Filing a Proof of Claim: Pitfalls and Precautions

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A Practice Note discussing some of the pitfalls and problems claimants may encounter when filing proofs of claim in a Chapter 11 bankruptcy case. This Note also discusses what precautions to take against improperly filed proofs of claim and the potential consequences of an improper filing.

Bankruptcy lawyers often neglect some of the most crucial aspects of any bankruptcy case. Chief among these issues is the proof of claim. For the vast majority of parties in interest, the bankruptcy process boils down to a forum for creditors to assert claims against a debtor while allowing the debtor an opportunity to assess its affairs and reorganize. When done right, a good proof of claim is rarely appreciated, and it may be a matter of filling out a simple form. When done wrong, an incorrect or ill-advised proof of claim can have tremendous negative repercussions.

As a word of caution to creditors, the 3000-series of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules), together with applicable local rules and forms, govern the filing of proofs of claim in bankruptcy cases. Claimants should carefully review and adhere to those rules, but the process is anything but mechanical.

This Note sets out additional considerations and warnings that should be accounted for before filing a proof of claim.

For more information on the basics of filing proofs of claim, see Practice Note, Filing a Proof of Claim in a Chapter 11 Bankruptcy Case (0-617-4008).

WHEN TO FILE A PROOF OF CLAIM

A proof of claim should be filed before the applicable deadline, or bar date, for filing these claims.

For more information on bar dates in general, see Practice Note, Bar Dates in a Chapter 11 Bankruptcy Case (0-617-4008).

There is often a gap of months between the date that a bar date order is entered until the actual bar date. Because there is no need to wait until a bar date order is entered to file a proof of claim, the question is when should a creditor file a proof of claim.

FILING CLOSE TO THE DEADLINE

It can be tempting to wait until the last day to file a proof of claim, and there are often reasons to do so. Waiting until the deadline can:

- Ensure that all information is current.
- Eliminate the need to amend the proof of claim as:
  - more information comes to light;
  - partial payments are made; or
  - additional obligations accrue.
- Help to avoid premature entanglement in the bankruptcy case, particularly if the creditor has not entered an appearance or otherwise made itself known before filing the proof of claim.

However, by waiting until the deadline, creditors may also forego certain advantages that come along with filing early (see Filing Early), principally:

- The danger that the filing might not go according to plan.
- The risk that the proof of claim might not be filed before the deadline (see *In re MarchFIRST, Inc.*, 573 F.3d 414 (7th Cir. 2009); *Toshiba Am. Info. Sys., Inc. v. New England Tech., Inc.*, 2007 WL 8089815 (C.D. Cal. Nov. 14, 2007); see also Legal Update, Seventh Circuit Disallows Proof of Claim Filed 43 Minutes Late) (1-386-6965).

These hazards can be avoided by finalizing and filing the proof of claim at least one day before the deadline to confirm receipt with sufficient time to remedy any deficiencies or technical issues.

FILING EARLY

It is equally tempting to file a proof of claim as soon as possible. Reasons for this approach include that:

- It can help to stake out a position in the case, particularly when a claimant wants to become involved in the bankruptcy case because of its status as a major creditor.

- Filing a proof of claim puts claims traders on notice of the claim, and filing early may help a creditor to collect on the claim immediately in exchange for any distributions to be made on account of the claim at a later date.

However, filing early can require the creditor to amend the proof of claim several times to present a fully up-to-date and accurate proof of claim.

Scheduled Claims

Creditors whose claims were reflected on the debtor's schedules may not be required to file a proof of claim if the scheduled claim was not disputed, contingent, or unliquidated. However, creditors should be cautious and take care to ensure that they agree with the scheduled claims, including the debtor entity against whom the claim is scheduled, as it can be dangerous to blindly rely on the debtor's representations.

