SERVING A SUMMONS BY FIRST CLASS MAIL: WHY BANKRUPTCY RULE 7004(b)(1) VIOLATES DUE PROCESS*

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Even though it has been accepted and widely used throughout the nation for thirty-five years by courts, practitioners, and commentators, the service method of delivering a summons and complaint solely by first class mail under Bankruptcy Rule 7004(b)(1) violates due process. Bankruptcy court jurisdiction was vastly expanded after the bankruptcy rules first authorized service by first class mail. This expansion fundamentally changed the nature of bankruptcy proceedings for which mail service could be made. Basing the legitimacy of something on the sole ground that it has been in existence for a long time without being changed is unconvincing logic and standing alone, does not legitimize Bankruptcy Rule 7004(b)(1). Because a summons carries out the dual purpose of providing notice to a defendant and conferring personal jurisdiction over a defendant by a bankruptcy court, the Supreme Court's mailings jurisprudence does not support the constitutionality of delivering a summons by first class mail. Under Mullane*'s analytical framework, inquiry into the expectations of defendants is appropriate because the intended beneficiary of both the Fifth and Fourteenth Amendments is the recipient of the process, not the sender or the summoning court. Defendants simply do not expect to be sued through a delivery method as informal as first class mail. In addition, service by first class mail creates proof of service problems and produces uncertainty over the defendant's receipt of the summons, resulting in questions over the legitimacy of the bankruptcy court's jurisdiction over the defendant. Consequently, delivery by first class mail under Bankruptcy Rule 7004(b)(1) should be eliminated and replaced with the acknowledgment procedure contained in Rule 4(d) of the Federal Rules of Civil Procedure.*

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INTRODUCTION

Methods of serving process in civil cases have both evolved and eroded. In medieval England, arrest of the defendant was common at the outset of civil actions at law.[1] Although arrest certainly provided notice, its primary purpose was to accomplish the court's assertion of physical power over the defendant.[2] Eventually, arrest at the commencement of a civil action was deferred.[3] Arrest was then replaced with subjection to the court's power by personal delivery of process,[4] which served as the foundation for one modern service method where a United States Marshal personally hands the summons to a defendant.[5]

The idea that only a governmental officer, such as a United States Marshal or deputy, could be the server was eventually abandoned in favor of allowing the server to be any person that is at least eighteen years old and not a party to the lawsuit.[6] Even the requirement that a defendant personally receive the summons was diluted by the addition of an alternative method allowing a summons and complaint to be left at the defendant's "dwelling or usual place of abode with someone of suitable age and discretion who resides there."[7]

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1. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *345; 1 GEORGE CROMPTON, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 56 (Baker John Sellon ed., New York, Gould, Banks & Gould 1st Am. Ed., 1813) (1780). For a more detailed explanation of the evolution of service of process in England, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1568 (2002) ("In practice, indeed, arrest became the *initial* form of process to compel the defendant's appearance in all three of the superior courts."); Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1189–91 (1987) ("Through a course of statutory enactments from 1267 to 1503, arrest at the outset of an action became the norm in virtually all civil actions at law.").

2. Sinclair, *supra* note 1, at 1189 ("Although arrest obviously performed a notice-giving function, a principal purpose of the procedure was to assert the court's power over the defendant."); Richard S. Miller, *Implementing Current Theories of Jurisdiction, Venue and Service of Process—Proposals for Revision of the Ohio Statutes*, 29 OHIO ST. L.J. 116, 119 (1968) (stating that "the court's jurisdictional authority rested upon physical power over the defendant"); Nelson, *supra* note 1, at 1570 ("In personal actions, then, a common-law court could proceed to judgment against a defendant only if the defendant either actually appeared or at least was given a valid command to appear, and was thereby brought within the court's power."); *see also* McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person.").

3. *See* ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 77 (1952); Sinclair, *supra* note 1, at 1188–90.

4. Sinclair, *supra* note 1, at 1190.

5. *See id.* at 1190–91; FED. R. CIV. P. 4(c)(3), (e)(2)(A).

6. *See* FED. R. CIV. P. 4(c)(2).

7. FED. R. CIV. P. 4(e)(2)(B).

From the recipient's[8] perspective, the summoning court's assertion of power has gradually worn away. As one expert in the field aptly described:

> The awesome impact of the sheriff arriving in armor and on horseback to deliver a writ in medieval England and the authority of the sovereign sealed in the hot, red wax of earlier times has been replaced by a bland manila envelope carrying a postage stamp that may celebrate notions of love or poetry.[9]

Although most modern service methods are welcome improvements to those of earlier years (i.e., not needing to arrest all defendants in every civil action), this Article argues the service method authorized by Rule 7004(b)(1) of the Federal Rules of Bankruptcy Procedure violates a defendant's due process rights under the Fifth Amendment.[10] Rule 7004(b)(1) allows a summons and complaint to be served by "first class mail postage prepaid . . . to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession."[11] There is no acknowledgement of receipt, no certified mailing, and no waiver document that must be signed and returned. Other than the defendant's response,[12] if any, there is no way to know whether the defendant received the summons and complaint.

Rule 7004(b)(1) is not a rare rule that is infrequently used. It applies in adversary proceedings.[13] For a twelve month period ending on March 31, 2010, there were 64,747 adversary proceedings filed throughout the United States.[14] Although first class mail is only one of several alternate methods

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8. Use of the word "recipient" instead of "defendant" is intentional because one modern service method deems service upon someone other than the defendant effective as to the defendant. *Id.* If the underlying policy is that someone close to a defendant, such as a person who resides at the defendant's dwelling and is of suitable age and discretion, will tell the defendant about the summons, then the impact of the service method on the non-defendant recipient should be considered.

9. Sinclair, *supra* note 1, at 1188–89.

10. U.S. CONST. amend. V.

11. FED. R. BANKR. P. 7004(b)(1).

12. For example, a defendant can respond by filing a responsive pleading or motion. FED. R. BANKR. P. 7012(a) (providing defendant with thirty days, subject to change by the court, to file a responsive pleading); FED. R. BANKR. P. 7012(b) (incorporating FED. R. CIV. P. 12(b)-(i) in adversary proceedings).

13. FED. R. BANKR. P. 7001.

14. U.S. BANKRUPTCY COURTS, ADVERSARY PROCEEDINGS COMMENCED, TERMINATED, AND PENDING UNDER THE BANKRUPTCY CODE DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2009 AND 2010 1, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/F08Mar10.pdf.

of service allowed in adversary proceedings,[15] for cases involving defendants who are individuals,[16] Rule 7004(b)(1)'s minimal cost, time savings, and ease of compliance presumably results in it being the favored service method.

The name "adversary proceeding" is deceiving because it implies something less than a full-blown lawsuit or action. However, an adversary proceeding does not involve contested matters that can merely be raised and resolved by motion,[17] and includes much more than the routine notices associated with the filing and administration of a bankruptcy case.[18] An adversary proceeding is a separate lawsuit[19] that is related to[20] an original bankruptcy case and has all of the attributes of a conventional federal lawsuit.[21] Adversary proceedings are governed by Part VII of the Federal Rules of Bankruptcy Procedure, and many, but not all, of the Federal Rules

15. Bankruptcy Rule 7004 incorporates portions of Rule 4 of the Federal Rules of Civil Procedure and, in addition to serving by first class mail, provides alternative methods of service. *See* FED. R. BANKR. P. 7004(b), (e)–(f).

16. Service of upon a defendant who is a domestic or foreign corporation; an officer or agency of the United States; the United States trustee; a state, local, or other governmental organization; or the debtor in bankruptcy is governed by a different rule and is outside the scope of this Article. *See* FED. R. BANKR. P. 7001(b)(3)–(10).

17. *See* FED. R. BANKR. P. 9014(a) ("In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.") An adversary proceeding is different than a contested matter. Contested matters are routine disputes, such as disagreements over a creditor's proof of claim filed in the debtor's bankruptcy, and are generally resolved by motion pursuant Rule 9014(a) of the Federal Rules of Bankruptcy Procedure. Notably, Rule 9014(b) provides that a motion in a contested matter must be served in the manner provided for service of a summons and complaint in Rule 7004. *See* FED. R. BANKR. P. 9014(b).

18. Examples of routine notices to creditors include the notice that a bankruptcy petition has been filed, the time and location of the meeting of creditors, the proposed sale, use or lease of property of the estate, and the deadline to file a proof of claim. *See* Henry E. Hildebrand, III, *Getting Noticed: The New Notice Requirements of Section 342*, 13 AM. BANKR. INST. L. REV. 533, 534–35 (2005).

19. *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451–52 (2004).

20. 28 U.S.C. § 157(a) (2006). Federal district courts may refer any or all cases under title 11 and any or all *proceedings* arising under title 11 or arising in or related to a case under title 11 to bankruptcy courts. The tag-along personal jurisdiction of bankruptcy courts is extremely broad: "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(d)(1) (2006). Interestingly, many adversary proceedings applying state law would fail to satisfy the jurisdictional requirement of the federal courts because of the lack of diversity of citizenship and no federal question other than the adversary proceeding's relationship to a bankruptcy case. *See* 28 U.S.C. § 1334(b) (2006).

21. *See Hood*, 541 U.S. at 451–52.

of Civil Procedure are adopted and incorporated therein.[22] A formal summons and complaint are required, and an answer may be filed.[23]

Rule 7004(b)(1)'s applicability is expanded by Bankruptcy Rule 7004(d), which allows service by first class mail to anywhere in the United States.[24] Courts have allowed in personam jurisdiction over non-resident defendants so long as the defendants have sufficient contacts with the United States.[25] Thus, a hypothetical seller in New York who supplied materials to a buyer in New York can be summoned and forced to appear before a bankruptcy court located in California because the buyer's home office is in California and that is where the buyer filed bankruptcy. No minimum contacts with the state of California are required. The contact need only be with the United States. The combination of the broad scope of matters that can be adjudicated through an adversary proceeding,[26] along with nationwide service of process, results in commonly occurring notice and service scenarios that raise grave due process concerns.

This Article begins by showing, in Part I, that the establishment of first class mail as an alternate service method occurred before the vast expansion of bankruptcy court jurisdiction, both as to subject matter and nationwide personal jurisdiction. This timing illustrates that the drafters of Rule 7004(b)(1)'s predecessor did not and could not have realized the full implications of allowing service of a summons and complaint by first class mail. Part II evaluates the various reasons why Rule 7004(b)(1) violates due process. For example, two federal circuit cases that are repeatedly cited by courts across the United States as support for the constitutionality of Rule 7004(b) are questioned. This Article then evaluates the Rule under the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*,[27] and considers the reasonable expectations of defendants. The so-called remedy of vacating or setting aside a default judgment is examined.

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22. *See, e.g.*, FED. R. BANKR. P. 7002–7005, 7016, 7018, 7020, 7055, 7056, 7065.

23. *See* FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3 stating that filing the complaint commences the legal action), 7004(a)(1) (incorporating FED. R. CIV. P. 4(c)(1), which requires a copy of the complaint to be served with the summons), and 7007 (incorporating FED. R. CIV. P. 7, which outlines the pleadings that are allowed, including an answer).

24. FED. R. BANKR. P. 7004(d) ("The summons and complaint and all other process except a subpoena may be served anywhere in the United States.").

25. *In re* Celotex Corp., 124 F.3d 619, 629–30 (4th Cir. 1997) (noting that "when an action is in federal court on 'related to' jurisdiction, the sovereign exercising authority is the United States, not the individual state where the federal court is sitting"); Gen. Am. Commc'ns Corp. v. Landsell, 130 B.R. 136, 160 (Bankr. S.D.N.Y. 1991) ("The 'minimum contact test,' applied to a State and a defendant, has no relevance here because . . . § 1334 provides us with 'federal question' jurisdiction.").

