

SIGNED.



Dated: January 28, 2011

*Randolph J. Haines*

RANDOLPH J. HAINES  
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re	)	Chapter 7
	)	
WILLIAM MICHAEL TODD,	)	CASE NO. 0:10-bk-15857-RJH
	)	
Debtor.	)	OPINION GRANTING
	)	ADDITIONAL TIME TO FILE
	)	NON-DISCHARGEABILITY
	)	COMPLAINT

This case raises two issues: Is notice to the attorney who obtained a state court judgment for a creditor, but who has not appeared in the bankruptcy case, sufficient notice of the deadline to file a nondischargeability action? What kind of evidence is required to rebut the presumption of receipt that is created by the mailbox rule? Based on the undisputed facts presented, the Court concludes that the presumption of receipt has been rebutted, so the creditor's motion for additional time to file a nondischargeability complaint is granted.

**Background Facts**

Creditors Doug and Kimberly McManus obtained a default judgment for \$6 million against William Todd for the wrongful death of their daughter, Andrea Ziegler. The judgment was \$3 million in compensatory damages and \$3 million in punitive damages. Although final judgment was entered against Todd on August 27, 2009, the state court action remains pending against other defendants. McManus took a judgment debtor's exam of Todd in November of 2009, but apparently since that date there have been no collection actions in the state court or other actions taken against Todd.

Todd filed this chapter 7 case on May 21, 2010. The only address given on Todd's master mailing list for creditor McManus was "c/o Robins & Curtin, 301 E. Bethany Home

1 Road Ste B-100, Phoenix, AZ 85012.” Robins & Curtin is the law firm that represented  
2 McManus in obtaining the state court judgment.

3 The notice of the first meeting of creditors established a deadline of August 23,  
4 2010, for the filing of complaints objecting to dischargeability of debts. The BNC certificate of  
5 mailing for that notice reflects that it was mailed to McManus at their state court law firm’s  
6 address, “c/o Robins & Curtin.”

7 No complaint objecting to dischargeability was filed by the August 23 deadline.  
8 Todd’s chapter 7 discharge was granted on August 30, and the BNC certificate of service  
9 reflects that it was mailed to McManus at their lawyer’s address on that date.

10 On September 13, McManus, through their attorney Joel Robins, filed a motion  
11 seeking additional time to file a nondischargeability complaint “pursuant to Rule 906(b)(1),  
12 FRBP” [sic]. Todd opposed that motion. At an initial hearing, the Court asked for additional  
13 briefing on the issues of the adequacy of service on a creditor’s state court lawyer and on the  
14 evidence necessary to rebut the presumption of receipt arising from the “mailbox rule” that is  
15 recognized in case law. At a subsequent nonevidentiary hearing, the Court took the matter  
16 under advisement.

### 17 **Service on Creditor’s State Court Lawyer**

18 The Debtor has provided no excuse for failure to list the Creditor’s actual address  
19 on the master mailing list. And because there is no evidence of mailing of the notice of deadline  
20 to file nondischargeability complaints to the Creditor at his actual address, the burden is upon  
21 the Debtor to prove receipt of actual notice by an authorized agent of the Creditor.

22 In a case virtually on all fours involving discharge of a debt scheduled with an  
23 incorrect address, the Ninth Circuit BAP announced a general rule in 1987: “An attorney who  
24 has represented a creditor in state court proceedings does not, by virtue of that relationship  
25 alone, represent the creditor with respect to that same debt in a federal bankruptcy proceeding.”<sup>1</sup>  
26 Two years later, however, the Ninth Circuit held that notice of a bankruptcy case was sufficient  
27 if timely received by the creditor’s attorney “[a]t [the] time he was pursuing the same claim in

28 <sup>1</sup> *Lubeck v. Littlefield’s Rest. Corp. (In re Fauchier)*, 71 B.R. 212, 215 (9th Cir. BAP 1987).