For more information on scheduled proofs of claim, see Practice Note, Filing a Proof of Claim in a Chapter 11 Bankruptcy Case: Should the Creditor File a Proof of Claim? (8-385-1512)

The debtor may also amend its schedules to modify or even remove a scheduled claim, and the creditor may overlook these modifications. It is often advisable to file a proof of claim, even if this is primarily a protective action, so long as there are no countervailing reasons not to file a proof of claim (see Jurisdictional Pitfalls: Main Reason Not to File a Proof of Claim).

AGAINST WHOM TO FILE A CLAIM

MULTIPLE DEBTORS

Where there are multiple debtors, a creditor may not know who the specific obligor is on account of its claim. This is particularly common where the debtor did business under a trade name. Some claimants generally err on the side of caution, filing a claim against each entity to ensure that no prejudice results from having chosen the wrong entity to list on the proof of claim. It is unnecessary to file a claim against each debtor, and debtors routinely object to these claims as duplicative or filed against the wrong debtor, in which case only the correct claim remains.

Distributions to creditors of one debtor (or one segment of the business) may vary materially from distributions to creditors of another debtor, with certain estates paying creditors in full, while other estates have little or nothing available for unsecured creditors. Given the broad definition of claim and the risk of irreparable harm for failure to assert claims against the correct debtor, it is usually best to file a separate claim against any debtor where there is reason to believe the claim may be viable.

GUARANTORS

Creditors may also hold actual claims against multiple debtors, or against debtors and non-debtors. As a general principle, creditors have a right to recover in full from each of multiple entities that are jointly and severally liable for a debt, including guarantors. This principle has been extended to permit creditors to assert claims against debtors in bankruptcy for the full amount of the debt, even if the debt has been partially satisfied by joint obligors (see *Ivanhoe Bldg. & Loan Ass'n of Newark, N.J. v. Orr*, 295 U.S. 243, 245-46 (1935); *Reconstruction Fin. Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495 (1946)). Because creditors do not always recover 100 cents on the dollar, they are permitted to assert the full amount of the claim against each obligor, even though recoveries may be limited to the actual amounts due. Creditors therefore generally file claims against any and all obligors and guarantors, in the hope of recovering as much as possible, against each entity, on account of the debt.

Concerns regarding res judicata (see Res Judicata) may weigh against filing a claim against a debtor obligor or guarantor if the creditor would sooner seek to have a disputed claim resolved in another forum. Debtors may seek to enjoin litigation regarding non-debtor obligors or guarantors if they believe that the adjudication of those disputes will have a prejudicial effect on the debtor's estate or where injunctive relief effectively extending the automatic stay to non-debtor guarantors or obligors would be warranted (see *Lyondell Chem. Co. v. Centerpoint Energy Gas Servs.* (*In re Lyondell Chem. Co.*), 402 B.R. 571 (Bankr. S.D.N.Y. 2009); see also Practice Note, Automatic Stay: Lenders' Perspective: Limitations and Exceptions) (9-380-7953).

JURISDICTIONAL PITFALLS: MAIN REASON NOT TO FILE A PROOF OF CLAIM

It may seem that when a creditor is in doubt about whether a proof of claim should be filed, one should be filed to preclude any risk that the claim will be lost forever (see *ResCap Liquidating Trust v. PHH Mortgage Corp.* (*In re Residential Capital, LLC*), 558 B.R. 77 (S.D.N.Y. Sept. 21, 2016)) (). However, there are some situations in which a creditor will not want to file a proof of claim. The act of filing a proof of claim can waive certain rights and have significant collateral effects on future litigation.

CONSENT TO JURISDICTION

The act of filing a proof of claim constitutes a party's consent to the jurisdiction of the bankruptcy court to adjudicate both:

- Matters pertaining to the claim itself.
- Related matters, including claims by the debtor against the creditor.