26. *See* discussion *infra* Part I.D.

27. 339 U.S. 306, 314–15 (1950) (establishing the test of reasonableness under the circumstances).

Proof of service problems are discussed and a comparison to service by mail under the Federal Rules of Civil Procedure is made. The Article concludes in Part III, by recommending a two-part solution to revise the rule. First, service by first class mail under Rule 7004(b)(1) should be eliminated. Second, Rule 7004(b)(1) should adopt and incorporate the acknowledgment procedure contained in Rule 4(d)(1) of the Federal Rules of Civil Procedure.

I. BACKGROUND ON BANKRUPTCY RULE 7004(b)(1)

This part of the Article reviews the historical promulgation and amendments to Rule 7004(b)(1) and its predecessors.[28] The timing of significant expansions to bankruptcy court jurisdiction is highlighted to show that when first class mail was originally inserted into the rule, its applicability was very limited. Examples of the broad scope of adversary proceedings are provided to show the types of actions to which Rule 7004(b)(1) is currently applied.

A. Constitutional and Congressional Authority of Bankruptcy Rule 7004(b)(1)

The "bankruptcy clause" of the Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[29] Congress has intermittently used this authority to enact, repeal and amend various bankruptcy acts since the year 1800.[30] In 1964, Congress authorized the Supreme Court to prescribe the rules of practice and procedure in cases under the bankruptcy code, with the following limitation: "Such rules shall not abridge, enlarge, or modify any substantive

28. *See, e.g.*, Windsor Commc'ns Grp. Inc. v. Grant, 75 B.R. 713, 730 (Bankr. E.D. Pa. 1985) (noting that under the Bankruptcy Act of 1898, "the courts' jurisdiction was an obvious limitation to the exercise of that power. Moreover, the courts of bankruptcy had jurisdiction only over 'summary' matters; 'plenary' proceedings had to be instituted in a state or federal court with an independent jurisdictional basis"); Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COM. L.J. 383, 384–89 (2005).

29. U.S. CONST. art. I, § 8, cl. 4.

30. The first American Bankruptcy Act was enacted in 1800. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (amended in 1801 and 1802, then repealed in 1803). Congress passed the second Bankruptcy Act in 1841. Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843). The third Bankruptcy Act was enacted in 1867. Bankruptcy Act of 1867, ch.176, 14 Stat. 517 (repealed 1878). The fourth Bankruptcy Act was enacted in 1898. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed in 1978 after significant amendments). The Bankruptcy Act of 1898 was repealed and replaced with the Bankruptcy Law Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. For a history of federal bankruptcy legislation, see generally 1 COLLIER ON BANKRUPTCY §§ 20.01–.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

right."[31] The Supreme Court noted later that it would be an "impermissible effect" for a bankruptcy rule to preclude a person from exercising a statutory right.[32] Obviously the same reasoning is even more compelling when applied in the context of a bankruptcy rule precluding a person from exercising a constitutional right, such as due process of law.

Prior to the promulgation of the Federal Rules of Bankruptcy Procedure, the General Orders in Bankruptcy and Official Forms adopted by the Supreme Court governed bankruptcy procedure.[33] The admirable efforts, struggles, and historical accounts of the members of the Advisory Committee on Bankruptcy Rules and the Standing Committee on Rules of Practice and Procedure are detailed elsewhere.[34] Even though the statutory

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31. Act of Oct. 3, 1964, Pub. L. No. 88-623, § 1, 78 Stat. 1001, 1001 (codified as amended at 28 U.S.C. § 2075 (2006)).

32. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 454 (2004). Interestingly, the 1964 version of 28 U.S.C. § 2075 stated: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." § 1, 78 Stat. at 1001. This sentence was intentionally removed in 1978 to make clear that the Federal Rules of Bankruptcy Procedure may not supersede title 11 of the U.S. Code. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(d), 92 Stat. 2549, 2685; H.R. REP. NO. 95-595, at 449 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6405; S. REP. NO. 95-989, at 157–58 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5943–44.

33. Lawrence P. King, *The History and Development of Bankruptcy Rules*, 70 AM. BANKR. L.J. 217, 218 (1996). For an example, see Amendments to General Orders in Bankruptcy & the Official Forms, 368 U.S. 1044 (1961).

34. *See* King, *supra* note 33, at 219–33 (providing a detailed treatment of the bankruptcy rulemaking process from the perspective of one of the members and associate reporters of the Advisory Committee on Bankruptcy Rules). An example of the efforts of committee members is illustrated by the November, 1964, Meeting Minutes of the Advisory Committee on Bankruptcy Rules:

> Discussion was held on whether the Committee can, by the rule that superseded Section 18 of the Bankruptcy Act, authorize registered or certified mail as a general mode of service. There was a variety of opinions on this subject: that the mail would be sufficient for service of a writ; that in involuntary bankruptcy cases certified mail was not sufficient; that we should not stray from the Federal rules; that if some form of mail is going to be permitted for bankruptcy, then it should be used generally under the Civil Rules; that the existing draft is inadequate inasmuch as it calls for personal service or publication and does not recognize other ways of service; that the Committee develop Civil Rule 4 by supplementing it to add service by certified mail. The Committee was in agreement that it needs to deal with extraterritorial service of process in supplemental rules because FRCP doesn't handle the extraterritorial service of process either as to the involuntary petition in bankruptcy or as to a controversy which may be heard by the bankruptcy court. Professor Kennedy stated he thought he had the views of the Committee in mind and that he would draft alternate rules on this subject for presentation at the next meeting.

ADVISORY COMM. ON BANKR. RULES, MINUTES OF THE NOVEMBER 1964 MEETING 4–5 (Nov. 18, 1964), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/BK11-1964-min.pdf. The minutes from the Advisory Committee's other meetings are can be found at *Minutes of Rules Committee Meetings*, U.S. CTS., http://www.uscourts

obligation to promulgate bankruptcy rules was placed on the Supreme Court; it is unlikely the Court gave the proposed rules the same review and consideration that was given to appellate opinions.[35]

B. *The Inception of Former Rule 704 and Amendments to Rule 7004(b)(1)*

In 1973, the Supreme Court prescribed Rule 704(c), the initial predecessor to the present Rule 7004.[36] Rule 704(c)(1) provided that service could "be made by any form of mail requiring a signed receipt" upon an individual by mailing a copy of the summons, complaint, and notice of trial to his dwelling house or usual place of abode or to the place where he regularly conducts his business or profession.[37] The minutes from the Advisory Committee's meeting in 1966 show that the committee debated and discussed whether personal service or mailing was appropriate:

> Judge [Elmore] Whitehurst asked if the rule gave the petitioning creditor the option, in serving an involuntary petition on a local respondent, to serve him by mail rather than by personal service. Professor [Frank R.] Kennedy answered affirmatively. Judge Whitehurst said it bothered him that service by mail could be made if service by a United States marshal could be had. Professor Kennedy said that was [a] matter for the Committee to consider. He said that he was building into Rule 7.4 a set of priorities whereby service there would be by personal service or by mail and by publication under 7.4(e) only if neither mail service nor personal service was possible. . . . He stated that there was no discrimination between service by mail and personal service in Rule 1.7.2 as it was drafted. Mr. [George M.] Treister said that he thought the Committee agreed that service by return-receipt mail was just as good as personal

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.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx (last visited June 21, 2011).

35. *See* Order, Bankruptcy Rules and Official Bankruptcy Forms, 411 U.S. 989, 994 (1973) (Douglas J., dissenting). Justice Douglas opposed the adoption of a bankruptcy rule that gave referees power to cite and punish for contempt, stating:

> I would not extend the contempt power to bankruptcy referees. Perhaps I am wrong. But that issue has never been considered, debated, or voted upon by this Court. The Court is merely the conduit for the Rules. It does not purport to approve or disapprove. As I have said on other like occasions, it has merely placed its imprimatur on the Rules without reading, let alone discussing, these Rules. ... [F]or most of these Rules I do not have sufficient insight and experience to know whether they are desirable or undesirable. I must, therefore, disassociate myself from them.

Id.

36. *Id.* at 1069–71; *see also id.* at 991–92 (1973) (approving the Bankruptcy Rules and authorizing the Chief Justice to transmit rules to Congress).

37. *Id.* at 1069.

> service by marshal, because service by marshal just meant that he left the summons at the house; it did not mean that the person served received it. He also felt that many times it took longer for service when it was done by the marshal. Judge [Elmore] Whitehurst said that he had his answer, and if no one else was concerned, he wouldn't pursue the matter.[38]

At the time of the above-quoted 1966 committee meeting, personal service was made by the United States Marshal Service.[39]

In 1976, the signed receipt requirement was eliminated and the rule was amended to allow "[s]ervice of summons, complaint, and notice of trial or pre-trial conference [to] also be made within the United States by first-class mail postage prepaid."[40] The Advisory Committee Note to the 1976 Amendment explained:

> First Class mail postage prepaid is substituted for mail requiring a signed receipt as the authorized mode of making service by mail in the United States. Experience with the provision requiring a signed receipt has been unsatisfactory. Although the defendant's correct address is used for mailing, the defendant is often unavailable to the delivering postman, either to sign or to refuse delivery. First-class mail suffices for service pursuant to Rule 5(b) of the Federal Rules of Civil Procedure and for many other purposes.[41]

The Advisory Committee's reference to Rule 5 of the Federal Rules of Civil Procedure merits explanation. Like the current version of Rule 5, the version of Rule 5 at the time of the Advisory Committee's note eliminated the acknowledgement requirement for every pleading "subsequent to the original complaint."[42] For an initial summons and complaint, Rule 5 never allowed service by mail without also requiring the defendant to sign and return an acknowledgement.[43] Thus, the Advisory Committee's reference to Rule 5(b) as a basis to support first class mail was erroneous, because the

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38. ADVISORY COMM. ON BANKR. RULES, MINUTES OF THE OCTOBER 1966 MEETING 17–18 (Oct. 31, 1996), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/BK10-1966-min.pdf.

39. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 618–22 (1978); *see also* Sinclair, *supra* note 1, at 1198 (stating that the United States Marshal Service had become burdened by serving process by 1978).

40. Bankruptcy Rule 704(c), as amended, 425 U.S. 1129, 1131 (1976). For an example of the then new rule being applied, see *In re* Park Nursing Center, Inc., 766 F.2d 261, 262–64 (6th Cir. 1985).

41. Windsor Commc'ns Grp. Inc. v. Grant, 75 B.R. 713, 736–37 (Bankr. E.D. Pa. 1985) (quoting 1976 Advisory Committee Note to Rule 704 Amendment).

42. FED. R. CIV. P. 5(a) (as amended Jan. 21, 1963).

43. *See* 128 CONG. REC. H9848, H9856 (daily ed. Dec. 15, 1982) (enacting Pub. L. No. 97-462, 96 Stat. 2527 (1982)).

Advisory Committee's amendment allowed first class mail to be used to serve the initial summons and complaint.

In 1984, Rule 704(c) was replaced with Rule 7004(b), which retained in identical form the relevant language.[44] In 1987, insignificant revisions were made to clean up the language.[45] The relevant language of the present Rule 7004(b)(1) has remained unchanged since the 1987 amendment.[46]

C. *Bankruptcy Court Jurisdiction Grew After the Rule Was Changed to Allow Service by First Class Mail*

Understanding the jurisdiction of bankruptcy courts at the time the signed receipt requirement was eliminated in 1976 helps explain why it may have seemed insignificant to allow a summons and complaint to be served by first class mail.

