WHAT TO SAY WHEN YOUR PROOF OF CLAIM IS FILED AFTER THE BAR DATE[1]

The Honorable Jerry C. Oldshue
United States Bankruptcy Court for the Southern District of Alabama

The reason for requiring a creditor to timely file a proof of claim is to alert the bankruptcy court, trustee, and other creditors, as well as the debtor to the existence of the particular claim so as to facilitate the orderly administration of the bankruptcy case. *In re Bargdill,* 238 B.R. 711, 717 (Bankr. N.D. Ohio 1999). So, what do you say when you realize that you filed your proof of claim after the bar date? Probably something ugly. This article picks up shortly after that point to suggest some things to say to the bankruptcy court. If you make the arguments set out below and have a good set of facts, the judge may allow you to file a proof of claim after the bar date.

As a creditor's attorney, if you find yourself beyond the bar date without a proof of claim on file, you have a limited number of options available. This article discusses your options by identifying five arguments you can make to the bankruptcy court to get your claim allowed. The first two arguments are generally applicable to all chapters of bankruptcy; the last three are only applicable to specific ones. The five arguments are:

1. I filed a timely "informal" proof of claim;
2. I never received notice of the bar date;
3. I filed a late claim in a chapter 11 case, but I have an excuse;
4. I filed a late claim in a chapter 7 case, but it should be allowed and paid as a tardily filed claim; and,
5. I had no notice or knowledge that the debtor filed for bankruptcy.

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[1] This article is largely based on the original *What to Say When Your Proof of Claim is Filed After the Bar Date* article written by former Judge Mahoney and her then law clerk, Jeffrey J. Hartley, for the May 1994 Bankruptcy at the Beach Seminar, which was amended later by another of Judge Mahoney's former law clerks, Bradley Hightower. Significant changes to the Bankruptcy Rules became effective December 1, 2017, and this article has been updated to address those changes; however because the case law is always changing, you should update this material yourself before relying on it in a court of law.

Each of these arguments is discussed in detail below. As you are probably aware though, the end result always depends upon your facts and the judge.

1. I FILED A TIMELY "INFORMAL" PROOF OF CLAIM

The Bankruptcy Rules define a proof of claim as "a written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001(a). A creditor (or the debtor on the creditor's behalf) must file a proof of claim to participate in the distribution of the debtor's bankruptcy estate to creditors in a chapter 7, 12 or 13 case. Fed. R. Bankr. P. 3002. In a chapter 9 or 11 case, the creditor must file a proof of claim if its claim is not scheduled or is listed as disputed, contingent, or unliquidated in the debtor's schedules. Fed. R. Bankr. P. 3003(c)(2). The time during which a creditor must file is determined by the type of bankruptcy proceeding chosen by the debtor. Generally, creditors must file a proof of claim no later than 70 days after the order for relief in a chapter 7, 12 or 13 case, Fed. R. Bank. P. 3002(c), and within the time fixed by a court's local rules in a chapter 9 or 11 case, although subject to the exceptions in Fed. R. Bankr. P. 3002(c)(2), (c)(3), (c)(4), and (c)(6). Fed. R. Bankr. P. 3003(c)(3). When these requirements are not met, the question arises whether a creditor that gave some written notice of its claim to the debtor and/or the court can rely on that notice as an "informal" proof of claim.

The Bankruptcy Code and Rules do not contemplate the filing of an informal proof of claim because it is a judicially created doctrine. *In re Bargdill*, 238 B.R. 711, 717 (Bankr. N.D. Ohio 1999). This doctrine is designed "to alleviate the problems of form over substance by averting the potentially devastating effects the failure to formally comply with the Bankruptcy Rules may cause, when practically speaking a creditor's pleading(s) put all the parties in interest on sufficient and timely notice that a claim was being asserted." *Id.* Nevertheless, the Eleventh Circuit Court of Appeals has held that not every document filed prior to the bar date will serve as

an informal proof of claim. *The Charter Co. v. Dioxin Claimants (In re The Charter Co.)*, 876 F.2d 861, 863-64 (11th Cir. 1989).

