

OCT 04 2012

NOT FOR PUBLICATION

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	AZ-11-1581-DJuHl
)		
6	BRADLEY DEAN DIEPHOLZ and)	Bk. No.	10-22054-CGC
	KAREN LOUISE DIEPHOLZ,)		
7)	Adv. No.	11-00271-CGC
	Debtors.)		
8	_____)		
)		
9	BRADLEY DEAN DIEPHOLZ;)		
	KAREN LOUISE DIEPHOLZ,)		
10)		
	Appellants,)		
11)		
	v.)	M E M O R A N D U M ¹	
12)		
	WALTER ZAHLMANN; TWIN)		
13	ENTERPRISES CONSULTING,)		
)		
14	Appellees.)		
15	_____)		

Argued and Submitted on September 20, 2012
at Phoenix, Arizona

Filed - October 4, 2012

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Charles G. Case II, Bankruptcy Judge, Presiding

Appearances: _____
Donald J. Lawrence, Jr., Esq. for the Appellants,
Bradley and Karen Diepholz; Brian M. Blum, Esq. of
Rosenstein Law Group PLLC for the Appellees,
Walter Zahlmann and Twin Enterprises Consulting.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Before: DUNN, JURY, and HOULE,² Bankruptcy Judges.
2

3 The debtor appellants Bradley and Karen Diepholz (the
4 "Debtors") filed a motion (the "Motion") to dismiss the plaintiff
5 creditors' Walter Zahlmann ("Zahlmann") and Twin Enterprises,
6 LLC's (collectively, "Creditors") adversary proceeding seeking to
7 determine the nondischargeability of a default judgment debt
8 under § 523(a) of the Bankruptcy Code.³ The bankruptcy court
9 denied the motion to dismiss. The Debtors appeal the denial of
10 their dismissal motion, and the motions panel granted leave to
11 hear the interlocutory appeal. We VACATE and REMAND for further
12 findings consistent with this memorandum decision.
13

14 I. FACTS

15 The too few facts before the Panel which are relevant in
16 this appeal tempt us to compare this case to the fates of certain
17 star-crossed parties for whom the question ultimately to be
18 decided was – "What is in a name?"

19 The Debtors filed a chapter 7 bankruptcy petition on
20 July 14, 2010. The Debtors' bankruptcy counsel at all relevant
21 times was Donald J. Lawrence, Jr. ("Lawrence"). The bankruptcy
22 filing apparently was precipitated by the Debtors' desire to
23

24 ² Hon. Mark D. Houle, Bankruptcy Judge for the Central District
25 of California, sitting by designation.

26 ³ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil
Rules."

1 preempt a wage garnishment order in the first of two Arizona
2 state court collection cases pending against them. In the first
3 case, Lawrence filed a notice of bankruptcy for the Debtors on
4 July 30, 2010.⁴ The second of the two state cases is the
5 Creditors' action filed in 2008 seeking to collect from the
6 Debtors on a default judgment which Creditors obtained in April
7 2006 against Logo Lines Corporation for allegedly knowingly
8 presenting a check with no intention of payment.⁵ The adversary
9 proceeding underlying this appeal seeks an exception to discharge
10 for fraud based on the 2006 default judgment against Logo Lines
11 Corporation.

12 The misadventure truly begins for our purposes when the
13 Debtors' name was misspelled as "Diepholtz" on the Debtors'
14 chapter 7 petition. On July 15, 2010, the bankruptcy court sent
15 a notice of the meeting of creditors to all scheduled creditors,
16 not including the Creditors, which showed October 18, 2010, as
17 the bar date ("Bar Date") for filing objections to discharge.

18 Neither the Creditors nor their counsel in the state
19 litigation were included on the original mailing matrix. On
20 August 12, 2010, the Debtors filed an amended petition to correct
21 the misspelling of the Debtors' name, an amended Schedule F, as

23 ⁴ Appellees cite to the dockets of these state court cases for
24 the notice of bankruptcy at tabs 3 and 4 of "Appellee's
25 Supplemental Excerpts of Record," but no such supplemental record
26 was ever filed on the appeal docket. However, the allegation
27 that such a notice was filed in the first state court case is
28 never disputed anywhere in the record.

⁵ Creditors allege that the Debtors own Logo Lines Corporation,
a contention which the Debtors vehemently contest.