Prior to 1978, the federal district courts were "courts of bankruptcy," and bankruptcy referees were given limited power to assist the district courts in exercising bankruptcy jurisdiction.[47] Bankruptcy court jurisdiction was limited to summary jurisdiction and plenary jurisdiction.[48] Summary jurisdiction allowed a bankruptcy referee to handle matters related to bankruptcy estate administration.[49] Plenary jurisdiction gave district courts authority over actions by a bankruptcy trustee against parties that had not

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44. *Compare* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 *with* 28 U.S.C. § 2075 (1976); *see also* FED. R. BANKR. P. 7004.

45. *See* FED. R. BANKR. P. 7004 advisory committee's note (making "technical amendments" to subsections (a), (b), (e), and (f), such as deleting the hyphen between "first class" and also removing the masculine references of "he" and "his" to gender neutral references of mailing to "the individual").

46. *See* FED. R. BANKR. P. 7004 (amending subsections other than (b) after 1987).

47. Bankruptcy Act of 1898, ch. 541, §§ 2, 38–39, 30 Stat. 544, 544, 555–56 (repealed in 1978 after significant amendments).

48. *See* Daley & Shuster, *supra* note 28, at 385 (noting that the 1898 Bankruptcy Act distinguished between the two types of jurisdiction).

49. *See* Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 FORDHAM L. REV. 721, 792 (1994). Summary jurisdiction could be had for

> (i) matters involving the administration of the bankruptcy case, (ii) disputes involving property in the actual or constructive possession of the bankruptcy court, (iii) proceedings in which the parties had consented to bankruptcy court jurisdiction (expressly, impliedly by failing to object in time, or impliedly by filing a proof of claim or otherwise participating in the bankruptcy case), and (iv) a few limited matters over which the statute expressly granted jurisdiction to bankruptcy courts.

Id. Many scholars and practitioners noted the difficulty distinguishing between summary and plenary jurisdiction. *See* Herbert U. Feibelman, *What Is the Difference Between Summary and Plenary Jurisdiction in Bankruptcy?*, 39 FLA. B.J. 155, 155–60 (1965) (relating a cautionary tale of one Jacksonville lawyer and elaborating the differences between the two types of jurisdiction).

consented to bankruptcy authority.[50] Consequently, before 1978, a bankruptcy court was basically limited to in rem jurisdiction.[51]

In the Bankruptcy Reform Act of 1978, Congress expanded the jurisdiction of bankruptcy courts to include all civil proceedings arising under title 11 of the United States Code or arising in or related to a title 11 case.[52] This expansion allowed bankruptcy courts to have jurisdiction over civil suits seeking personal judgments as well as in rem judgments over property.[53] It also moved the adjudication of most bankruptcy litigation from the federal district and state courts to bankruptcy courts.[54] The Senate Judiciary Committee explained the broad extent of jurisdiction granted in the Bankruptcy Reform Act of 1978:

> This broad grant of jurisdiction will enable the bankruptcy courts, which are created as adjuncts of the district court for the purpose of exercising the jurisdiction, to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in the State court or in the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court. The idea of possession and consent as bases for jurisdiction is eliminated. The adjunct bankruptcy courts will exercise in personam jurisdiction as well as in rem jurisdiction in order that they may handle everything that arises in a bankruptcy case.[55]

In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[56] the Supreme Court struck down the law granting authority to bankruptcy courts

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50. *See* Bankruptcy Act of 1898, ch. 541, § 23(a), 30 Stat. 544, 552 (repealed in 1978 after significant amendments).

51. *See* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 850 (2000) (noting that the 1978 reforms shifted from an in rem jurisdiction theory to an in personam jurisdiction theory). For an exhaustive review of the history and development of bankruptcy court jurisdiction, see *id.*

52. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, sec. 241(a), §1471(b), 92 Stat. 2549, 2668.

53. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90–92 (1982) (Rehnquist, J., concurring) (agreeing with the majority that the bankruptcy courts' jurisdiction violated Article III of the Constitution and noting that the suit against Marathon concerned ordinary state law and contract claims that were only brought to the bankruptcy courts since Northern Pipeline had filed for reorganization).

54. Lloyd D. George, *From Orphan to Maturity: The Development of the Bankruptcy System During L. Ralph Mecham's Tenure as Director of the Administrative Office of the United States Courts*, 44 AM. U. L. REV. 1491, 1494 (1995).

55. S. REP. NO. 95-989, at 153 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939; *see also* H.R. REP. NO. 95-595, at 48–49 (1977) ("Possession of the res[] that is the subject of a particular proceeding will no[] longer be relevant. The bankruptcy courts will have *in personam* jurisdiction over all proceedings, whether or not involving a specific item of property."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6010.

56. 458 U.S. 50 (1982).

to adjudicate proceedings "related to" a bankruptcy case and held that federal bankruptcy jurisdiction could not be assigned to non-Article III bankruptcy courts.[57] The holding necessitated a restructuring of the jurisdictional scheme and led to the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984,[58] which permitted district courts to refer all bankruptcy matters to bankruptcy judges.[59] Cases were divided between those that could be "heard and determined" by non-Article III bankruptcy courts,[60] and cases that could only be "heard" by bankruptcy courts and then must be finally determined by district courts.[61] The Bankruptcy Amendments and Federal Judgeship Act of 1984 did not change the statutory language of the Bankruptcy Reform Act of 1978 conferring original but not exclusive jurisdiction to district courts of "all civil proceedings arising under title 11, or arising in or related to cases under title 11."[62]

The Bankruptcy Reform Act of 1978 also vastly enlarged the jurisdiction of bankruptcy courts from the territorial jurisdiction of the district within which the court of bankruptcy was located to the territorial limits of the entire United States.[63]

None of these expansions were in existence at the time the Advisory Committee drafted the rule allowing service of the initial summons and complaint by first class mail. The extension of jurisdiction to the territorial limits of the United States, as well as nationwide service of process, allowed a bankruptcy court to exercise in personam jurisdiction over

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57. *Id.* at 87 n.40 (plurality opinion) ("It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon.").

58. Bankruptcy Amendments & Federal Judgeship Act, Pub. L. No. 98-353, 98 Stat. 333 (1984).

59. Bankruptcy Amendments & Federal Judgeship Act, Sec. 105(a), § 157(a), 98 Stat. at 340.

60. 28 U.S.C. § 157(b)(1) (2006).

61. § 157(c)(1) ("The bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.").

62. *Compare* Sec. 101(a), § 1334(b) ("Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.") *with* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Sec. 241(a), § 1471(b), 92 Stat. 2549, 2668 ("Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.").

63. Bankruptcy Reform Act of 1978, Pub. L. 95-598, Sec. 241(a), § 1471(e), 92 Stat. 2549, 2669.

anyone who could be served by mail within the United States.[64] Of course, personal jurisdiction and venue are not the same, and adversary proceedings are still subject to proper venue requirements.[65] Nonetheless, at the time the Advisory Committee created Rule 7004(b)(1)'s predecessor, both the scope of adversary proceedings and the jurisdiction of the bankruptcy courts were very limited.

D. Scope of Applicability

The type of actions to which Rule 7004(b)(1) applies is surprisingly broad. The rule applies to adversary proceedings,[66] which include a host of matters such as an action to set aside property transfers, void a lien, determine the extent of an interest in property, determine the dischargeability of a debt, impose injunctive relief, or enter a money judgment against a party.[67] Additionally, there is no required minimum or maximum dollar amount.[68]

Where a plaintiff is seeking a money judgment, the subject matter of an adversary proceeding includes state-law claims of breach of contract or tortious injury by the debtor in bankruptcy.[69] Adversary proceedings also include actions to determine the priority of a lien in property pursuant to state law.[70] Depending upon the nature of the claim, the plaintiff in an adversary proceeding may be a bankruptcy trustee, the debtor in bankruptcy, or a third party.[71] From a defendant's perspective, an adversary

64. *See, e.g.*, Fleet v. U.S. Consumer Council, Inc. (*In re* Fleet), 53 B.R. 833, 841 (Bankr. E.D. Pa. 1985) ("There is no requirement that a defendant reside in or do business in the state or district where an adversary proceeding is commenced in order for the bankruptcy judge, exercising the power of the district court, to obtain *in personam* jurisdiction over that defendant."); Jahan Co. v. Dakota Indus., Inc., 27 B.R. 575, 578 (D.N.J. 1983); Benchic v. Century Entm't Corp. (*In re* Century Entm't Corp.), 21 B.R. 160, 162 (Bankr. S.D. Ohio 1982); Beasley v. Kelco Foods, Inc. (*In re* Trim-Lean Meat Products, Inc.), 11 B.R. 1010, 1011–13 (D. De. 1981).

65. *See* 28 U.S.C. §§ 1408, 1412 (2006); 28 U.S.C.A § 1409 (West Supp. 2011); FED. R. BANKR. P. 7087 ("On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412, except as provided in Rule 7019(2)."). FED. R. BANKR. P. 7019(2) requires a court to determine if part of the proceeding involving a joined party should be transferred to another district or whether the entire adversary proceeding should be transferred to another district. FED. R. BANKR. P. 7019(2).

66. FED. R. BANKR. P. 7001 ("An adversary proceeding is governed by the rules of this Part VII.").

67. *See id.*

68. *See id.* (containing no maximum or minimum dollar amount).

69. *See* FED. R. BANKR. P. 7001(1).

70. FED. R. BANKR. P. 7001(2).

71. FED. R. BANKR. P. 6009, 7017.

proceeding can obviously result in a deprivation of property under the Fifth Amendment.[72]

II. ANALYSIS: WHY BANKRUPTCY RULE 7004(b)(1) VIOLATES DUE PROCESS

This section analyzes various aspects of Rule 7004(b)(1), including the rule's language and the case law that has applied the rule. The Supreme Court's decisions approving notice by mail are explained for the purpose of showing why these cases do not legitimize serving a summons by first class mail. Finally, the implications of Rule 7004(b)(1) are examined under *Mullane*'s "reasonably calculated under all circumstances"[73] standard.

A. The Current Language of Rule 7004(b)(1)

The present language of Rule 7004(b)(1) allows for service in the United States by first class mail "[u]pon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession."[74]

The rule is drafted primarily from the sender's perspective. It identifies the types of recipients (individuals located within the United States that are not infants and not incompetent), the method of delivery (first class mail postage prepaid), and the allowable addresses to place on the envelope. Unlike the requirements of Rule 4 of the Federal Rules of Civil Procedure,[75] Rule 7004(b)(1) does not identify who can receive the process. There is no requirement that the recipient be the defendant or someone of suitable age and discretion or reside at the address.[76] A consideration of each component of the rule follows.

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72. Windsor Commc'ns Group Inc. v. Grant, 75 B.R. 713, 734–35 (E.D. Pa. 1985) (holding that "a money judgment against a person . . . implicates a due process property interest" meriting notice and an opportunity for a hearing).

73. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950) (establishing the test of reasonableness under the circumstances).

74. FED. R. BANKR. P. 7004(b)(1).

75. FED. R. CIV. P. 4(e)(2) (identifying permissible recipients of a summons, such as the defendant or "someone of suitable age and discretion" who resides at the defendant's dwelling or usual place of abode).

76. *Contra id.* at 4(e)(2)(A)–(B) (requiring that defendant be served process or, if process is left at defendant's dwelling, that it be left with "someone of suitable age and discretion who resides there").

1. First Class Mail

The United States Postal Service strives to deliver first class mail in one to three days; however, delivery time is not guaranteed.[77] "The price of First-Class Mail includes forwarding service to a new address for up to 12 months"[78] and "return service if the mailpiece is undeliverable."[79] For most individuals living in the United States, first class mail is part of daily life and its use is fairly common.

