

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

5	In re:)	BAP No. CC-03-1242-KBoB
6	PATRICIA A. DWYER,)	Bk. No. SV 02-17770-AG
7	Debtor.)	Adv. No. SV 02-02266-AG
8	_____)		
9	VINCENT J. DUFFY,)	
10	Appellant,)	
11	v.)	
12	PATRICIA A. DWYER,)	
13	Appellee.)	
14	_____)		

OPINION

FILED

NOV 21 2003

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

Argued and Submitted on October 22, 2003
at Pasadena, California

Filed - November 21, 2003

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Arthur Greenwald, Bankruptcy Judge, Presiding

Before: KLEIN, BOWIE,¹ and BRANDT, Bankruptcy Judges.

¹Hon. Peter W. Bowie, Bankruptcy Judge for the Southern
District of California, sitting by designation.

1 KLEIN, Bankruptcy Judge:
2

3 A nondischargeability adversary proceeding was dismissed as
4 untimely filed. We REVERSE and publish to call attention to the
5 status of the day after Thanksgiving as a California holiday that
6 qualifies as a "legal holiday" under Federal Rule of Bankruptcy
7 Procedure 9006(a), which mirrors Federal Rule of Civil Procedure
8 6(a) and Federal Rule of Appellate Procedure 26(a)(4).
9

10 FACTS

11 Appellee, Patricia Dwyer ("Dwyer"), filed a voluntary
12 chapter 7 bankruptcy petition on August 29, 2002.

13 The deadline prescribed by Federal Rule of Bankruptcy
14 Procedure 4007(c) for filing complaints to determine the
15 dischargeability of debts encompassed by 11 U.S.C. § 523(c) was
16 November 29, 2002, which was the day after Thanksgiving.

17 Appellant Vincent Duffy, Dwyer's former spouse, commenced an
18 adversary proceeding by filing a complaint on December 2, 2002,
19 which was the Monday following Thanksgiving. He pled counts
20 under 11 U.S.C. §§ 523(a)(4), (a)(5), (a)(6), and (a)(15) that
21 were designed to preserve a state matrimonial court judgment in
22 excess of \$200,000 and spousal support of \$750/month.

23 Duffy's counsel had, on Wednesday, November 27, 2002,
24 entrusted the complaint to his messenger service, expecting it to
25 be filed that day. The messenger service did not file it that
26 day and then closed its office until the following Monday.

27 Dwyer moved to dismiss the complaint as untimely, contending
28 that it should have been filed on November 29, 2002.

1 As argued, the contest over dismissal focused on four
2 theories. First, Duffy argued that Thanksgiving Friday is a
3 holiday under California Code of Civil Procedure § 135 that
4 qualifies for automatic extension of time under Rule 9006(a).

5 Second, Duffy contended that the filing was timely because
6 the clerk's office was "inaccessible" due to the court's
7 published notice that "emergency matters only will be handled by
8 the clerk's office on: Friday, November 29, 2002."

9 Third, Duffy asserted that the combination of timely
10 delivery of the complaint to the messenger and the ambiguous
11 notice from the court warranted a finding of excusable neglect.

12 Finally, Duffy pointed out that, in any event, § 523(c) does
13 not affect § 523(a)(5) spousal support dischargeability issues,
14 and, hence, the Rule 4007(c) limitation does not apply.

15 The bankruptcy court ruled that Thanksgiving Friday is not a
16 holiday under Rule 9006(a), relying on an unpublished Ninth
17 Circuit decision holding that Thanksgiving Friday is not
18 "'declared a holiday' by California Government Code § 19853."

19 The bankruptcy court also ruled the clerk's office was not
20 inaccessible, that there was no excusable neglect, and that
21 § 523(a)(5) is subject to the Rule 4007(c) limitations period.

22 The bankruptcy court dismissed the complaint "with
23 prejudice, in its entirety" but ordered Dwyer to keep paying
24 spousal support pending disposition of the appeal.

