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Don't Miss the Bar Date! The Importance of Timely Filing Bankruptcy Proofs of Claim

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When a debtor files bankruptcy, bankruptcy attorneys and creditors are well aware of the importance of assessing the need for creditors to file proofs of claim and making sure that proofs of claim are timely filed.

Generally, timely filing a proof of claim will preserve the creditor's right to receive payments from the debtor's bankruptcy estate. On the other hand, a creditor who does not file a proof of claim, or files a proof of claim after the deadline (commonly referred to as the "bar date"), may be unable to share in any distribution from the bankruptcy estate. Recent cases provide an important reminder of the importance of timely filing proofs of claim and an opportunity to examine interesting developments in case law dealing with proofs of claim.

Determining the "Bar Date"

The relevant deadline for filing a proof of claim will generally depend on the type of bankruptcy case (*i.e.*, chapter 7 liquidation, chapter 11 reorganization, individual chapter 13 case) and whether the creditor is a "governmental unit." In a chapter 7 case where there are assets for liquidation and distribution to creditors (so-called "asset case"), the bar date will usually be set forth in a notice of the bankruptcy case that all creditors listed in the debtor's bankruptcy schedules should receive at the beginning of the case. If a chapter 7 case is initially commenced as a "no asset" case and the chapter 7 trustee files a *Notice of Possible Dividends* upon discovery of potential assets for liquidation and distribution, a notice will be sent stating the deadline by which proofs of claim are due.

Similarly, in a chapter 13 case, the bar date will usually be set forth in the initial notice of the chapter 13 bankruptcy case. Lastly, in a chapter 11 case, the debtor will request that the bankruptcy court set the bar date and then serve a notice of the court-imposed deadline.

Generally, in chapter 7 and 13 cases, if the creditor does not file a timely proof of claim, it will not share in any distributions from the debtor's bankruptcy estate. In chapter 11 cases, a creditor may not need to file a proof of

claim if it agrees with the amount that the debtor listed as due to the creditor in its bankruptcy schedules and the debtor has not listed the debt as disputed, contingent, or unliquidated. On the other hand, if the creditor believes it is owed more than stated on the debtor's schedules, or the particular claim is listed as disputed, contingent, or unliquidated, the creditor has to file a proof of claim for the full amount owed.

For voluntary chapter 7 cases and chapter 13 cases, Bankruptcy Rule 3002(c) generally provides that a proof of claim is timely "if it is filed not later than 70 days" after commencement of the case or conversion of a case to chapter 13. Fed. R. Bankr. P. 3002(c). For chapter 11 cases, the court will set a bar date. *See* Fed. R. Bankr. P. 3003(c)(3) (providing, with respect to chapter 11 cases, that "[t]he court shall fix" the bar date).

However, as expressly provided under the Bankruptcy Rules, certain types of creditors are entitled to longer periods of time to file a proof of claim, including "governmental units." For a "governmental unit", Bankruptcy Rule 3002(c)(1) provides that a proof of claim is timely filed "if it is filed not later than 180 days" after the commencement of the case. Fed. R. Bankr. P. 3002(c)(1); *see also* 11 U.S.C. § 502(b)(9) ("[A] claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide."). As such, the deadline to file a proof of claim for a "governmental unit" will usually be later than the bar date for general creditors, including in chapter 11 cases where the court will set separate deadlines for different types of creditors.

Clearly, when a creditor first receives a notice of a bankruptcy filing (or a subsequent notice setting the deadline for filing proofs of claim), it should carefully determine the deadline for filing the proof of claim. If the creditor fails to timely file its proof of claim, the claim may be deemed invalid. Consulting bankruptcy counsel can be reassuring as to this critical step.

Making Sure that the Proof of Claim is Actually Received by the Court Before the Bar Date

A recent case from a Bankruptcy Court in North Carolina, *In re North Carolina New Schools Inc.*, No. 16-80411, 2020 WL 6891915 (Bankr. M.D.N.C. Oct. 26, 2020), underscores the importance of timely filing a proof of claim. In that chapter 7 case, the court set September 13, 2016 as the bar date. 2020 WL 6891915, *1. A creditor's proof of claim was received and file-stamped by the court clerk on September 14, 2016 (one date after the bar date). *Id*. The creditor argued that the proof of claim should be considered timely, under the so-called "mailbox rule", because it was completed and mailed to the court clerk "on or about September 7, 2016," which was prior to the bar date. *Id*.

