

Client Alert

September 2014

Publication Notice in *The Wall Street Journal* and the *Orange County Register* May Not Be Sufficient Notice to Unknown Creditors

The United States District Court for the District of Delaware recently entered a Memorandum Opinion (the “District Court Opinion”) concerning the constitutional sufficiency of the publication of the bar date notice in the New Century bankruptcy as it applies to unknown creditors.¹ The District Court vacated the Bankruptcy Court’s August 30, 2013, order (the “Constructive Notice Order”), which had approved the constitutional sufficiency of notice to unknown creditors by publication in *The Wall Street Journal* and the *Orange County Register*. In vacating the Constructive Notice Order, the District Court concluded that the publication notice “likely was not reasonably calculated to apprise appellants of the bar date” and remanded the matter to the Bankruptcy Court for further proceedings.²

Case Background

In July 2006, Molly White and Ralph White (collectively, the “Whites”) closed a consumer loan transaction with New Century Mortgage Corporation. In April 2007, New Century Mortgage Corporation and certain of its affiliates (collectively, the “Debtors” or “New Century”) filed chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the District of Delaware. The Bankruptcy Court entered an order on June 28, 2007, that set August 31, 2007, as the claims bar date (the “Bar Date Order”). In accordance with the Bar Date Order, on July 23, 2007, the Debtors published the bar date notice in the national edition of *The Wall Street Journal* and in the *Orange County Register*.³

On November 22, 2008, and January 21, 2009, the Whites filed claims in the New Century bankruptcy case.⁴ On November 20, 2009, the Debtors’ chapter 11 plan was confirmed and Alan M. Jacobs was appointed as the Liquidating Trustee of New Century Liquidating Trust and Plan Administrator of New Century Warehouse Corporation (the “Trustee”).⁵

On August 13, 2010, the Trustee objected to the Whites’ claims as late filed and lacking merit. On November 10, 2010, the Whites filed an adversary proceeding against the Debtors (the “Adversary Proceeding”).⁶ The Bankruptcy Court consolidated the claim dispute and the Adversary Proceeding and on June 7, 2011, the Bankruptcy Court granted in part and denied in part the Trustee’s motion to dismiss the Whites’ complaint holding that “[a]t this stage of the proceeding, the Trustee has not met his burden of

¹ *Molly S. White and Ralph N. White v. Alan M. Jacobs, as liquidating trustee of the New Century Liquidating Trust*, Civ. No. 13-1719-SLR, 2014 WL 4100749 (D. Del.).

² *Id.* at *6.

³ *Id.* at *1.

⁴ *Id.*

⁵ *Id.* at *2.

⁶ *White v. New Century TRS Holdings*, Adv. No. 10-55357-BLS.

proving that publication in one national edition newspaper and one local newspaper is sufficient to meet due process requirements as applied to the Whites as unknown creditors.”⁷

Subsequently, in litigation between the Trustee and another “unknown” claimant who filed her claim after the bar date, the Bankruptcy Court entered an order holding that the publication of the bar date notice in the national edition of *The Wall Street Journal* and in the *Orange County Register* was constitutionally adequate to provide due process notice to the unknown creditor (the “Galope Decision”).⁸

On April 2, 2012, the Trustee filed a motion for an order consistent with the Galope Decision confirming that the publication of the bar date notice in *The Wall Street Journal* and in the *Orange County Register* satisfied the constitutional due process requirements for all unknown creditors (the “Global Constructive Notice Motion”).⁹ On May 23, 2012, the Bankruptcy Court held an evidentiary hearing on the Global Constructive Notice Motion. On August 30, 2013, the Bankruptcy Court entered the Constructive Notice Order, which provided that the publication of the bar date notice was “reasonably calculated, under the circumstances, to apprise interested parties nationwide of the bar date and afford them an opportunity to file claims.”¹⁰ The Constructive Notice Order provides that it “addresses only the sufficiency of the publication of the bar date notice as it applies to unknown creditors.”¹¹ The Whites appealed the Constructive Notice Order to the District Court.