1 well as an amended mailing matrix, which included Creditors⁶ and
2 their attorney, Mayes Telles, PLLC.⁷ Despite the amendment and
3 Lawrence's alleged notification of the corrected name to the
4 Clerk of Court, the caption of the case was not changed in the
5 court's electronic records to reflect the correct spelling of the
6 Debtors' name until June 15, 2011.⁸ Lawrence alleges that on
7 August 12, 2010, the same day that the amended documents were
8 filed, Lawrence's firm sent notice of the bankruptcy bearing the
9 correct spelling of the Debtors' name by mail to Creditors and
10 Mayes Telles, PLLC. For reasons unexplained in any declaration
11 in the record, a certificate of notice for these mailings was not
12 filed by Debtors' counsel until January 6, 2011.

13 On August 20, 2010, Zahlmann sent an email directly to
14 Mr. Ehringer ("Ehringer"), the Debtors' state court counsel in
15 the collection case, offering to settle and informing Ehringer
16 that Zahlmann's address had changed. Ehringer notified Mr. Blake
17 Mayes ("Mayes"), Creditors' state court attorney, that Zahlmann
18 had contacted Ehringer directly and that Ehringer had not read
19 the email because the communication was improper since Zahlmann
20

21 ⁶ With the address: c/o Twin Enterprises Consulting, 4236 E.
22 Whitney Lane, Phoenix, AZ 85032.

23 ⁷ With the address: 331 North First Avenue, St. 107, Phoenix,
24 AZ 85003.

25 ⁸ The bankruptcy court's Under Advisement Decision notes that
26 because the amendment was titled, "Amendment to Petition," the
27 Clerk's Office did not automatically review the filing and make
28 the appropriate change, but the bankruptcy court made no specific
finding regarding Lawrence's allegation that the Clerk's Office
was specifically informed of the name change.

1 was represented. Further, Ehringer asked if Ehringer should
2 delete the email, to which Mayes responded that Ehringer should
3 delete the email. Ehringer alleges that because he never read
4 and immediately deleted the email, Ehringer never saw Zahlmann's
5 notification of a new address. The only fact explicitly disputed
6 by the parties at the hearing before the bankruptcy court appears
7 to be whether Creditors actually received the August 12, 2010
8 corrected notice with the Debtors' name correctly spelled.

9 On August 10, 2010, Ehringer emailed Mayes saying that, "I
10 have been told that Mr. and Mrs. Diepholz have filed bankruptcy,
11 but I have not seen any paperwork to confirm that filing." Mayes
12 alleges that beginning on August 22, 2010, and on subsequent
13 occasions, Mayes "conducted research on PACER," to locate the
14 Debtors' filing, but could not find any information. On
15 August 25, 2010, Mayes asked Ehringer by email for the name of
16 the Debtors' bankruptcy counsel, but Ehringer did not immediately
17 respond.

18 Neither Ehringer nor Mayes communicated again as to the name
19 of the Debtors' bankruptcy counsel until October 11, 2010, when
20 Mayes requested further information about the bankruptcy because
21 Mayes allegedly still could not find any information about the
22 Debtors' bankruptcy on PACER. On October 11, 2010, the same day,
23 and seven days before the Bar Date, Ehringer provided Lawrence's
24 name to Mayes in response to Mayes' email request. Ehringer
25 alleges that Ehringer did not feel it was necessary to respond to
26 the earlier August 25, 2010 request for bankruptcy counsel's name
27 because Ehringer believed that Mayes and Lawrence were in direct
28 contact after Ehringer was advised by Lawrence on

1 September 4, 2010, that notice of the bankruptcy was sent to
2 Mayes.

3 Mayes emailed Ehringer on October 25, 2010, eight days after
4 the Bar Date, asking for "[a]ny word on bankruptcy," to which
5 Ehringer responded that the bankruptcy assuredly had been filed
6 and provided not only Lawrence's name, but also Lawrence's email
7 address, "teamlaw_don@teamlawaz.com." However, in the same
8 October 25, 2010, email, Ehringer sympathized with Mayes' hard
9 luck in his name search for the Debtors' bankruptcy filing
10 admitting that, "I just don't know how to run a PACER search,
11 since I got the same results that you did." Finally, on
12 October 27, 2010, Lawrence emailed Mayes advising Mayes of the
13 bankruptcy case number.

