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What Is the Bar Date for Rejection Damage Claims?

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Of the many tasks performed by an attorney in a bankruptcy case, ascertaining the bar date for filing a damages claim resulting from the rejection of an executory contract or unexpired lease would upon first impression appear to be among the most simple. Indeed, in many cases, the court expressly sets the bar date for the filing of rejection damage claims, either in a local rule, general standing order, notice or specific order. In such cases, a brief examination of the court's docket will quickly reveal the bar date.



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But suppose the court initially fails to specify the bar date. In cases in which rejection has occurred after the general bar date, courts have designated a separate deadline for filing rejection damage claims. After all, in these cases, the rejection damage claims did not even arise until after the general bar date; thus, parties asserting such claims could not possibly have complied with the deadline. But now suppose rejection occurs before the general bar date. Does that bar date apply to rejection damage claims under such circumstances? Although some courts have held that the general bar date does not apply to such claims, other courts have ruled to the contrary. Thus, in some cases, the rejection damage claim bar date will not be as apparent as some might think. This article briefly examines these concepts.

Governing Law

Bankruptcy Code §365(g) provides that the rejection of an unassumed

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executory contract or unexpired lease of the debtor generally constitutes a breach of such contract or lease immediately before the petition filing. 11 U.S.C. §365. Section 502(g) in turn provides that a claim arising from such rejection or rejection under a plan shall be determined and allowed the same as if such claim had arisen before the date of the petition filing. 11 U.S.C. §502(g). Likewise, §501(d) provides that a claim asserted under §502(g) may be filed the same as if such claim had arisen before the date of the petition filing. 11 U.S.C. §501(d).

do not become fixed or do not arise until after the commencement of the case, must be treated differently for filing purposes such as the bar date for filing claims." H.R. Rpt. 95-595, 95th Cong., 1st Sess. 351 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 61 (1978). The legislative history provides further: "The Rules will provide for later filing of claims of these kinds." *Id.*

Bankruptcy Rules 3002(c)(4) and 3003(c)(3) provide the deadlines for the filing of rejection damage claims. Rule 3002(c)(4), applicable in chapter 7 and 13 cases, provides that "a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors," except that "[a] claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct." Fed. R. Bankr. P. 3002(c)(4). The Advisory Committee Note to Rule 3002(c)(4) reflects that the drafters of the Rule intended that rejection claimants should have a sufficient period of time in

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Section 502(b)(9) addresses the timing of the filing of claims; it provides that, subject to certain exceptions, a claim may be disallowed to the extent that proof of such claim is not timely filed. 11 U.S.C. §502(b)(9). Thus, generally, a rejection damage claim must be timely filed in order to be allowed. *See, e.g., In re Spiegel Inc.*, 337 B.R. 816, 820-21 (Bankr. S.D.N.Y. 2006) (disallowing late filed proofs of claim for lease rejection damages).

The legislative history relating to §501(d) indicates that Congress contemplated the designation of a separate, subsequent bar date for rejection damage claims. It provides: "The separation of this provision from the other claim filing provisions in this section is intended to indicate that claims [under §502(g)], which

which to file a claim. It provides: "In light of the reduced time it is necessary that a party with a claim arising from the rejection of an executory contract have sufficient time to file that claim. This clause allows the court to fix an appropriate time." All creditors must receive notice of the deadline for filing claims under Rule 3002. Fed. R. Bankr. P. 2002(f)(3).

Rule 3003(c)(3) provides that in a chapter 11 case, "[t]he court shall fix and for cause shown may extend the time within which proofs of claim may be filed." Fed. R. Bankr. P. 3003(c)(3). Rule 3003(c)(3) provides, further, that "[n]otwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in [Rule 3002(c)(4)]." *Id.* All creditors must

receive notice of the deadline for filing claims under Rule 3003. Fed. R. Bankr. P. 2002(a)(7).

When the Court Sets Rejection Damage Claim Bar Date

Thus, the Bankruptcy Rules do not require a court to set a bar date for the filing of rejection damage claims. *Liakis v. Creditors' Comm. of Déjà vu, Inc.*, 780 F.2d 176, 179 (1st Cir. 1986). Nevertheless, pursuant to the authority set forth above, many courts expressly set such a bar date. For instance, some courts, including the U.S. Bankruptcy Courts for the District of New Jersey and the Southern District of New York, have adopted a local rule establishing or authorizing the establishment of a deadline for the filing of rejection damage claims. D. N.J. LBR 3003-1(b); S.D.N.Y. LBR 3003-1.