The District Court Opinion

The District Court examined whether the notice to unknown creditors was sufficient to comply with due process requirements. Although the District Court did not definitively conclude that the publication notice was inadequate, it strongly suggested that the notice was insufficient before remanding the issue to the Bankruptcy Court by stating that the publication notice “likely was not reasonably calculated to apprise appellants of the bar date.”¹²

“An unknown creditor is one whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor].”¹³ Notice to parties in interest, such as creditors, is a fundamental requirement of due process; without notice to impacted parties, the finality of any proceeding is called into doubt.¹⁴ Whether notice is adequate depends on the circumstances of each case, and the notice provided must be reasonably calculated to make interested parties aware of the action and allow them the opportunity to protect their rights.¹⁵ In bankruptcy proceedings, lack of notice or inadequate notice precludes discharge of a creditor’s claim.¹⁶

Due process for unknown claimants may be satisfied by publication in national newspapers; however, “whether adequate notice has been provided depends on the circumstances of a particular case.... Due

⁷ *District Court Opinion*, at *2.

⁸ *Id.* at *2 (citing *In re New Century TRS Holdings, Inc., et. al.*, Case. No. 07-10416-BLS at D.I. 10725, 10726).

⁹ *Id.*, at *2.

¹⁰ *Id.* at *3.

¹¹ *Id.* at *3 (citing Constructive Notice Order at 11233 at 4-5 n.9, 15).

¹² *Id.* at *6.

¹³ *Id.* at *4 (internal quotes omitted).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

process requires notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”¹⁷

New Century did business throughout the United States and had more than a million borrowers.¹⁸ The District Court noted that the “Debtors were concerned about the potential for unknown claims asserted by former employees (unknown employee claims), but apparently did not consider their customers (borrowers) at all in connection with the question of notice.”¹⁹ In contrasting the facts of the *Wright* case, where the Third Circuit found notice to unknown creditors sufficient, the District Court noted that the debtors in *Wright* published the bar date notice in *The New York Times* twice, *The Wall Street Journal* twice, and *USA Today* twice, among other publications. In *Wright* there also was almost five months between the court order approving publication of the bar date notice and the bar date, whereas in New Century the time between the publication and the bar date was only thirty-nine days.²⁰

The District Court concluded “that the adequacy of the notice provided in this case has not been meaningfully explored and likely was not reasonably calculated to apprise appellants of the bar date. The [District Court] concludes that ‘[d]ue process affords a re-do’ under the circumstances of this case.”²¹ The District Court also stated that “[i]t strikes the [District Court] that, when the bar date is set so close to the publication date, debtors have a heavier burden to ensure that notice is widespread.”²² The District Court vacated the Constructive Notice Order and remanded the notice issue to the Bankruptcy Court for further proceedings consistent with the District Court Opinion.

Conclusion

Although publication notice is often how debtors provide constitutionally sufficient due process to unknown claimants, the District Court Opinion serves as a reminder that debtors must be diligent in how they determine when and where to publish notice of a claims bar date. In particular, as the District Court Opinion illustrates, it may be beneficial for a debtor to expend additional resources to provide more expansive notice tailored to all groups of unknown claimants, and to provide unknown claimants additional time to file claims prior to the bar date, rather than to risk being forced to “re-do” the notice process.

¹⁷ *Id.* at *4, citing *Wright v. Owens Corning*, 679 F.3d at 108 (quoting *Mullane*, 339 U.S. at 314, 70 S.Ct. 652) (internal quotes omitted).

¹⁸ The District Court found that the Bankruptcy Court did not commit any error in relying upon the testimony and declaration of the Debtors’ witness, Suzanne Uhland, to the extent Uhland explained why *The Wall Street Journal* and the *Orange County Register* were chosen as the publications to provide the bar date notice to unknown claimants.

¹⁹ *District Court Opinion*, at *6, citing *Wright v. Owens Corning*, 679 F.3d at 108.

²⁰ The District Court also expressed some concern that the single national publication of the bar date notice was in *The Wall Street Journal*, “a newspaper with national distribution, but not one – like *USA Today* – that necessarily enjoys a broad circulation among less than sophisticated, focused readers.” *Id.* at *6.

²¹ *Id.* at *6.

²² *Id.* at *6 n.8.

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