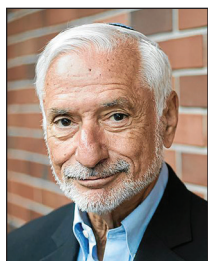


Practice & Procedure

BY MICHAEL H. TRAISSON AND BRIDGET C. HART

Froiland: A Procrastinator's Guide to Computing Time

Few lawyers fail to take seriously the importance of abiding by the rules and requirements of the U.S. courts, especially when it comes to filing deadlines. However, many practitioners have made a habit out of filing motion papers and documents with the courts at the very last moment. While procrastinating on a filing until the final hours of a due date might not have an adverse effect on a lawyer's ultimate goal, being unaware of rules dictating a time computation in the bankruptcy courts might have grave consequences for both attorneys and clients. A recent bankruptcy court decision underscores the importance of understanding the bankruptcy courts' rules for computing time, especially when waiting to take action until the very last day allowed by the court.



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In re Froiland

In a decision dated July 6, 2018, Hon. **H. Christopher Mott** of the U.S. Bankruptcy Court for the Western District of Texas grappled with "whether an objection to discharge and dischargeability by a creditor is late, when the complaint is filed one day after a fixed-date deadline set by an agreed order of the Court."¹ In *Froiland*, the debtor, Nickie Jo Froiland, filed a voluntary chapter 7 petition on Aug. 7, 2017.² The original deadline for her creditors to file a complaint objecting to the discharge of debt fell on Nov. 7, 2017.³

On the day that the original deadline was set to expire, Smart-Fill Management Group Inc., one of Froiland's creditors, requested a deadline extension to object to discharge, which was granted by the court.⁴ On the day that the extended deadline to object to discharge was set to expire, Smart-Fill requested a second extension.⁵ The court granted the second extension and, pursuant to an order agreed upon by counsel for both Smart-Fill and Froiland, extended the deadline for Smart-Fill to file an objection to discharge expired on Jan. 15, 2018.⁶

Monday, Jan. 15, 2018, turned out to be Martin Luther King Jr. Day, which is a federal holiday. On Jan. 16, 2018, Smart-Fill initiated an adversary proceeding against Froiland by filing a complaint

objecting to Froiland's discharge.⁷ However, Froiland filed a motion to dismiss, arguing that Smart-Fill's complaint was time-barred because it was filed one day after the deadline set forth by the bankruptcy court to commence such a proceeding.⁸ Smart-Fill contended that its complaint was timely filed because the filing deadline pronounced by the court was a legal holiday and Smart-Fill was thus automatically granted a one-day extension to file the complaint.⁹

Judge Mott, relying on the plain text of Rule 9006 of the Federal Rules of Bankruptcy Procedure and the Advisory Committee's Note to the 2009 Amendment, found that Smart-Fill's complaint was untimely and was therefore dismissed.¹⁰

Bankruptcy Rule 9006 and Its History

Bankruptcy Rule 9006(a) governs the computation of time for actions and proceedings in bankruptcy cases. The most current iteration of Bankruptcy Rule 9006(a) states:

The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period stated in days or a longer unit. When the period is stated in days or a longer unit of time:

- (A) exclude the day of the event that triggers the period;
- (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
- (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.¹¹

Rule 9006 has been amended several times since the Bankruptcy Rules were adopted in 1983.

¹ *Smart-Fill Mgmt. Grp. Inc. v. Froiland (In re Froiland)*, No. 17-10979-HCM, 2018 WL 3343491, at *1 (Bankr. W.D. Tex. July 6, 2018).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at *2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *1, *4.

¹¹ Fed. R. Bankr. P. 9006.

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Notably, it was amended in 2009 to clarify competing case law regarding the computation of time under this rule.¹²

In *In the Matter of Am. Healthcare Mgmt. Inc.*, the debtor filed several motions to extend the time during which it could assume or reject its leases.¹³ The court granted the debtor's second motion and extended the deadline for assumption or rejection to a fixed date of Feb. 15, 1988,¹⁴ which happened to be Presidents' Day (a federal holiday).¹⁵ On Feb. 16, the debtor filed a motion to assume certain leases.¹⁶

The bankruptcy court eventually held that the debtor's motion to assume was timely and should be granted, and the district court affirmed the bankruptcy court's decision.¹⁷ Stating that "[t]he clear purpose of the rule is to avoid a forfeiture of rights when a deadline for acting falls on a day on which courts are closed for business," the Fifth Circuit held that the district court properly determined that Rule 9006(a) extended the debtor's deadline for acting in this case to Feb. 16.¹⁸

Fifteen years after the *American Healthcare* case, the Sixth Circuit grappled with the same issue (in the context of Rule 6(a) of the Federal Rules of Civil Procedure), but came out on the other side.¹⁹ In *Violette*, the appellants challenged the district court's order granting the plaintiffs' motion to include, in the list of those who excluded themselves from a class settlement, class members whose opt-out forms were postmarked on Feb. 17, 2004, which was the first business day after the court-ordered, fixed deadline of Saturday, Feb. 14.²⁰ The district court concluded that Rule 6(a) mandated that forms postmarked on the first business day following the court's Saturday deadline were timely filed, but the Sixth Circuit reversed the district court's decision.²¹ The Sixth Circuit found that "[t]he language of [Rule] 6(a) does not address situations where litigants are required to file papers on a particular, stated, calendar date."²²