Where a debtor might otherwise have to pursue its claims against third parties in other forums (or even outside the territorial jurisdiction of US courts), a filed proof of claim can create the necessary nexus for the bankruptcy court to exercise jurisdiction over entities without a presence in the US (see *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990); *Gulf States Exploration Co. v. Manville Forest Prod. Corp. (In re Manville Forest Prod. Corp.)*, 896 F.2d 1384, 1389 (2d Cir. 1990); *Boyd v. ResCap Borrower Claims Trust (In re Residential Capital, LLC)*, 2016 WL 4082712 (S.D.N.Y. July 28, 2016)).

WAIVERS

The filing of a proof of claim can have the unintended effect of bringing any number of related claims into the ambit of the bankruptcy court and, at the same time, deprive the creditor of the right to seek a jury trial (see *In re Cruisephone, Inc.*, 278 B.R. 325, 330 (Bankr. E.D.N.Y 2002) ("By filing a claim against the estate, a creditor triggers the process of allowance and disallowance of claims and an adversary proceeding seeking recovery against the creditor becomes part of that claims allowance process.")). Existing

US Supreme Court precedent confirms the essential nature of the proof of claim in allowing bankruptcy courts to hear and determine avoidance actions by debtors in bankruptcy with no right to a jury trial (see *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)).

The act of filing a proof of claim can similarly constitute a waiver of the right to challenge the bankruptcy court's authority to enter a final judgment in an action involving the debtor. For example, the right of a claimant to argue that the bankruptcy court lacks final constitutional authority over matters that would otherwise be non-core or *Stern* claims, which would be outside the bankruptcy court's authority to enter a final judgment without the parties' consent (see *Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932 (2015)). However, the disposition of claims is plainly within the bankruptcy court's core authority, and resolution of any matters that would necessarily be resolved in ruling on the proof of claim are therefore within the bankruptcy court's final adjudicatory authority, regardless of the parties' consent and where the matter would have to be heard had the creditor not filed a proof of claim (see *Stern v. Marshall*, 564 U.S. 462, 472 (2011)). This may hold true even if the debtor is just one of many parties that would be affected by the outcome of the proceeding.

Filing a proof of claim can also constitute a waiver of sovereign immunity, insofar as the state has, by filing a proof of claim, voluntarily invoked the jurisdiction of the federal courts and therefore submitted to the bankruptcy court's jurisdiction (see *Arecibo Cmty. Health Care, Inc. v. Commonwealth of Puerto Rico* (*In re Arecibo Cmty. Health Care, Inc.*), 270 F.3d 17, 26-27 (1st Cir. 2001) (citing *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999))).

FACTOR FOR GRANTING RELIEF

Even where filing a proof of claim does not result in a complete waiver of certain arguments, it can be accounted for in assessing whether to grant or deny certain relief. For example, a bankruptcy court facing a motion to exercise permissive abstention may consider the filed claim to be one of the factors weighing against abstention (see *Delaware Trust Co. v. Wilmington Trust, N.A.*, 534 B.R. 500, 513-518 (S.D.N.Y. 2015); see also Practice Note, Notice of Removal, Remand, and Abstention in Bankruptcy) (w-000-7148).

DOCUMENTING A PROOF OF CLAIM

Proofs of claim need not set out every single shred of documentation evidencing a claim. However, Federal Rule of Bankruptcy Procedure 3001 provides that proofs of claim must conform to the applicable proof of claim form, as determined by the Judicial Conference (see Official Bankruptcy Form B401). That form, where applicable, must include the supporting documentation contemplated in Bankruptcy Rule 3001, including, for example, the writing on which the claim is based (if such a writing exists).

Those filing proofs of claim must include a reasonable amount of supporting documentation, including, where appropriate, an explanation of the claim together with:

- Contracts.
- Invoices.
- Statements of accounts.
- Other documentary support for the claim.

If sufficient documentation is not attached, the court might disallow the claim outright (see *Virginia Broadband, LLC v. Manuel*, 538 B.R. 253 (W.D. Va. 2015)).