1 state court that the [creditor] now seeks to have declared nondischargeable.”<sup>2</sup> That opinion cited  
2 a Third Circuit opinion that emphasized for the notice to be deemed received by the creditor  
3 through an authorized agent, the evidence must demonstrate that it was received by his lawyer  
4 “while representing his client in enforcing a claim against the bankrupt.”<sup>3</sup> Because the  
5 judgment debtor is not a “bankrupt” until the bankruptcy case is filed, that holding clearly  
6 implies the evidence must show the lawyer was seeking to enforce collection of the debt after  
7 the bankruptcy was filed. The Ninth Circuit BAP recently stated this holding succinctly: “[a]n  
8 implied agency to receive service is not established by representing a client in an earlier  
9 action.”<sup>4</sup>

10 Here, there is no evidence that Robins & Curtin was representing McManus or  
11 seeking to collect the debt after this bankruptcy case was filed on May 21, 2010. There is only  
12 the Debtor’s argument that twice during 2010 the Creditor’s lawyer attempted to reschedule  
13 debtor’s exams, but there is no suggestion that it occurred after the bankruptcy case was filed.  
14 The Debtor’s additional arguments based on the law firm’s statements and declarations that it  
15 would have taken action if it had received notice of the bankruptcy do not constitute evidence of  
16 representation.

17 The Court therefore concludes that the Debtor has failed to satisfy his burden of  
18 demonstrating receipt of actual notice by an authorized agent.

### 19 **Nature of Evidence Necessary to Rebut Presumption of Receipt**

20 Even if notice to a creditor’s state court lawyer is sufficient, it remains necessary  
21 to determine whether such notice was actually given. This issue implicates the nature and  
22 extent of the evidence necessary to rebut the presumption of receipt created by the mailbox rule.

23 Before addressing the mailbox rule, however, it is important to note this is not an  
24 issue of service of process. Most motions in contested matters and adversary complaints are

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25 <sup>2</sup> *Lompa v. Price (In re Price)*, 871 F.2d 97, 99 (9th Cir. 1989).

26 <sup>3</sup> *Id.*, citing *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985)(“while representing the  
27 creditor in enforcing a claim against the debtor”).

28 <sup>4</sup> *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93 (9th Cir. BAP 2004).

1 required to be “served” by Bankruptcy Rules 7004 and 9014(b).<sup>5</sup> Service is a highly technical  
2 term that functions both to provide notice and for the court to acquire personal jurisdiction over  
3 the party. Rule 7004(b)(1) authorizes such service to be made by first class mail. When that  
4 method of service is utilized, the service is complete upon mailing, so the adequacy of such  
5 service does not depend on either the receipt of the mailing or a presumption of such receipt.<sup>6</sup>

6 But the issue before the Court here is not “service,” but rather “notice.” No  
7 Bankruptcy Rule requires “service” of the deadline to file nondischargeability complaints.  
8 Instead, Code § 523(c) and Bankruptcy Rule 4007(c)<sup>7</sup> merely require that creditors be given  
9 “notice” “in the manner provided in Rule 2002.” Rule 2002 does not require “service,” and  
10 although it does require that creditors be given “notice by mail” it does not imply that such  
11 notice is deemed given upon mailing.

12 The issue therefore before the Court is not whether the notice was mailed, but  
13 whether the notice was actually received, and that is what implicates the mailbox rule and raises  
14 the issue of the nature and sufficiency of the evidence necessary to rebut its judge-made  
15 presumption of receipt.

16 Debtor maintains that the evidence must be more than evidence tending to prove  
17 non-receipt, such as evidence that the notice was never mailed or evidence that the mail was  
18 never delivered. Creditor maintains that evidence of nonreceipt coupled with specific evidence  
19 of standard mail handling procedures is sufficient to rebut the presumption. Ninth Circuit case  
20 law seems to provide the answer for which the creditor argues here.

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22 <sup>5</sup> Except as otherwise indicated, all chapter, section and rule references are to the United States  
23 Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules  
24 1001-9037.

25 <sup>6</sup> *Bak v. Vincze (In re Vincze)*, 230 F.3d 297 (7th Cir. 2000); *Flores v. Safadi (In re Safadi)*, 431  
26 B.R. 478 (Bankr. D. Ariz. 2010).