The *Charter* court found that a "document must apprise the court of the existence, nature and amount of the claim (if ascertainable) and make clear the claimant's intention to hold the debtor liable for the claim" to qualify as an informal proof of claim. *Id.* It cited to cases finding "motions for relief from an automatic stay, letters notifying the trustee of a debt of the estate, and complaints against a chapter 7 discharge together with an objection to a chapter 13 plan" as examples of documents that qualified as informal claims. *Id.* at 864 (citations omitted). The *Charter* court also gave a caveat to this list, stating that "[m]ere knowledge by the debtor of the creditor's claim will not suffice to establish the existence of a valid proof of claim." *Id.*

This argument, if applicable under your set of facts, is the first one you should make in any case where you filed your proof of claim late. It is easier to prove than the notice arguments discussed in Part II below; it does not expose you to the potential liability of a losing "excusable neglect" argument discussed in Part III; and it pays better than a tardily filed chapter 7 claim discussed in Part IV. If the bankruptcy court finds that your informal proof of claim meets the standards set out by the court of appeals in *Charter*, it will allow you to file a formal amended proof of claim even though you are past the bar date. Your formal amended claim will be given "retroactive effect to the date of the timely filed informal proof of claim." *Bargdill* at 717.

2. I NEVER RECEIVED NOTICE OF THE BAR DATE

Rule 2002(a) of the Federal Rules of Bankruptcy Procedure requires that all creditors receive 21 days' notice by mail of, among other things, the § 341 meeting of creditors and the time fixed for filing proofs of claim pursuant to Rule 3003(c), which sets out the time for filing claims in a chapter 9 or 11 case. Rule 2002 does not however, require that creditors receive

notice of the claims bar date in Chapters 7, 12, and 13. Additionally, Rule 2002 does not define the term "notice," other than stating that it must occur by mail. Fed. R. Bankr. P. 2002. Although notice is not defined by the Bankruptcy Code or the Bankruptcy Rules, bankruptcy courts "sensibly assume that the general norms of fair notice, as set forth in *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489-91 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797-800 (1983), and other such cases, apply to bankruptcy as to other settings in which a person's legal right is extinguished if he fails to respond to a pleading." *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000); *see also In re Long*, 564 B.R. 750, 757 (Bankr. S.D. Ala. 2017).

"Fair or adequate notice has two basic elements: content and delivery." *Id.* "If the notice is unclear, the fact that it was received will not make it adequate," *id.*; if the notice is not received, it is "inadequate unless the means chosen to deliver it was reasonable." *Id.* at 963. As a creditor's attorney, you can make an argument under either of these two notice elements if the bar date has passed and you did not file a proof of claim.

Under the first element, unclear notice, the Supreme Court of the United States has held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). To this end, the "notice must be of such nature as reasonably to convey the required information . . . ." *Id.* (citing *Grannis v. Ordean*, 234 U.S. 385 (1914)). Although the Supreme Court has not directly addressed the issue of an unclear bar date notice, it has found that an attorney's neglect in not filing a claim was excusable largely based on the "unusual form" of the bar date notice issued by the bankruptcy court. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 399 (1993).

The holding in *Pioneer* is based on the "excusable neglect" doctrine, which *only* applies in a chapter 9 or 11 case. Nonetheless, the case provides an excellent illustration of what constitutes unclear bar date notice in a case under any chapter of the Bankruptcy Code. As a creditor's attorney arguing for permission to file a late claim, you should refer to this case whenever the bar date notice is not "prominently announced and accompanied by an explanation of its significance." *Pioneer* at 398.

Under the second element, non-receipt of notice, the Supreme Court has held that "even creditors who have knowledge of a [bankruptcy case] have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297 (1953). In *New York*, the city of New York was a known creditor with liens against a railroad that filed bankruptcy. *Id.* at 293. The city knew that the railroad was in bankruptcy but it did not file a timely claim because it never received notice by mail. *Id.* The Supreme Court held that the city "acted reasonably in waiting" to receive notice before filing its claim; therefore, it was allowed to file a late claim. *Id.* at 297.

