Bankruptcy Rule 7004(h) after Espinosa: A Timely Distinction between Constitutional and Statutory Service

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I. Introduction

In a contested matter or adversary proceeding, Federal Rule of Bankruptcy Procedure 7004(h) sets forth the requisites for service on an “insured depository institution.” Subject to three exceptions, a motion or complaint must be served by certified mail on an officer of these statutorily defined institutions. In a Chapter 13 case, a debtor may attempt to strip-off a wholly unsecured junior mortgage via a motion under § 506(a) pursuant to Rule 3012, a plan provision in accordance with § 1322(b)(2), an adversary proceeding, or some combination. This article focuses on how a debtor’s failure to satisfy Rule 7004(h) affects the validity of a valuation and strip-off order, judgment, or plan provision in light of the Supreme Court’s decision in United Student Aid Funds, Inc. v. Espinosa. By recognizing the frequently obscured distinction between the statutory (i.e., rule-based) and constitutional standards of due process, Espinosa effectively limits the legal consequences of noncompliance with Rule 7004(h): Failure to serve in accordance with Rule 7004(h) affects the validity of a valuation and strip-off order, judgment, or plan provision in light of the Supreme Court’s decision in United Student Aid Funds, Inc. v. Espinosa. By recognizing the frequently obscured distinction between the statutory (i.e., rule-based) and constitutional standards of due process, Espinosa effectively limits the legal consequences of noncompliance with Rule 7004(h): Failure to serve in accordance with Rule 7004(h) enjoys the mortgagee to relief from a valuation and strip-off order prior to plan confirmation, but only constitutionally defective service can render a confirmed plan void for lack of due process pursuant to Federal Rule of Civil Procedure 60(b).

II. Threshold Issues

Before construing Rule 7004(h), two ambiguities need be resolved. First, under the Rules, it remains unclear whether valuation and strip-off actions should be classified as contested matters, adversary proceedings, or something else entirely. If such juridical events are neither adversary proceedings nor contested matters, Rule 7004(h) will not apply. Therefore, whether the definition of a contested matter in Rule 9014 or of an adversary proceeding in Rule 7001 includes them is a critical threshold question. Second, to discern the effect of Espinosa on the application of Rule 7004(h), four due process concepts must be defined and distinguished: (1) constitutional service and (2) notice, versus (3) statutory service and (4) notice.

A. Defining a Contested Matter

Valuation and strip-off must be either a contested matter or an adversary proceeding to be governed by Rule 7004(h). Regrettably, Rule 7001 enumerates ten types of adversary proceedings—including any “proceeding to determine the validity, priority, or extent of a lien or other interest in property”—but makes no mention of an action to value a lien or the property securing one. Even so, a handful of courts define such a request as an adversary proceeding to which Rule 7004(h) expressly applies. Far more courts have concluded that valuation and lien stripping commence a contested matter subject to Rule 9014 and, by partial incorporation, Rule 7004. Yet, even some of these courts concede, Rule 9014 does not actually define the term “contested matter” or include even one example. This vacuum has inspired a few courts to exempt valuation and strip-off from Rule 7004(h) entirely.
Convincingly utilizing two distinct lines of reasoning, a majority of courts have concluded that valuation and strip-off is a contested matter subject to Rule 7004. The reason most often cited for this categorization is “the sort of relief at issue when secured claims are valued.” When the claim allowance process determines that a claim is wholly unsecured, that creditor’s lien will be deemed void pursuant to § 506(d). Lien stripping of even a wholly unsecured junior mortgage inevitably impacts the creditor’s property interest, and success is certain to compromise the creditor’s interest in real property. Because “real property interests are implicated and may be impaired”, valuation is an intrinsically contested matter.

Other cases focus on the Advisory Committee Note to Rule 9014: “Whenever there is an actual dispute, other than an adversary proceeding … the litigation to resolve that dispute is a contested matter.” The phrase “actual dispute” has a well-established meaning in the context of justiciability jurisprudence: an actual dispute arises when the interests of two parties are “adverse,” and “adverse” interests exist “if opposition is known or reasonably foreseeable.” Under the Bankruptcy Rules, a timely filed proof of claim constitutes prima facie evidence of the validity and amount of a secured claim. A request to strip off that lien attacks either (or both) the validity or amount of the secured claim based on the value of the collateral. A putative lienholder’s opposition to lien stripping is predictable, engaging an actual dispute and hence a contested matter.

In sum, a majority has coalesced around one interpretation: Valuation and lien stripping is a contested matter generated by Rule 9014 and hence subject to the requirements of due process embodied in Rule 7004.