14 On February 7, 2011, Creditors filed an adversary complaint
15 seeking an exception to discharge for their claim. On March 11,
16 2011, Debtors filed a motion to dismiss ("Motion to Dismiss") the
17 complaint for failure to file the complaint timely under
18 Rule 4007(c). On June 9, 2011, the bankruptcy court heard
19 argument from counsel for both parties on the Motion to Dismiss
20 and took the matter under advisement. On July 18, 2011, the
21 bankruptcy court issued its Under Advisement Decision Denying
22 Motion to Dismiss Complaint ("Under Advisement Decision"),
23 finding that Creditors lacked adequate notice of the bankruptcy
24 case and timely filed the complaint under Rule 4007(b). On
25 August 17, 2011, the bankruptcy court issued its Order Denying
26 Defendants' Motion to Dismiss.

27 On August 1, 2011, Debtors filed a Motion for
28 Reconsideration of the bankruptcy court's decision on the Motion

1 to Dismiss, which the bankruptcy court denied by order entered on
2 October 6, 2011.

3 On October 18, 2011, Debtors filed their Notice of Appeal of
4 the denial of their Motion to Dismiss. On December 30, 2011, the
5 Clerk of the Bankruptcy Appellate Panel issued an order requiring
6 appellants either to file a written response explaining why the
7 Panel has jurisdiction given the interlocutory nature of the
8 denial of a motion to dismiss, or file a motion for leave to
9 appeal. On January 12, 2012, Debtors filed a Motion for Leave to
10 Appeal, which was granted by the motions panel on February 9,
11 2011.

12 **II. JURISDICTION**

13 The bankruptcy court had jurisdiction under 28 U.S.C.
14 §§ 1334 and 157(b)(2)(I). The Panel has jurisdiction under
15 28 U.S.C. § 158.

16 **III. ISSUES**

17 Did the bankruptcy court fail to make sufficient findings of
18 fact and conclusions of law on the question of whether the
19 mailbox rule applies to impute receipt of notice by the
20 Creditors.

21 Did the bankruptcy court err when it held that failure to
22 comply with Rule 1005 implicates § 523(a)(3)(B) and Rule 4007(b),
23 where there is a misspelling of debtor's name in the court's
24 records.

25 Did the court err when it held that a properly scheduled
26 creditor without proper notice may file a complaint pursuant to
27 section § 523(a)(3)(B) at any time.

1 which require the bankruptcy court to find the facts specifically
2 and state its conclusions of law separately. In the absence of
3 sufficient fact findings, the Panel may vacate a decision and
4 remand the case to the bankruptcy court to make further findings.
5 First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First
6 Yorkshire Holdings, Inc.), 470 B.R. 864, 871 (9th Cir. BAP
7 2012)(citing United States. v. Ameline, 409 F.3d 1073 (9th Cir.
8 2005)).

9 V. DISCUSSION

10 A. The bankruptcy court failed to make specific findings
11 of fact and conclusions of law on the question of
12 whether the mailbox rule applies to impute receipt of
notice by Creditors.

13 In this case, the "rule of law" governing the mailbox rule
14 for notice is articulated by the Panel's decision in Cuna Mut.
15 Ins. Group v. Williams (In re Williams), 185 B.R. 598
16 (9th Cir. BAP 1995). The Williams Panel made clear that, "Proof
17 of mailing creates a rebuttable presumption of its receipt."
18 Id. at 599 (citing In re Bucknum, 951 F.2d at 206-07; Osborn v.
19 Ricketts (In re Ricketts), 80 B.R. 495, 497 (9th Cir. BAP 1987)).
20 Further, "the law in this circuit is that denial of receipt does
21 not rebut the presumption." In re Bucknum, 951 F.2d at 207;
22 In re Ricketts, 80 B.R. at 497. The Ricketts court reasoned
23 that, "If a party were permitted to defeat the presumption of
24 receipt of notice resulting from the certificate of mailing by a
25 simple affidavit to the contrary, the scheme of deadlines and bar
26 dates under the Bankruptcy Code would come unraveled." Id. at
27 497.

