540 (Bankr. S.D.N.Y. 1985) (mailing to creditor's address on proof of claim provides creditor with sufficient notice).

[31] BAPCPA § 315(a)(2) (to be codified at 11 U.S.C. § 342(e)) provides:

> (e)(1) in a case under chapter 7 or 13 of this title of a debtor who is an individual, a

The provisions of section 342(e) are applicable to notices provided by debtors and the court.[32] To make such provision effective, however, the creditor must "both file with the court and serve on the debtor" the preferred address to be used.[33] Although the rules have recognized that a preferred address may be designated on a proof of claim, nothing requires a creditor to "serve on the debtor" a copy of its proof of claim so as to invoke the provisions of section 342(e) and cause for the court and the debtor to utilize the addresses designated on their proofs of claim to receive notice.[34]

The statute now requires the designated address to be used within five days of the filing of the address and the serving of the address on the debtor.[35] Both the court and the debtor must use the designated address.[36] The provisions of section 342(e) do not contain the same restrictions as noted in section 342(c)(2), and the notices which must be sent to the designated address are not limited to notices "required by this title" but seem to apply to notices "under this title, any rule, any applicable law, or any order of the court . . ." similar to notices specified in section 342(c)(1).

The requirements of section 342(e) may conflict with the notice requirements of section 342(c)(2)(A). For example, if a creditor has provided a preferred address in two written communications sent to the debtor within ninety days of the filing of the petition, the statute requires the debtor to use that notice address. If the creditor has also filed and served a proof of claim on the debtor with a different requested notice address, it appears that the debtor must comply with both provisions to assure that notice is effected. The dual requirements could well leave debtors uncertain as to the correct address to be used to provide effective notice to creditors.[37] Practitioners expect that all of the addresses known to the debtor will be used to be certain that at least one notice will satisfy the requirements of section 342.

III. UNIVERSAL NOTICE—REQUIRED TO BE GIVEN BY THE COURT

> creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor.
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> (2) Any notice in such case required to be provided to such creditor by the debtor or the court later than five days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.

Id. Since Congress has by statute required use of a creditor's designated address in chapter 7 and chapter 13 cases of individual debtors only, has Congress negated the provisions of Rule 2002(g) as it relates to chapter 11, chapter 12, corporate, or partnership cases?

[32] BAPCPA § 315(a)(2) (to be codified at 11 U.S.C. §§ 342(e)(1), 342 (e)(2)).

[33] *Id*. § 315(a)(2) (to be codified at 11 U.S.C. § 342(e)(1)).

[34] *Id*.

[35] *Id*. § 315(a)(2) (to be codified at 11 U.S.C. §§ 342(e)(1), 342 (e)(2)).

[36] *Id*.

[37] Of course, should section 342(c)(2)(A) truly be limited to only notices provided "under this title," the conflict may not be so problematic, since the instances where dual notices would be required would be limited to the rescission of a reaffirmation agreement or the election to assume a lease. *See* BAPCPA § 315(a)(1) (to be codified at 11 U.S.C. § 342(c)(2)(A)).

Under existing bankruptcy law, certain entities have had the ability to designate a preferred address and file the same with the bankruptcy court clerk. This gives to those entities the ability to designate a preferred address for use in that particular court by all entities in bankruptcy cases, whether or not that bankruptcy case has been filed. This ability has, however, been restricted to governmental entities[38] and has applied to the clerks on a court-by-court basis. BAPCPA now gives to all creditors the ability to file a preferred address with the bankruptcy court. The drafters recognized that the designation of a preferred notice address with the bankruptcy court would enhance the ability of all participants to provide to creditors notice at the location of their choice by adding (f)(1) to section 342. This unusual and expansive provision, by its terms, permits any entity to file with the court a notice of address for its preferred location in cases filed under chapter 7 or chapter 13.[39]

The enigmatic and somewhat difficult provision of this subsection permits any entity to file with "any bankruptcy court" its preferred notice which must be "used by all the bankruptcy courts or by particular bankruptcy courts . . ." (emphasis added). Thus, a creditor seeking to receive all or certain bankruptcy notices at a particular location, irrespective of the district of filing of the bankruptcy and irrespective of the addresses that it may have provided to the debtor prior to filing, need only file its designated address in any of the bankruptcy courts in the United States designating the courts to which its designation would apply. BAPCPA specifically requires the clerks of those designated courts to use the address so filed within thirty days after the filing of the notice.