Notwithstanding the Supreme Court's *City of New York* decision, the Eleventh Circuit Court of Appeals has held that under § 523(a)(3) of the Bankruptcy Code a known creditor with actual knowledge of an *individual* debtor's bankruptcy must timely file a proof of claim to avoid having its claim discharged even if the creditor does not receive formal notice of the bar date. *Byrd v. Alton (In re Alton)*, 837 F.2d 457 (11th Cir. 1988). The same court later held that under § 1141 of the Bankruptcy Code, a known creditor with actual knowledge of a *corporate* debtor's bankruptcy is not required to timely file a proof of claim for a claim scheduled as contingent, disputed, or liquidated to avoid having its claim discharged if it does not receive formal notice of

the bar date. *Spring Valley Farms, Inc. v. Crow (In re Spring Valley Farms, Inc.),* 863 F.2d 832, 835 (11th Cir. 1989) (interpreting the 1985 version of 11 U.S.C. § 523(a)(3)(B) excepting from discharge debts of individual debtors). The *Spring Valley* court did caution in a footnote though, that its holding "might be different if [the creditor] had actual knowledge of the bar date itself rather than merely a general knowledge of the initiation of bankruptcy proceedings." *Id.* at 835 n. 2.[2]

What you should take from these two decisions by the Eleventh Circuit Court of Appeals regarding notice is that if you, or your client, know about a bankruptcy filing, do not sit around and wait for the formal notice of the bar date to arrive in the mail. If the debtor files a chapter 7, 12 or 13 case, the debtor is required to provide you with notice of the meeting of creditors but not necessarily the bar date (your knowledge of the filing alone may be enough to discharge your claims). Therefore, you should take the date of the filing and add 70 days to it to determine the bar date. If the debtor files a chapter 9 or 11 case, you can relax a little because the debtor is required to provide you with formal notice of the bar date even if you have knowledge of the filing (but maybe not if you have knowledge of the bar date rather than merely knowledge of the filing based on *Spring Valley's* footnote 2.). If all this seems a little confusing, just remember not to sit and wait for the formal notice to arrive if you have knowledge of the filing. Go ahead and file your proof of claim.

Although this argument is not as preferable as the "informal" proof of claim argument

[2] *But see In re Christopher,* 28 F.3d 512, 518-19 (5th Cir. 1994) (Fifth Circuit held that postpetition, preconfirmation claims discharged when claimholders had actual notice of Chapter 11 bankruptcy but did nothing to protect their rights); *In re TLI, Inc.,* 1998 WL 684242, at *4-6 (N.D. Tex. Sept. 25, 1998)(unscheduled creditors with actual notice of bankruptcy bound by plan's discharge injunction notwithstanding debtor's failure to serve them with important notices of bankruptcy-related deadlines).

discussed in Part I, it is the second best. Like an informal proof of claim, it does not expose you to the potential liability of making the "excusable neglect" argument discussed in Part III and it pays better than a tardily filed chapter 7 claim discussed in Part IV.

3. I FILED A LATE CLAIM IN A CHAPTER 11 CASE, BUT I HAVE AN EXCUSE

The Bankruptcy Rules permit late-filed claims in a chapter 9 or 11 case if the creditor's failure to timely file the claim "was the result of excusable neglect." Fed. R. Bankr. P. 9006(b)(1).[3] The Supreme Court considered the "excusable neglect" doctrine in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). In *Pioneer*, a creditor's attorney received notice of a creditors meeting from the bankruptcy court shortly after the debtor filed its chapter 11 case. *Id.* at 383-84. The notice also contained the bar date for filing claims in the case. *Id.* The attorney was in the middle of withdrawing from his law firm; he did not catch the bar date provision in the notice and failed to file a timely claim. *Id.* at 384.