25 This timely appeal ensued.

26

27

28

1 JURISDICTION

2 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334
3 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).
4

5 ISSUE

6 Whether the day after Thanksgiving is an "other day
7 appointed as a holiday" by the State of California within the
8 meaning of Federal Rule of Bankruptcy Procedure 9006(a).
9

10 STANDARD OF REVIEW

11 We review questions regarding construction of the Bankruptcy
12 Code and applicable rules of procedure de novo. Gonzalez v.
13 Munoz (In re Munoz), 287 B.R. 546, 550 (9th Cir. BAP 2002).
14

15 DISCUSSION

16 Although several theories are urged upon us, our resolution
17 of the status of Thanksgiving Friday as a state holiday for
18 purposes of the automatic "legal holiday" extension afforded by
19 Rule 9006(a) and Civil Rule 6(a) is dispositive.
20

21 I

22 The limitations period in question is fixed by Federal Rule
23 of Bankruptcy Procedure 4007(c) rather than statute.
24

25 A

26 Debts described by Bankruptcy Code §§ 523(a)(2), (a)(4),
27 (a)(6), and (a)(15) are discharged unless the court determines
28

1 that they are excepted from discharge. 11 U.S.C. § 523(c).²

2 These so-called "\$ 523(c) debts," unlike other nondischargeable
3 debts, must be the subject of actual bankruptcy litigation.

4 Congress left the deadline for filing the action required by
5 § 523(c) to be established by rule. Thus, Rule 4007(c) requires
6 that an action regarding § 523(c) debts be filed within 60 days
7 after the first date set for the meeting of creditors under § 341
8 except in chapter 13 cases. Fed. R. Bankr. P. 4007(c).³

9 The computation of the expiration of the period for filing a
10 dischargeability action under § 523(c) and Rule 4007(c) is
11 governed by Rule 9006(a), which was cloned from Civil Rule 6(a)

12
13 ²§ 523(c)(1):

14 (c)(1) Except as provided in subsection (a)(3)(B) of
15 this section, the debtor shall be discharged from a debt of
16 a kind specified in paragraph (2), (4), (6), or (15) of
17 subsection (a) of this section, unless, on request of the
18 creditor to whom such debt is owed, and after notice and a
19 hearing, the court determines such debt to be excepted from
20 discharge under paragraph (2), (4), (6), and (15), as the
21 case may be, of subsection (a) of this section.

22 11 U.S.C. § 523(c)(1).

23 ³Rule 4007(c):

24 (c) Time for Filing Complaint Under § 523(c) in a
25 Chapter 7 Liquidation, Chapter 11 Reorganization, or
26 Chapter 12 Family Farmer's Debt Adjustment Case; Notice
27 of Time Fixed. A complaint to determine the
28 dischargeability of a debt under § 523(c) shall be
filed no later than 60 days after the first date set
for the meeting of creditors under § 341(a). The court
shall give all creditors no less than 30 days' notice
of the time so fixed in the manner provided in Rule
2002. On motion of a party in interest, after hearing
on notice, the court may for cause extend the time
fixed under this subdivision. The motion shall be
filed before the time has expired.

Fed. R. Bankr. P. 4007(c).

1 and provides that when the last day falls on a Saturday, Sunday,
2 legal holiday, or a day on which weather or other conditions make
3 the clerk's office inaccessible, then the period expires at the
4 end of the next working day. Compare Fed. R. Bankr. P. 9006(a),⁴
5 with Fed. R. Civ. P. 6(a);⁵ accord, Fed. R. App. P. 26(a)(4).
6

7 ⁴Rule 9006(a):

8 (a) Computation. In computing any period of time
9 prescribed or allowed by these rules, or by the Federal
10 Rules of Civil Procedure made applicable by these rules, by
11 the local rules, by order of court, or by any applicable
12 statute, the day of the act, event, or default from which
13 the designated period of time begins to run shall not be
14 included. The last day of the period so computed shall be
15 included, unless it is a Saturday, a Sunday, or a legal
16 holiday, or, when the act to be done is the filing of a
17 paper in court, a day on which weather or other conditions
18 have made the clerk's office inaccessible, in which event
19 the period runs until the end of the next day which is not
20 one of the aforementioned days. When the period of time
21 prescribed or allowed is less than 8 days, intermediate
22 Saturdays, Sundays, and legal holidays shall be excluded in
23 the computation. As used in this rule and in Rule 5001(c),
24 'legal holiday' includes New Year's Day, Birthday of Martin
25 Luther King, Jr., Washington's Birthday, Memorial Day,
26 Independence Day, Labor Day, Columbus Day, Veterans Day,
27 Thanksgiving Day, Christmas Day, and any other day appointed
28 as a holiday by the President or the Congress of the United
States, or by the state in which the court is held.

21 Fed. R. Bankr. P. 9006(a) (emphasis added).

22 ⁵Civil Rule 6(a):

23 (a) Computation. In computing any period of time
24 prescribed or allowed by these rules, by the local rules, by
25 order of court, or by any applicable statute, the day of the
26 act, event, or default from which the designated period of
27 time begins to run shall not be included. The last day of
28 the period so computed shall be included, unless it is a
Saturday, a Sunday, or a legal holiday, or, when the act to
be done is the filing of a paper in court, a day on which
weather or other conditions have made the clerk's office
inaccessible, in which event the period runs until the end

(continued...)