28 Although an affidavit alleging nonreceipt alone is not

1 sufficient to defeat the presumption, such an affidavit should be
2 considered along with other submitted evidence. Williams,
3 185 B.R. at 600. In order to overcome the presumption, specific
4 objective evidence showing nonreceipt is required. Id. For
5 example, the Williams Panel suggested several kinds of evidence
6 that could defeat the presumption including "testimony of a
7 clerk's office employee that notice was not sent" (citing
8 Ricketts, 80 B.R. at 489-99), or proof that the mail was returned
9 unclaimed (citing Herndon v. De la Cruz (In re De la Cruz),
10 176 B.R. 19, 22 (9th Cir. BAP 1994)). The Williams Panel held
11 that evidence of a party's business routine regarding receipt of
12 mail is merely another form of a statement of nonreceipt which
13 may not, by itself, defeat the presumption. Id.

14 Because we review a fact determination as to whether notice
15 was adequate for clear error, we must determine whether the
16 evidence considered by the bankruptcy court supports a finding
17 that Creditors did not have adequate notice of the Debtors'
18 bankruptcy. Specifically, the factual question before the
19 bankruptcy court was whether Creditors put forward sufficient
20 evidence to overcome the receipt presumption of the alleged
21 August 12, 2010, mailing of notice bearing the correct spelling
22 of the Debtors' name (the "Corrected Notice"). Since the
23 bankruptcy court did not make any reference to the mailbox rule
24 or the cases governing the presumption of notice receipt in its
25 Under Advisement Decision, nor in its final order denying the
26
27
28

1 Motion to Dismiss,⁹ it is unclear from the record whether, or to
2 what degree, the bankruptcy court considered the Corrected Notice
3 or the nonreceipt of the Corrected Notice alleged by Creditors.

4 However, at oral argument on the Motion to Dismiss, the
5 bankruptcy court acknowledged that "we have a mailbox-rule
6 problem," noting that the reason for the mailbox rule is to avoid
7 "an unfortunate circumstance when you have a he said she said."
8 Tr. of June 9, 2011 H'ring 144:4-11.

9 Lawrence argued to the bankruptcy court that the certificate
10 of service confirming the Corrected Notice should be sufficient
11 evidence of receipt because both the Debtors' name and the
12 addresses of Creditors, as well as their attorney, were correct
13 at the time of mailing despite any possible move by Creditors
14 "around the same time" of the notice.¹⁰ Tr. of June 9, 2011
15 H'ring 137:3-4, 8-9. LaShawn Jenkins, bankruptcy counsel for
16 Creditors, argued that despite Mayes Telles having standard mail
17 handling procedures, Mayes Telles never received the Corrected

18
19 ⁹ The Order Denying the Motion to Dismiss incorporates the
20 findings and conclusions of law from the Under Advisement
21 Decision.

22 ¹⁰ Lawrence conceded that Zahlmann's attorney Mayes, but not
23 Zahlmann himself, may have put forward sufficient evidence
24 supporting nonreceipt of the August 20, 2010, notice by
25 describing Mayes' firm's mail handling procedures. Tr. of
26 June 9, 2011 H'ring 137:5-8. As noted above, this evidence by
27 itself may not be sufficient to overcome the presumption. See
28 Williams, 185 B.R. at 600. Further, Lawrence conceded that
although creditors have a duty to file a change of address in
order to receive notices after a move, "[Zahlmann's move] may
actually be the reason why Mr. Zahlmann never received the notice
that we mailed out because he did move." Tr. of June 9, 2011
H'ring 148:6-11.

1 Notice. Tr. of June 9, 2011 H'ring 144:18-19.

2 In declining to make oral findings on the record at the
3 hearing, the bankruptcy court cited the fact intensive nature of
4 the case and the court's intent to take the matter under
5 submission for a later ruling. Tr. of June 9, 2011 H'ring 148:23-
6 25 - 149:1-2. No findings with respect to application of the
7 mailbox rule were made subsequently in the bankruptcy court's
8 Under Advisement Decision. Because defeating the presumption of
9 receipt requires specific objective evidence of nonreceipt,
10 additional findings are necessary to clarify the record for
11 review.