The Supreme Court found that "[b]ecause Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' . . . the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer* at 395. It then identified four relevant circumstances that courts should consider: (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 movant); and (4) whether the movant acted in good faith. *Id.*

After considering the four relevant circumstances it identified as part of the equitable determination, the Supreme Court held that the attorney's neglect in not filing a claim was excusable. *Id.* at 398. Its holding was largely based on the "unusual form of notice employed" by

[3] You cannot argue the excusable neglect standard in a Chapter 7, 12, or 13 case because Rule 9006(b)(3) of the Federal Rules of Bankruptcy Procedure limits its application to chapters 9 and 11.

the bankruptcy court. *Id.* at 399. Notably, the Supreme Court gave "little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date." *Id.* at 98. Instead, it found that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396.

After reading *Pioneer*, you may find the "excusable neglect" doctrine appealing if you filed a late proof of claim in a chapter 9 or 11 case. It seems like a great way to get your claim in, even though it's late. But before you file your motion, consider this—motions to allow late-filed claims "necessarily read like confessions that should be sent directly to your malpractice carrier. For the motion to be granted, you have to plead and prove your own negligence (that's the neglect part) and hope that it was excusable. Otherwise, you know that motion will be Plaintiff's Exhibit No. 1 in the malpractice action against you." Penn, John D., *Informal Proofs of Claim: The Last Resort When The Bar Date Passes*, ABI Bankr. J., Nov. 2000.

You should consider "excusable neglect" as the doctrine of last resort for getting your late-filed claim allowed. Try the "informal" proof of claim argument discussed in Part I and the notice arguments discussed in Part II first. The tardily filed claim argument discussed in Part IV only applies to chapter 7 cases.

4. I FILED A LATE CLAIM IN A CHAPTER 7 CASE, BUT IT SHOULD BE ALLOWED AND PAID AS A TARDILY FILED CLAIM

Bankruptcy Code § 726(a), "which sets forth the priority for the distribution of claims in a Chapter 7 case, expressly allows for the payment of tardily filed claims." *In re Bargdill*, 238 B.R. 711, 719 (Bankr. N.D. Ohio 1999). "Specifically, § 726(a)(3) states that property of the bankruptcy estate may be distributed 'in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) . . . .'" *Id.* Although this provision seems to conflict with Fed. R. Bankr. P. 3002(c), which states that creditors must file a proof of claim no later than 70 days

after the date of filing in a chapter 7, 12 or 13 case, the 1996 Advisory Committee Notes to Rule 3002(c) state that the allowance of tardily filed claims is governed by § 502(b)(9) of the Bankruptcy Code rather than Rule 3002(c). *Id.* at 720. Section 502(b)(9) permits tardily filed proofs of claim under § 726(a)(3). *Id.*

Similar to the "excusable neglect" doctrine applicable to chapter 9 and 11 cases, filing your claim late under § 726(a)(3)'s tardily filed claims exception is not desirable if there are other arguments you can make first. Although your late-filed claim will be allowed by the bankruptcy court under this section, "there is no assurance, even if funds are available in a debtor's bankruptcy estate that [you] will actually receive any distribution," *Bargdill* at 720, because your claim will only be paid if money is left over after paying priority creditors (domestic support obligations, administrative expenses, wages, taxes, etc.) and creditors who timely filed their claims. 11 U.S.C. § 726. Therefore, you should make the arguments discussed in Part I and Part II in a chapter 7 case before resorting to § 726(a)'s exception for tardily filed claims.

5. I HAD NO NOTICE OR KNOWLEDGE THAT THE DEBTOR FILED BANKRUPTCY

Section 502(a) of the Bankruptcy Code states that a claim or interest, proof of which is filed under section 501 is deemed allowed unless a party in interest objects. If it is still within 70 days of when the debtor filed for relief, you are ok to file your proof of claim, and it will be timely in chapters 7, 12, or 13. However, if you had no notice or knowledge that the debtor filed bankruptcy, and the bar date has passed, go ahead and file your claim anyway, since under § 502(a), your claim will be deemed allowed unless someone objects.

