

## BANKRUPTCY LAW

### Informal Proofs of Claim

An exception to the timely claim requirement

By Henry M. Karwowski

Does the failure of an unsecured creditor to timely file a proof of claim necessarily doom the prospects for payment of its prepetition claim in a bankruptcy case? Conventional wisdom would say yes. After all, generally a creditor must file a proof of claim in order to have an allowed claim. In some cases, however, a creditor can miss the claims bar date and still argue that it should be deemed to possess an allowed claim. For instance, if it filed a document in the bankruptcy case prior to the bar date, the creditor can argue that the document constitutes a timely filed "informal proof of claim," provided the document contains certain information.

#### Proof of Claim Filing Requirement

Generally, with the exception of claims that appear in a Chapter 11 or 9 schedule and that are not scheduled as disputed, contingent or unliquidated, a creditor, either secured or unsecured,

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must file a proof of claim in order to have an allowed claim in a bankruptcy case. 11 U.S.C. § 1111(a); *In re Dennis*, 230 B.R. 244, 247 (Bankr. D.N.J. 1999) (citing 11 U.S.C. §§ 501, 502; Fed. R. Bankr. P. 3002, 3003(c) (2)).

Subject to certain exceptions, a proof of claim must be filed no later than 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c); D.N.J. LBR 3003-1(a).

In a Chapter 7 case, failure to timely file a proof of claim generally results, depending on the timing of the filing of the claim, in lower priority status of payment. 11 U.S.C. § 726(a). Meanwhile, in a Chapter 11 or 13 case, failure to timely file a proof of claim generally results in disallowance of the claim. See, e.g., *Maertin v. Armstrong World Indus., Inc.*, 241 F.Supp.2d 434, 457 D.N.J. 2002; *Dennis*, 230 B.R. at 249. Also, in a Chapter 11 case, failure to timely file a proof of claim results in loss of voting rights with respect to any Chapter 11 plan. *In re Claremont Towers Co.*, 175 B.R. 157, 163-64 (Bankr. D.N.J. 1994).

#### Creditors' Arguments in Support of Allowance of Late Claim

Exceptions to the timeliness requirement exist. First, a creditor can invoke inadequate notice as a basis for allowance of the claim. See, e.g., 11 U.S.C. § 726(a)(2)(C) (providing for second priority payment of late claim in

Chapter 7 case if creditor did not have notice or actual knowledge of case); *Jones v. Chemetron Corp.*, 212 F.3d 199, 209-10 (3d Cir. 2000) (holding that potential tort claimant was not, by virtue of debtor's discharge, precluded from pursuing claims against debtor, where claimant had no notice of or participation in debtor's reorganization plan); *In re Martini*, 2006 WL 4452974 (Bankr. D.N.J. Apr. 3, 2006) (allowing creditor's late filed proof of claim because creditor's attorney, who had received notice of Chapter 13 filing, was not actively representing creditor at time of receipt of notice).

Second, in a Chapter 11 case, a creditor can argue that the failure to timely file a proof of claim resulted from excusable neglect. See, e.g., *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388-98 (1993) (holding that claimants' failure to timely file proof of claim resulted from excusable neglect, warranting allowance of late claim, because claimants acted in good faith, debtor was not prejudiced by delay, and notice of bar date was ambiguous).

Third, if it timely filed a proof of claim, but it seeks to assert, after the bar date, additional claims for payment, a creditor can seek leave to amend its initial claim provided the amendment arises out of the conduct, transaction or occurrence set forth in the original claim. See, e.g., *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 309 (3d Cir. 1999) (holding that bankruptcy court did not abuse its discretion when it permitted creditor to amend proof

of claim, where additional claims arose from the same transactions alleged in original proof of claim).