2. The Individual's Dwelling House or Usual Place of Abode

The bankruptcy rules fail to define what constitutes an individual's dwelling house or usual place of abode.[80] The language of the rule implies that the address must be the one existing at the time of the mailing.[81]

Courts have held that mailing to an intended recipient's " 'last known address' is not sufficient to effect service under [Rule 7004(b)(1)] if the respondent is not living at that address at the time service is attempted."[82] This position is validated by comparing Rule 7004(b)(1) to Bankruptcy Rule 7005. Bankruptcy Rule 7005 incorporates Rule 5 of the Federal Rules of Civil Procedure, which applies to motions, orders and pleadings filed after the original complaint.[83] Rule 5 of the Federal Rules of Civil Procedure authorizes service by mailing to the person's last known address.[84] A comparison of Rule 7004(b)(1) to Bankruptcy Rule 7005 demonstrates that a higher burden of service is required for serving a summons and complaint. The difference in language also suggests that an individual's dwelling house or usual place of abode is not necessarily the individual's last known address.[85]

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77. *See* DOMESTIC MAIL MANUAL, RETAIL MAIL: FIRST-CLASS MAIL PRICES AND ELIGIBILITY, U.S. POSTAL SERVICE 133.2.1.1, http://pe.usps.com/cpim/ftp/manuals/dmm300/133.pdf (last updated Aug. 1, 2011); UNITED STATES POSTAL SERVICE, 2000 COMPREHENSIVE STATEMENT ON POSTAL OPERATIONS 90–91 tbl.5.1 (Apr. 6, 2001, 5:27 PM), *available at* http://www.usps.com/history/_pdf/00comp_state.pdf (reporting on-time delivery rate of first class mail between 87% and 94%).

78. *See* DOMESTIC MAIL MANUAL, *supra* note 777, at 133.2.2.2.

79. *See id.* at 133.2.2.3.

80. *See* FED. R. BANKR. P. 9001 (defining particular words and phrases to be used by the rules but failing to define "dwelling place" or "usual place of abode").

81. *Cf.* Jobin v. Otis (*In re* M&L Bus. Mach. Co.), 190 B.R. 111, 117 (D. Colo. 1995) (holding that mailing a summons and complaint to an address on a three-year-old letter from the recipient was not notice reasonably calculated to apprise him of the action).

82. *See, e.g.*, *In re Barry*, 330 B.R. 28, 33 (Bankr. D. Mass. 2005).

83. FED. R. BANKR. P. 7005 (incorporating Rule 5 of the Federal Rules of Civil Procedure).

84. FED. R. CIV. P. 5(b)(2)(c).

85. *See In re Barry*, 330 B.R. at 33; DuVoisin v. Arrington (*In re* S. Indust. Banking Corp.), 205 B.R. 525, 533 (E.D. Tenn. 1996) (noting the distinction drawn by the drafters of the rules not to be insignificant).

Despite the apparent intention to not allow service to an individual's last known address, at least one court has interpreted and applied Rule 7004(b)(1) to merely require the last known dwelling house or usual place of abode.[86] Another court has held that an individual can have more than one dwelling house or usual place of abode.[87]

Although the "constitutional obligation"[88] to ensure proper service is placed on the plaintiff,[89] the rule does not provide a mechanism to ensure that the address placed on the envelope is the correct address of the defendant's "dwelling house or usual place of abode" or place where the "individual regularly conducts a business or profession."[90]

For example, one court held that "[s]trict compliance with Rule 7004 precludes equating the term 'residence' with 'dwelling house or place of abode' "[91] and that a person's dwelling house or usual place of abode "is the place, at the time of service, at which one could reasonably expect to find the individual sought living."[92] Thus, although Rule 7004(b)(1) has been interpreted by some courts to require the actual and present address of the defendant at the time of service, it contains no requirement that the sender provide proof that the address used satisfies that criteria.

3. The Place Where the Individual Regularly Conducts a Business or Profession

The bankruptcy rules do not provide a definition for "the place where the individual regularly conducts a business or profession."[93] One court has found that an individual may have more than one business or profession.[94]

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86. Garcia v. Cantu, 363 B.R. 503, 513 (Bankr. W.D. Tex. 2006) ("A place shown by a plaintiff to have once been a valid 'dwelling house or usual place of abode' does not cease to be a valid address for mailing of service unless the party contesting service establishes by evidence that he has in fact abandoned that address.").

87. *In re* Xacur, 219 B.R. 956, 966–67 (Bankr. S.D. Tex. 1998) (noting that in a highly mobile and affluent society, "it is unrealistic to interpret rule 7004(b) so that the person to be served has only one dwelling house or usual place of abode at which process may be left. 'There is nothing startling in the conclusion that a person can have two or more dwelling houses or usual places of abode, provided each contains sufficient indicia of permanence.' " (citation omitted) (quoting *In re* Premium Sales Corp., 182 B.R. 349, 354 (Bankr. S.D. Fla. 1995)).

88. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799–800 (1983).

89. FED. R. BANKR. P. 7004(a)(1) (incorporating Rule 4(c)(1) of the Federal Rules of Civil Procedure). Rule 4(c)(1) indicates that "[t]he plaintiff is responsible for having the summons and complaint served." FED. R. CIV. P. 4(c)(1).

90. FED. R. BANKR. P. 7004(b)(1) (allowing for service to be made to the house or place of business without providing any way to verify the address will qualify).

91. John v. Otis (*In re* M&L Bus. Mach. Co.), 190 B.R. 111, 116 (D. Colo. 1995).

92. *Id.* at 117.

93. *See* FED. R. BANKR. P. 7004(b)(1) (allowing for service to the place of regularly conducted business but not defining the term).

94. Garcia v. Cantu, 363 B.R. 503, 516 (Bankr. W.D. Tex. 2006).

Another court held that when a defendant closed his used car lot, but continued to engage in commerce and hold himself out as using the address, that location qualified as a place where the defendant regularly conducted business.[95] Not working full time at an address, but being at the address two to three times per week, has also been held to be sufficient.[96] Consequently, the determination of whether a place is where an individual regularly conducts a business or profession is a fact-intensive inquiry and varies depending upon the circumstances.[97] This factual dependency creates uncertainty as to whether service has complied with the rule.

B. Mistaken Reliance Upon Two Federal Circuit Cases to Uphold Service by First Class Mail

Two federal circuit cases, *Belford v. Martin-Trigona (In re Martin-Trigona)*[98] and *Creditors Committee of Park Nursing Center, Inc. v. Samuels (In re Park Nursing Center, Inc.)*[99] are repeatedly cited by courts across the nation as authority to support the constitutionality of service by first class mail under Rule 7004(b).[100] In addition, one authoritative

95. Morris v. Peralta (*In re* Perlata), 317 B.R. 381, 387 (B.A.P. 9th Cir. 2004) (stating the defendant "continued to engage in commerce at least to the extent of causing vehicles to be repossessed and continued holding himself out in such dealings as using that business address").

96. Berry v. Maney (*In re* Sustaita), 438 B.R. 198, 209 (B.A.P. 9th Cir. 2010).

97. *Cf.* John v. Otis (*In re* M&L Bus. Mach. Co.), 190 B.R. 111, 117 (D. Colo. 1995) (noting in a dwelling house or usual place of abode context that "[t]he inquiry is fact intensive").

98. 763 F.2d 503 (2d Cir. 1985).

99. 766 F.2d 261 (6th Cir. 1985).

100. Cossio v. Cate (*In re* Cossio), 163 B.R. 150, 156 (B.A.P. 9th Cir. 1994) (citing *In re Park Nursing Center, Inc.* to support the conclusion that service by mail "has withstood constitutional challenge"); Whitaker v. Am. Partitions, Inc. (*In re* Olympia Holding Corp.), 230 B.R. 623, 627 (Bankr. M.D. Fla. 1999) (citing *In re Park Nursing Center, Inc.* and concluding that "[s]ervice in bankruptcy cases by U.S. Mail under what is now F.R.B.P. 7004(b), rather than personal service, has been held to pass constitutional due process muster"); DuVoisin v. Arrington (*In re* S. Indus. Banking Corp.), 205 B.R. 525, 530–31 (E.D. Tenn. 1996) (citing *In re Park Nursing Center, Inc.* as a basis for Rule 7004(b)(1) to survive facial constitutional challenges); Holbrook v. Carlisle (*In re* Steel Reclamation Res., Inc.), No. 94-6396, 1995 U.S. App. LEXIS 23750, at *4 (10th Cir. Aug. 21, 1995) (citing both *In re Martin-Trigona* and *In re Park Nursing Center, Inc.* as a basis to conclude that "service by first class mail postage prepaid conferred bankruptcy court jurisdiction"); Jones Apparel Grp., Inc. v. Miller & Rhoads, Inc. Secured Creditors' Trust, No. 3:91CV00637, 1992 U.S. Dist. LEXIS 14418 (E.D. Va. Mar. 25, 1992) (citing *In re Park Nursing Center, Inc.* as a basis for holding that constitutional attacks are without substance); Rakozy v. Hobbs (*In re* Hobbs), No. 89-00099, 1990 Bankr. LEXIS 1518 (Bankr. D. Idaho June 26, 1990) (citing *In re Park Nursing Center, Inc.* as a basis for the allowance of service by mail); Wyandotte Indus. v. E.Y. Neill & Co. (*In re* First Hartford Corp.), 63 B.R. 479, 485 (Bankr. S.D.N.Y. 1986) (referencing *In re Martin-Trigona* and concluding that the issue of whether service by first-class mail is constitutional "has already been considered and rejected by this circuit"); *In re* Mancini, No. 85-30168, 1986 Bankr. LEXIS 6407, at *26 (Bankr. S.D.N.Y. Mar. 26, 1986) (citing *In re Park Nursing Center, Inc.* and noting that "service by mail was permitted and has withstood constitutional challenge"); Windsor Commc'ns Grp. Inc. v. Grant (*In re* Grant), 75 B.R. 713, 716 (Bankr. E.D. Pa. 1985) (citing *In re Martin-Trigona* as

commentary cites these two cases as the sole basis for the assertion that "[a]lthough Rule 7004(b) has been attacked as violative of procedural due process, its validity consistently has been sustained."[101] Despite the widespread reference to these two cases, neither one provides a valid basis for supporting the constitutional validity of service by first class mail under Rule 7004(b). Both cases hinge upon defective reasoning and lack any meaningful analysis of the actual language or effect of the rule.

1. *In re Martin-Trigona*

In *Martin-Trigona*, the Second Circuit Court of Appeals was asked to determine whether former Bankruptcy Rule 704(c) and its successor Rule 7004(b) were "questionable" in light of the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[102] The appellants argued that "the district court lacked personal jurisdiction over them because the method of service was defective."[103] The Second Circuit summarily rejected the argument by noting that "[n]othing in *Northern Pipeline* indicated that the bankruptcy rules were invalid."[104] The only reasoning given by the Second Circuit was that "the uninterrupted legitimacy of former Rule 704(c) is evidenced by its retention substantially unchanged as Rule 7004(b) of the new bankruptcy rules, promulgated after *Northern Pipeline*."[105]

The Second Circuit's reasoning is shallow. Basing the legitimacy of something on the sole ground that it has been in existence for a long time without being changed is unconvincing logic and, standing alone, is generally[106] not a justification for upholding the constitutional legitimacy of a practice or rule.[107]

The holding does contain an implied approval arising from the substantially unchanged rule language being adopted in the new bankruptcy rules, but no substantive analysis is given. There is no evaluation of the rule's language, effect, or implications. *Martin-Trigona* provides little

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support for the court to have jurisdiction over the defendant because "first class mail service under Rule 7004 is effective after the *Northern Pipeline* decision").