27 <sup>7</sup> And because the deadline for filing a nondischargeability complaint is governed by Rule  
28 4007(c), which contains its own provision for extension of the time by motion filed before the time has  
expired, Rule 9006(b)(3) expressly prohibits enlargement of that time on any other terms and the  
principles of excusable neglect as addressed in *Pioneer Ins. Servs. Co. v. Brunswick Assocs.*, 507 U.S.  
380 (1993) do not apply. *Herndon v. De La Cruz (In re De La Cruz)*, 176 B.R. 19, 24 (9th Cir. BAP  
1994).

1           In *Bucknum*,<sup>8</sup> the bankruptcy court had dismissed a nondischargeability complaint  
2 as having been untimely filed, and found that the presumption of receipt had not been overcome  
3 by the creditor's declaration that it had never received the notice of the bankruptcy and deadline  
4 to file. The Ninth Circuit's actual holding was that the adequacy of notice was a factual issue as  
5 to which the appellate court must defer to the trier of fact absent clear error. But in the course of  
6 finding no such error, the opinion stated (in what probably constitutes dictum) that the  
7 presumption of receipt cannot be overcome simply by an affidavit of nonreceipt.<sup>9</sup> That same  
8 dictum quoted from a concurrence in the BAP decision that the "presumption can only be  
9 overcome by clear and convincing evidence that the mailing was not, in fact, accomplished."<sup>10</sup>  
10 This quote from a BAP concurring opinion is one of the principal authorities the Debtor relies  
11 on to argue that the evidence necessary to overcome the presumption of receipt must be more  
12 than evidence of nonreceipt, such as evidence that the mailing did not occur.

13           More recently, however, the Ninth Circuit has held that the mailbox rule's  
14 presumption of receipt *can* be overcome by evidence of nonreceipt. In *Nunley*,<sup>11</sup> the Court  
15 addressed the presumption of receipt created by the "common law mailbox rule" in the context  
16 of FRAP Rule 4(a)(6). The Ninth Circuit appeared to adopt the "bursting bubble" approach to  
17 such presumptions, holding that "when a movant specifically denies receipt of notice, a district  
18 judge must then weigh the evidence and make a considered factual determination concerning  
19 receipt . . . ."<sup>12</sup> That holding appears to mean that the presumption may be rebutted by specific  
20 denial of receipt. Once rebutted, the evidence must be weighed. Of course this leaves it to the  
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22           <sup>8</sup> *Moody v. Bucknum (In re Bucknum)*, 951 F.2d 204 (9th Cir. 1991).

23           <sup>9</sup> *Id.* at 206-07, quoting *Osborn v. Ricketts (In re Ricketts)*, 80 B.R. 495, 497 (9th Cir. BAP  
24 1987).

25           <sup>10</sup> *Ricketts*, 80 B.R. at 498-99 (Jones, J., concurring).

26           <sup>11</sup> *Nunley v. City of Los Angeles*, 52 F.3d 792, 795-97 (9th Cir. 1995).

27           <sup>12</sup> *Id.* at 796.  
28

1 fact finder whether, under the specific facts, the bare denial of receipt is sufficient to carry the  
2 movant's burden of proof.

3 The BAP's most recent consideration of the issue was in *Williams*,<sup>13</sup> There the  
4 movant did present evidence of mail handling procedures, but the bankruptcy court found such  
5 evidence insufficient to carry the burden of proof, and the BAP affirmed. In so doing, the BAP  
6 noted that the denial of receipt had rebutted the presumption which meant the evidence must be  
7 weighed. On appeal, the movant argued that its evidence of mail handling procedures went  
8 beyond mere denial of receipt, which the BAP acknowledged. But the BAP held that such  
9 evidence "does not *require* a conclusion that the presumption has been overcome."<sup>14</sup> The  
10 opinion went on to quote from *Ricketts* that "more positive evidence was in order," such as  
11 evidence that the mailing did not occur or that other creditors did not receive the notice.<sup>15</sup> It  
12 concluded by noting that such cases "illustrate the requirement that evidence of an objective  
13 nature going beyond the claimant's statement of non-receipt is necessary."<sup>16</sup>

