AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
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Claims Chat

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A Practitioner's Guide to Resolving Late Claims

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Proofs of claim play a critical role in bankruptcy cases. Debtors use them to determine their liabilities; creditors use them to preserve their rights to distribution. Accordingly, the Bankruptcy Rules require that all unsecured creditors file a proof of claim in order for their claims to be allowed.[2] Missing the bar date to file claims can have severe consequences, but don't panic; there are options when clients approach you with late claims.

Was My Client's Claim Scheduled?

First, you should determine whether your client needed to file a proof of claim at all. Pursuant to § 1111(a) of the Bankruptcy Code, if a claim is identified on the debtor's schedules and it is not listed as contingent, unliquidated or disputed (CUD), then the claim is deemed filed.[3] Most bar date orders provide an exception for such scheduled claims, but review the order to make sure. At least one court has held that, notwithstanding § 1111(a), a bar date order can require creditors with scheduled non-CUD claims to file proofs of claim.[4]

Did My Client Submit an Informal Proof of Claim?

Even if your client did not submit a claim prior to the bar date, you should confirm whether they submitted documentation to the debtor that may constitute an informal proof of claim. A document evidencing the existence, nature and amount of a claim against the debtor that has become part of the judicial record prior to the bar date may constitute an informal proof of claim.[5] The writing must contain a demand by the creditor on the debtor's estate; mere notice of a debt is not sufficient.[6] For example, if your client filed a motion for relief from the stay early in the case, your client may be deemed to have filed an informal proof of claim.[7] Once deemed valid, an informal proof of claim may be subsequently amended by a formal proof of claim in order to comply with Bankruptcy Rule 3001.[8]

Has the Bar Date Been Extended Due to Conversion?

Although your client may have missed the bar date in the debtor's chapter 11, 12 or 13 case, there may still be hope if the case is converted to chapter 7. Pursuant to Bankruptcy Rule 1019(2), when a case is converted to a chapter 7, a new deadline to file proofs of claim will be fixed.[9] Generally, the bar date in a converted chapter 7 case will be 90 days after the date of the first postconversion creditors' meeting.[10] Notably, this extension does not apply if the chapter 11 case being converted had previously been converted from a chapter 7 and the bar date in that chapter 7 case had already expired.[11]

Did My Client Receive Proper Notice of the Bar Date?

Another line of defense is to determine whether your client received proper notice of the bar date. Without proper notice, a creditor's claim cannot be

1 Jeffrey H. Taub, an associate at the firm, contributed to the preparation of this article.
2 Fed. R. Bankr. P. 3002(a).
3 11 U.S.C. § 1111(a).
4 *See In re McLean Enter. Inc.*, 98 B.R. 485 (Bankr. W.D. Mo. 1989); *but see ATD Corp. v. Advantage Packages Inc. (In re ATD Corp.)*, 352 F.3d 1062 (6th Cir. 2003) (questioning *McLean* and stating, in *dicta*, that bankruptcy court cannot enter order conflicting with § 1111(a)).
5 *See, e.g., Hefta v. Official Comm. of Unsecured Creditors (In re American Classic Voyages Co.)*, 405 F.3d 127 (3d Cir. 2005); *Barlow v. M.J. Waterman & Associates Inc. (In re M.J. Waterman & Associates Inc.)*, 227 F.3d 604 (6th Cir. 2000).
6 *See Hefta*, 405 F.3d at 132.
7 *See Brown v. Turner (In re Brown)*, 76 Fed. Appx. 471 (3d Cir. 2003); *see also In re Petrucci*, 256 B.R. 704, 706-7 (Bankr. D. N.J. 2001) (collecting decisions allowing informal proofs of claim).
8 *Barlow*, 227 F.3d at 608.
9 Fed. R. Bankr. P. 1019(2)(A).
10 *See F&M Marquette Nat'l Bank v. Richards*, 780 F.2d 24, 25 (8th Cir. 1985); Fed. R. Bankr. P. 1019(2)(A), 3002(c)(1).
11 Fed. R. Bankr. P. 1019(2)(A).

discharged,[12] and in order to satisfy due process, notice must be reasonably calculated to apprise interested parties of the pendency of the action.[13] In bankruptcy, the form of notice depends on whether a creditor is known or unknown.

A known creditor is one "whose identity is either known or 'reasonably ascertainable by the debtor.'"[14] A creditor's identity is reasonably ascertainable "if that creditor can be identified through reasonably diligent efforts."[15] "[I]mpracticable and extended" searches are not required, but the requisite search for a known creditor should include a careful examination of a debtor's books and records.[16] Conversely, unknown creditors are those that cannot be ascertained with a reasonably diligent search of the debtor's books and records in the ordinary course of business.[17]

For known creditors, actual notice of the bar date is required, which generally means mail service.[18] If the notice was mailed to a known creditor's correct address, it is presumed to be received.[19] This presumption may be rebutted by evidence of the creditor's system for processing mail, but not by mere assertions that the creditor did not receive the notice.[20] If the address is slightly incorrect, the presumption is weakened but not lost.[21] Unknown creditors, on the other hand, are only entitled to constructive notice, which is generally satisfied by publication of the bar date in newspapers.[22]

If your client can prove that the debtor's books and records identify (or should identify) a debt owed to your client, then actual notice of the bar date was required. Confirm whether the affidavit of service of the bar date notice includes your client and correctly recites the client's address. If not, a letter to the debtor or motion to file a late claim should follow.