B. Constitutional and Statutory Notice and Service

Due process incorporates two concepts—notice and service—each of which has discrete constitutional and statutory dimensions. Because a property interest is at stake in lien stripping, a mortgagee has constitutional due process rights guaranteed by the Fifth Amendment, but the Rules compel a debtor to meet higher standards for both notice and service. Understanding the differences between service and notice under the Rules and between these minimums and the Constitution’s own is necessary to accurately discerning the legal consequences of a Rule 7004(h) violation.

The Supreme Court announced the modern constitutional standards for service and notice in Mullane v. Central Hanover Bank. Under Mullane, “notice” must be “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.” Constitutional notice has both a qualitative—“The notice must be of such nature as reasonably to convey the required information”—and a quantitative aspect— “[I]t must afford a reasonable time for those interested to make their appearance.” Distinguishable from notice, service must “in itself [be] reasonably certain to inform those affected.” Although they are often achieved by the same means, as a constitutional matter, notice and service are doctrinally separate due process requirements.

More obviously than Mullane, the Rules distinguish between notice and service by lodging the standards for each in separate provisions. Rule 9014(a) requires only that “reasonable notice and opportunity for hearing shall be afforded to the party against whom relief is sought.” Most courts determine whether “reasonable notice” has been delivered by adopting the Mullane standard: Adequate notice is “notice reasonably calculated to make the party aware of the impact confirmation will have on the creditor’s rights and must provide reasonable time in which the creditor can respond.” The quantitative aspect of the notice requirement will always be satisfied by a debtor’s adherence to Rule 2002 and, by virtue of 11 U.S.C.A. § 102(1)(B), a district’s negative notice policy (if one has been adopted). Its qualitative minimum will be met if sufficient information is included in the motion or plan, such as “the name of the creditor,” “the subject real property,” a “legal description of the property,” and unequivocal statements regarding the debtor’s intent to strip-off the junior mortgage and his
or her alleged lack of equity. In effect, per Rule 2002 as widely interpreted, the statutory and constitutional standards for notice have been merged into a single test.

By its terms, Rule 9014(b) does not subject service in a contested matter to a reasonableness standard similar to the one articulated in *Mullane*. Instead, it compels service in compliance with Rule 7004. Precisely because they are governed by discrete rules, notice must be treated differently from service in bankruptcy. Notice pursuant to Rule 2002 will not excuse failure to serve as required by Rule 7004; the latter alone dictates the type of service to which a creditor is entitled. Because notice and service are “different (but related) concepts” that may be “accomplished in different (but similar) manners,” insufficient service deprives a mortgagee of statutory due process regardless of a debtor’s fidelity to *Mullane’s* more discretionary standard.

III. Interpretation of Rule 7004(h) After *Espinosa*

A. Need for a Strict Reading

Pursuant to Rule 7004(a), Rule 7004(h) governs service on an insured depository institution in “a contested matter or adversary proceeding.” The Rule requires service “by certified mail addressed to an officer of the institution” with three exceptions:

(1) [t]he institution has appeared by its attorney, in which case the attorney shall be served by first-class mail;

(2) [t]he court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first-class mail sent to an officer of the institution designated by the institution; or

(3) [t]he institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

With rules, as with statutes, plain and unambiguous language controls. Not only does “the text of a rule … limit[] judicial inventiveness” but modern precedent frowns upon the invocation of “generalized equitable pronouncements” to prevent the “harsh” results of applying a clear rule or statute. Arguably, Rule 7004(h) is ambiguous in at least two respects. It offers no clarity whether service upon a specifically named officer rather than to an unnamed president is sufficient or whether the filing of a proof of claim or a request for special notice is an appearance. Still, two conditions—certified mail addressed to an officer of the institution—are stated with unmistakable precision.

As courts have recognized, the unique roots of Rule 7004(h) reveal a clear purpose and bolster the case for strict construction. Unlike most federal rules, Rule 7004(h) did not originate in a Judicial Conference rules committee or undergo the time-tested, multiple stages of formal comment and review through which a rule normally passes prior to becoming effective pursuant to the Rules Enabling Act (“REA”). Though it has an historical antecedent, in its current iteration Rule 7004(h) represents one of Congress’ rare forays into the rulemaking process. Enacted with the admitted purpose of forcing courts to employ a higher standard of service on insured depository institutions in bankruptcy cases, Rule 7004(h) was designed to replace the prior “liberal service of process Rule,” which had “only require[d] that service be achieved by first class mail.” In so doing, Congress rejected the objections posed by the Judicial Conference of the United States regarding Rule 7004(h)’s potential unworkability, its “substantial and unnecessary costs to the debtor’s estate,” and Congress’ unwarranted interference with the REA’s “formal rule-making process.”
The implications of this history are obvious. First, Rule 7004(h) is more like a statute than many federal rules, consciously designed without a discretionary “reasonable” standard like that embedded in Rule 9014(a) or as articulated in Mullane. Second, it represents a clear legislative command to courts and litigants not to excuse deviations from its two unequivocal minimums. Although courts should not presume that amendments to the Rules alter preexisting bankruptcy practices absent a clear indication from Congress, unambiguous legislative history may legitimately support that conclusion. Rule 7004(h)’s history does so.