In the practical world, there is no clear means as to how each individual court can implement this particular provision. Although many courts now utilize the Bankruptcy Noticing Center of Restin, Virginia, (hereinafter "BNC") in order to deliver notices, and most clerks anticipate that the BNC will provide a mechanism

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[38] *See* FED. R. BANKR. P. 5003(e):

> The United States or the state or territory in which the court is located may file a statement designating its mailing address. The clerk shall keep . . . a register that includes these mailing addresses, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory.

Id.

[39] *See* BAPCPA § 315(a)(2) (to be codified at 11 U.S.C. § 342(f)(1)):

> An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

Id.

to sort through the various addresses that it utilizes to identify creditors, it is difficult to imagine how such "preferred address" can be implemented efficiently.[40]

Subsection (f) of section 342 is applicable to all notices "provided by a court . . . ." This provision, however, is not restricted to required notices in cases filed after the effective date of BAPCPA. The court is required to implement the preferred universal notice addresses in all chapter 7 or chapter 13 cases "pending in the courts with respect to which such notice is filed . . . ." Courts will be required to use this universal noticing address for all notices mailed relating to cases that are active when the BAPCPA becomes effective.

Nor should practitioners assume that, because this provision is applicable to notices provided by the court that such provision applies only to notices actually mailed by the court clerk. Notices "required to be provided by a court" are often, in fact, distributed by another entity.[41]

The ability of a creditor to file a preferred notice in one bankruptcy court which within thirty days would be automatically applicable to all bankruptcy courts assumes a technology that does not exist and an infrastructure that has not been established. Congress has provided neither the time nor the funding for clerks or the BNC to make this happen. That Congress directed this mandate to the clerks with the expectation they would promptly comply is clear.[42] Whether there is any way to make this happen is still unclear.

IV. THE CONSEQUENCES OF FAILURE TO COMPLY

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[40] For example, should a hypothetical "First National Bank" in Hattiesburg, Mississippi designate as its preferred address a post office box in Hattiesburg, identifying itself as "First National Bank," it may be difficult to segregate the notices to be sent to that creditor as opposed to the hypothetical First National Bank of Louisville, Kentucky. Although these banks may identify themselves with a geographic modifier ("First National Bank of Hattiesburg", *e.g.*), many debtors submit creditor names only with the generic name of the institution, *i.e.* "First National Bank." Since a bankruptcy court is compelled to use the designated address in serving its notices including the notice of the filing, the mistaken designation of one creditor for another could create havoc. *See* FED. R. BANKR. P. 2002. The use of the appropriate address to mail notices is vital, even where the actual recipient is an affiliate of the debtor. *See* Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 458 (6th Cir. 1982) (finding even though two companies shared common parent company, notice to one cannot be imputed to other); Southwest Bankcard Ctr. v. Curenton (*In re* Curenton), 205 B.R. 967, 969 (Bankr. M.D. Ala. 1995) (concluding mailing notice to SouthTrust of Montgomery, Alabama was not adequate notice when creditor was affiliate, SouthTrust Bank Card Center); *In re* Anderson, 159 B.R. 830, 838 (Bankr. N.D. Ill. 1993) (stressing while two entities were same entity for tax purposes, debtor still had responsibility to make appropriate notice regarding fact in bankruptcy proceeding).

[41] *See* FED. R. BANKR. P. 2002(a) (stating that notice requirements must be given by court clerk "or some other person as the court may direct . . . ."). Many local rules impose noticing requirements on practitioners, which notice would otherwise be required by the clerk. *See, e.g.*, Curry v. Castillo (*In re* Castillo), 297 F.3d 940, 951 (9th Cir. 2002) (indicating notice of rescheduled confirmation hearing was to be mailed by trustee); Nat'l Bank & Trust Co. v. Allied Supply Co., 386 F.2d 225, 228 (4th Cir. 1967) (holding referee had duty to give notice of action to other parties).

[42] H.R. REP. NO. 109-31, at 77 (2005) (stating that section 315(a) allows an entity to "file a notice with the court stating an address to be used generally by all bankruptcy courts . . . [and] this address must be used by the court to supply notice in such cases within 30 days following the filing of such notice . . . .").