Other courts routinely set or recognize a bar date for the filing of rejection damage claims in the following types of orders, among others: (1) an order authorizing or approving rejection, *In re Herman's Sporting Goods Inc.*, 166 B.R. 581, 582 (Bankr. D. N.J. 1994) (noting that order approving rejection of lease provided that any claims for lease rejection damages had to be filed within 30 days of rejection); (2) a general bar date or notice of bar date, *In re Alexander's Inc.*, 176 B.R. 715, 718 (Bankr. S.D.N.Y. 1995) (noting that notice of bar date for filing of all claims specifically provided deadline for claims arising from rejection of leases); *In re Interco Inc.*, 149 B.R. 934, 935 (Bankr. E.D. Mo. 1993) (noting that standing order on filing of claims expressly provided deadline for claims arising from rejection of contract or lease); (3) an order confirming a reorganization plan, *In re Winn-Dixie Stores Inc.*, 356 B.R. 813, 826 (Bankr. M.D. Fla. 2006) (providing that any claim arising from rejection of contract or lease shall be filed within 30 days of entry of confirmation order); (4) a confirmed reorganization plan, *In re Armstrong World Indus. Inc.*, 348 B.R. 136, 210-11 (D. Del. 2006) (noting that plan set deadlines for claims arising from rejection of contract or lease); (5) a reorganization plan not yet confirmed, *In re West Chestnut Realty of Haverford Inc.*, 177 B.R. 501, 503 (Bankr. E.D. Pa. 1995) (noting that proposed disclosure statement and reorganization plan required rejection damage proofs of claim to be filed within 30 days of date of rejection); and (6) an order approving a sale of the debtor's assets, *In re AppliedTheory Corp.*, 312

B.R. 225, 234 (Bankr. S.D.N.Y. 2004) (noting that order approving sale of debtor's business required creditors to file proofs of claim for rejection damages within 30 days of rejection).

When the Court Fails to Set Rejection Damage Claim Bar Date and Claim Arises after the General Bar Date

In some cases, however, courts fail to initially set a bar date for the filing of rejection damage claims. What is the bar date in such cases? The answer depends on the timing of the rejection. In cases in which rejection has occurred after the general bar date, courts have refused to apply the general bar date to rejection damage claims and have designated a separate bar date for such claims. For instance, in *Roeder v. United Steel Workers of America (In re Old Electralloy Corp.)*, a chapter 7 case, the court held that a labor union could file severance claims resulting from the post-bar date rejection of a labor agreement. 167 B.R. 786, 790 (Bankr. W.D. Pa. 1994). Because it had not previously fixed a bar date for the filing of rejection damage claims, the court reasoned that the union could still file the claims "within such time as the court may direct" under Rule 3002(c)(4). *Id.* See also *White v. Shalala (In re Pace Enters. of Columbia, Inc.)*, 1994 WL 449442 at *3 (Bankr. D. D.C. May 6, 1994) (holding that proper remedy was to set bar date under Rule 3002(c)(4) for rejection damage claimant to file proof of claim). The legislative history relating to §501(d), contemplating a separate bar date for rejection damage claims, and the Advisory Committee Note to Rule 3002(c)(4), reflecting that rejection damage claimants should have a sufficient period of time in which to file a claim, support this line of cases.

Likewise, courts have allowed the filing of chapter 11 post-bar date rejection damage claims on the basis that Rule 3003(c)(3) expressly provides that, in a chapter 11 case, the court may under Rule 3002(c)(4) fix a bar date for the filing of rejection damage claims notwithstanding the expiration of the general bar date. *K & J Coal Co. v. PPL Generation LLC*, 2007 WL 1653599 at **6-7 (W.D. Pa. June 5, 2007) (noting that bankruptcy court had found, and parties did not dispute, that rejection damage claim could be filed under Rule 3003(c)(3) notwithstanding passage of filing deadline). See also *In re*

Thomson McKinnon Secs. Inc., 152 B.R. 840, 841 (Bankr. S.D.N.Y. 1993) (allowing proof of claim for rejection damages filed after the general bar date because the damages had arisen only after the bar date and as a consequence of confirmation of chapter 11 plan); *In re Blue Diamond Coal Co.*, 147 B.R. 720, 725 n.6 (Bankr. E.D. Tenn. 1992) (finding, in response to debtor's allegation that claim had been filed after general bar date, that "debtor...ignore[d] the potential effect of the proviso in Rule 3003(c)(3)" on such date), *aff'd*, 160 B.R. 574 (E.D. Tenn. 1993). But see *Malkove & Womack Inc. v. Western Steer-Mon & Pop's Inc. (In re Malkove & Womack Inc.)*, 134 B.R. 965, 969-70, 972 (Bankr. N.D. Ala. 1991) (holding, in a case pre-dating adoption of Rule 3003(c)(3), that creditor-franchisor should have timely filed proof of claim for damages under franchise agreement, even though court had not allowed rejection until plan confirmation and after the general bar date, where the creditor-franchisor had previous knowledge of the debtor's intent to terminate the agreement, and as a result, limiting creditor-franchisor's claim to amount scheduled by debtor).