1 The Supreme Court requires that Bankruptcy Rule 9006(a) and
2 Civil Rule 6(a) be construed in light of a policy of liberality
3 and leniency. Union Nat'l Bank v. Lamb, 337 U.S. 38, 41 (1949)
4 (F.R. Civ. P. 6(a)).⁶ Hence, Rule 9006(a) has been described as
5 intended to protect parties from a forfeiture of rights. Chapman
6 Inv. Assocs. v. Am. Healthcare Mgmt., Inc. (In re Am. Healthcare
7 Mgmt., Inc.), 900 F.2d 827, 831-32 (5th Cir. 1990). Close cases
8 are resolved in favor of reaching the merits of disputes.

9 The pertinent operative language common to the rules is:

10 "legal holiday" includes any day appointed as a holiday by
11 the state in which the court is held.

12 Fed. R. Bankr. P. 9006(a); Fed. R. Civ. P. 6(a); Fed. R. App. P.
13 26(a)(4) (elisions omitted).⁷

14
15 _____
16 ⁵(...continued)

17 of the next day which is not one of the aforementioned days.
18 When the period of time prescribed or allowed is less than
19 11 days, intermediate Saturdays, Sundays, and legal holidays
20 shall be excluded in the computation. As used in this rule
21 and in Rule 77(c), 'legal holiday' includes New Year's Day,
22 Birthday of Martin Luther King, Jr., Washington's Birthday,
Memorial Day, Independence Day, Labor Day, Columbus Day,
Veterans Day, Thanksgiving Day, Christmas Day, and any other
day appointed as a holiday by the President or the Congress
of the United States, or by the state in which the district
court is held.

23 Fed. R. Civ. P. 6(a) (emphasis added).

24 ⁶Fed. R. Bankr. P. 9006(a) and Fed. R. App. P. 26(a) are
25 each modeled on Rule 6(a). Decisions interpreting Rules 6(a),
9006(a), and 26(a) are mutually informative.

26 ⁷The word "district" modifies "court" in Civil Rule 6(a).
27 Appellate Rule 26(a)(4) uses "means" instead of "includes" and
28 incorporates the holidays of the state of the trial court and of
the state of the principal office of the circuit clerk.

1 The question thus becomes whether the day after Thanksgiving
2 is appointed as a holiday by the State of California.

3
4 B

5 California Code of Civil Procedure § 135 provides that:
6 "The day after Thanksgiving Day is a judicial holiday." Cal.
7 Code Civ. Proc. § 135.⁸

8 The effect of a "judicial holiday" on court operations is
9 spelled out in California Code of Civil Procedure § 134.⁹

10
11 § 135. Judicial holidays; alternate day of observance from
12 Saturday or Sunday

13 Every full day designated as a holiday by Section 6700
14 of the Government Code, including that Thursday of November
15 declared by the President to be Thanksgiving Day, is a
16 judicial holiday, except September 9, known as "Admission
17 Day," and any other day appointed by the President, but not
18 by the Governor, for a public fast, thanksgiving, or
19 holiday. If a judicial holiday falls on a Saturday or a
20 Sunday, the Judicial Council may designate an alternative
21 day for observance of the holiday. Every Saturday and the
22 day after Thanksgiving Day is a judicial holiday. Officers
23 and employees of the courts shall observe only the judicial
24 holidays established pursuant to this section.

25 Cal. Code Civ. Proc. § 135. The sentence with the phrase
26 "including that Thursday of November declared by the President to
27 be Thanksgiving" was added in 1986. 1986 Cal. Stat. c. 1398.
28 The word "Day" was inserted in 1992. 1992 Cal. Stat. c. 460.

29 § 134. Court closure on judicial holidays; exceptions

30 (a) Except as provided in subdivision (c), the courts
31 shall be closed for the transaction of judicial business on
32 judicial holidays for all but the following purposes:

33 (1) To give, upon their request, instructions to a jury
34 when deliberating on their verdict.

35 (2) To receive a verdict or discharge a jury.

36 (3) For the conduct of arraignments and the exercise of
37 the powers of a magistrate in a criminal action, or in a
38 proceeding of a criminal nature.

(continued...)

1 The courts are officially closed, but a court may choose to
2 be open and transact judicial business on a judicial holiday.
3 Any papers "lodged" with a court (even if open) on a judicial
4 holiday are not to be "filed" until the next day that is not a
5 judicial holiday. Cal. Code Civ. Proc. § 134(d).