TECHNICAL NON-COMPLIANCE WITH RULE 3001

Courts disagree regarding whether technical non-compliance with Federal Rule of Bankruptcy Procedure 3001 alone warrants disallowance of a claim. Some courts:

- Consider that rule to be procedural, without conferring a substantive basis for objection or disallowance, and that only section 502 of the Bankruptcy Code confers a basis for objections to claims.
- Have held that failure to file a conforming proof of claim can, by itself, warrant disallowance (see In re Tatro Order Denying Objection to Claims 5.14.15).

LIMITING SUPPORTING DOCUMENTATION

There are several compelling reasons to limit the amount of supporting documentation for proofs of claim.

Potential Misrepresentation

A proof of claim is a sworn and signed document attesting to the validity of a claim. Any misrepresentations in the proof of claim or the documents attached can provide a basis for disallowance, sanctions, or worse (see Filing an Incorrect or Incomplete Proof of Claim). The inclusion of an overabundance of information only increases the chances that some statement or representation could be attacked as untrue. This is especially the case for declarations or affidavits filed in support of a proof of claim, particularly when considering the filer's understandable desire to tell its story in a light most favorable to allowance of the claim or even for convincing claims traders to buy the claim.

Confidential and Sensitive Information

There may be important business sensitivities regarding publicly filing confidential or commercially sensitive information, including:

- Terms of business relationships.
- Pricing strategies.
- Ongoing research and development.
- Supply and payment terms.

Inclusion of this or other information may provide competitors or contract counterparties with information that would otherwise be kept confidential. Certain documents may be filed in redacted form or under seal, or may be referenced but not attached to a proof of claim. Consider that commercial sensitivities do not absolve a creditor of its responsibility to file a complete proof of claim. Claimants must therefore pay careful attention to the content of any proof of claim and the accompanying documentation.

The creditor may owe the debtor or a third party a duty to maintain confidentiality of the terms of the relationship, or even of the existence of the relationship, for example:

- Military contracts.
- Employment contracts.

- Early-stage partnerships in emerging technology or pharmaceuticals.

The amount of the claim may even be sensitive or confidential.

Disclosure of certain personal names, numbers, and data may violate federal laws regarding privacy, especially health records and information pertaining to minors, or may unknowingly facilitate identity theft (§ 107(c), Bankruptcy Code; 18 U.S.C. § 1028). The Bankruptcy Rules specifically enumerate the limited identifying information that can be included in public filings (Federal Rule of Bankruptcy Procedure 9037(b)). Those preparing proofs of claim should be careful to avoid breaching contractual confidentiality obligations in attempting to file complete proofs of claim and recover from a debtor in bankruptcy.

A violation of Bankruptcy Rule 9037 does not necessarily create a private cause of action or a basis for complete disallowance of the claim (see *Lentz v. Bureau of Med. Econ.* (*In re Lentz*), 405 B.R. 893, 898 (Bankr. N.D. Ohio 2009)). Counsel should avoid breaking the rules and disclosing sensitive or protected information.

Strategic Considerations

An overabundance of information in the proof of claim may risk prematurely tipping one's hand about litigation strategy or the nature and extent of a creditor's claims. The proof of claim, by definition, includes more than would be divulged in an ordinary complaint and inherently provides the debtor with significantly more time to respond. By laying out the entire claim and all supporting documentation, the creditor provides the debtor (and potentially third parties) with months, or even years, to assess the nature of the claim and to prepare an objection or opposition. This can be especially problematic where the debtor is just one of many current or potential targets by a creditor.

ISSUES OF PREJUDICE

RES JUDICATA

Another key problem that can be posed in filing a proof of claim is that the creditor might end up winning the battle on the proof of claim but losing the war regarding the actual underlying claims being asserted. For example, if the claim is allowed against the debtor, the allowance of that claim can constitute res judicata on the underlying dispute, precluding the creditor from asserting any subsequent claims for additional damages (see *In re Blackhawk Corp.*, 2016 WL 3131954 (Bankr. D. Del. May 26, 2016)).