BAPCPA imposes consequences when a debtor or the court fails to comply with the notice and address provisions it contains. Section 342(g)(1) provides as follows:

> Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor. If such creditor designates a person or organizational subdivision of such creditor to be responsible for receiving notices under this title and establishes reasonable procedures so that such notices receivable by such creditor are to be delivered to such person or such subdivision, then a notice provided to such creditor other than in accordance with this section (excluding this subsection) shall not be considered to have been brought to the attention of such creditor until such notice is received by such person or such subdivision.[43]

By enacting the specific provisions of section 342(c), (e), and (f), Congress has established specific requirements which must be satisfied in order to give notice to a creditor. Recent cases under pre-BAPCPA law, have magnified the importance of notice made in compliance with a rule.[44] Through BAPCPA Congress is seeking to limit the scope of those decisions in which notice was held to be effective and applicable to a creditor even though notice was provided in a manner inconsistent with the rules.[45]

Newly enacted subsection (g) establishes the consequences that result from a failure of a debtor or the court to employ the notice requirements of section 342:

> (2) A monetary penalty may not be imposed on a creditor for a violation of a stay in effect under section 362(a) (including a monetary penalty imposed under section 362(k)) or for failure to

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[43] BAPCPA § 315(a)(2) (to be codified at 11 U.S.C. § 342(g)(1)).

[44] *See* Ruehle v. Educ. Credit Mgmt. Corp. (*In re* Ruehle), 412 F.3d 679, 683 (6th Cir. 2005) (explaining lack of notice as prescribed by rules prevents imposing preclusive effect of chapter 13 plan); Banks v. Sallie Mae Serv. Corp. (*In re* Banks), 299 F.3d 296, 302 (4th Cir. 2002) (stating failure to provide notice in accordance with Code and rules denies due process to affected party); Cen-Pen Corp. v. Hanson, 58 F.3d 89, 92 (4th Cir. 1995) (indicating failure of objection process to comply with rules precludes order from having binding effect); Piedmont Trust Bank v. Linkous (*In re* Linkous), 990 F.2d 160, 162 (4th Cir. 1990) (positing chapter 13 confirmation order cannot be res judicata if enforcing order results in denial of due process).

[45] *See In re* Wright, 300 B.R. 453, 461 (Bankr. N.D. Ill. 2003) ("Thus notice complying with due process principles does not need to be absolutely perfect; it must merely be calculated to inform."); *In re* King, 290 B.R. 641, 645 (Bankr. C.D. Ill. 2003) (illustrating use of lock box mailing address is effective notice); *In re* Glow, 111 B.R. 209, 218 (Bankr. N.D. Ind. 1990) (finding notice to attorney was sufficient to provide effective notice to creditor).

> comply with section 542 or 543 unless the conduct that is the basis of such violation or of such failure occurs after such creditor receives notice effective under this section of the order for relief. [46]

If the notice provided by the debtor fails to contain the name, address, and last four digits of the taxpayer identification number of the debtor (section 342(c)); if the notice is mailed by the debtor to an address other than the address provided in the two communications sent by the creditor (section 342(c)(2)); if the notice mailed by the court or the debtor is sent to an address other than the requested address of the creditor on a case by case basis (section 342(e)); or if the address to which the court mailed a notice is sent to an address other than the national address filed by a creditor in any bankruptcy court (section 342)(f)), then no monetary penalties can be imposed against a creditor for violating the stay or failing to turnover property of the estate unless the information is brought to the attention of the creditor.

Notice provided to a creditor that is not in compliance with the strict requirements of section 342(c), (e), or (f) may still be effective notice, however, if the notice in question is "brought to the attention" of that creditor. Nothing in BAPCPA or the Code, however, assists us in determining what constitutes "brought to the attention" of a particular creditor. The statute does, however, indicate what is not covered.

If a creditor has established a procedure to receive bankruptcy notice where either a person (which could include a corporation or partnership)[47] or an organizational subdivision of the creditor has been designated to receive bankruptcy notices, and the procedure employed is reasonable, then notice by a debtor or the court can not be effective until that "person" or organizational subdivision actually receives the notice given.