### 1. Flaws in Rule 7004 Jurisprudence

Notwithstanding these principles, courts have often departed from the explicit text when interpreting Rule 7004, focusing instead on the traditional objectives of constitutional due process: to establish personal jurisdiction and ensure a defendant “has had service reasonably calculated to give him actual notice of the proceedings.” For example, it has been said that once a creditor has filed a proof of claim, a creditor has implicitly consented to service to the addressee and address listed therein, and, in addition, “there is no need to be concerned that the failure to perfect service of process … has left the court without personal jurisdiction.” Most courts embracing this view deal with Rule 7004(b)(3), not Rule 7004(h), but this emphasis on the flexible, essential demands of due process has influenced the construction of Rule 7004(h), a result seen as logical by many. Based on the foregoing history and the text of Rule 7004(h), two flaws taint this purposive approach.

First, these courts have relied upon the asserted purposes of constitutional due process, as famously formulated in Mullane, to excuse a debtor’s noncompliance with the technical yet crystal clear legislative decree in Rule 7004(h). Rule 7004(h), however, is plain and not ambiguous as to the need for certified mailing to an institution’s officer. Although it may seem hyper-technical to punish a debtor for noncompliance when a mortgagee has received actual notice, the explicit terms of Rule 7004(h) foreclose judicial dispensation for even innocent oversights.

Second, and more significantly for purposes of understanding Espinosa’s import, these cases confuse the analytically distinct tests for constitutional and statutory due process in bankruptcy. Constitutional due process only “calls for such procedural protections as the particular situation demands.” To meet this fluid standard, delivery of actual notice and the creation of personal jurisdiction by other means will nearly always suffice. Yet, this flexibility has no place in construing the statutory requirements for service in Rule 7004 because its bare text does not allow for any readjustment based on traditional discretionary standards such as reasonableness, cause, or fairness. Mullane and its progeny do, as does Rule 9014(a) with its “reasonable notice” standard, but Rule 7004(h) does not, its meaning is not subject to amelioration in equity’s name.

### 2. Personal Jurisdiction: Confusing Constitutional and Statutory Due Process

This analysis reveals the misunderstanding underlying one common critique of Espinosa: By deciding that a violation of a procedural rule did not void a judgment, the Court arguably “overrul[ed], sub silentio, all of the case law holding that failure to serve a party does not create personal jurisdiction.” True, personal jurisdiction requires constitutional service, but service in accordance with a procedural rule that erects a higher standard is not required to affect personal jurisdiction. So long as constitutionally minimum service occurred—and in Espinosa, the creditor had actual notice—a court has personal jurisdiction over any party, including a creditor that was not served pursuant to Rule 7004(h). Only if Rule 7004(h) allowed service on the same terms permitted by constitutional due process would a violation of either of its explicit service commands deprive a bankruptcy court of personal jurisdiction over the mortgagee. Unlike many jurisdictional rules and state statutes, Rule 7004(h) was not so written.

### B. Statutory and Constitutional Service Objections Post-Espinosa

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In bankruptcy, the confirmation of a Chapter 13 plan is a critical moment, as a confirmed plan has res judicata effect. Legally equivalent to a final judgment, once an order has been entered and the deadline for appeal has passed, a bankruptcy court may only invalidate that order in accordance with Rule 60(b). Rule 60(b)(4) permits relief from void judgments, and a denial of constitutional due process renders a judgment void. Although Espinosa dealt with Rule 7001, the principle it endorsed applies with equal force to Rule 7004(h): Service (and notice) of a plan provision can satisfy constitutional due process even if a debtor failed to follow Code or Rule procedural requirements. Nevertheless, though the deprivation of “a right granted by a procedural rule” will not amount to a constitutional due process violation, this deprivation of statutory due process still entitles a creditor to “timely object[... and appeal[ from an adverse ruling on its objection.” In essence, Espinosa attaches a temporal limitation on the reach of Rule 7004(h), grounding the decision in the longstanding distinction between statutory and constitutional due process.