12 It is clear from the Under Advisement Decision that the
13 bankruptcy court found that notice was inadequate because of the
14 misspelling of Debtors' name in the original petition and court
15 records.¹¹ However, it is unclear whether the bankruptcy court
16 intended to find that Creditors or their attorney never received
17 adequate notice via the alleged Corrected Notice with the correct
18 spelling of the Debtors' name. The Panel could infer a finding
19 from the bankruptcy court's silence that the presumption was
20 rebutted as to the Corrected Notice being received by either the
21 Creditors or their attorneys. However, the lack of any reference
22 at all to the mailbox rule and related findings in the Under
23 Advisement Decision makes that inferential leap inappropriate.

24 We note that a bankruptcy court's failure to make factual
25 findings as required by Civil Rule 52(a) does not require
26 vacating and remand unless a full understanding of the issues

27

28 ¹¹ See infra Section B of the Discussion.

1 under review is not possible without the aid of such findings.
2 See Simeonoff v. Hiner, 249 F.3d 883, 891 (9th Cir. 2001). Here,
3 it is not clear without further findings from the bankruptcy
4 court whether the Corrected Notice gave adequate notice to the
5 Creditors of the Debtors' bankruptcy filing. Had the bankruptcy
6 court made a determination that either Creditors or their
7 attorney had received actual or presumptive notice with the
8 correct spelling of the Debtors' name, then the bankruptcy
9 court's holding based on Rule 1005 would be moot with respect to
10 whether the misspelling in the court's records failed to provide
11 adequate notice in and of itself. Accordingly, we VACATE the
12 denial of the Motion to Dismiss and REMAND to the bankruptcy
13 court for further proceedings and findings of fact.

14 B. Whether failure to comply with Rule 1005 implicates
15 § 523(a)(3)(B) and Rule 4007(b) where there is
16 misspelling of debtor's name in court records.

17 1. Bankruptcy Court's Holdings

18 The bankruptcy court found that the Debtors' name was
19 misspelled on the original petition and court records, and
20 therefore Creditors' attorney could not find the Debtors'
21 bankruptcy filing on PACER using only the Debtors' name as a
22 search criterion. The bankruptcy court held that notice was
23 inadequate to allow for Creditors to file a timely objection to
24 discharge, triggering § 523(a)(3)(B) because the PACER searches
25 by name failed, and Creditors' attorney did not receive the case
26 number until October 27, 2010.

27 The bankruptcy court further held, despite Creditors' filing
28 of the adversary complaint on February 7, 2011, 103 days after
the October 27, 2010, actual notice date, that because

1 Rule 4007(b) governing complaints under § 523(a)(3)(B) allows for
2 filing at any time, the Creditors' complaint should not be
3 dismissed as untimely. The bankruptcy court reasoned that the
4 burden was on the Debtors to provide notice because the Debtors
5 were in the best position to spell their name correctly on the
6 petition.

7 Finally, despite the correction of the Debtor's name in the
8 amended petition, because the Debtors' own negligence caused the
9 failed PACER searches, the bankruptcy court held that the harm
10 resulting from the lack of notice should not be held against the
11 Creditors.

12 2. Ellet v. Stanislaus

13 To support its holding, the bankruptcy court relied
14 primarily on the reasoning in Ellet v. Stanislaus, 506 F.3d 774
15 (9th Cir. 2007), a case of first impression in the Ninth Circuit.
16 In Ellet, the California Franchise Tax Board ("FTB") was
17 scheduled as a creditor and actually received notice by mail of
18 the debtor's bankruptcy filing. However, although the debtor's
19 name was spelled correctly, the last four digits of the debtor's
20 social security number ("SSN") were misstated on the notice. The
21 Ellet court held that the notice was inadequate because the
22 debtor's identity could not be discovered without undue burden to
23 the FTB, thereby preventing the taxing authority from timely
24 filing a claim for the debtor's delinquent taxes. Id. at 778,
25 781.