### Informal Proofs of Claim

Finally, if a creditor filed a document with the bankruptcy court before the bar date, it can argue that the document constitutes an "informal proof of claim." In determining whether a document qualifies as an informal proof of claim, a court examines whether the document is in writing, whether it contains a demand by the claimant on the bankruptcy estate, whether it expresses intent to hold the debtor liable for the debt, and whether it is filed with the bankruptcy court. If the document meets these four requirements, the court must then determine whether, given the particular surrounding facts of the case, it would be equitable to treat the document as a proof of claim. *Hefta v. Off. Comm. of Unsecured Creditors (In re American Classic Voyages Co.)*, 405 F.3d 127, 130-32 (3d Cir. 2005).

In accordance with this test, the Third Circuit and courts in this District have deemed, as informal proofs of claim, documents such as a motion for relief from the automatic stay, a complaint seeking nondischargeability and a motion for recognition of a claim. See, e.g., *Brown v. Turner*, 2003 WL 22245652 (3d Cir. Sept. 30, 2003) (holding that claimant's motion for relief from automatic stay satisfied requisites of informal proof of claim because motion was in writing, it contained demand by claimant on debtor's estate, it expressed intent to hold debtor liable for debt, it was filed with bankruptcy court, and it was

equitable to allow amendment), cert. denied, 541 U.S. 960 (2004); *In re Petrucci*, 256 B.R. 704, 706-07 (Bankr. D.N.J. 2001) (holding that claimant's nondischargeability complaint constituted informal proof of claim because it was in writing; it contained demand on estate and against debtor; it was filed with court; trustee offered no evidence of detrimental reliance by other creditors on receipt of particular percentage; and disallowance of valid claim would result in windfall to other creditors); *In re Forrester*, 1995 WL 499615 (Bankr. D.N.J. Oct. 3, 1994) (holding that debtor's filing of motion for entry of order recognizing unsecured priority claim in favor of IRS constituted informal proof of claim because motion showed that IRS had made demand against estate and had expressed intention to hold estate liable for debt).

In cases in which one or more of the required elements are missing, however, these courts have refused to find an informal proof of claim. For instance, in *American Classic*, the Third Circuit affirmed a bankruptcy court's holding that a creditor's letter to a court-appointed claims agent, in which the creditor indicated that he had been injured aboard a vessel owned and operated by the debtor and that he possessed a claim against debtor, failed to qualify as an informal proof of claim, where the alleged demand contained in the letter did not inform the debtor of either the nature of the creditor's injury or the amount of the alleged claim. 450 F.3d at 130-132.

Likewise, in *Enter. Bank v. Young (In re Fryer)*, the Third Circuit affirmed a district court's rejection of the argument that a creditor's numer-

ous filings with the bankruptcy court constituted an informal proof of claim, where such filings failed to assert a demand against the debtor's estate, but instead, merely disputed contents of the estate, and because the absence of the creditor's name in the trustee's summary of proposed distribution demonstrated that the bankruptcy court had already disallowed the claim. 2007 WL 1667198 (3d Cir. June 11, 2007).

Finally, in *Berger v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, the Third Circuit refused to treat a compulsory counterclaim as an informal proof of claim because the counterclaim was not filed until after the bar date. 96 F.3d 687, 690 (3d Cir. 1996). See also *In re Pigott*, 684 F.2d 239, 244 (3d Cir. 1982) (holding that telephone call, in which creditor's counsel explained to trustee that proof of claim would be delayed beyond due date, could not be viewed as "timely oral filing"); *Claremont*, 175 B.R. (holding that letters to debtor and letter memorandum in opposition to debtor's motion to extend retention of accountant did not constitute informal proofs of claim); *In re Dauer*, 165 B.R. Bankr. D.N.J. 1994) (holding that creditor's letter to chapter 7 trustee failed to qualify as informal proof of claim).

### Conclusion

Accordingly, if a creditor has a right to payment from a debtor but fails it to timely file a proof of claim, it should investigate whether it has filed any documents in the bankruptcy case prior to the bar date, and if so, whether any of the documents might qualify as an informal proof of claim. ■