Pre-confirmation, a creditor has four potential due process objections under Espinosa: (1) imperfect service pursuant to Rule 7004(h); (2) notice inadequate under Rules 9014 and 2002; (3) constitutionally insufficient service; or (4) constitutionally deficient notice. If a constitutional defect can be proven, the creditor need not establish a statutory violation. Absent constitutionally defective notice or service, if a debtor fails to comply with Rule 7004(h)’s two plain conditions, a valuation or strip off motion or complaint or confirmation of a plan with such a provision must still be denied. Generally, the burden of proving service in accordance with Rule 7004(h) is on the debtor.

Post-confirmation, a mortgagee cannot expect to unravel the plan based only in improper notice and/or service under Rule 2002 and/or Rule 7004(h). After confirmation, the mortgagee has only two due process arguments at its disposal: (1) service or (2) notice inadequate under the Due Process Clause. Many cases prior to Espinosa held that a violation of Rule 7004(h) was sufficient to void a judgment pursuant to Rule 60(b)(4). In part due to continued conflation of the constitutional and the statutory standards for service, courts continue to equate a failure to comply with Rule 7004(h) with a failure to meet the constitutional minimum for service. Correctly read, Espinosa bars this merged due process scrutiny, for it establishes that only a violation of constitutional due process rights, as defined by Mullane, will void a confirmation order under Rule 60(b)(4). Actual notice sent to an address listed on a proof of claim should satisfy the constitutional minimum.

1. Another Espinosa Fix: The Problem Presented by § 1330
Espinosa briefly addresses another controversy: Whether the application of Rule 60(b) via Rule 9024 to Chapter 13 cases is barred by § 1330(a) post-confirmation. Section 1330(a) imposes a 180-day limit for a party to seek revocation of a confirmation order “procured by fraud.” A number of courts have held that § 1330 trumps Rule 9024 and leaves a creditor with only this fraud-based argument for relief from a confirmation order. Rather than directly delving into this dispute, Espinosa makes a telling observation: the limits in § 1330 are deemed “not jurisdictional.” This recognition allows one to harmonize Rule 60(b) with § 1330(a) for two reasons. First, as Rule 60(b)(4) permits the voiding of a judgment for a jurisdictional infirmity that no statute can excuse, § 1330(a) cannot provide “the complete substantive basis for all motions for revocation of confirmed Chapter 13 Plans.” Its limit is not jurisdictional, it cannot deprive any court of the ability to overturn an order or judgment due to a lack of constitutional due process, a requirement not subject to obviation by any statute. Second, because “a void order has no legal effect and is treated as if it never existed,” a judgment void pursuant to Rule 60(b) for a lack of due process must logically be regarded as having never issued. Consequently, as a matter of law, if no more than constitutionally defective service occurred, no confirmation order exists; in such cases, the order necessary to trigger the application of § 1330(a) has never been. By virtue of a footnote, then, Espinosa affirms the availability of two routes for overturning a confirmed plan: Rule 60(b)(4) and § 1330.
IV. Conclusion

Accepted canons of construction require that Rule 7004(h) be strictly construed. Pre-confirmation, a court should not grant a valuation and strip-off motion or confirm a plan with such a clause if the wholly unsecured junior mortgagee was not served as mandated by Rule 7004(h). Upon confirmation, this statutory due process objection loses its dispositive legal significance: If the mortgagee received constitutionally sufficient service, service deficient under Rule 7004(h) will not alone upset a confirmed plan. Despite persistent confusion of constitutional and statutory due process, this outcome is required by Espinosa and the plain language of Rule 7004(h). As in much of law, for creditors with a cognizable Rule 7004(h) objection, time is of the essence.

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Footnotes

1. Unless otherwise noted, “Rule” and “Rules” refer to the Federal Rules of Bankruptcy Procedure in this article.

2. Fed. R. Bankr. P. 7004(h). This category includes most national banks and hence most mortgagees in bankruptcy cases. A list of such banks can be found at http://research.fdic.gov/bankfind/.


9. Because any rule promulgated pursuant to 28 U.S.C.A. § 2075 has the force and effect of federal statutory law, service and notice standards established by the Rules can be characterized as a form of statutory due process.


12. “It is important to recognize … that stripping off a lien is simply a result that flows under § 506(d) from the valuation of the allegedly unsecured mortgage.” In re Millspaugh, 302 B.R. 90, 98 (Bankr. D. Idaho 2003); see also Bennett v. Springleaf Fin. Servs. (In re Bennett), 466 B.R. 422, 438 (Bankr. S.D. Ohio 2012).