In a chapter 13 case, the bar date is jurisdictional, meaning the court has zero discretion within which it may extend the deadline for a creditor to file a claim, regardless of the reason why the creditor failed to timely file the claim. *See* Fed. R. Bankr. P. 9006(b), 3002(c); 9 Collier on

Bankruptcy P 3002.03 (16th 2017) (collecting cases). This harsh rule is intended to avoid prejudice to the unsecured creditors who timely filed claims, and to avoid undue burden on the trustee of the post-confirmation reallocation of payments if such untimely claims were allowed, even where the plan provides for payment of creditors in full. *See In re Shelton,* 116 B.R. 453 (Bankr. D. Md. 1990). However, the creditor with no notice or knowledge of the chapter 13 debtor's case is not deprived of its due process rights, since under § 523(a)(3)(A) of the Code, debts neither listed nor scheduled are not dischargeable if the creditor whose debt was not listed lacks notice and actual knowledge of the bankruptcy, and as a result, was unable to file a timely proof of claim. *In re Marty*, 2014 WL 7466757, at *1-2 (S.D. Fla. Dec. 31, 2014). Applying this analysis, it becomes clear that the only path to overcoming an objection to a late filed claim in chapter 13 is for the reasons set out in Fed. R. Bankr. P. 3002(c). *In re Burtanog*, 2017 WL 4570701, at *3 (S.D. Ala. Oct. 12, 2017); Fed. R. Bankr. P. 9006(b).

Under Rule 3002(c)(6), there are two reasons wherein an extension of up to 60 days may be granted by the court if "notice was insufficient under the circumstances." The first being where the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a) and the second, where notice was mailed to the creditor at a foreign address. A creditor's request under subsection (c)(6) may be made before or after the expiration of the deadline for filing a proof of claim.

Where a creditor received no notice that the debtor filed for relief in a chapter 7 case, the request to file a late filed claim is determined based on whether the case is an asset or no asset case. Where a debt was neither listed nor scheduled in a no asset chapter 7 case, and regardless of whether the creditor had notice of the bankruptcy proceeding at all, the debt will be discharged. The reasoning is that no claim can be untimely in a no-asset case because, pursuant to Federal Rule of Bankruptcy Procedure 2002(e), no deadline is ever set for creditors to file

claims. *In re Shearls,* 2016 WL 69778 (Bankr. S. D. Ala. Feb. 19, 2016). Therefore, 11 U.S.C. § 523(a)(3)(A), which makes some otherwise dischargeable debts non-dischargeable if the debtor neglects to schedule them in time for the creditor to timely file a proof of claim, does not apply. *Id.* (*citing In re Nielsen,* 383 F.3d 922, 925 (9th Cir. 2004).

However, if a creditor's unscheduled debt in a no asset chapter 7 case is discharged without notice, a creditor is not without recourse to contest the dischargeability of their debt. Section 727(d) permits a creditor to request the court to revoke the discharge where the discharge was entered as a result of a fraud of the debtor. The creditor's burden of proof in a section 727(d) is high, as revocation of a discharge is an extraordinary remedy intended to protect the dignity of the court. *In re Scott,* 481 B.R. 119, 213 (N.D. Ala. Sept. 27, 2012).

In a chapter 11 case, there is no rule or statute that imposes a deadline for filing a proof of claim. *See* Fed. R. Bankr. P. 3003, 3007. Most chapter 11 debtors, by motion, request the court to establish a deadline to file claims that the debtor lists in its schedules. Fed. R. Bankr. P. 3003(c)(2)-(3).

6. CONCLUSION

Many creditor's attorneys do not know what to say when they realize that they filed their proof of claim after the bar date. Understandably, the thought of making an argument to save your late-filed claim from being excluded from the distribution of the debtor's bankruptcy estate is far from desirable. Even if you win, your formal amended proof of claim may be paid cents on the dollar. Nonetheless, if you make the arguments set out in this article, in the suggested order, you may end up with a formal amended proof of claim that receives the same treatment as the timely filed claims of other creditors. That is a very good result, considering the equitable policies of the Bankruptcy Code.