

Building Blocks

By JAMES J. HALLER AND ORLANDO VELAZQUEZ

How to File a Late Claim in a Chapter 13 Case

Occasionally, there are times when a debtor needs to file a late claim in a consumer bankruptcy case. The question arises frequently in chapter 13 cases when payment of a claim is necessary to achieve the goal of the chapter 13 plan (e.g., payment of taxes, child support arrearage, mortgage arrearage, etc.). Many jurisdictions address the allowance of late claims differently. This article is written from the standpoint of a conservative jurisdiction so that it may assist as many practitioners as possible.



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The Claims Process

The Bankruptcy Code addresses claims at 11 U.S.C. §§ 501 and 502. Relevant to this discussion, § 502(a) states, “A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects.” This provision is expanded upon by Rule 3002(c) of the Federal Rules of Bankruptcy Procedure, which states, “In a chapter 7 liquidation, chapter 12 family farmer’s debt adjustment, or chapter 13 individual’s debt-adjustment case, 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.”¹ This rule applies to both secured and unsecured creditors in many jurisdictions.² Furthermore, proposed amendments to Bankruptcy Rule 3002(a) clarify the rule to specify that Bankruptcy Rule 3002(a) applies to secured creditors. If approved by the Judicial Conference in March 2017 and subsequently by the U.S. Supreme Court and Congress, the amended rule would become effective on Dec. 1, 2017.³

¹ What follows are narrowly drawn exceptions to this rule that are inapplicable to most situations. Other limited exceptions apply to claims filed in a chapter 7 case. See 11 U.S.C. § 726(a)(1)-(3).

² See *In re Dumain*, 492 B.R. 140, 143-49 (Bankr. S.D.N.Y. 2013) (collecting cases, dividing cases into “three approaches” and concluding that Rule 3002(c) applies to secured claims); *In re Nwonwu*, 362 B.R. 705, 708-09 (Bankr. E.D. Va. 2007) (recognizing disagreement, citing cases and concluding that deadline for timely filing under Rule 3002(c) applies to secured claims); see also *In re Pajian*, 785 F.3d 1161, 1162 (7th Cir. 2015) (Rule 3002(c) applies to secured claims); *In re Dennis*, 230 B.R. 244, 246-54 (Bankr. D.N.J. 1999) (same); Keith M. Lundin, *Chapter 13 Bankruptcy* § 280.1 (4th ed. 2009) (“Something this basic should be clear in the Code and Rules. It isn’t.”); Mark Glover, “Note, Timely Filing in Chapter 13 Bankruptcy Cases: Does Rule 3002(c)’s Deadline Apply to Secured Creditors?,” 87 *B.U. L. Rev.* 1231 (2007) (arguing that Rule 3002(c) applies to secured creditors); *In re Mehl*, No. 04-85570, 2005 Bankr. LEXIS 2092, 2005 WL 2806676, at *2-3 (Bankr. C.D. Ill. Oct. 25, 2005) (secured creditors need not comply with deadline, although there might be some point after which they cannot file proof of claim); and *In re Strong*, 203 B.R. at 112-13 (Rule 3002(c) deadline does not apply to secured creditors).

³ See Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, Report of the Advisory Committee on Bankruptcy Rules (December 2016), available at uscourts.gov/rules-policies/pending-rules-and-forms-amendments/pending-changes-bankruptcy-forms (unless otherwise indicated, links in this article were last visited on Feb. 24, 2017).

A creditor must file a claim in order to receive disbursement from the bankruptcy trustee on that claim.⁴ If a claim is filed beyond 90 days, it might be disallowed (after motion and hearing) under 11 U.S.C. § 502(b)(9).

Identifying the Missing Claim as Timely

The best practice for consumer attorneys is to check filed claims soon after the claims bar dates expire.⁵ In the event that a necessary claim is not filed, the Bankruptcy Rules provide a mechanism for a debtor to file a late claim for a creditor. Bankruptcy Rule 3004 states:

If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.

A debtor can file a claim for a creditor during the 30-day period after the expiration date for the creditor to file a claim.

Identifying the Missing Claim as Late

The missing claim is often discovered beyond the 30-day period to file a proof of claim. Even in this situation, however, a claim may still be filed. Under Bankruptcy Rule 9006(b)(1), the bankruptcy court can enlarge the period to file a proof of claim upon a showing of excusable neglect. Bankruptcy Rule 9006(b)(1) states:

In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or

⁴ See Bankruptcy Rule 3021. See also *In re Dumain*, 492 B.R. 140, 143 (Bankr. S.D.N.Y. 2013); *In re Hogan*, 346 B.R. 715, 720 (Bankr. N.D. Tex. 2006); *In re Baldrige*, 232 B.R. 394, 396 (Bankr. N.D. Ind. 1999); and *In re Minbatwalla*, 424 B.R. 104, 118 n.8 (Bankr. S.D.N.Y. 2010) (“[I]f the secured creditor wants to receive payments under a confirmed plan, the creditor must file a proof of claim.”).