When the Court Fails to Set Rejection Damage Claim Bar Date and Claim Arises Before the General Bar Date

The terrain is not so smooth in cases in which rejection has occurred before the general bar date, however. In some cases, courts have held that the general bar date does not apply to rejection damage claims even if such claims arise before that date. In *Allied Tech. Inc. v. R.B. Brunemann & Sons Inc.*, for instance, the court reasoned that because a lease rejection damage claim does not arise until rejection, “which may or may not occur (if at all) by the time of the deadline for pre-petition claims,” the deadline for proofs of claim for pre-petition debt cannot bar the assertion of an alleged claim for post-petition debt. 25 B.R. 484, 498 (Bankr. S.D. Ohio 1982). Also, the court noted that the legislative history for §501(d) provides that rejection damage claims must be treated differently for proof of claim filing purposes. *Id.* (quoting H.R. Rpt. 95-595, 95th Cong., 1st Sess. 351 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 61 (1978)). The court concluded that the deadline for rejection damage claims is “within such time as the court may direct,” under the predecessor to Rule 3002(c)(4), “presumably not prior to the existence of the claim.” *Id.* Other courts have reached the same conclusion. *See, e.g., Century Indem. Co. v. Nat’l Gypsum Co. Settlement Trust (In re Nat’l Gypsum Co.)*, 208 F.3d 498, 505 (5th Cir.) (noting that, because “[t]he nondebtor, former contractual partner only becomes an unsecured creditor after rejection,” “the nondebtor is not required to have filed a proof of claim prior to the claims bar date, a date that in all likelihood preceded the debtor’s decision to reject the contract or lease”), *cert. denied*, 531 U.S. 871 (2000); *In re Marostica*, 2000 WL 35439062 at *2 n.4 (Bankr. D. Idaho Nov. 22, 2000) (finding debtor’s reliance on general bar date misplaced by virtue of court’s authority under Rule 3002(c)(4) to establish a date for filing rejection damage claims).

In other cases, however, courts have applied the general bar date to rejection damage claims arising prior to that date. *See, e.g., Liakis*, 780 F.2d at 179. In *Liakis*, for example, the First Circuit observed that Rule 3002(c)(4) imposes no duty on a court to instruct a creditor to file a proof of claim arising from the rejection of an executory contract. Rather, the court noted, that rule merely allows the court to fix an

appropriate time for the filing of such claims. Because the general bar date in *Liakis* had occurred approximately 18 months after rejection, the court found that the rejection damage claimant had more than sufficient time within which to file a proof of claim and affirmed the disallowance of the party’s claim. *Id.* *See also Equity Property Mgmt. Inc. v. Harper (In re Harper)*, 1997 WL 121171 at *2 (9th Cir. Mar. 14, 1997) (holding that bankruptcy judge properly treated general bar date as deadline for lease rejection damage claim on basis that Rule 3002(c)(4) does not require court to fix a later bar date).

Likewise, in *In re Lee Way Holding Co.*, the court, recognizing that the Advisory Committee Note to Rule 3002(c)(4) reflects that the Rule is intended to provide creditors sufficient time in which to file lease rejection damage claims, found that a period of nearly two months, between the date on which rejection of certain leases had occurred and the general bar date, was a sufficient period of time in which to file such claims. 178 B.R. 976, 984 (Bankr. S.D. Ohio 1995). The court noted, further, that it may fix a later date if such period of time is not sufficient. Yet the court found that the rejection claimant had never requested that the court set a deadline for the filing of rejection damage claims or otherwise extend the general bar date. Accordingly, the court refused to fix a later bar date for the filing of rejection damage claims. *Id.* *See also In re Holyoak*, 2004 WL 4960368 at **3-4 (Bankr. D. Idaho May 6, 2004) (holding that proof of lease rejection damage claim was late filed where rejection had occurred approximately two months before general bar date and rejection claimant could have sought separate deadline for rejection damage claims or could have timely filed a proof of claim containing a good-faith estimate of its claim and then subsequently amended the claim after it had obtained more information relating to the claim).