26 Ellet turned on evidence showing that when the FTB searched
27 for the debtor's incorrect SSN in the FTB's own databases, an
28 incorrect record of another person showing no tax liability was

1 found instead of the debtor's tax records. Id. at 776.
2 Therefore, although the FTB arguably could have used the debtor's
3 name as a cross-reference to find the debtor's tax records by
4 using a labor intensive alternative process, the FTB was unable
5 to identify the debtor correctly until after the bar date. Id.
6 Rule 1005 is implicated under Ellet's reasoning because that rule
7 imposes a duty on the debtor to provide correct identifying
8 information, including name and SSN, to creditors receiving
9 notice so that the creditors can discover the debtor's true
10 identity without independent investigation.¹² Id. at 781. A
11 failure to list correct identifying information on a petition
12 fails "to notify creditor about the relevance of the bankruptcy
13 proceeding to some of its claims." Id. (citing In re Anderson,
14 159 B.R. 830, 837-38 (Bankr. N.D. Ill. 1993)). Specifically, the
15 Ellet court reasoned that placing the burden on the debtor to
16 provide correct identifying information under Rule 1005 was
17 reasonable where "[r]equiring a creditor to ferret out a debtor's
18 correct identity when incorrect identifying information is

20
21 ¹² Rule 1005 states the following:

22 The caption of a petition commencing a case under the
23 Code shall contain the name of the court, the title of
24 the case, and the docket number. The title of the case
25 shall include the following information about the
26 debtor: name, employer identification number, last four
27 digits of the social security number, any other federal
28 tax identification number, and all other names used
within six years before filing the petition. If the
petition is not filed by the debtor, it shall include
all names used by the debtor which are known to the
petitioners.

1 provided would be overly burdensome and inappropriate."

2 Id. at 781.

3 In reasoning in Ellet that the burden should be on the
4 debtor to give correct identifying information to the FTB, the
5 court distinguished other cases supporting the debtor's position
6 in which notice was found sufficient even though errors existed
7 in the notice "because in each [case] the creditor was aware of
8 the debtor's identity." Id. at 779. In fact, the Ninth Circuit
9 distinguished a case where, though the debtor's name was
10 misspelled in the caption of the petition, the creditor learned
11 of the bankruptcy independently of the petition. Id. at 779-80
12 (citing Lagniappe Inn of Nashville, Ltd. v. Washington Nat'l Ins.
13 Co. (In re Lagniappe Inn of Nashville, Ltd.), 50 B.R. 47, 50
14 (Bankr. M.D. Tenn. 1985)). Similarly, a case finding adequate
15 notice was distinguished on the ground that the identity of the
16 debtor was not truly at issue in that case because, even though
17 the creditor was not listed at all in court documents and
18 received no notice by mail, the creditor was informed of the
19 bankruptcy by the debtor's attorney. Ellet, 506 F.3d at 780
20 (citing Zidell, Inc. v. Forsch (In re Coastal Alaska Lines,
21 Inc.), 920 F.2d 1428, 1431 (9th Cir. 1990)). Inquiry notice
22 alone was sufficient in Coastal Alaska Lines to defeat the
23 creditor's due process based notice challenge where the creditor
24 received some information about the existence of bankruptcy
25 proceedings of a known debtor. Coastal Alaska Lines, 920 F.2d at

1 1431.¹³

2 Thus, the Ellet court distinguished between cases where the
3 creditor could discover who the debtor was, and what claims the
4 creditor had against that debtor, without burdensome searching of
5 its records, from cases like the one before the Ellet court where
6 the creditor needed to perform a burdensome search through the
7 creditor's own records merely to figure out if the creditor had
8 any claims against the debtor described in the notice.

9 There are three steps to the notice analysis: first, whether
10 a party can identify the debtor based on receipt of notice;
11 second, whether there has been actual notice based on the
12 information exchanged and conduct of the parties; and third,
13 after actual notice is received, whether there was enough time to
14 file a complaint or a motion for extension. Ellet addresses only
15 the first part of the analysis where a notice actually had been
16 provided.¹⁴

17 Given the Ellet court's emphasis on knowledge of the
18 debtor's identity, it would be difficult to argue that Ellet
19 stands for the proposition that a creditor does not have adequate
20 notice of a bankruptcy filing when the creditor is aware of the
21

22
23 ¹³ Not only a scheduled creditor, but even "an unscheduled
24 creditor with actual notice of the bankruptcy has the burden to
25 inquire as to the bar date for filing a nondischargeability
26 complaint." Manufacturers Hanover v. DeWalt (In re Dewalt),
107 B.R. 719, 721 (9th Cir. BAP 1989)(citing In re Alton, 64 B.R.
221, 224 (Bankr. M.D. Fla. 1986)), rev'd on other grounds,
961 F.2d 848 (9th Cir. 1992).