18. In re Millspaugh, 302 B.R. at 97-98 (collecting cases); 10 Collier on Bankruptcy ¶7001.3(1) (15th ed. 1999).

See Dickey v. Beneficial Fin. (In re Dickey), 293 B.R. 360, 364 (Bankr. M.D. Pa. 2003) (allowing a debtor to void an unsecured junior mortgage via a plan so long as adequate notice has been given without regard to a debtor’s compliance with Rule 7004).


In re Millspaugh, 302 B.R. at 101.


Fed. R. Bankr. P. 9014, Advisory Committee Note; see also In re Dinubilo, 177 B.R. 932, 941 n.15 (E.D. Cal. 1993) (citing committee notes).

Black’s Law Dictionary 943 (9th ed. 2009).


In re Boykin, 246 B.R. at 828-29 & 828 n.5.


Mullane, 339 U.S. at 314.

Mullane, 339 U.S. at 314.

Mullane, 339 U.S. at 315.


In re Boykin, 246 B.R. at 828.


See In re Boykin, 246 B.R. at 828-29.

In re Fiorilli, 196 B.R. 83, 86 (Bankr. N.D. Ohio 1996); In re Stogsdill, 102 B.R. 587, 588 (Bankr. W.D. Tex. 1989). Section 102 has been described as “founded in fundamental notions of procedural due process” and in the same terms as notice in the Mullane line of cases. Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus.), 43 F.3d 714, 721 (1st Cir. 1994).

In re King, 290 B.R. at 649.


Fed. R. Bankr. P. 9014(b); In re Nowling, 279 B.R. at 611; In re Bennett, 312 B.R. at 848.


Welzel v. Advocate Realty Ins., LLC (In re Welzel), 275 F.3d 1308, 1318 (11th Cir. 2001); see also New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 91-92 (2d Cir. 2003).


In re Hamlett, 322 F.3d at 346. Courts are “not required to interpret a statute in such a narrow fashion as to defeat what … [they] conceive to be its obvious and dominating general purpose.” United States v. DuBose, 598 F.3d 726, 731 (11th Cir. 2010) (internal quotation marks omitted); see also United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000).


Congress has rarely enacted legislation that expressly amends a bankruptcy rule; in 1994, with Rule 7004(h), it did. The Bankruptcy Rulemaking Process, 70 Am. Bankr. L.J. at 265-66. The rarity of this congressional action makes this history unusually significant.


139 Cong. Rec. S707-09; see also Fleet Credit Card Servs. v. Tudor (In re Tudor), 282 B.R. 546, 551 n.8 (Bankr. S.D. Ga. 2002) ("Rule 7004(h) has been criticized for putting an undue burden on debtors[,]"").


See Jacobo, 477 B.R. at 539 (relying on In re Hamlett, 322 F.3d at 346); PNC Mortg. v. Rhiel, Nos. 2:10-CV-578, 2:10-cv-579, 2011 WL 1043949, at *4-5 (S.D. Ohio Mar. 18, 2011); In re Hamlett, 322 F.3d at 346; In re Banks, 299 F.3d at 302.


Gambill v. Consumer Recovery Assocs. (In re Gambill), 477 B.R. 753, 762 (Bankr. E.D. Ark. 2012) (holding that the same interpretation as to Rule 7004(b) logically applies to construction of Rule 7004(h)); see also In re Eimers, 2013 WL 1739645, at *1 n.10 (same).


Espinosa, 559 U.S. at 272.

See Section II.B.


Omni Capital, 484 U.S. at 104.
David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 Fordham L. Rev. 17 (1987) (“Typically, the legislature or the state court of last resort has declared that the statute was intended to be interpreted as broadly as possible—to go to the limits of due process—thus limiting jurisdiction only to the extent required by the Constitution.”).

See *Hope v. Acorn Fin., Inc.*, 731 F.3d 1189, 1194 (11th Cir. 2013); *Burnett v. Burnett (In re Burnett)*, 646 F.3d 575, 581 (8th Cir. 2011).

Fed. R. Civ. P. 60(b).


In re Lankous, 990 F.2d at 162.

See *Espinosa*, 559 U.S. at 272.

Espinosa, 559 U.S. at 272 (emphasis added).


In re Zimmerman, 276 B.R. 598, 603 (Bankr. C.D. Ill. 2001).


Espinosa, 559 U.S. at 276; *Jacobo*, 477 B.R. at 540-41.

Espinosa, 559 U.S. at 270 n.9.


Espinosa, 559 U.S. at 270 n.9.

In re Miller, 428 B.R. at 796.


