THE ART OF FILING A PROOF OF CLAIM IN A BANKRUPTCY CASE

By: Howard Rubin and Deidre Richards
Published: Law Journal Newsletters
October 2017

EQUIPMENT LEASING NEWSLETTER

This article focuses on the strategies that an equipment financier may explore when it needs to file a proof of claim in a bankruptcy case to preserve its rights. It also describes a debtor's right to object to a creditor's claim.

Background

The filing of proofs of claim and any objections thereto are governed by the Federal Rules of Bankruptcy Procedure 3001 *et seq*. ("Bankruptcy Rules"). As of Dec.1, 2017, the amendments to the Bankruptcy Rules (the "Amendments" or "Amended Bankruptcy Rules") will bring notable changes to the time to file, and who must file a proof of claim. Among other changes, the Amendments will require secured creditors to file proofs of claim for their claims to be allowed (though their failure to do so will not void their liens).

This article primarily addresses the Bankruptcy Rules as they currently exist, but at times refers to some of the future Amendments. In addition, different jurisdictions have different local rules dealing with such items as attachments to the claim, serving the claim on debtors and trustees, and other issues not directly covered by the Bankruptcy Rules.

What a Notice of the Bankruptcy Explains: The Meeting of Creditors

Shortly after a debtor files a bankruptcy case in virtually all jurisdictions, a bankruptcy court sends out a Notice of Bankruptcy Case (the "Notice") in all cases filed under Chapters 7, 12 and 13, and in cases filed by individuals under Chapter 11. With respect to a Chapter 11 filing by a non-individual, debtor's counsel generally sends out the Notice to a debtor's creditors.

A Notice typically states the date of the bankruptcy filing, the chapter under which the debtor filed, the case number, and whether the case was a voluntary or involuntary filing. In a Chapter 7 case, the Notice will state whether the case is "No Asset," the date, time and place for the Meeting of Creditors, the name of the Chapter 7 Trustee assigned to the case, and the applicable deadlines, such as the last date to file a proof of claim, the last date to object to a debtor's exemptions, and the last date to object to the discharge of the debtor or dischargeability of a creditor's claim in the case. Similarly, in a Chapter 12 or 13 case, a Notice will state the same, and the name of the Trustee.

Who Must File a Proof of Claim

Pursuant to Bankruptcy Rule 3002(a), "NECESSITY FOR FILING, an unsecured creditor or equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005." Thus, if any part of a creditor's claim is unsecured, it should file a proof of claim in a Chapter 7, 12 or 13 case. In a Chapter 11 or Chapter 9 case, Bankruptcy Rule 3003(c)(2) states, "[a]ny creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." In addition, Amended Bankruptcy Rule 3002(c), when it becomes effective later this year, will require a secured creditor to file a proof of claim.

The Effect of Filing a Proof of Claim

"A proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim." Bankruptcy Rule 3001(f). This evidentiary effect is maintained regardless of the chapter under which a debtor's case is filed. Pursuant to Rule 3003, which refers to Chapter 9 and Chapter 11 cases, "[a] proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest [*i.e.*, the debtor's schedules] pursuant to § 521(a)(1) of the Code. " *See* Bankruptcy Rule 3003 (c)(4).

Filling Out and Filing the Claim Form

In 1988, a bankruptcy judge, somewhat flippantly, noted in a published opinion that filling out a proof of claim form by an unsecured creditor should take no more than five minutes. How some of us wish that were true for equipment lessors and lenders! We have to be careful to accurately and fully set forth our claims and provide backup so that they are allowed in the way we want. Also, remember the words of Mahatma Gandhi: "If you don't ask, you don't get."

In December 2015 a new proof of claim form (Official Form 410) became effective, replacing Form B10, which had been in existence for several years. The Rules Advisory Committee commented that the new form is "easier to read and, as a result, likely to generate more complete and accurate responses." By and large, this has turned out to be true, but there are still drafting and substantive issues to be aware of. Official Form 410 (as was the old Form B10) is an Adobe fill-in-the-blank form that can be electronically filed. So, for instance, one cannot include commas in the dollar amount of the claim. As was the case with the old form, the claimant needs to state its name, address, telephone number and email address, but the format is revised to make the sections more readable. The form asks for information on who should receive notices. This is typically the attorney for the claimant, or the credit manager if the claimant has no attorney. The form then requests where payments are to be sent. This is usually the claimant's receivables office. It is generally not a good idea for the payment to go to the attorney, since a payment may come months or years after the filing of the claim. Attorneys move or cease representing clients. Credit offices usually stay in one place. Of course, the claimant should provide the amount of the claim on the form. However, the claimant must now be careful to include an itemization of interest, fees and other expenses. As noted below, the form provides for attachments for this information as well as further explanations. There is also a specific inquiry about the amount necessary to cure any default as of the date of the bankruptcy petition for both lenders and lessors. As it relates to leases, this inquiry may be important for determining cure amounts if a lease is to be assumed. However, very often, there may be some post-petition charges accruing before the assumption of a lease, so the amount due as of the petition date may be "old business" by the time this issue is raised by the debtor. At any rate, most courts set a specific bar date in response to a "cure notice" for assumption of a lease. While there is a blank on Form 410 for a secured creditor to fill in the value of the collateral, "value" is a topic with many facets well beyond the scope of this article. It is important, however, for the creditor's business representative and its attorney to discuss this issue before filling in that blank or not, and arrive at a number that takes into consideration the condition of the collateral, its market value, and the likely use of the collateral after the bankruptcy. Form 410 leaves little room for additions on the form itself. Sometimes, in a complicated case, one feels compelled to direct the reader to the attachments (*e.g.*, "see attached"), but finds that this exercise is difficult in the limited "fill-in-the-blank" form. However, most Adobe programs have a text-edit window in which a filer can make small changes such as inserting the "see attached" note. Efforts have also been made by the courts to permit claims to be filed electronically even if a filer is not a fully registered user of the electronic case filing system of the bankruptcy courts. Just about all judicial district websites have instructions for filers who are not registered to file claims. These are extremely helpful, and all court clerks have "help desks" to assist novice filers.