The mystery of this so called "safe harbor" provision, however, is whether the procedure employed by a creditor to receive and process notices is "reasonable." Debtors often file for bankruptcy relief on the eve of a foreclosure or repossession and do so seeking the immediate protection of the automatic stay. If a creditor is actively engaged in collecting its debt, which might include foreclosure or repossession of collateral, courts now acknowledge that notice of the filing need not be by formal means.[48] The pervasive effect of the automatic stay and the

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[46] BAPCPA § 315(a)(2) (to be codified at 11 U.S.C. § 342(g)(2)).

[47] 11 U.S.C. § 101(41) (2000) ("The term 'person' includes individual, partnership and corporation . . . .").

[48] *See In re* Perviz, 302 B.R. 357, 367–68 (Bankr. N.D. Ohio 2003) ("For purposes of § 362(h), bankruptcy law only requires that a party receive actual notice which is defined as the type of notice that would cause a reasonably prudent person to make a further inquiry; formal notice is not required.") (citation omitted); *In re* Flack, 239 B.R. 155, 163 (Bankr. S.D. Ohio 1999):

> It is a debtor's responsibility to make sure that creditors have reasonable, actual notice of a pending bankruptcy case. Such knowledge does not have to

consequences of its violation have historically paralyzed collection efforts which has served to both protect assets for the benefit of other creditors and to protect the debtor from immediate loss of property. The new-filing debtor has little trouble in halting an automobile repossession by simply advising the repossession agent of the filing of the petition; such advice puts the creditor on notice (constructively) and compels the repossession agent to stop collection activity until relief from the stay can be effected.

Monetary sanctions are the teeth of the automatic stay. The new "safe harbor" provisions of section 342(f) will work to effectively insulate creditors from monetary risk as a result of violating the automatic stay or failing to turnover property of the estate. Note, however, that such protection is restricted to a "monetary penalty," a term undefined. A willful violation of the automatic stay, however, would entitle the injured party to "actual damages" to include attorney's fees and, where appropriate, punitive damages. The reference to a "penalty" in section 342(g)(2), rather than the more general term "damages," may mean that actual but not punitive damages might be awarded if a creditor received actual notice of the filing of a bankruptcy petition, even though that notice was provided in a manner inconsistent with the provisions of section 342(c), (e), or (f). Such damages are in the form of compensatory damages or attorney's fees; only punitive damages may be prescribed.

Clearly, the automatic stay is in place even if a creditor has not received notice, and actions taken by a creditor, in violation of the stay, are void.[49] That a creditor may escape monetary penalty for its violation of the automatic stay with statutorily inadequate notice does not preclude the court from undoing whatever it has done. Transfers made in violation of the stay would appear to be subject to avoidance (if not simply nugatory).

More troubling are broader implications of the language in section 342(g), that notice "shall not be effective notice" unless made in compliance with either the provisions of section 342(c), (e), or (f) or in accordance with the procedures established by a creditor under the safe harbor provisions. Because the binding effect of a chapter 13 plan is so pervasive upon its confirmation,[50] it has the effect

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> come through formal means, and even if not scheduled, a willful violation may be established where the creditor has sufficient facts to cause . . . 'a reasonably prudent person to make further inquiry.'

Id. (citation omitted); *see also In re* Freemyer Indus. Pressure, Inc., 281 B.R. 262, 267 (Bankr. N.D. Tex. 2002) (providing oral notice to creditor's attorney was adequate to put creditor on notice of filing of petition and existence of automatic stay).

[49] *See* Morris v. Peralta (*In re* Peralta), 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004) ("Since the automatic stay is effective against the world, regardless of notice, acts in violation of the stay are automatically void ab initio."); Ford v. A.C. Loftin (*In re* Ford), 296 B.R. 537, 542 (Bankr. N.D. Ga. 2003) (indicating stay is effective regardless whether notice of filing has been received); *see also* Mollo v. IRS, No. 4:04-CV-2758, 2005 U.S. Dist. LEXIS 4367, at *4–5 (M.D. Pa. Feb. 25, 2005) (discussing plaintiff's contention IRS's filing of federal tax lien notice violated automatic stay).

[50] *See* 11 U.S.C. § 1327(a) (2000) ("The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has

of forcing an efficient and prompt consideration of issues involving creditors at one time. The terms of the plan become the controlling law of the case. To achieve this, however, confirmation can only be effected with full and adequate notice to creditors. If notice is not effective, the binding effect of a chapter 13 plan is suspect.