Was My Client's Delay Due to Excusable Neglect?

Pursuant to Bankruptcy Rule 9006(b), the court may permit a creditor to file a late proof of claim if the failure to file was the result of "excusable neglect."[23] While not defined, the term "excusable neglect" is determined through a balancing of four factors: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the creditor; and (4) whether the creditor acted in good faith.[24] In many jurisdictions, the reason for the delay is the pre-eminent factor.[25]

A finding of excusable neglect is based on the particular circumstances of the case, so you should collect as much information as possible regarding why your client missed the bar date. If the lateness was due to bad advice provided by an officer of the court[26] or the creditor's prior attorney, it might be excusable.[27] Also, ambiguity in the bar date notice may constitute cause to permit a late claim.[28] However, if your client failed to file a proof of claim due to the client's (or its lawyer's) busy schedule[29] or the client's mistaken belief that the claim was undisputed,[30] excusable neglect may not be an excuse.

Can Someone Else File a Claim on My Client's Behalf?

It is also possible for someone else to file a claim on your client's behalf. Pursuant to § 501(c) of the Bankruptcy Code and Bankruptcy Rule 3004, the debtor may file a proof of claim on behalf of a creditor within 30 days after the bar date.[31] While it may seem odd, this rule is intended to facilitate a fresh start by allowing the debtor to file proofs of claim for claims that could potentially survive a bankruptcy discharge. It could also be used by the debtor simply to ensure payment of a debt owed to a friend or relative.[32]

Similarly, § 501(b) and Bankruptcy Rule 3005 allow a co-debtor, surety or guarantor of the debtor to file a proof of claim within 30 days after the bar date.[33] A co-debtor may be willing to file a claim on your client's behalf in order to ensure that some or all of the debt for which the codebtor is liable is paid through the bankruptcy. Thus, depending on the timing, you should investigate whether the debtor or a co-debtor, surety or guarantor would be willing to file a late proof of claim for your client.

Did My Client Already Mail a Proof of Claim?

If your client insists that he or she did mail a proof of claim, but the debtor alleges never to have received it, a bankruptcy court may still allow the claim if you can establish that the proof of claim was timely mailed. Unlike the presumption that arises when a debtor mails a notice, courts are split on whether a presumption arises as to a debtor's receipt of a proof of claim if a creditor can prove that it was timely mailed.[34]

In order to benefit from the presumption, the individual responsible for mailing procedures should submit an affidavit describing the client's outgoing mail procedures and affirming that the proof of claim was indeed mailed. But it may not