The Advisory Committee's Note to the 2009 Amendment to Rule 9006 explains that the rule was amended to "simplify and clarify the provisions that describe how deadlines are computed" in a way that is consistent with the court's decision in *Violette*.²³ The Advisory Committee's Note to the 2009 Amendment emphatically states that "[t]he time-computation provisions of subdivision (a) apply *only* when a time period must be computed. They do not apply when a *fixed time* to act is set."²⁴

The *Froiland* decision follows several other bankruptcy court decisions interpreting the text of Rule 9006 similar-

ly. For example, in *Gray*, the bankruptcy court extended the deadline for filing dischargeability actions in a chapter 7 case to a fixed date of March 31, 2013, which was a Sunday.²⁵ One of the debtor's creditors, assuming that the deadline would be automatically extended to the next business day, filed its dischargeability action on Monday, April 1, and the debtor moved to dismiss the complaint as being untimely.²⁶ The U.S. Bankruptcy Court for the Middle District of Florida held that the dischargeability deadline was not extended under Rule 9006, stating that the automatic extension provided by Rule 9006(a) "only applies when the original time period must be computed — not when a fixed date to act is set."²⁷

In *MF Global*, the trustee for the liquidation of the debtor objected to certain proofs of claim filed after the bar date, which fell on a Saturday.²⁸ One of the debtor's creditors, which filed a proof of claim on the Monday following the bar date, argued that the court should apply Rule 9006(a) and find that his proof of claim was not untimely filed.²⁹ However, the U.S. Bankruptcy Court for the Southern District of New York simply stated that "Rule 9006(a) does not apply when there is a court-specified date," as was the case there.³⁰

Courts' Discretion Regarding Excusable Neglect and Suggested Practice

Smart-Fill's failure to file its complaint by the deadline established by the bankruptcy court in *Froiland* led the court to dismiss Smart-Fill's action.³¹ However, the Bankruptcy Rules do provide courts with the discretion to allow for late filings in various circumstances.³² Rule 9006(b) states that

when an act is required or allowed to be done at or within a specified period ... by order of court, the court for cause shown may at any time in its discretion ... on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.³³

Essentially, this rule "empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect.'"³⁴ "Excusable neglect" is not defined by the Bankruptcy Rules, so when considering whether a late filing was the result of excusable neglect, the U.S. Supreme Court has articulated the following standard:

Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant

12 Fed. R. Bankr. P. 9006 Advisory Committee's Note to 2009 Amendment. Prior to the amendment, the language of Rule 9006(a) generally allowed for the extension of time for a legal holiday when "computing any period of time." Fed. R. Bankr. P. 9006 (1989) (emphasis added).

13 *In the Matter of Am. Healthcare Mgmt. Inc.*, 900 F.2d 827, 829 (5th Cir. 1990).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 832.

19 *Violette v. P.A. Days Inc.*, 427 F.3d 1015 (6th Cir. 2005).

20 *Id.* at 1016.

21 *Id.*

22 *Id.* at 1018 (emphasis added).

23 Fed. R. Bankr. P. 9006 Advisory Committee's Note to 2009 Amendment (emphasis added).

24 *Id.* (emphasis added).

25 *In re Gray*, 492 B.R. 923 (Bankr. M.D. Fla. 2013).

26 *Id.*

27 *Id.*

28 *In re MF Global Inc.*, No. 11-2790 (MG) SIPA, 2014 WL 1320094, at *1 (Bankr. S.D.N.Y. April 1, 2014).

29 *Id.* at *5.

30 *Id.* at *6.

31 *Froiland* at *1.

32 See Fed. R. Bankr. P. 9006(b)(1).

33 *Id.*

34 *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 382 (1993).

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circumstances surrounding the party's omission ... includ[ing] ... the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.³⁵

While parties who make an untimely filing with the bankruptcy court could ultimately be saved by the court's discretion pursuant to Rule 9006(b), relying on such discretion would be unwise. The concept of "excusable neglect" is obviously flexible and subject to each judge's opinion based on the facts at hand. Further, the burden of proving excus-

able neglect lies with the late-filing claimant — leaving the claimant with an uphill battle.³⁶

Even more, courts have specifically found that ignorance to or mistakes regarding the court's rules regarding the computation of time is not excusable neglect under Rule 9006(b).³⁷ Considering the general trend in the bankruptcy courts' interpretations of Rule 9006(a), when practitioners are faced with a fixed deadline for taking action, it would be prudent to take such action on or before the fixed deadline — even if that deadline falls on a weekend or legal holiday. **abi**

³⁶ *In re Enron Corp.*, 419 F.3d 115, 121 (2d Cir. 2005); *Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3d Cir. 2000).

³⁷ See, e.g., *In re Waggoner*, 157 B.R. 433, 436 (Bankr. E.D. Ark. 1993); *In re Singer Co. NV*, No. M-47 (MBM), 2002 WL 10452, at *3 (S.D.N.Y. Jan. 3, 2002).

³⁵ *Id.* at 395 (citation omitted).

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