Although the bankruptcy court acknowledged that "there is a split in authority as to whether the mailbox presumption applies to the mailing of a proof of claim to the clerk of court," *id*. at *2, it ultimately rejected the creditor's argument and held that the creditor's claim "cannot be considered timely filed." *Id*. at *3. The court explained "that applying the mailbox presumption to the mailing of a proof of claim would complicate, bring uncertainty, and cause undue delay to the bankruptcy claims process," while "[s]etting a bright-line rule for the filing of claims is vital to the timely administration of a chapter 7 case." *Id*.

The apparently simple act of filing a claim can be complicated. Consulting counsel is wise. Creditors are well-advised to make sure that their claims are filed and actually received by the court sufficiently in advance of the bar date in order to avoid challenges to their claims based on timeliness of the filing. In ensuring that their proofs of claim are timely filed, creditors and their counsel should be familiar with the way that bankruptcy courts compute periods of time for filing under Bankruptcy Rule 9006(a). Bankruptcy Rule 9006(a) and related case law was the subject of an article written by one of the authors of this alert in the American Bankruptcy Institute Journal (*see* Michael H. Traison & Bridget C. Hart, *Froiland: A Procrastinator's Guide to Computing Time*, 37-NOV Am. Bankr. Inst. J. 20 (November 2018).

Is a Federal Credit Union a "Governmental Unit"?

Another aspect of the challenge to timely file a claim involves the extra time given to a "governmental unit". As noted above, a creditor that is a "governmental unit" has longer to file its proof of claim. Bankruptcy Code section 101(27) defines "governmental unit" to mean "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. § 101(27).

In an interesting case from a bankruptcy court in New Mexico, *In re Marquez*, No. 19-10284-j7, 2020 WL 5823272, at *1 (Bankr. D. N.M. Sept. 30, 2020), the court determined this definition of a "governmental unit" to include a federal credit union. The federally chartered non-profit credit union in the *Marquez* case filed its proof of claim three days after the general bar date but well in advance of the 180-day deadline set forth in Bankruptcy Code section 502(b)(9).

The *Marquez* court determined that the federal credit union qualified as a "governmental unit" under Bankruptcy Code section 101(27) and was subject to the 180-day deadline under Bankruptcy Code section 502(b)(9). 2020 WL 5823272, *6. "Because of the important governmental functions federal credit unions perform, combined with their extensive federal regulation, immunity from state taxation, and federal charters," the *Marquez* court found "that a federal credit union is an 'instrumentality of the United States' included in the definition of 'governmental unit' under" Bankruptcy Code section 101(27). *Id*. at *6. As such, the federal credit union's proof of claim was timely filed. *Id*. at *1.

The *Marquez* court relied on the *In re Trusko* case, which also held that federal credit unions are "governmental units" for purposes of the bar date, as well as a number of other cases which concluded that a federal credit union was a "governmental unit" for other purposes. *Id*. at *3-5 (referencing, among others, *In re Trusko*, 212 B.R. 819 (Bankr. D. Md. 1997). However, other courts have found that federal credit unions are not "governmental units." *See for example*, *Brown v. Pa. State Employees Credit Union (In re Brown)*, 49 B.R. 558, 560 (Bankr. M.D. Pa. 1985) (finding that a federal credit union was not a "governmental unit" for purposes of Bankruptcy Code section 525(a), which provides a debtor with protection from discriminatory treatment by a "governmental unit", because the subject federal credit union "is regulated by the same laws and regulations that controls all the other credit unions," and "performs no different functions than other financial institutions offering identical services.").

While the *Marquez* case held that a federal credit union was a “governmental unit” and thus entitled to a longer deadline to file its proof of claim, it is far from clear whether courts in other jurisdictions will accept this holding. Cautious federal credit unions, as well as other creditors, should make sure to file their proofs of claim well in advance of the general bar date set for non-governmental units. Failure to do so not only risks having a proof of claim disallowed, it unnecessarily invites potentially expensive motion practice and litigation.

Each day brings developments in the law. We look forward to your questions and bringing you more news on these issues as the law continues to develop.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, please contact Michael Traison at 312.860.4230 or Amanda Tersigni at 516.357.3738.

Practices

- Bankruptcy and Creditors' Rights

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