14 Again, *Williams* is one of the principal authorities debtor relies on for his  
15 argument that in order to overcome the presumption of receipt, the movant must present more  
16 than evidence of nonreceipt. But that is not actually the holding of *Williams*. In the context  
17 where the BAP is affirming the bankruptcy court's finding of receipt, its statement must be  
18 understood as explaining, in dictum, what might be required for the appellate court to conclude  
19 that the bankruptcy court made clear error in its factual conclusion. It should not be taken as a  
20 holding, as a matter of law, that such evidence of nonreceipt including evidence of standard mail  
21 handling procedures, is never sufficient to support the fact finder's finding that the movant has  
22 carried the burden of proving nonreceipt. To the contrary, the opinion's recognition that denial  
23 of receipt rebuts the presumption "which is then weighed against the declaration of non-receipt  
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25 <sup>13</sup> *Cuna Mut. Ins. Group v. Williams (In re Williams)*, 185 B.R. 598 (9th Cir. BAP 1995).

26 <sup>14</sup> *Id.* at 600 (emphasis added).

27 <sup>15</sup> *Id.*

28 <sup>16</sup> *Id.*

1 together with any other evidence submitted” implies that if the bankruptcy court had weighed  
2 the evidence and found nonreceipt, that conclusion would also have been affirmed as not being  
3 “clear error.”<sup>17</sup>

4           So the holdings of *Bucknum*, *Nunley* and *Williams* are that the presumption created  
5 by the mailbox rule can be rebutted by specific evidence of nonreceipt, and then the trier of fact  
6 must weigh the evidence. Here, there is certainly sufficient specific evidence of nonreceipt  
7 provided by the affidavits from virtually everyone in the law office. This Court must therefore  
8 weigh the evidence.

9           In weighing the evidence, the Court finds and concludes that the preponderance of  
10 the evidence establishes that the notice was not received. The Court bases this finding on  
11 primarily three factors. First, the evidence of specific, precise and detailed mail handling  
12 procedures has been provided, and is unrebutted. Affidavits have been submitted from the  
13 firm’s receptionist, legal assistant, file clerk, and three lawyers, none of whom saw the notice  
14 and each whom had responsibility and would have responded if such a notice had been seen.  
15 Under those procedures, notice of a bankruptcy filing by such a notorious defendant would not  
16 have escaped notice and immediate action by the firm. As the Central District of California  
17 recently concluded, this evidence “is plenty sufficient to rebut the presumption of receipt,” it  
18 “accounted for every [potentially percipient] attorney and staff member” at the law firm, and  
19 such facts “go way beyond what the appellant proffered unsuccessfully in the case [debtor]  
20 relies on most heavily,”<sup>18</sup> *Williams*.

21           Second, given the law firm’s significant involvement in obtaining a very large  
22 judgment in a high-profile case, there is really no doubt that notice of the bankruptcy received  
23 by anyone in the law firm would have been a matter of immediate and serious concern and  
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25           <sup>17</sup> *Id.*

26           <sup>18</sup> *In re Baron*, 2010 WL 2354341 at \*6 (C.D. Cal. June 8, 2010). *Accord, Artesia, Inc. v.*  
27 *Brown (In re Realia, Inc.)*, 2009 WL 775413 at \*3 (D. Ariz. March 23, 2009)(“This declaration is  
28 sufficient to rebut the presumption . . . . Not only did [defendant’s president] swear that she did not  
receive the summons, she also described the procedure for processing mail . . . .”); *Moglia v. King*  
*Marine, Inc. (In re Outboard Marine Corp.)*, 369 B.R. 353, 360 (Bankr. N.D. Ill. 2007).

1 would have been brought to the actual knowledge of the lawyers involved in obtaining that  
2 judgment.

3 Third, there would be no benefit to the law firm in ignoring such notice once it had  
4 been received. This is not a situation where a party could benefit from delay. This conclusion  
5 is well supported by the firm's prompt and decisive action immediately upon receipt of notice of  
6 the entry of discharge: within about a week, it filed a motion for extension of time supported by  
7 six affidavits.

8 After weighing the evidence, the Court is of the firm conclusion that notice of the  
9 deadline to file a nondischargeability complaint was not received by an authorized agent. Both  
10 due process and Bankruptcy Rule 4007(c) therefore require that McManus' motion be granted  
11 and that McManus be given until 30 days after receipt of this ruling to file a nondischargeability  
12 complaint.

13 DATED AND SIGNED ABOVE

14 Copy of the foregoing e-mailed  
15 this 28th day of January, 2011, to:

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