Attachments to the Claim Form

The thrust of Official Form 410 is to extract as much information as possible so that a debtor or trustee can determine the validity of the claim. Consequently, a claimant should not be shy about providing an "addendum" to the claim form that explains anything that cannot fit into the Form's blanks, or that may assuage any questions a debtor or trustee might have about the details of the claim — such as showing one's work for calculating the claim, or providing charts or tables. It may also include reserving rights to change the claim amount if new information becomes available, the right to argue whether the claim is a "lease" or a "secured transaction," or generally reserving rights to respond to issues raised by the debtor or other parties. A reservation of rights ostensibly gives the claimant a wide variety of options during the changing course of the bankruptcy case.

Of course the claimant must provide the materials upon which the claim is based. This may consist of leases, notes, contracts, security documents, financing statements and itemized statements of account. There is a size limit for uploading these documents, so in the case of voluminous documentation, a party may want to provide only those portions of the lease, contract or note that are relevant to the amount owed, with a footnote that full copies can be provided by the claimant upon request. By providing a complete narrative and documents attached to the claim, the claimant can provide detail to satisfy the debtor-in-possession or trustee and, hopefully, avoid a claim objection.

Signing the Proof of Claim

Official Form 410 attempts to tighten the "oath" one must make that the proof of claim is true and correct. The prior form required a declaration under penalty of perjury that the claim was "true and correct to the best of my knowledge, information and belief." Official Form 410 now requires a simple declaration that the person signing the form declares "under penalty of perjury that the foregoing is true and correct." There is very little wiggle room, and makes it more important for the person signing the claim form to confirm that the information is accurate. The change in the oath also means that outside attorneys probably should not sign the claim form for their clients. First, it is doubtful whether attorneys have the requisite personal knowledge to make this declaration under penalty of perjury. Second, a couple of courts have warned counsel to think twice before signing proofs of claim for their clients or risk possible disqualification by being a "fact witness." In one 2013 case, the court found that the attorney who signed the proof of claim made himself a fact witness, waived work-product and attorney-client privileges, and put himself in a position as a deponent in a contested matter. *See In re Rodriguez*, 2013 WL 2450925 (Bankr. S.D. Tex. 2013). Consequently, the better practice may be for the attorney to assist in the preparation of the claim, just as is done in the drafting of affidavits and declarations, but have the proof of claim signed by a client's representative with knowledge of the facts or account.

Deadline for Filing Proofs of Claim

In a Chapter 7, 12 or 13 case, the deadline for filing a proof of claim is not only set forth in the Notice of Bankruptcy, but is established under Rule 3002(c) of the Bankruptcy Rules. "TIME FOR FILING … 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 called under § 341(a) of the Code" (emphasis supplied) with some exceptions as listed therein. We encourage the reader to review Rule 3002 for details regarding this Rule and its exceptions. By way of example, if the § 341(a) creditor's meeting is first set for March 1, but it is continued to April 1, the last date to file a proof of claim is June 1, 90 days after the first set § 341(a) meeting, not July 1. Under the current Bankruptcy Rules, if a creditor misses the last date to file a claim in a Chapter 7, 12 or 13, the creditor will likely be told

that Congress sets the date, and the court cannot change it. However, the creditor should still file a motion to extend the date, especially considering the amendments to Bankruptcy Rule 3002. *See infra*.

New Deadline to File Proofs of Claim Under the Amendments

The Amendments state a new requirement that in Chapter 7,12 or 13 cases, a proof of claim must be filed no later than 70 days after the order for relief. Amended Bankruptcy Rule 002(c)(6) provides exceptions to complying with the new proof of claim bar date, and states: "(1) on a motion filed by a creditor before or after the filing deadline, the court may extend the deadline by not more than 60 days if the court finds insufficient notice because 1) the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a), or 2) notice was mailed to the creditor at a foreign address." *See* Amended Bankruptcy Rule 3006(c)(6).