Finally, in *In re Montaldo Corp.*, the court did not even consider the length of time between the date of rejection of a lease and the general bar date—a period of approximately three months. 209 B.R. 40, 4243, 46 (Bankr. M.D.N.C. 1997). Rather, the court determined that, in a chapter 11 case, Rule 3003(c)(3) governs in the absence of an order setting a “special deadline” for the filing of claims arising from rejection, and hence, pursuant to that Rule, the general bar date set by the court for filing proofs of claim applies to

rejection damage claims arising before the general bar date. *Id.* at 46. The court held that because the lease at issue had been rejected before the general bar date, that date applied to the lease rejection damage claim. *Id.* at 46, 49. Also, the court noted that upon receiving notice of the general bar date, the nondebtor lessor had already been aware before the general bar date that the debtor had surrendered the premises and breached the lease; thus, the lessor had already been aware that it possessed a claim against the debtor. As a result, the court disallowed the claim. *Id.* at 49.

Rejection Claimant’s Potential Courses of Action

What actions can a claimant take in order to preserve its right to assert a rejection damage claim in a case in which the court has initially failed to set a rejection damage claim bar date and in which rejection occurs before the general bar date? Several options exist. In a chapter 7 or 13 case in which the general bar date has not yet lapsed, the claimant can request that the court set a separate rejection damage claim bar date pursuant to Rule 3002(c)(4). In a chapter 11 case, the claimant can request that the court extend the general bar date or set a separate rejection damage claim bar date pursuant to Rule 3003(c)(3). Finally, in a case under any chapter, the claimant can simply file a proof of claim containing a good faith estimate of the claim, and if necessary, subsequently seek to amend the claim.

Meanwhile, in cases in which the general bar date has already lapsed, the claimant can take any of several courses of action. First, the claimant can, if applicable, assert lack of notice of the rejection or of the general bar date. *Krynicky v. Penthouse (In re Gen. Media Inc.)*, 368 B.R. 334, 341-42 (Bankr. S.D.N.Y. 2007) (holding that rejection damage claim bar date failed to apply because of failure to provide notice of rejection and rejection damage claim bar date). Second, if the case is in chapter 11, the claimant can request that the court set a separate rejection damage claim bar date pursuant to the express language of Rule 3003(c)(3). Third, the claimant can argue, under the *Allied Tech.* line of cases cited above, that the general bar date does not apply to rejection damage claims. Fourth, the claimant can attempt to distinguish the *Liakis* line of cases cited above, *e.g.*, on the grounds that the claimant did not have a sufficient period of time in which to file its claim or that no breach had occurred under the contract or lease until the date of

rejection. Fifth, the claimant can, if applicable, move to amend a previously filed proof of claim referring to other debts owed by the debtor to the claimant. *Blue Diamond*, 147 B.R. at 724-25 (holding that untimely amended proof of claim related back to original timely filed proof of claim). Sixth, the claimant can, if applicable, move to amend a previously filed “informal” proof of claim, such as a motion or other pleading referring to the rejection damage claim. *In re Wm. B. Wilson Mfg. Co.*, 59 B.R. 535, 540-41 (Bankr. W.D. Tex. 1986) (holding that creditor’s complaint for relief from automatic stay, filed prior to general bar date, constituted timely filed informal proof of claim, and subsequent proof of rejection damage claim would be allowed as amendment of informal proof of claim). Next, if the case is in chapter 11, the claimant can seek an extension of the general bar date through demonstration of excusable neglect. *Holyoak*, 2004 WL 4960368 at **5-6 (extending bar date in chapter 11 case for filing of rejection damage claim based on excusable neglect). Finally, the claimant can seek payment under other applicable Code sections, *e.g.*, seek payment of administrative expenses under Code §503(b)(1)(A) to the extent the estate has received a direct benefit from the use of property or services. *Roeder*, 167 B.R. at 795 (awarding administrative expense priority to severance pay claims under rejected labor agreement).

Conclusion

In cases in which the court has initially failed to set a bar date for the filing of rejection damage claims, the timing of the rejection will determine the establishment of such deadline. In cases in which rejection does not occur until after the general bar date, the court will likely set a separate rejection damage claim bar date. In cases in which rejection occurs before the general bar date, however, the facts of the case, including in particular, the period of time between rejection and the general bar date, may determine the establishment of the rejection damage claim deadline. ■

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