6 Deadlines that end on judicial holidays designated in § 135
7 are automatically extended to the next day that is not a holiday.
8 Cal. Code Civ. Proc. § 12a(a);¹⁰ id. § 12.¹¹ This includes

9
10 ⁹(...continued)

11 (4) For the conduct of Saturday small claims court
12 session pursuant to the Small Claims Act set for in Chapter
13 5.5 (commencing with Section 116.110).

14 (b) Injunctions and writs of prohibition may be issued
15 and served on any day.

16 (c) In any superior or municipal court, one or more
17 departments of the court may remain open and in session for
18 the transaction of any business that may come before the
19 department in the exercise of the civil or criminal
20 jurisdiction of the court, or both, on a judicial holiday or
21 at any hours of the day or night, or both, as the judges of
22 the court prescribe.

23 (d) The fact that a court is open on a judicial holiday
24 shall not make that day a nonholiday for purposes of
25 computing the time required for the conduct of any
26 proceeding or for the performance of any act. Any paper
27 lodged with the court at a time when the court is open
28 pursuant to subdivision (c), shall be filed by the court on
the next day that is not a judicial holiday, if the document
meets appropriate criteria for filing.

Cal. Code Civ. Proc. § 134.

¹⁰§ 12a. Computation of time; holidays; application of
section

25 (a) If the last day for the performance of any act
26 provided or required by law to be performed within a
27 specified period of time is a holiday, then that period is
28 hereby extended to and including the next day which is not a
holiday. For purposes of this section, "holiday" means all
day on Saturdays, all holidays specified in Section 135 and,
(continued...)

1 California statutes of limitations that expire on judicial
2 holidays. DeLeon v. Bay Area Rapid Transit Dist., 33 Cal. 3d
3 456, 460-61 (1983).

4 Moreover, the terms "holiday" and "judicial holiday" are
5 formally equated by California Code of Civil Procedure § 10.
6 Cal. Code Civ. Proc. § 10.¹²

7 In short, the California legal system is inured to the
8 propositions that the day after Thanksgiving is a holiday on
9 which no deadlines, including statutes of limitations, expire and
10 that everybody can safely relax on that account.

11 The federal computation-of-time scheme embodied in
12 Bankruptcy Rule 9006(a), Civil Rule 6(a), and Appellate Rule
13 26(a)(4) is designed to harmonize the federal rules with state
14 procedure in order to eliminate traps for the unwary that result
15 from treating a day differently as between a state's federal and

16 _____
17 ¹⁰(...continued)

18 to the extent provided in Section 12b [relating to days of
19 actual closure], all days which by terms of Section 12b are
20 required to be considered as holidays.

21 Cal. Code Civ. Proc. § 12a.

22 ¹¹§ 12. Computation of time

23 Computation of time. The time in which any act
24 provided by law is to be done is computed by excluding the
25 first day, and including the last, unless the last day is a
26 holiday, and then it is excluded.

27 Cal. Code Civ. Proc. § 12.

28 ¹²§ 10. Holidays

Holidays within the meaning of this code [of procedure]
are every Sunday and any other days that are specified or
provided for as judicial holidays in Section 135.

Cal. Code Civ. Proc. § 10.

1 state courts. The day after Thanksgiving is appointed as a
2 holiday under California statute for every purpose pertinent to
3 the federal rules on computation of time and must be treated as
4 such by California federal courts.

5 The Tenth Circuit's analysis reaching a contrary result in
6 Cascade Oil actually supports our view. There, the Chief Justice
7 of Kansas ordered all state courts to close on the day after
8 Thanksgiving. The Tenth Circuit held that the administrative
9 order did not make that day a "legal holiday" for purposes of
10 Appellate Rule 26(a) because it was not an act of the Kansas
11 state legislature. Official Creditors' Comm. v. Crooker (In re
12 Cascade Oil Co.), 848 F.2d 1062, 1064 (10th Cir. 1988).

13 We implicitly agreed with the Tenth Circuit in a case
14 involving an untimely proof of claim where the bankruptcy clerk's
15 office remained open and accessible following the Northridge
16 magnitude 6.7 earthquake despite state emergency administrative
17 orders that permitted late filing in state courts. Dicker v. Dye
18 (In re Edelman), 327 B.R. 146, 151 n.6 & 153 (9th Cir. BAP 1999).

19 Here, the fact that the California legislature enacted the
20 California Code of Civil Procedure making the day after
21 Thanksgiving a holiday makes all the difference.