Since the "safe harbor" for creditors requires them to establish "reasonable procedures," the question remaining is what constitutes such "reasonable procedure." Congress intended bankruptcy courts to evaluate the procedures established by creditors to respond to notice of bankruptcy filings if such creditors seek to protect themselves from the imposition of monetary penalties. Is it reasonable, for example, for a mortgage service provider to require notice to be mailed to a centralized address rather than the attorney or agent conducting a foreclosure sale? Will it be reasonable for an automobile finance company to fail to authorize the tow truck operator to forward notice of a bankruptcy filing to a central office? Will a "reasonable procedure" require a means to receive facsimile notice or e-mail notice?

If a chapter 13 plan is confirmed without adequate notice, its terms cannot be binding. If the notice to creditors is not provided in accordance with section 342, notice "is not effective" and, as *Ruehle*,[51] *Banks*,[52] and *Hanson* [53] demonstrate, failure to comply with the detailed procedural steps for providing notice can unravel the binding effect of a confirmed plan.

BAPCPA represents a concerted effort by Congress to open up the bankruptcy process to make certain that all parties receive notice of their rights, responsibilities, and remedies. The new muscular provisions of section 342 are clearly intended to guarantee that creditors have ample opportunity to become aware of the existence of a bankruptcy case or proposed plan so they can enforce their rights in a timely fashion.

Debtors have a significant incentive to provide creditors with adequate notice of a bankruptcy filing. The cumbersome steps employed by section 342 will breed litigation and may not provide the insulation from liability that creditors may have intended in suggesting its adoption. Because the need for debtors to provide adequate notice is so significant, debtors' counsel will clearly invoke the "belt and suspenders" approach in providing notice. Debtor's counsel will utilize every address known to provide notice to the creditor on the filing of a petition, the

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objected to, has accepted, or has rejected the plan."); *see also Cen-Pen Corp.*, 58 F.3d at 92 (relying on section 1327(a) to argue confirmation of chapter 13 plan voided liens); *Piedmont Trust Bank*, 990 F.2d at 162 (stating bankruptcy court confirmation order is res judicata under section 1327(a)).

[51] Ruehle v. Educ. Credit Mgmt. Corp. (*In re* Ruehle), 412 F.3d 679 (6th Cir. 2005) (affirming order vacating discharge because creditor failed to institute adversary hearing or give creditor notice when it was required).

[52] Banks v. Sallie Mae Serv. Corp. (*In re* Banks), 299 F.3d 296, 302–03 (4th Cir. 2002) (holding confirmed chapter 13 plan did not have preclusive effect where creditor did not have notice of debtor's intent to discharge nondischargeable debt).

[53] *In re* Hanson, 397 F.3d 482, 487 (7th Cir. 2005) (holding due process requires proper notice to creditor where Code requires an adversary proceeding to discharge debt).

confirmation of a chapter 13 plan, or its modification.[54] Rather than simplify and streamline the process, the effect of section 342 may result in multiple copies of the same notice being forwarded to separate divisions of a creditor's operations, multiplying the number of notices which must be processed and which must be addressed. The challenge on the creditors will be to establish a means of discovering the clarion bell of warning in the cacophony of duplicative notices.

Section 342 will have a profound impact on the practice of consumer bankruptcy law. The drafters' clear hope was that notice would be carefully forwarded to creditors at their preferred address. In practice, however, this section will breed litigation, multiply the quantity of notices in a case, and increase the costs to debtors and creditors alike. Rather than defer notice issues to the Rules drafters, Congress has here assumed the mantle of the Rules Committee. A cumbersome and potentially unmanageable system may be the result.

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[54] Even though the provisions of section 342 are applicable only to notices provided by debtors or those provided by the court, and are not applicable to notices provided by the United States Trustee, Bankruptcy Administrator, or the case trustee, trustees will seek to get notice to the correct address. *See* BAPCPA § 315(a)(2) (to be codified at 11 U.S.C. §§ 342(f)(1), 342 (g)(1)). Chapter 13 trustees may well use five separate addresses for every creditor: a payment address, an address scheduled by the debtor (as the address provided by the creditor in the two written communications prior to the filing of the petition), the address elected by the creditor to receive notices under section 342(e) on a proof of claim, the national address provided by the creditor to the court which then may be forwarded to the trustee, and the address of an attorney that has filed a notice of request for noticing under Rule 2002(g)(1), F.R.B.P. *See* FED. R. BANKR. P. 2002(g)(1).