27 ¹⁴ See infra Section C of the Discussion with respect to
28 timing.

1 debtor's identity and that a bankruptcy case has been filed
2 despite having little information about the bankruptcy case,¹⁵
3 including not knowing the bar date.

4 Here, the undisputed facts in the record show that the only
5 notice which was ever possibly sent to Creditors or their
6 attorneys in advance of the Bar Date was the Corrected Notice
7 allegedly sent by Lawrence's office on August 12, 2010. This
8 conclusion is supported by the undisputed fact that the Creditors
9 and their attorney did not receive the only other notice ever
10 sent, which was the court's initial notice of the bankruptcy
11 case, sent before the Corrected Notice. On the record before us,
12 subject to findings as to application of the mailbox rule, as
13 discussed supra, we cannot conclude that the bankruptcy court
14 clearly erred in the factual findings supporting its conclusion
15 that Creditors were not provided with sufficient notice before
16 the Bar Date to make them aware that the Debtors in fact had
17 filed a bankruptcy case.

18 C. Whether a scheduled creditor without proper notice may
19 file a complaint pursuant to § 523(a)(3)(B) at any
20 time.

21 Even an unscheduled or unlisted creditor who has either
22 received formal notice or gains actual knowledge of the
23 bankruptcy case has an "obligation to take timely action to
24 protect [its] claim." Lompa v. Price (In re Price), 871 F.2d 97,
25 99 (9th Cir. 1989)(reasoning that "[t]he statutory language [of

26 ¹⁵ Dewalt, one of the cases on which Ellet relies, turned on
27 whether there was adequate time to file a complaint after
28 sufficient notice was given, not whether there was sufficient
notice as such. Ellet, 506 F.3d at 778.

1 § 523(a)(3)(B)] clearly contemplates that mere knowledge of a
2 pending bankruptcy proceeding is sufficient to bar the claim of a
3 creditor who took no action, whether or not that creditor
4 received official notice from the court of various pertinent
5 dates.”)(internal citations omitted). In Price, a creditor whose
6 counsel received actual notice of the debtor’s bankruptcy filing
7 58 days before the bar date and failed to file an exception to
8 discharge complaint or a motion for extension before the bar date
9 deadline passed was held to have failed to object timely to
10 discharge under Rule 4007(c).¹⁶ Id. at 99.

11 In Dewalt, the 9th Circuit laid out the parameters for the
12 timely filing of a complaint after actual notice, stating that
13 there is a 30-day presumptive minimum time for a creditor to file
14 a complaint or request an extension by motion unless, in an
15 extreme case, the creditor intentionally refrained from filing a
16 complaint. Dewalt, 961 F.2d at 851. The creditor in Dewalt was
17 not included in the schedules as a creditor but was listed with
18 an inaccurate address in the debtor’s Statement of Intent. Id.
19 at 849. Notice of the debtor’s bankruptcy filing was not given
20

21 ¹⁶ Rule 4007(c) provides that:

22 A complaint to determine the dischargeability of any
23 debt pursuant to § 523(c) of the Code shall be filed
24 not later than 60 days following the first date set for
25 the meeting of creditors held pursuant to § 341(a). The
26 court shall give all creditors not less than 30 days
27 notice of the time so fixed in the manner provided in
28 Rule 2002. On motion of any party in interest, after
hearing on notice, the court may for cause extend the
time fixed under this subdivision. The motion shall be
made before the time has expired.

1 to the creditor until "the secretary for the debtor's counsel
2 telephoned the office of the creditor's counsel and left a
3 cryptic message with the secretary that the debtor had previously
4 filed for bankruptcy," only seven days before the bar date. Id.
5 The Ninth Circuit reversed this Panel's determination that the
6 creditor's complaint to except its debt from the debtor's
7 discharge was untimely, having been filed approximately 140 days
8 after the bar date, holding that requiring a creditor in such
9 circumstances to file a motion for extension before the bar date
10 ran would "unfairly punish[] creditors, holding them to the
11 highest standards of diligence in a situation caused by
12 negligence of the debtor, and rewarding the debtor, in effect,
13 for negligent filing." Id. at 850.