Deadline for Filing Proofs of Claim in Chapter 11 Cases

In some jurisdictions, the court will set the bar date in Chapter 11 cases. In other jurisdictions, a debtor files a motion with a bankruptcy court requesting that the court set the "bar date" (*i.e.*, the last date for filing a proof of claim) after notice and a hearing. Pursuant to Bankruptcy Rule 3003(c)(3), "TIME FOR FILING. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." In a Chapter 11 case, a creditor or party in interest may file a motion to extend the last day to file a proof of claim. Bankruptcy Rule 9006 provides when a creditor or party in interest may extend a deadline either before or after a deadline has passed. Pursuant to Rule 9006 (b), "… the court for cause shown may at any time in its discretion … (2) on motion made after the specified period, permit the act to be done where the failure to act was the result of excusable neglect." *See* Bankruptcy Rule 9006(b).

In a landmark case, the United States Supreme Court defined and interpreted the "excusable neglect" standard. In *Pioneer Investment Services Company vs. Brunswick Associates, LP*, 507 U.S. 380 (1993), the Court analyzed the four factors that determine whether a movant meets the excusable neglect standard. Those factors are: "(1) the danger of prejudice to the debtor, 2) the length of 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, (4) whether movant acted in good faith." 507 U.S. at 395. The Court took into account all relevant circumstances and determined that the neglect was excusable in that case.

What Is an Informal Proof of Claim?

From the perspective of an attorney, you never want to argue that something you have filed in the court constitutes an "informal proof of claim." That means that either you or your client missed the deadline for filing the Official Form 410, and that you are scurrying around to find a way to rectify the situation so that the client can be paid. In order to ameliorate the effect of a failure to file a proof of claim, creditors have argued that other filings made before the claim deadline should serve as an "informal" proof of claim, which may be amended by using the standard claim form. An informal proof of claim is a document filed with the court that was not intended to be a "formal" proof of claim, but is sufficient enough to be construed as a "demand" on the estate. For instance, an adversary proceeding to declare a debt non-dischargeable or an effort by a secured creditor to have the stay lifted so it might foreclose and dispose of collateral can be considered an informal proof of claim as long as it meets certain requirements.

Courts have used a multi-pronged test to determine whether a document qualifies as an informal proof of claim: 1) The document must be in writing; 2) it must contain a demand by the creditor on the estate; 3) it expresses an intent to hold the debtor liable for the debt; 4) it is filed with the bankruptcy court; and 5) based on the facts of the case, it would be equitable to treat the document as a proof of claim. *In re Reliance Equities, Inc.*, 966 F.2d 1338, 1345 (10th Cir.1992). Of course, as courts of equity, this last prong gives the bankruptcy court a wide-berth in

considering all sorts of "equitable" factors in determining whether to allow the claim. Of course no one tries to draft an informal proof of claim. The prongs of this test are definitely a way of looking back in an attempt to "right a self-imposed wrong." Informal claims cannot be part of a well-thought-out legal strategy. However, in the unforeseen event that one needs to rely on this form of a bankruptcy claim, it may behoove a creditor's attorney to consider including in his or her drafting repertoire a specific demand for the amount owed and a statement that the debtor and its estate is liable for the debt. Then it simply becomes a case of whether the totality of the circumstances calls for equity in the particular case.

Objections to and Hearings on Proof of Claim

Bankruptcy Rule 3007 sets forth the rule with respect to a debtor's objection to a creditor's claim(s). Pursuant to current Bankruptcy Rule 3007, "[a]n objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing." Rule 3007(a). Pursuant to Amended Bankruptcy Rule 3007 (a)(2), when it takes effect in on Dec. 1, the claim objection and notice must be served by firstclass mail to the person designated on the creditor's proof of claim, and per Amended Bankruptcy Rule 3007(a)(1), hearings on claim objections are no longer mandatory.

Typical and Omnibus Objections

Rule 3007(d) provides that, subject to the subsection regarding the requirements for omnibus objections, (e), "objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, of the objections are based solely on the grounds that the claims should be disallowed in whole or part, because:

- They duplicate other claims;
- They have been filed in the wrong case;
- They have been amended by subsequently filed proofs of claim;
- They were not timely filed;
- They have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order; or • They were presented in a form that does not comply with applicable rules, and the objections states that the objector is unable to determine the validity of the claim because of the noncompliance;
- They represent interests, rather than claims; [or]
- They assert priority in an amount that exceeds the maximum amount under § 507 of the Code."

Burdens of Proof When a Claim Is Subject to an Objection

The burden of proof for claims in bankruptcy cases is on different parties at different times. Pursuant to Bankruptcy Code § 502(a), "A claim or interest, proof of which is filed under Section 501 of this title, is deemed allowed, unless a party in interest … objects."

In the first instance, a "claimant must alleges facts sufficient to support the claim." *In re: Allegheny Int'l, Inc.,* 954 F.2d 167,173 (3d Cir. 1992). The claim is then *prima facie* valid and the burden of going forward shifts to the objector to refute at least one allegation that is essential to the claim. If the objector does the latter, the burden then "reverts to the claimant to prove the validity of the claim by a preponderance the evidence." *Id*.

Conclusion

There are a multitude of considerations in drafting and filing a proof of claim. We encourage you to review the Amendments that will be effective Dec. 1, 2017 so you understand the relevant changes and can appropriately protect your client.