101. 10 COLLIER ON BANKRUPTCY, *supra* note 30 ¶ 7004.03, at 7004–22.

102. *In re Martin-Trigona*, 763 F.2d at 505 (referencing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)).

103. *Id.*

104. *Id.*

105. *Id.*

106. Certainly there are some contexts that are exceptions to this assertion. For example, consider the general principles of reliance or stare decisis.

107. For example, consider the application of that reasoning in the context of slavery or the civil rights movement.

support for upholding the constitutionality of service by first class mail under Rule 7004(b).

2. *In re Park Nursing Center, Inc.*

In *Park Nursing Center, Inc.*,[108] the Sixth Circuit Court of Appeals was asked to determine whether former Bankruptcy Rule 704(c) permitting service of process by first class mail satisfied the constitutional requirements of procedural due process.[109] In that case, process was served by first class mail addressed to the defendant's last known address, which was the residence of his wife.[110] At the time of service, the defendant was separated from his wife.[111] Although the defendant submitted a change of address form to the United States Post Office updating his mailing address, the decision does not indicate if the defendant actually received the mailed process.[112] A default judgment for $34,200 was entered against the defendant and the defendant's motion for relief against the default judgment was denied because the defendant had failed to show that he had a meritorious defense to the action.[113]

The Sixth Circuit noted that bankruptcy proceedings occupied a large and important place in the federal judicial system, and that bankruptcy proceedings needed "a form of notice which is likely to achieve actual notice in a large volume of cases but is not overly expensive or time consuming."[114] The court continued by holding that in order to be constitutionally adequate:

> 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

108. Creditors Comm. Of Park Nursing Ctr., Inc. v. Samuels (*In re* Park Nursing Ctr., Inc.), 766 F.2d 261 (6th Cir. 1985).

109. *Id.* at 262.

110. *In re Park Nursing Ctr.*, 766 F.2d at 262. Former Bankruptcy Rule 704(c) required the mailing be made to an individual's dwelling house or usual place where he regularly conducts his business or profession. Bankruptcy Rule 704(c), as amended, 425 U.S. 1131 (1976). Although process in *Park Nursing Ctr., Inc.* was mailed to the defendant's last known address, it was forwarded from the last known address to the defendant's business address. 766 F.2d at 262. It is unclear why using the last known address was not an independently sufficient ground for reversal.

111. *In re Park Nursing Ctr.*, 766 F.2d at 262.

112. *Id.*

113. *Id.*

114. *Id.* at 263. Admittedly, a significant reason in support of mail as a service method is the expense and time savings. However, large case volumes, expense savings, and time efficiencies do not displace the need for a summons to be properly served in a judicial proceeding.

> available remedy for setting aside the judgment of default entered against him.[115]

The court went on to apply this standard to the facts of the case and held that Bankruptcy Rule 704(c)(1) satisfied due process requirements when interpreted in light of the available remedy of setting aside the default upon the showing of a meritorious defense, which the defendant failed to offer.[116] The entire reasoning and justification underlying the *Park Nursing Center, Inc.* decision is based upon a foundation that the Supreme Court later held to be constitutionally infirm in *Peralta v. Heights Medical Center, Inc.*[117] In that case, a party had obtained a default judgment in a judicial proceeding despite defective service of process.[118] When the party against whom the default judgment had been entered sought to have the default judgment vacated, the lower state courts held that in order to vacate the judgment, a meritorious defense must be shown regardless of whether service or notice had been proper.[119] The Supreme Court reversed holding that "[w]here a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' "[120]

The Supreme Court's decision in *Peralta* fully undermines the reasoning of the Sixth Circuit's holding in *Park Nursing Center, Inc.* that former Bankruptcy Rule 704(c)(1) satisfied due process requirements. Consequently, the *Park Nursing Center, Inc.* decision provides little support in favor of the constitutionality of Rule 7004(b)(1). Therefore, reliance upon the *Martin-Trigona* and *Park Nursing Center, Inc.* decisions to sustain the constitutional validity of Rule 7004(b)(1) is mistaken.

C. *The Supreme Court's "Mailings" Jurisprudence Does Not Support Serving a Summons by First Class Mail*

Although personal service of written notice upon a defendant would certainly constitute a constitutional safe harbor[121] for purposes of notice and

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115. *Id.*
116. *Id.* at 263–64.
117. 485 U.S. 80, 84–86 (1988).
118. *Id.* at 82.
119. *Id.* at 83–84.
120. *Id.* at 86–87 (quoting Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915)).
121. For an example of constitutional safe harbors in a criminal procedure context, see Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1044–47 (2001); *see also* James J. Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U. CIN. L. REV. 63, 95 (2008) ("Rules that protect constitutional rights can provide enough efficiency through their clarity to justify any overinclusion that might result. But,

is "always adequate in any type of proceeding,"[122] the constitutional mandate that a person not be deprived of property without due process of law has not been interpreted to require actual notice.[123] Rather, there are less rigorous notice procedures that have been determined to satisfy the Due Process Clause's "constitutional minimum."[124] The Court's seminal decision in *Mullane*, along with its progeny, require notice to 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."[125]

The Court has indicated its approval of the use of mail to provide notice, but it has never approved the use of mail in a case involving both service of a summons in a judicial proceeding and the exercise of personal jurisdiction by a court over the person of the defendant.

For example, *Schroeder v. City of New York*[126] involved notice of an administrative condemnation proceeding relating to a decrease in the flow velocity of a river that ran along a landowner's property.[127] The Court held that a plaintiff is "constitutionally obliged to make at least a good faith effort to give [notice] personally to the [landowner]—an obligation which the mailing of a single letter would have discharged."[128]

Another case involved a judicial forfeiture proceeding against an automobile, where the defendant-owner was confined in jail at the time the State of Illinois mailed notice of the proceeding to the defendant's home

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the risk of underinclusion raises the need for greater caution. A constitutional safe harbor rule should not trump a less determinate, but more accurate, standard unless the application of that standard is intolerably indeterminate. Even when the true need for the creation of a constitutional safe harbor has been demonstrated, the risk of underinclusion must be strictly limited.").

122. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

123. Jones v. Flowers, 547 U.S. 220, 226 (2006) ("Due process does not require that a property owner receive actual notice before the government may take his property."); Dusenbery v. United States, 534 U.S. 161, 170 (2002) ("[*Mennonite*] does not say that the state *must provide* actual notice, but that it *must attempt to provide* actual notice .... *Mennonite* concluded that mailed notice of a pending tax sale to a mortgagee of record was constitutionally sufficient ...." (emphasis in original)).

124. *See, e.g.*, Greene v. Lindsey, 456 U.S. 444, 451–53 (1982) (explaining that the secure posting of notice on property is in some circumstances an adequate method of providing notice to the property owner that proceedings affecting his interests may be pending).

125. *Dusenbery*, 534 U.S. at 167–68 (citing *Mullane*, 339 U.S. at 314) (explaining that *Mullane* and its progeny supply "the appropriate analytical framework" for due process claims under both the Fifth and Fourteenth Amendments regarding the adequacy of notice).

126. 371 U.S. 208 (1962).

127. *Id.* at 209 (quoting the Administrative Code of the City of New York which contained the procedure to be followed by the New York Board of Water Supply in condemning land, easements, and rights affecting real property required for the New York City water system).

128. *Id.* at 214. The interest being deprived was the impairment of the river's value to the landowner arising from a decrease in the velocity of the river flow. *Id.* at 214 n.6.

address.[129] The Court held that notice by mail was not reasonably calculated to apprise the defendant when the State knew that the defendant was not at the address where the notice was mailed.[130] The interest being deprived in that case was the potential forfeiture and sale of the defendant's vehicle.[131]

In a different case involving an eviction proceeding seeking repossession of an apartment, a writ of forcible entry, and detainer was served by posting a notice on the tenant's apartment door.[132] The notice was likely removed by children or other tenants, prompting the Court to hold "where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings."[133] The interest being deprived was possession of the apartment for the tenant's use and occupancy.[134]

On another occasion, the Court addressed the sufficiency of notice for a tax sale of real property in order to pay delinquent taxes.[135] Notice of the sale was given by publication, posting and mailed notice to the property owner but not to the mortgagee holding a lien on the sold property.[136] The Court held that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable."[137]

A few years later, the Court commented that "[w]e have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."[138] This case involved the deprivation of a creditor's cause of action against an estate for an unpaid

129. Robinson v. Hanrahan, 409 U.S. 38, 38 (1972) (per curiam). The State of Illinois instituted forfeiture proceedings against appellant's automobile pursuant to the Illinois vehicle forfeiture statute, which authorized service of notice by certified mail to the address listed in the records of the Secretary of State. *Id.* at 38 n.1.

130. *Id.* at 39–40.

131. *Id.* at 39.

132. Greene v. Lindsey, 456 U.S. 444, 455 (relating to the sufficiency of a Kentucky statute allowing service of process of a forcible entry or detainer action by posting a copy of a writ on the door of the tenant's apartment).

133. *Id.* at 446. The Court explained that "posting" refers to the practice of placing the writ on the property by use of a thumbtack, adhesive tape, or other means. *Id.* at 446 n.1.

134. *Id.* at 453.

135. *Id.* at 452.

136. Mennonite Board of Missions v. Adams, 462 U.S. 791, 800 (1983). The interest being deprived was a decrease in value of the mortgagee's lien arising from the tax-sale purchaser's lien that was given priority over the lien of the mortgagee. *Id.* at 798.

137. *Id.* at 792–95 (concluding due process required notice of the tax sale to the mortgagee).

138. Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988).

bill where a publication notice to creditors of an estate in a judicial probate proceeding was found to be inadequate.[139]

In a case involving the Federal Bureau of Investigation's ("FBI") non-judicial process of administratively forfeiting cash and an automobile seized pursuant to a search warrant,[140] the Court held that delivery of notice using a certified letter was "a method our cases have recognized as adequate for known addressees when we have found notice by publication insufficient."[141] The party appearing to have an interest in the cash and automobile was incarcerated in a Federal Correctional Institution at the time notice was sent.[142]

Finally, in a case involving an administrative tax sale of real property,[143] the Court noted that when a notice sent by certified mail was returned to the sender as unclaimed "[o]ne reasonable step . . . would be for the State to resend the notice by regular mail, so that a signature was not required."[144] The interest being deprived was extinguishment of a property owner's interest in a home.[145]

Although each of the above-described cases involved a risk of losing significant property interests, none of the Court's decisions that approved mailings involved (i) service of a summons in a judicial proceeding, (ii) exercise of personal jurisdiction by a Court over the person of the defendant, or (iii) a personal money judgment against the defendant.

There is a fundamental distinction between service of a judicial summons as opposed to service of a notice that the government may take someone's property. A summons carries out the dual purpose of providing both personal jurisdiction to the court and notice to the defendant. Although the Court has signified that the distinction between in rem and in

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139. *Id.* at 483–84 The Court confirmed that an intangible interest such as a cause of action is a protected property interest under the Fourteenth Amendment. *Id.* at 485.

140. Dusenbery v. United States, 534 U.S. 161, 163–64 (2002) (explaining designated agents of the FBI were allowed to dispose of property seized pursuant to the Controlled Substances Act without initiating judicial proceedings if the property's value did not exceed $100,000 and if no person claimed an interest in the property within twenty days after the Government published notice of its intention to forfeit and sell or otherwise dispose of it).

141. *Id.* at 169.

142. *Id.* at 164 (stating the forfeiture statute required written notice of the seizure to each party who appeared to have an interest in the property and publication for at least three successive weeks).