12 *Paging Network Inc. v. Nationwide Paging Inc. (In re Arch Wireless)*, 534 F.3d 76, 83 (1st Cir. 2008); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995).
13 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950).
14 *Chemetron*, 72 F.3d at 346 (quoting *Tulsa Prof'l Collection Serv. Inc. v. Pope*, 485 U.S. 478, 490, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)).
15 *Id.* (internal quotation marks and citations omitted); *In re XO Commc'ns Inc.*, 301 B.R. 782, 793 (Bankr. S.D.N.Y. 2003).
16 *Chemetron*, 72 F.3d at 346-47 (quoting *Mullane*, 339 U.S. at 317); *DePippo v. Kmart Corp.*, 335 B.R. 290, 296 (S.D.N.Y. 2005).
17 *Mullane*, 339 U.S. at 317.
18 *Tulsa*, 485 U.S. at 490.
19 *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 419 (1932); *In re Dana Corp.*, 2007 WL 1577763, *4 (Bankr. S.D.N.Y. May 30, 2007).
20 *See In re Farris*, 365 Fed. Appx. 198, 200 (11th Cir. 2010); *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Securities LLC*, 2011 WL 6010292, *3 (Bankr. S.D.N.Y. Dec. 1, 2011).
21 *See In re Longardner & Assocs. Inc.*, 855 F.2d 455, 460 (7th Cir. 1988) (mailing without zip code results in weakened presumption); *but see In re La Rouche Inds. Inc.*, 307 B.R. 774 n. 5 (D. Del. 2004) (noting that Third Circuit has not addressed concept of weakened presumption and "not clear" if such presumption could be used by debtors).
22 *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296 (1953); *Chemetron*, 72 F.3d at 348.
23 Fed. R. Bankr. P. 9006(b)(1).
24 *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).
25 *In re Enron Corp.*, 419 F.3d 115, 123 (2d Cir. 2005); *United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004); *Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence Inc.*, 270 F.3d 1, 5 (1st Cir. 2001).
26 *Greyhound Lines Inc. v. Rogers (In re Eagle Bus Mfg. Inc.)*, 62 F.3d 730, 739 (5th Cir. 1995) (confusion created in part by court's order to engage in alternative dispute resolution constituted excusable neglect). *In re Papp Int'l Inc.*, 189 B.R. 939, 947 (Bankr. D. Neb. 1995) (creditor's reliance on bankruptcy court clerk's office was excusable neglect).
27 *In re Earth Rock*, 153 B.R. 61, 62-64 (Bankr. D. Idaho 1993) (allowing late proof of claim in "close case" where prior attorney advised client that "nothing more needed to be done" and allowing that claim would not result in prejudice to debtor).
28 *See Pioneer*, 507 U.S. at 398 (bar date was "peculiarly placed" in notice regarding creditors' meeting and not "prominently announced"); *cf., In re Pappalardo*, 210 B.R. 634 (Bankr. S.D. Fla. 1997) (creditor failed to timely file because it did not receive notice of meeting of creditors).
29 *In re South Atlantic Fin. Corp.*, 767 F.2d 814, 818 (11th Cir. 1985) (citing *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387-88 (11th Cir. 1981)).
30 *In re New York Seven-Up Bottling Co. Inc.*, 153 B.R. 21, 23 (Bankr. S.D.N.Y. 1995).
31 11 U.S.C. § 501(c); Fed. R. Bankr. P. 3004.
32 *See* 4 *Collier on Bankruptcy* ¶ 501.04 (Alan N. Resnick and Henry J. Sommer eds. 16th ed. 2011).
33 11 U.S.C. § 501(b); Fed. R. Bankr. P. 3005(a).
34 *In re Nimz Transportation Inc.*, 505 F.2d 177, 179 (7th Cir. 1974) (holding that presumption arises); *In re Borders Group Inc.*, 462 B.R. 48 (Bankr. S.D.N.Y. 2011) (same); *but see Chrysler Motors Corp. v. Schneiderman (In re Schneiderman)*, 940 F.2d 911, 914 (3d Cir. 1991) (holding that presumption does not arise).

be necessary for the affiant to specifically recall mailing the proof of claim.[35] The debtor can rebut the presumption by providing a similar affidavit stating that its procedures ensure that all proofs of claim are included in the claims register and that it did not receive your client's proof of claim. As with bar date notices, merely denying receipt of a proof of claim will not rebut the presumption.[36] Once the presumption is rebutted, the creditor must provide evidence, such as a certified mail return receipt, to demonstrate that the proof of claim was actually received.[37]

Alternatively, your client may get credit for mistakenly mailing the proof of claim to an incorrect party. Pursuant to Bankruptcy Rule 5005(c), if the creditor mistakenly mailed the proof of claim to the U.S. Trustee, the bankruptcy trustee or its attorney, or a bankruptcy or district court judge, the court may order the proof of claim deemed filed as of the date of the original delivery of the proof of claim.[38] In most courts, your client can only benefit from this rule if they intended to send the proof of claim to the claims agent or the clerk of the bankruptcy court but mistakenly sent it to a party covered by Bankruptcy Rule 5005. If your client intended to mail the proof of claim to a party covered by the rule because they mistakenly thought that the recipient was the correct party, the rule will not apply.[39]

When All Else Fails

Finally, if your client has no other options, your client could file a late proof of claim and roll the dice that no objection is raised. Pursuant to § 502(a) of the Code, if no party objects to the late filing, the claim is deemed allowed.[40]

Attorneys advising clients who have missed a bar date certainly face an uphill battle. Nevertheless, a review of the debtor's schedules, prior communications between the client and the debtor, the bar date order and the related affidavits of service may turn up some promising leads to get your client back in the game. abi

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35 *See In re Adler, Coleman Clearing Corp.*, 204 B.R. 99, 110 (Bankr. S.D.N.Y. 1997).
36 *Id.*
37 *Id.*
38 Fed. R. Bankr. P. 5005(c); *Hi-Tech Commc'ns Corp.v. Poughkeepsie Bus. Park LLC (In re Wheatfield Bus. Park LLC)*, 308 B.R. 463, 466-67 (9th Cir. B.A.P. 2004).
39 *See, e.g., In re Griffin Trading Co.*, 270 B.R. 883, 897 (Bankr. N.D. Ill. 2001) (citing *Matter of Evanston Motor Co. Inc.*, 735 F.2d 1029, 1032 (7th Cir. 1984)); *In re Rainbow Trust*, 179 B.R. 51, 54 (Bankr. D. Vt. 1995).
40 11 U.S.C. § 502(a).