14 In dicta, the Ninth Circuit stated in Dewalt that, "In no
15 event . . . could the reasonable time period contemplated by
16 section 523(a)(3)(B) be greater than the 80 days advance notice a
17 properly scheduled creditor will ordinarily receive." Id. at 851
18 n.4.¹⁷ That statement is interesting in light of the fact that
19 the holding in Dewalt effectively blessed as timely an exception
20 to discharge complaint filed approximately 140 days after the
21 creditor was notified of the debtor's bankruptcy filing, as noted
22 above. As discussed at oral argument, a "bright line" deadline
23 of 80 days to file an exception to discharge or a denial of
24

25
26 ¹⁷ The suggested eighty-day maximum time assumes that
27 ordinarily, creditors will receive at least twenty days' notice
28 in advance of the § 341(a) meeting, with sixty days following the
meeting date set as the bar date for the filing of
nondischargeability complaints.

1 discharge complaint once notice is received by the creditor does
2 not necessarily make sense in light of the reality that the
3 § 341(a) meeting that triggers the 60-day deadline under
4 Rule 4007(c) often is scheduled and noticed more than twenty days
5 after the bankruptcy filing date.

6 Synthesizing the reasoning of Price and Dewalt leads to the
7 conclusion that once a creditor gains actual notice of a
8 bankruptcy, such notice triggers a deadline by which the creditor
9 must protect its rights or its claim will be subject to
10 discharge. Under Dewalt, a minimum 30-day deadline is
11 presumptively reasonable, and the application of some deadline
12 also is presumed, but no particular outside deadline is mandated.

13 Rule 4007(b) specifies no time limit for an unlisted
14 creditor without notice under § 523(a)(3)(B) to file a
15 nondischargeability complaint. In Ellet, the Ninth Circuit did
16 not address Rule 4007. However, in Ellet, the FTB was scheduled
17 as a creditor, but its claim was determined not subject to the
18 claims bar date, so it can be inferred from Ellet's outcome that
19 the fact that the FTB was scheduled as a creditor had no effect
20 on the allowance or discharge of its claim in the absence of
21 effective due process notice.

22 The Debtors argue chiefly that the distinction between
23 § 523(a)(3) applicable to unlisted creditors and § 523(c)(1)
24 applicable to listed creditors is "not merely technical."
25 Appellants' Opening Brief at p. 12 (citing McGhan v. Rutz,
26 288 F.3d 1172, 1181 (9th Cir. 2002)). Instead, the Debtors
27 contend that the Bankruptcy Code and Rules place the burden on
28 scheduled creditors without notice to file a motion for extension

1 of time to file a complaint once they become aware of a debtor's
2 bankruptcy, which Creditors did not do.

3 In rebuttal, Creditors argue that "the code does not seem to
4 contemplate the situation where a claimant is listed on the
5 schedule of liabilities, but yet does not receive notice of the
6 bankruptcy filing." Appellees' Brief at p. 11. For support,
7 Creditors cite a concurrence in In re Bucknum in which Judge
8 O'Scannlain opined that "[t]he Bankruptcy Code and Rules
9 themselves articulate no appreciable distinction between
10 scheduled and unscheduled creditors for purposes of determining
11 what constitutes sufficient notice of the filing deadline for
12 nondischargeability complaints. If Congress had intended to make
13 such a distinction, it certainly could have done so." Appellee's
14 Brief at pp. 11-12 (quoting In re Bucknum, 951 F.2d at 209-10
15 (O'Scannlain concurring)). Creditors also offer several cases
16 from bankruptcy courts in other circuits, but chiefly
17 In re Lyman, where the court reasoned that "when a creditor is
18 omitted from the matrix, that creditor is not 'scheduled' within
19 the meaning of 523(a)(3)(B)." Appellee's Brief at p. 13;
20 In re Lyman, 166 B.R. 333, 337 (Bankr. S.D. Ill. 1994).

21 While the bankruptcy court did not explicitly find that
22 Creditors received actual notice at the latest via Mayes on
23 October 27, 2010, when Lawrence sent Mayes the bankruptcy case
24 number by email, that fact was not disputed, and the bankruptcy
25 court reported that fact in its Under Advisement Decision.

26 The bankruptcy court ultimately held that Creditors did not
27 receive adequate notice because Creditors could not access PACER
28 records by name. Therefore, the complaint fell under