143. Jones v. Flowers, 547 U.S. 220, 223–24 (2006) (involving notice by publication and certified mail where the certified mail was returned to the sender as "unclaimed").

144. *Id.* at 234. Interestingly, the Court noted that requiring further effort when the government learns that notice was not delivered may cause "the government to favor modes of providing notice that do not generate additional information—for example, starting (and stopping) with regular mail instead of certified mail." *Id.* at 237.

145. *Id.* at 230 (stating the subject matter of the letter concerned the important and irreversible prospect of the loss of a house).

personam jurisdiction is not determinative of the constitutional question,[146] that distinction is one of the main differences between the Court's above-mentioned "mailings" jurisprudence and adversary proceedings under Rule 7004(b)(1). Each of the Court's "mailings" cases was limited to an in rem jurisdiction scenario.[147] The Court has not indicated its approval of using first class mail in an action or proceeding against a person.

The Court has emphasized that the nature of the action has a bearing on the constitutional assessment of the reasonableness of the procedure used.[148] Because of the nature of an adversary proceeding, a delivery method that is more certain and fail-safe than first class mail should be required.

Despite the Court's catch-all observation that "[a]ll proceedings, like all rights, are really against persons,"[149] a judicial summons is different from a bill, tax assessment, or potential taking of real or personal property because it is the method by which a court exercises power and authority over the person of the defendant. Unlike a notice, which serves the purpose of informing the recipient that a deprivation of property may occur, a summons in an adversary proceeding is the assertion of judicial power over the person of the defendant and is a condition precedent that must be satisfied before a bankruptcy court can proceed to adjudicate the action.[150] The timing of the corresponding result shows the difference. A notice is a warning of future deprivation. A summons is the mechanism through which jurisdiction and power over the person of the defendant is obtained. Service of a summons yields the result, or at least part of it.[151] This is not to say that a court's assertion of power and jurisdiction over a defendant through a summons constitutes a deprivation. Otherwise defendants would be entitled to a pre-summons notice that they may be served a summons.

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146. Greene v. Lindsey, 456 U.S. 444, 450 (1982) ("[W]e decline to resolve the constitutional question based upon the determination whether the particular action is more properly characterized as one *in rem* or *in personam*.").

147. *See* Schroeder v. City of New York, 371 U.S. 208, 214 n.6 (1962) (involving a river's value); Robinson v. Hanrahan, 409 U.S. 38, 39 (1972) (involving a vehicle); *Greene*, 456 U.S. at 452 (involving the possession of an apartment); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983) (involving the value of a lien); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988) (involving a cause of action to collect a bill); *Jones*, 547 U.S. at 230 (involving a home).

148. *Greene*, 456 U.S. at 450 ("The character of the action reflects the extent to which the court purports to extend its power, and thus may roughly describe the scope of potential adverse consequences to the person claiming a right to more effective notice.").

149. Shaffer v. Heitner, 433 U.S. 186, 207 n.22 (1977) (quoting Tyler v. Court of Registration, 55 N.E. 812, 814 (1900) (Holmes, C.J.)).

150. FED. R. BANKR. P. 7004(f) (stating that serving a summons is "effective to establish personal jurisdiction over the person of any defendant").

151. Since a summons serves the dual role of providing both notice and assertion of power over the defendant by the court, the result I am referring to is the assertion of power.

"The reasonableness and hence the constitutional validity"[152] of the delivery method should be both different and heightened for a judicial summons as opposed to a notice of a potential deprivation of property. This distinction between giving notice and serving a summons was a cautionary highlight of Justice Ginsburg's dissent in *Dusenbery*:

> In these cases [referring to *Mullane* and its offspring], the Court identified mail service as a satisfactory supplement to statutory provisions for publication or posting. But the decisions, it bears note, do not bless mail notice as an adequate-in-all-circumstances substitute for personal service. They home in on the particular proceedings at issue and do not imply that in the mine-run civil action, a plaintiff may dispense with the straightforward, effective steps required to secure proof of service or waiver of formal service.[153]

Justice Ginsburg's dissent recognizes the distinction between a notice and a summons. Because of this difference, the Court's jurisprudence approving various notices by mail neither supports nor provides a solid basis for upholding the constitutional validity of serving a judicial summons by first class mail under Rule 7004(b)(1).

D. *Serving a Judicial Summons by First Class Mail Does Not Satisfy* Mullane's *"Reasonably Calculated Under All Circumstances" Standard*

Rule 7004(b)(1) does not satisfy the "constitutional minimum"[154] prescribed by the Due Process Clause. The Court has indicated that *Mullane* supplies the appropriate analytical framework for determining the constitutional adequacy of a method used to give notice.[155] 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. . . . The means employed must be

152. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

153. Dusenbery v. United States, 534 U.S. 161, 177 (Ginsburg, J., dissenting).

154. Greene v. Lindsey, 456 U.S. 444, 449 (1982).

155. *See Dusenbery*, 534 U.S. at 168 ("Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice."). Even though the *Dusenbery* Court rejected the three-factor balancing test from *Mathews v. Eldridge* in favor of *Mullane*'s test of reasonableness under all circumstances, the breadth of the *Mullane* test encompasses the *Mathews* test. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (identifying the following three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

such as one desirous of actually informing the [defendant] might reasonably adopt to accomplish it."[156] This Part looks at different aspects of Rule 7004(b)(1) to determine if first class mail is reasonably calculated to apprise under all the circumstances.

1. The Delivery Method of First Class Mail Goes Against the Reasonable Expectations of Defendants

Defendants do not expect to be served a judicial summons through a delivery method that is as informal as first class mail. Assessing the expectations of defendants is appropriate because the intended beneficiary of the Fifth and Fourteenth Amendments is the recipient of the process, not the sender.[157] From the defendant's perspective, the delivery method employed often corresponds to and reflects the significance of the contents of the item delivered. A judicial summons and complaint are far more significant than matters that are routinely delivered by regular first class mail.[158]

Admittedly, important things are commonly sent by first class mail such as bills, paychecks, vehicle registrations, retirement fund performance reports, real property tax assessment notices, and a host of other matters. But it is instructive to consider the delivery methods that are used to serve notice in matters that are similar to or less significant than adversary proceedings.

For example, in state court small-claims actions, where the interests at stake are often capped by a set dollar amount such as $5,000, service by first class mail alone is not allowed.[159] Internal revenue service agents personally serve an individual notice if a person's property is at risk of seizure for failure to pay federal taxes (and the amount of past due taxes can be significantly less than the amount at issue in an adversary proceeding).[160] In South Carolina, a summons may be served by registered or certified mail, return receipt requested and delivery restricted to the

156. *Mullane*, 339 U.S. at 314–15.

157. Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 492 (1988) (Rehnquist, C.J., dissenting).

158. Weigner v. City of New York, 852 F.2d 646, 650 (2d Cir. 1988) (explaining that a request for a signature on a certified mail return receipt alerts the property owner that the letter contained "something more than a routine interest").

159. *See, e.g.*, NEW YORK, N.Y. CIV. ACT § 1803(a) (McKinney 2011) (stating that in the New York City Civil Court Small Claims Part, claims that are less than $5,000 are served on the defendant by both first class mail and certified mail with return receipt); CAL. CIV. PROC. CODE § 116.340(a)(1), (d) (providing that in Small Claims Court in California, claims that are less than $7,500 may be served on the defendant by any form of mail providing for a return receipt and that service is deemed complete on the date the defendant signs the mail return receipt).

160. 28 U.S.C. § 6335(a) (2006).

addressee.[161] Routine debt collection actions often involve matters much less significant in terms of dollar amounts than matters involved in adversary proceedings, but these proceedings do not allow service by regular first class mail.[162]

The unreasonableness of relying solely on first class mail for delivery becomes clear after examining other methods of mail delivery. Certified mail is dispatched and handled in transit as ordinary mail, except it "provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made."[163] Registered mail is the most secure service that the United States Postal Service offers.[164] It incorporates a system of receipts to monitor the movement of the mail from the point of acceptance to delivery and "provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made."[165] Senders may obtain a delivery record by purchasing return receipt service.[166]

Requiring a signed receipt certainly alerts a recipient that the contents of the envelope are more significant than an ordinary letter or junk mail. A return receipt also provides the sender objective proof of service to the address. If the postal service is unable to obtain a signed receipt, the return of the unsigned receipt will give the sender notice that service has been defective and further efforts are required. First class mail provides none of these safeguards or advantages.

In the context of notice delivery methods, the Court has established a positive relationship between the required level of notice, the extent of governmental power that is exercised, and the type of right that is at risk:

> [T]he nature of the action has [a] bearing on a constitutional assessment of the reasonableness of the procedures employed. The character of the action reflects the extent to which the court purports to extend its power, and thus may roughly describe the scope of

161. S.C. R. CIV. P. 4(d)(8). This rule also states that if delivery of the process is refused or is returned undelivered, service must be made as otherwise provided by the rules. *Id.*

162. *See, e.g.*, CAL. CIV. PROC. CODE §§ 415.20, 415.30; N.Y. C.P.L.R. 312-a (McKinney 2010).

163. *See* DOMESTIC MAIL MANUAL, *supra* note 77, at 503.3.2.1. In the context of an earlier version of Rule 4 of the Federal Rules of Civil Procedure, one author has argued certified mail represents the best tradeoff between the dual goals of actual notice and a simple, easy, low-cost method of service. Ann Varnon Crowley, Note, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 IND. L.J. 217, 243 (1986).

164. *See* DOMESTIC MAIL MANUAL, *supra* note 77, at 503.2.2.1.

165. *Id.*

166. *Id.*

> potential adverse consequences to the person claiming a right to more effective notice.[167]

A court's extension of power in an adversary proceeding is significant because of the broad scope of matters involved in an adversary proceeding. A default judgment in an adversary proceeding could contain an injunction[168] or an order directing the defendant to pay a specified dollar amount, turnover possession and title to a vehicle, or convey real estate to a Bankruptcy Trustee. If the defendant does not comply, contempt proceedings could follow.[169] In addition, a plaintiff has a host of rights and methods to enforce a default judgment against a defendant[170] that are not merely limited to a specific item such as a vehicle or real estate.[171]

There should be a positive relationship between the degree of power asserted by a court and the method used to inform the defendant of that power. As a practical matter, most individual defendants are not familiar with Rule 7004(b)(1) and do not expect a mailed envelope that is received in the same manner as junk mail to be a federal bankruptcy court exercising power over the person of the addressee and summoning such person to immediately respond or face having a judgment entered against them.

Rule 7004(b)(1) employs a service method that is not commensurate with the legal ramifications of a judicial summons. Based on ordinary, everyday experience, one would expect the commencement of a lawsuit to involve more than just a single, regularly-stamped envelope casually dropped off in a mail box. Rule 7004(b)(1) does not require the outside of the envelope to indicate the contents are important, from a court, or that a timely response is required.[172] Nothing sets apart the delivery of mail containing the summons and complaint from any other first class mail a defendant might receive.

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167. Greene v. Lindsey, 456 U.S. 444, 450 (1982).

168. FED. R. BANKR. P. 7065 (incorporating significant portions of Rule 65 of the Federal Rules of Civil Procedure).

169. FED. R. BANKR. P. 9020.

170. FED. R. BANKR. P. 7069 (incorporating Rule 69 of the Federal Rules of Civil Procedure). A plaintiff can, for example, obtain a writ of execution and garnish the defendant's wages or have a law enforcement officer seize and sell a defendant's non-exempt property. 30 AM. JUR. 2d §§ 67, 177, 552, 383. A judgment can be recorded in real property records and the defendant's real property can be sold at a sheriff's sale. 30 AM. JUR. 2d §§ 48, 195. A judgment certainly adversely effects a defendant's credit score, which in turn can effect significant aspects of a defendant's life and standard of living.