⁵ Bankruptcy Rule 3002(c) requires nongovernmental claims to be filed 90 days after the first date set for the meeting of creditors, and Bankruptcy Rule 3002(c)(1) requires governmental claims to be filed not later than 180 days after the date the bankruptcy petition was filed.

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by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Unfortunately, the bankruptcy court cannot extend the time for a creditor to file a claim. Bankruptcy Rule 9006(b)(3) states in pertinent part, “*Enlargement Governed By Other Rules*. The court may enlarge the time for taking action under Rules ... 3002(c) ... only to the extent and under the conditions stated in those rules.” Even in inequitable situations, the majority of cases have held that the bankruptcy court was not vested with the equitable power to allow a claim outside the exceptions contained in Bankruptcy Rule 3002(c).⁶

Fortunately, Bankruptcy Rule 9006(b)(1) does apply to Bankruptcy Rule 3004. This means that a debtor can file a motion under Bankruptcy Rule 9006(b)(1) for an approval to file a claim beyond the 30-day limit of Bankruptcy Rule 3004. In this situation, the debtor will need to plead and prove excusable neglect.⁷ There are four factors to determine whether a finding of excusable neglect is warranted: (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.⁸

The motion to extend time should set forth the facts and circumstances demonstrating these factors. For example, if the claim is for mortgage arrears, then prejudice to the debtor would occur if the arrearage claim is not allowed and paid. If the confirmed plan already funds the arrears, then allowance of the claim will have minimal impact on judicial proceedings. In order to file an arrears claim, the debtor may not have access to the information and documentation to timely file a proof of claim. Finally, the debtor’s motion to pay his/her creditors demonstrates good faith. Other situations with similar circumstances could include tax debts discovered after filing an amended return, as well as child support or student loan obligations not known at the time of filing for bankruptcy.

Do not file the claim without permission, and do not file a motion to allow a late claim. Remember, the motion is for permission to extend the time to file a claim under Bankruptcy Rule 3004.

The recommended process for using this rule is to file a motion to allow the late filing of a claim and attach the proposed claim as an exhibit, so cite the Bankruptcy Rules in the motion. If the court finds the argument convincing, then the court will allow the late filing of the claim. Enlist the support of the creditor and the trustee whenever possible before the hearing to support the motion.

Practice Tips

Follow this recommended procedure when asking the bankruptcy court to extend the time to file a late claim. Do not file the claim without permission, and do not file a motion to allow a late claim. Remember, the motion is for permission to extend the time to file a claim under Bankruptcy Rule 3004. If you have further questions, ask a seasoned bankruptcy practitioner.⁹ **abi**

⁶ *In re Greenig*, 152 F.3d 631, 635 (7th Cir. 1998); *In re Gardenhire*, 209 F.3d 1145 (9th Cir. 2000); *In re Quinones*, 2011 Bankr. LEXIS 727 (Bankr. D.P.R. March 2, 2011); *In re Daniels*, 466 B.R. 214, 218 (Bankr. S.D.N.Y. 2010); *In re Nwonwu*, 362 B.R. 705, 708 (Bankr. E.D. Va. 2007); *In re McNeely*, 309 B.R. 711, 712 (Bankr. M.D. Pa. 2004); *In re Kristiniak*, 208 B.R. 132 (Bankr. E.D. Pa. 1997); *In re Marty*, 25 Fla. L. Weekly Fed. B 203 (Bankr. S.D. Fla. 2014); and *In re Brogden*, 274 B.R. 287, 289 (Bankr. M.D. Tenn. 2001) (J. Lundin) (“In Chapter 13 cases, the Code and Rules make no exception to the 180-day timeliness deadline when faulty notice or other circumstances disable a governmental creditor to file a timely claim.”); but see *In re Collier*, 307 B.R. 20 (Bankr. D. Mass. 2004); *In re Stacy*, 405 B.R. 872 (Bankr. N.D. Ohio 2009); and *In re Russo*, 2009 U.S. Dist. LEXIS 113865, 2009 WL 4672669 (D.N.J. 2009) (three cases that recognized general lack of authority to extend time, but allowed claims on due-process grounds).

⁷ Excusable neglect is not defined in the Bankruptcy Code. However, the Supreme Court, in *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380 (1993), constructed a test for excusable neglect under Bankruptcy Rule 9006(b)(1). This case established a two-part test: (1) the movant must establish neglect by showing either circumstances beyond the movant’s control or the movant’s inadvertence, mistake or carelessness; and (2) after neglect is established, the court must determine whether the neglect was excusable. *Nat’l Steel Corp.*, 316 B.R. 510, 515 (Bankr. N.D. Ill. 2004). The Court noted that the ordinary meaning of “neglect” is to give little attention or respect to a matter or to leave undone or unattended to especially through carelessness. *Id.* at 516. The determination of whether “neglect” is excusable is at bottom an equitable one, taking into account all relevant circumstances surrounding the party’s omission. *Id.*

⁸ *Id.*

⁹ A list of qualified attorneys can be found at nacba.org/find-an-attorney, as well as ABI’s Bankruptcy Resources website at bankruptcyresources.org.

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