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In re Williams, Case No. 397-36061-elp7

6/11/98 ELP Unpublished

The court overruled debtors' objection to the trustee's motion for authorization to send a surplus asset notice. The notice would advise creditors of their rights to possible distribution under section 726(a)(3). Local Bankruptcy Rule 3001-1.A.1.d., as amended by General Order 98-1, is not invalid as inconsistent with the federal bankruptcy rules. The local rule deals only with notice, not with extending the time for filing claims. There was "cause" for sending the notice because of the large surplus in this case, and because the original order and notice to file claims was unclear. It contained language that creditors could have interpreted to mean that, if they did not file a timely claim, they would be barred from receiving any distribution, even if there was a surplus.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 397-36061-elp7
CHARLES M. WILLIAMS,)
SANDRA L. WILLIAMS,) MEMORANDUM
))
) Debtors.)

Debtors object to the trustee's motion for authorization to send a notice of surplus assets. The trustee is anticipating receipt of an approximately \$9,000 tax refund to the estate. The estate will then have a surplus after payment to claimants holding allowed claims of between \$20,000 and \$25,000. The trustee seeks authority to send a notice to creditors advising them of their rights to possible distribution under section 726(a)(3). Debtors argue that the local rule providing for such a notice is invalid as contrary to the Bankruptcy Code and Rules, and that, even if it is valid, the trustee has not met the requirements set out in the rule for providing the notice.

Local Bankruptcy Rule 3002-1.A.1.d., as amended by General Order 98-1, provides:

1 "If the trustee concludes a case has surplus assets,
2 the trustee may file a motion for authorization to send
3 notice of such surplus to creditors who have not filed a
4 claim. The court may then, for cause shown in an individual
5 case, authorize the clerk to send a surplus asset notice in
6 that case. If such notice is authorized, and is sent after
7 the filing deadline for tardy claims set forth in LBR 3001-
8 1.A.1.c.,¹ the deadline for filing tardy claims shall become
9 that set in the notice."

6 Debtors argue that the rule is invalid, because Bankruptcy Rule
7 3002(c)(6), which allowed a granting of an extension of time for
8 filing claims in the event of a surplus, was deleted in the 1996
9 amendments, and therefore there is no authorization for a local rule
10 allowing an extension of time.

11 Collier on Bankruptcy explains the abrogation as follows:

12 "As a result of the addition of section 502(b)(9) and
13 changes to section 726(a) of the Code, Rule 3002 was
14 significantly amended in 1996. Language requiring that
15 proofs of claim or interest be 'filed in accordance with
16 this rule' was eliminated because Rule 3002 governs
17 timeliness only and late filed claims will be dealt with
18 pursuant to section 726 of the Code. Similarly, the
19 language of Rule 3002(c) was changed to clarify that the
20 rule governs timeliness rather than operating to absolutely
21 prohibit late filings of claims and interests."

18 9 Collier on Bankruptcy ¶ 3002.RH[3] (15th ed rev 1996) (footnotes
19 omitted).

20 The local bankruptcy rule is not inconsistent with the
21 deletion of Rule 3002(c)(6). LBR 3001-1.A.1.d. deals not with
22 timeliness, but instead with notice. It merely allows the trustee
23

24 ¹ LBR 3001-1.A.1.c. provides that creditors with tardy claims will share
25 in the distribution under section 726(a)(2) or (3) if their claims and orders
26 authorizing tardy claims are filed by the later of the filing of the trustee's
final account or the last date of the objection period for the trustee's notice of
final account.

1 to ask the court to send notice to creditors who have not filed
2 claims that they may be entitled to a distribution even if they file
3 tardy claims. There is nothing that prohibits the court from
4 sending notice that the circumstances of the case are such that a
5 creditor may want to preserve its rights under section 726(a)(3).
6 If a court may not send such a notice, the next issues will be
7 whether, in the case of a surplus, a trustee may send such a notice
8 or whether a trustee would be obligated to file claims under section
9 501(c) for creditors who did not file timely claims.

10 In this case, the sending of the notice will not delay the
11 administration of the case and its closure. The trustee represented
12 that he was not sure whether he would have already filed a final
13 account but for this motion and objection. Even if he would have
14 filed the final account, the process for distribution and closure
15 would not yet have been completed. Therefore, the sending of a
16 notice in this case will not delay distribution or closure.

17 The next question is whether the trustee has shown "cause" as
18 required by the local rule. I conclude that he has. The surplus in
19 this case is quite large, between \$20,000 and \$25,000. Although the
20 mere fact of a surplus cannot, without more, constitute cause, I
21 think that the magnitude of the surplus can, especially where there
22 is no delay in the administration of the case caused by the sending
23 of the notice.

24 In addition, the order and notice to file claims that was
25 sent to creditors was potentially misleading. It stated, in part:

26 "1. In order to have a claim allowed and possibly share in

1 any distribution from this estate, a creditor must file a
2 proof of claim within 90 days of the above 'filed' date or it
3 will not be allowed except as otherwise provided by law
4 (e.g., if case filed after 10/21/94, governmental units may
5 file within 90 days of the above 'filed' date, or before 180
6 days after the date relief was ordered, whichever is longer).

7 "2. You must send the claim to the address shown below.

8 "3. Any surplus of funds remaining after payment of filed
9 claims will be returned to the debtor(s)."

10 A creditor reading the order could logically conclude that failure
11 to file a claim within the time permitted would bar any
12 distribution. Creditors are not informed that, if they file a late
13 claim, they will receive a distribution before any surplus is
14 returned to the debtor. Lack of clarity in notification of claims
15 deadlines can be cause for relief. See Pioneer Investment Services
16 Co. v. Brunswick Associates Limited Partnership, 507 US 380, 398-99
17 (1993).²

18 Debtors' objection will be overruled and the trustee's motion
19 for authorization to send a surplus asset notice granted. The
20 United States Trustee will submit the order.

21 _____
22 ELIZABETH L. PERRIS
23 Bankruptcy Judge

24 cc: Robert J. Vanden Bos
25 Robert K. Morrow
26 U. S. Trustee

27 _____
28 ² Pioneer Investment is distinguishable in that it was a Chapter 11 case
29 that addressed whether cause existed to extend the claims bar date. It recognized
30 that such extensions are not permitted in Chapter 7 cases. 507 US at 389 n4. The
31 issue in this case is whether cause exists to send an informational notice, not
32 whether cause exists to extend the bar date.