171. Significantly, the losses at stake in the Court's "mailings" cases discussed in this Article were limited to specific pieces of real or personal property. *See, e.g.*, Dusenbery v. United States, 534 U.S. 161, 163 (2002) (seizure of knife, firearms, and automobile); *Greene*, 456 U.S. at 446 (repossession of apartment); Weigner v. City of New York, 852 F.2d 646, 648 (2d Cir. 1988) (tax sale of real property).

172. FED. R. BANKR. P. 7004(b)(1).

Consideration of a bankruptcy court's assertion of power over a defendant in other contexts is telling. For example, if a defendant attends a hearing in connection with an adversary proceeding, the experience would include the profound sense of respect that is often felt by individuals standing in a courtroom. The defendant, along with all other individuals in the room, would be commanded by the clerk to "rise!" when the bankruptcy judge walks into the courtroom. A bailiff or marshal is often visibly present. This type of experience with judicial power is a considerable contrast to a defendant's experience with a bankruptcy court's initial assertion of power through a summons that is delivered by regular first class mail and is placed in a mailbox next to a coupon for a couple of cents off of dairy products at a local grocery store. First class mail does not satisfy the reasonable expectations of defendants.

2. Situations Where Rule 7004(b)(1) is Satisfied But No Notice is Given

In assessing the constitutionality of a notice procedure, the actual application and practical effect of the procedure must be considered:

> In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted."[173]

There are numerous situations where Rule 7004(b)(1), as applied in practice, results in defective service of process. For example, even assuming the requirements of Rule 7004(b)(1) are strictly followed, the defendant is not reasonably likely to receive the summons and complaint if he or she is on an extended vacation or is sick in the hospital. In today's modern society, individuals commonly travel and have transient work-lives. Additionally, a mailing pursuant to Rule 7004(b)(1) could be inadvertently thrown away as junk mail by a recipient because the recipient does not recognize the sender.

From a more deviant perspective, service by mail under Rule 7004(b)(1) creates loopholes for a defendant to avoid service. Under the United States Postal Service's Domestic Mail Manual, addressees may control delivery of their mail.[174] The Manual also allows addressees to refuse to accept a mailpiece when it is offered for delivery.[175] One author has written a chapter in a hypothetical "Handbook for Avoiding Service"

173. *Greene*, 456 U.S. at 451 (quoting North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925)).

174. *See* DOMESTIC MAIL MANUAL, *supra* note 77, at 508.1.1.1.

175. *Id.* at 508.1.1.2.

specifically on service by mail that summarizes alternative courses of action a defendant may take to avoid being served.[176] For example, a defendant can open a post office box and discontinue home delivery or move to a new residence without filing a change of address or forwarding order with the post office.[177]

There is also the concern that the mail, even if postage is properly paid and it is correctly addressed, will not be delivered because of some fault of the United States Postal Service. A growing number of courts are acknowledging that "[t]he risk that letters may be lost in the mail is commonly known."[178] Postal mishandling, unforwardability, and misdelivery are known realities. Many, if not most individuals, have inadvertently received a mail piece that was addressed to a neighbor or prior resident. *Mullane* requires notice methods be "reasonably calculated" to reach the intended recipient.[179] The shortcomings of first class mail make it not reasonably calculated to reach the intended recipient and therefore an inappropriate method for serving a summons under Rule 7004(b)(1).

3. Vacating or Setting Aside a Default Judgment Does Not Remedy the Problem

In analyzing the constitutionality of notice, one factor the Court looks to is the nature of the property right that is at risk.[180] Although some have argued that the entry of a judgment is not a deprivation of property until the stage of execution on the judgment,[181] it is well established that part of the constitutional violation is the entry of the judgment itself—even if the judgment is eventually vacated or set aside.[182] The Court has recognized the real and present harm arising solely from the entry of a judgment:

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176. Note, *Service of Process by Mail*, 74 MICH. L. REV. 381, 393–96 (1975).

177. *Id.* at 393–94.

178. Lechoslaw v. Bank of Am., N.A., 618 F.3d 49, 59 (1st Cir. 2010); *see also Greene*, 456 U.S. at 460 (O'Connor, J., dissenting) (noting the risk that regular mail "might fail due to loss, misdelivery, lengthy delay, or theft" and observing that "[i]t is no secret, after all, that unattended mailboxes are subject to plunder by thieves"); Jones v. Flowers 547 U.S. 220, 247 (2006) (Thomas, J., dissenting) (discussing unreliability of service by regular mail); Miserandino v. Resort Props., Inc., 691 A.2d 208, 215 (1997) (discussing unreliability of regular mail as an exclusive method of notice).

179. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

180. *See Jones*, 547 U.S. at 230 (stating that the fact that "the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house" is a key consideration in determining the adequacy of service).

181. Windsor Commc'ns Grp. Inc. v. Grant (*In re* Grant), 75 B.R. 713, 737–38 (Bankr. E.D. Pa. 1985) (holding that Rule 7004(b) withstands a constitutional due process challenge because upon the threat of execution, a defendant can assert the defense of no jurisdiction based on lack of proper service of a complaint).

182. Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 85 (1988).

> Nor is there any doubt that the entry of the judgment itself had serious consequences. It is not denied that the judgment was entered on the county records, became a lien on appellant's property, and was the basis for issuance of a writ of execution under which appellant's property was promptly sold without notice. Even if no execution sale had yet occurred, the lien encumbered the property and impaired appellant's ability to mortgage or alienate it; and state procedures for creating and enforcing such liens are subject to the strictures of due process.[183]

At its core, an individual has a right to not have a judgment entered against him or her where notice of the proceeding and an opportunity to participate were "mere gestures"—that is the message of *Mullane*.[184] It is flawed logic to argue Rule 7004(b)(1) is constitutional because in the event a defendant does not receive the summons, the defendant has the ability later on to vacate or set aside the default judgment. At that point, the constitutional violation has already occurred. In addition, the bankruptcy court would be entering a judgment without having jurisdiction over the defendant. The entry of the judgment itself, independent of whether it is recorded in the real property records or collection attempts are made, is a deprivation of rights under the Fifth Amendment. Furthermore, the burden would be on the defendant to hire an attorney and expend money to get the default judgment set aside.

Presumably, the primary rationale behind Rule 7004(b)(1) is to reduce the cost and delay of serving the summons and complaint while still maintaining efficient administration of bankruptcy proceedings. When default judgments are later required to be set aside or vacated because of deficient service of process, it defeats the entire goal behind Rule 7004(b)(1) allowing service by mail. The argument that a wrongfully entered default judgment can be vacated or set aside provides little support for upholding the constitutionality of Rule 7004(b)(1).

4. First Class Mail Creates Proof of Service Problems and a Plaintiff's Ignorance Should Not Be Bliss

One major problem of Rule 7004(b)(1) is that it provides no confirmation to the server that the summons has been received by the defendant. Bankruptcy Rule 1001 states "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."[185] Rule 7004(b)(1) seems to focus solely on the "speedy" and

183. *Id.* at 85 (internal citation omitted).

184. *Mullane*, 339 U.S. at 315 ("[W]hen notice is a person's due, process which is a mere gesture is not due process.").

185. FED. R. BANKR. P. 1001.

"inexpensive" parameters while forgetting the "just" requirement.[186] By not requiring a return or acknowledgement of receipt and relying solely upon first class mail, Rule 7004(b)(1) does not provide a high level of confidence that the summons was delivered.[187]

Bankruptcy Rule 7004(a) incorporates Rule 4(*l*)(1) of the Federal Rules of Civil Procedure, which states that unless service is waived, proof of service must be made to the court by the server's affidavit.[188] The problem is that a server using first class mail has no idea of whether the defendant received the summons and complaint. Rule 7004(b)(1) has no procedure or method for the server to confirm or know if the envelope was delivered or received. The server can only confirm the envelope was deposited with the United States Postal Service. There is a gap in the chain of custody between depositing the envelope and its presumed delivery.

In the context of evaluating the constitutional sufficiency of a notice method, the Court has held that information demonstrating that a notice was not received by the intended recipient was a pivotal factor.[189] In *Jones v. Flowers*, the Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so."[190] Under Rule 7004(b)(1), the server does not know if the summons and complaint were received or not.

Bankruptcy Rule 9006(e) exacerbates the problem by stating that service of process by mail is complete on mailing.[191] This means the time in which a defendant must respond starts running before the defendant has received the summons or complaint. Presumably, this is why a defendant has thirty days to respond instead of the shorter twenty days that is generally allowed in federal and state courts.[192] The obvious problem with Bankruptcy Rule 9006(e) is that in those situations where the first class mailing is not delivered, the time period in which a defendant must respond

186. Flores v. Sadafi (*In re* Safadi), 431 B.R. 478, 482 (Bankr. D. Az. 2010) (finding service was proper despite the defendant's forty day absence from the address to which the summons was mailed).

187. Miserandino v. Resort Props., Inc., 691 A.2d 208, 215 (Md. 1997), *cert. denied*, 522 U.S. 953 (1997); W.S. Frey Co., Inc. v. Heath, 729 A.2d 1037, 1039 (N.J. 1999); Shah v. HealthPlus, Inc., 696 A.2d 473, 481 (Md. Ct. Spec. App. 1997) ("[I]t is ordinarily customary and reasonable for a correspondence of significance, in particular documentation regarding financial or legal matters . . . to be sent by a form of delivery that can insure and provide acknowledgement of receipt.").

188. FED. R. CIV. P. 4(*l*)(1).

189. Jones v. Flowers, 547 U.S. 220, 225 (2006).

190. *Id.*

191. FED. R. BANKR. P. 9006(e) ("Service of process and service of any paper other than process or of notice by mail is complete on mailing.").

192. FED. R. BANKR. P. 7012(a).

has started and continued to run despite the non-occurrence of the event (i.e. service) that is presumed to occur a day or two after the mailing.[193]

One problem arising from the effect of Bankruptcy Rule 9006(e) is that even if the summons and complaint are returned to the sender by the United States Postal Service marked "unclaimed," "undeliverable," or "wrong address," the effect of the plain language of Bankruptcy Rule 9006(e) would be that service has been complete and jurisdiction has attached. Although this potential problem has been softened by the Court's holding in *Jones v. Flowers*, which allowed consideration of what a sender does when a notice letter is returned unclaimed,[194] the question of whether it is constitutional to serve a summons by first class mail remains unanswered.

A person electing to serve process by first class mail is not on the same constitutionally-required level as "one desirous of actually informing the [intended recipient]."[195] First class mail allows the server to avoid learning whether process was received. Ignorance should not be bliss when it comes to the obligation to serve a judicial summons and provide proof of service.

5. Service by Mail Under Rule 4(d)(1) of the Federal Rules of Civil Procedure is Appropriate Because it is Based on the Consent of the Defendant

Rule 4(d)(1)(G) of the Federal Rules of Civil Procedure provides that a plaintiff may notify a defendant by "first-class mail or other reliable means" that an action has been commenced and request that the defendant waive service of a summons.[196] Rule 4(d)(1)(C) requires a waiver form and a prepaid means for returning the form to be included in the mailing of the complaint. In contrast, Bankruptcy Rule 7004(b)(1) only requires a summons and complaint be mailed.[197]

Another difference between Rule 4(d) of the Federal Rules of Civil Procedure and Rule 7004(b)(1) is that service is not complete under Rule 4(d) upon the mailing. Rule 4(d)(2) provides that if a defendant fails to sign

193. Conceptually, there is also a slice of time (from the time the plaintiff deposits the envelope in the mail to the time when the mail is delivered to the defendant) in which a bankruptcy court would be deemed to have jurisdiction over a defendant even though the defendant has not received the summons or complaint.