22 Accordingly, we hold that Duffy's complaint was timely
23 because California Code of Civil Procedure §§ 10, 12, 12a, 134,
24 and 135 operate to make the day after Thanksgiving a "day
25 appointed as a holiday ... by the state in which the court is
26 held" within the meaning of Bankruptcy Rule 9006(a).

27 As the complaint was timely, we need not consider whether
28 the clerk's office was inaccessible, whether any neglect was

1 excusable, and whether we should correct the plain error inherent
2 in dismissing with prejudice the count under § 523(a)(5), to
3 which § 523(c) does not apply.

4
5 II

6 Nor does the unpublished Ninth Circuit memorandum decision
7 upon which the bankruptcy court relied as binding precedent
8 compel a different result. It is neither binding nor precedent.

9 Specifically, the court treated as published and binding a
10 Ninth Circuit decision that rejects a contention that California
11 Government Code § 19853 (regarding employment policy for state
12 employees) makes the day after Thanksgiving a holiday and that
13 does not address the "judicial holiday" provisions of the Code of
14 Civil Procedure § 135 upon which we rely.

15 The mere appearance of a memorandum decision in Federal
16 Appendix, Westlaw, or some other medium accessible to the public
17 does not does not make it either published or binding in the face
18 of a contrary Ninth Circuit rule. Indeed, the first footnote in
19 that decision states that it is not published and not eligible
20 for citation.¹³ Moreover, Westlaw cautions: "Please use FIND to
21 look at the applicable circuit court rule before citing this
22 opinion. (FIND CTA9 Rule 36-3.)"

23 Ninth Circuit Rule 36-3 provides that unpublished
24 dispositions are not binding precedent, except when relevant

25
26
27 ¹³That footnote reads: "This disposition is not appropriate
28 for publication and may not be cited to or by the courts of this
circuit except as may be provided by Ninth Circuit Rule 36-3."

1 under the doctrines of preclusion. 9th Cir. Rule 36-3(a).¹⁴
2 Moreover, they may not be cited to the Ninth Circuit or by the
3 courts of the circuit except when relevant under the doctrine of
4 law of the case, res judicata, or collateral estoppel, or for
5 factual purposes, or in a request to publish or for rehearing in
6 order to demonstrate the existence of a conflict. Id. 36-3(b).

7 Although unpublished Ninth Circuit decisions are valuable
8 research tools, the bankruptcy court should not have cited the
9 unpublished decision (which, in obedience to Rule 36-3, we do not
10 cite) and should not have treated it as binding precedent. That

11
12 ¹⁴Circuit Rule 36-3. Citation of Unpublished Dispositions or
13 Orders

14 (a) Not Precedent. Unpublished dispositions and orders
15 of this Court are not binding precedent, except when
16 relevant under the doctrine of law of the case, res
17 judicata, and collateral estoppel.

18 (b) Citation. Unpublished dispositions and orders of
19 this Court may not be cited to or by the courts of this
20 circuit, except in the following circumstances.

21 (i) They may be cited to this Court or to or by any
22 other court in this circuit when relevant under the doctrine
23 of law of the case, res judicata, or collateral estoppel.

24 (ii) They may be cited to this Court or to or by any
25 other court in this circuit for factual purposes, such as to
26 show double jeopardy, sanctionable conduct, notice,
27 entitlement to attorney's fees, or the existence of a
28 related case.

(iii) They may be cited to this Court in a request to
publish a disposition or order made pursuant to Circuit Rule
36-4, or in a petition for panel rehearing or rehearing en
banc, in order to demonstrate the existence of a conflict
among opinions, dispositions, or orders.

(c) Attach Copy. A copy of any cited unpublished
disposition or order must be attached to the document in
which it is cited, as an appendix.

9th Cir. Rule 36-3; accord, 9th Cir. BAP R. 8013-1(c)
("Unpublished memoranda and orders have no precedential value and
may not be cited except when relevant under the doctrines of law
of the case, res judicata, or collateral estoppel.").

1 decision is entitled to the respect warranted by its source and
2 by any persuasive value in its reasoning but does not bind trial
3 courts or future panels of the Ninth Circuit. To the extent the
4 unpublished decision in question cannot be distinguished on the
5 basis that it does not address the statutes on which we rely, it
6 is (with all respect) not persuasive.

7
8 CONCLUSION

9 The bankruptcy court erred in dismissing the adversary
10 proceeding. Because the Friday after Thanksgiving is appointed
11 as a holiday by the state in which the court is held and, hence,
12 constitutes a "legal holiday" within the meaning of Rule 9006(a),
13 the complaint was timely filed on the following Monday.

14 We REVERSE and REMAND for further proceedings consistent
15 with this decision.