194. 547 U.S. at 231 ("[I]f a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure.").

195. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

196. FED. R. CIV. P. 4(d)(1)(G).

197. FED. R. BANKR. P. 7004(b)(1).

and return the waiver without good cause, the court must impose on the defendant the expenses "later incurred in making service."[198] Thus, by the language of Rule 4(d), service is deemed waived only when the defendant signs and returns the waiver, not when the papers are mailed, and significantly, not when the defendant receives the mail.[199] Although others have written in opposition to an earlier version of Rule 4(d),[200] the acknowledgement requirement in Rule 4(d) provides assurance of receipt as well as the defendant's acceptance of, and consent to, service. There is an objective verification (the returned acknowledgment) that the plaintiff can use to provide proof that service was waived and due process was satisfied. Rule 7004(b)(1), on the other hand, requires no acknowledgement and has no correlating safeguards.

It is significant that a summons is not included in the items that are mailed to a defendant under the waiver of service procedure in Rule 4(d) of the Federal Rules of Civil Procedure.[201] Rule 4(d)(4) states that when a waiver is filed, the rules "apply as if a summons and complaint had been served at the time of filing the waiver."[202] There is no justifiable distinction as to why a less stringent method of service is allowed in an adversary proceeding, which is a civil lawsuit in federal court with a nexus or connection to a bankruptcy case, when an identical civil lawsuit without the nexus to a bankruptcy case would require the waiver acknowledgement or some other more stringent method of service. Comparing Rule 7004(b)(1) to Rule 4(d) of the Federal Rules of Civil Procedure shows how the efficiency of first class mail delivery can be utilized without violating the due process rights of a defendant.

6. Proper Service of a Summons in Judicial Proceedings is Necessary

Proper service is essential to judicial proceedings because service of process upon a defendant is necessary for a court to exercise personal jurisdiction over a defendant and is fundamental to any procedural imposition on a defendant.[203] "In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise

198. FED. R. CIV. P. 4(d)(2)(A).

199. KENT SINCLAIR, 1 SINCLAIR ON FEDERAL CIVIL PRACTICE § 2:7.2 (4th ed. 2010).

200. Crowley, *supra* note 163, at 217.

201. FED. R. CIV. P. 4(d)(1)(c) (stating the notice and request for a waiver must "be accompanied by a copy of the complaint, 2 copies of a waiver form, and a prepaid means for returning the form").

202. *Id.* at 4(d)(4).

203. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999). For an engaging summary of the historical roots of service of process, see Sinclair, *supra* note 1, at 1183.

power over a party the complaint names as defendant."[204] This is because "service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."[205]

Thus, "[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."[206] One becomes an official party to an action, and is required to take action in that capacity only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.[207] One bankruptcy court has explained the importance of a summons in this manner:

> A summons serves a particularly important role in litigation, establishing as it does that legal action has actually been commenced in a court to which a defendant is called to respond. While in part serving the perhaps antiquated function and concept of formally "bringing" a defendant before a court, the detailed contents of the summons provided for by Fed. R. Bankr. P. 7004(a)(1)/Fed. R. Civ. P. 4(a)(1) serve the necessary function of establishing the official formality of the initiation of litigation, and provide notice of the initiation of litigation. It is for this reason that Rule 4(c)(1) *absolutely requires* that a copy of a summons be served upon a putative defendant.[208]

Courts have a compelling interest in making sure defendants receive summonses. Admittedly, there may be some additional delay (and judicial economy implications) arising from the elimination of first class mail alone as a service method, but such additional delay is already being acceptably borne by federal courts in the context of civil proceedings governed by the Federal Rules of Civil Procedure.

E. Other Considerations

There are other items that should be considered when making an analysis of the constitutional sufficiency of Rule 7004(b)(1). One item is the plaintiff's self-interest and the risk of perjury when it comes to making proper service. The Bankruptcy Rules are not clear on whether service by first class mail may be made by the plaintiff or if it must be made by a

204. *Murphy Bros.*, 526 U.S. at 350 (holding service of a summons must occur before one is subject to any court's authority).

205. Miss. Pub. Corp. v. Murphree, 326 U.S. 438, 444–45 (1946).

206. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987).

207. *Murphy Bros.*, 526 U.S. at 350; *see also* FED. R. BANKR. P. 7004(a); FED. R. CIV. P. 4(a), (b), (c)(1).

208. Tully v. Haughee (*In re* Haughee), 428 B.R. 828, 832 (Bankr. N.D. Ind., 2010).

person who is not a party. Under Rule 4(c)(2) of the Federal Rules of Civil Procedure, any person who is not a party may serve a summons and complaint.[209] Rule 4(c)(2) is not incorporated by Bankruptcy Rule 7004(a)(1). Although Bankruptcy Rule 7004(a)(1) does state "personal service" may be made by any person who is not a party, the authorization is limited to personal service and does not include service by first class mail.[210]

Rule 4(c)(1) is incorporated by Bankruptcy Rule 7004(a)(1) and states that the plaintiff is responsible for having the summons and complaint served and "must furnish the necessary copies to the person who makes service."[211] The requirement that the plaintiff must furnish copies to the person who makes service implies the plaintiff is not a person authorized to serve the summons and complaint.[212] This implication is certainly not clear. Even if a party other than the plaintiff deposits the envelope into the mail and physical delivery is made by a United States Postal Service worker, the research and confirmation that a correct address is used should be the responsibility of the plaintiff—who is the party standing to gain from the summons and complaint.

A plaintiff does have an incentive to do its own due diligence and use a correct mailing address. If it is later determined that the plaintiff sent the summons and complaint to the wrong address or the mailing was otherwise deficient, any subsequent default judgment may be voidable upon a motion to dismiss or vacated for lack of jurisdiction.[213]

From the plaintiff's perspective, another concern arises from the effect of Rule 4(m) of the Federal Rules of Civil Procedure, which is incorporated by Bankruptcy Rule 7004(a)(1). Rule 4(m) states that "[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time."[214] The concern is that a first class mailing may have been sent and the plaintiff later discovers after the 120-day time period has expired that for some reason, service was defective. The 120-day time limit may be extended if the plaintiff shows good cause.[215] At least one court has held that the "good cause" must relate to the reasons

209. FED. R. CIV. P. 4(c)(2).

210. FED. R. BANKR. P. 7004(a)(1).

211. FED. R. CIV. P. 4(c)(1).

212. Lehrer v. Flaherty (*In re* Flaherty), 432 B.R. 742, 750 (Bankr. N.D. Ill. 2010).

213. Reaves v. Ams. Serv. Co. (*In re* Reaves), 396 B.R. 708, 716 (Bankr. W.D. Tenn 2008) (holding that because service of process was improper, the court had no personal jurisdiction over the defendant at the time the judgment was rendered and, therefore, the judgment was void).

214. FED. R. CIV. P. 4(m).

215. *Id.*

why service of process was not made in a timely manner, not to other reasons of why an adversary proceeding should not be dismissed.[216] Depending on how much time has expired under the applicable statute of limitations at the time of the dismissal, a plaintiff's election to attempt to serve process by first class mail may be fatal to its claim.

III. PROPOSED SOLUTION

The concerns raised in this Article should be resolved by deleting Rule 7004(b)(1)'s alternate method allowing individuals to be served by first class mail.[217] Bankruptcy Rule 7004(a)(1) already incorporates significant portions of Rule 4 of the Federal Rules of Civil Procedure.[218] The service waiver and acknowledgement procedure contained in Rule 4(d) of the Federal Rules of Civil Procedure should be adopted and incorporated into Bankruptcy Rule 7004(b).[219] The signed acknowledgment of a consenting defendant eliminates due process concerns that arise from service by first class mail alone. In the event an acknowledgment is not timely returned, Rule 4(d) still requires service to be made.

Admittedly, deleting the first class mail alternative may[220] increase the cost of service[221]—but an identical cost burden is borne by plaintiffs in federal lawsuits governed by the Federal Rules of Civil Procedure without momentous effects. In addition, the increased cost of service arising from eliminating the first class mail alternative is immaterial. Even though there is a dramatic difference between the cost of a stamp and the cost of paying a private process server or utilizing other service methods allowed under Rule 4 of the Federal Rules of Civil Procedure, the increased cost is still no more than a few hundred dollars. The filing fee to start adversary

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216. S. Indus. Banking Corp. v. DuVoisin (*In re* S. Indus. Banking Corp.), 205 B.R. 525, 534 (E.D. Tenn. 1996) (noting that good cause relates to the diligence and reasonable efforts to serve process).

217. An amendment to Rule 7004 may also necessitate a change to Bankruptcy Rule 9014(b), which provides that motions in contested matters must be served in the manner provided for service of a summons and complaint by Rule 7004. FED. R. BANKR. P. 9014(b). However, because the nature of the interest at stake for contested matters resolved by motions is not as significant as initial service of a summons in a judicial proceeding, service of motions in contested matters by first class mail may be appropriate.

218. FED. R. BANKR. P. 7004(a)(1).

219. From a drafting perspective, this could easily be accomplished by deleting the carve-out of FED. R. CIV. P. 4(d)(1) that is currently referenced in FED. R. BANKR. P. 7004(a)(1).

220. If Rule 7004(b)(1) is amended to incorporate FED. R. CIV. P. 4(d)(1), and a defendant returns the acknowledgment form, there would be no increase in the cost of service.

221. Suggesting the perfect solution is difficult, if not impossible. *See* Crowley, *supra* note 163, at 239 ("For any one service procedure to be simple and economical, and at the same time failsafe for achieving actual notice, is ultimately impossible.").

proceedings is $250.[222] If the cost of personal service as opposed to the cost of a stamp has a chilling effect upon a plaintiff's claim, then that simply shows that the claim does not have enough merit to be brought. It is a materiality analysis. Three hundred dollars to properly serve a defendant will be immaterial to a plaintiff in most adversary proceedings. In fact, deleting first class mail under Rule 7004(b)(1) may actually further judicial economy because it would screen out claims involving trivial amounts.

Deleting service by first class mail eliminates the uncertainty of whether the summons was properly served and helps avoid proof of service problems.[223] It also avoids the risk of recipients not realizing the contents of the envelope are more significant than an ordinary letter or junk mail. Not allowing first class mail service also gets around the concern that a plaintiff may not know that service has been defective and further efforts are required.

CONCLUSION

Delivering a summons by first class mail is an example of how far service methods have eroded. The creation of first class mail as a service method occurred before the vast expansion of bankruptcy court jurisdiction, both as to subject matter and nationwide personal jurisdiction. Reliance upon the *Martin-Trigona* and *Park Nursing Center, Inc.* decisions to sustain the constitutional validity of Rule 7004(b)(1) is mistaken. The Supreme Court's decisions approving various notices by mail do not support or provide a basis for serving a judicial summons by first class mail. Defendants do not expect to be served a judicial summons through a delivery method as informal as first class mail. Under *Mullane*'s analytical framework, this delivery method is not reasonably calculated, under all the circumstances, to apprise and therefore violates due process. Rule 7004(b)(1)'s allowance of service by first class mail should be deleted and replaced with the acknowledgment procedure contained in Rule 4(d) of the Federal Rules of Civil Procedure.

222. *See* US COURTS, FORMS AND FEES, *Bankruptcy Court Miscellaneous Fee Schedule issued pursuant to 28 U.S.C. § 1930(b), available at* http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourtMiscellaneousFeeSchedule.aspx (last visited Aug. 19, 2011).

223. FED. R. BANKR. P. 7004(a) (incorporating FED. R. CIV. P. 4(*l*)(1), which states "proof of service must be made to the court").