In *Blackhawk*, certain creditors sought damages due to landslides and soil movement allegedly emanating from property owned by the debtor, which affected homes owned by creditors. The affected creditors commenced an action against the debtor before the commencement of the debtor's Chapter 7 bankruptcy case and subsequently filed proofs of claim against the debtor, to which they attached a copy of the complaint in the pending action. After each claim was allowed in its face amount of $6 million, the debtor sought an order of the bankruptcy court granting the debtor summary judgment in the underlying state court action. In so resolving that action, the bankruptcy court acknowledged that the allowance of a proof of claim constitutes a final judgment on the merits, even if the creditor suffered damages (or, presumably, additional damages) after the reorganization (see *Blackhawk*, 2016 WL 3131954; see also *EDP Med. Computer Sys. v. United States*, 480 F.3d 621, 625 (2d Cir. 2007) ("[A] bankruptcy court order allowing an uncontested proof of claim constitutes a 'final judgment' and thus a predicate for res judicata."); *Katchen v. Landy*, 382 U.S. 323 (1966) ("[A] creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined.")).

If a proof of claim is filed in a liquidated amount and then allowed in full or otherwise resolved, the resolution of that claim in the bankruptcy court may deprive the creditor of any opportunity to pursue additional claims for subsequent damages, even if those damages were unknown to the creditor at the time of the claim's bar date. The failure to file a proof of claim would not necessarily help the creditor, as its claim could be barred due to the failure to file a timely proof of claim. Counsel should acknowledge the collateral effects that the resolution of the proof of claim might have on subsequent proceedings.

A filed proof of claim may include allegations or documents that can result in evidentiary prejudice to the creditor in a related action. For example, creditors should expect that filed proofs of claim will be closely scrutinized not just in the bankruptcy case but also by any third parties who may be implicated by the conduct alleged in the proof of claim. This prejudice may be compounded by the fact that the proof of claim is a sworn statement, signed and verified under penalty of perjury (see Filing an Incorrect or Incomplete Proof of Claim).

STANDING

As with the concerns regarding res judicata (see Res Judicata), a creditor may be prejudiced in other ways by the resolution of a proof of claim in the bankruptcy case. A creditor is a party in interest with a right to be heard in a bankruptcy case (§ 1109(b), Bankruptcy Code). However, once a claim is fully resolved and, if allowed, paid in full, the entity ceases to be a creditor in the bankruptcy case and may lose its right to appear or be heard in any subsequent proceedings.

For example, if a creditor is a thorn in the debtor's side and seen as an impediment to the confirmation or effectiveness of a Chapter 11 plan, the debtor may choose to allow and pay the claim in full under section 363 of the Bankruptcy Code (see Practice Note, Rule 9019 Settlements: Section 363 of the Bankruptcy Code). Doing so moots any objections or arguments that the creditor may have otherwise raised before the bankruptcy court. In these circumstances, the creditor likely has no right to refuse payment or otherwise pursue continued involvement in the case, even on an asserted interest in the integrity of the bankruptcy process or of the public interest (see *In re RnD Eng'g, LLC*, 546 B.R. 738 (Bankr. E.D. Mich. 2016)).

Many creditors only want to be paid in full. Great care should be taken to ensure that the claim is accurate and complete and reflects the full extent of the creditor's interest in the case. Those wishing to maximize their chances of being heard and avoid a forced settlement of all outstanding claims should consider asserting contingent claims or otherwise ensuring their status as parties in interest (such as through contract counterparties or by holding other interests in the case).

OPEN-ENDED CLAIMS AND UNLIQUIDATED AMOUNTS

Filing contingent or open-ended claims can ensure that creditors do not prejudice themselves because of a claim that is too low, easily satisfied, or forthcoming regarding the alleged damages. However, there can be risks inherent in filing contingent or unliquidated claims, including that:

- The debtor can seek to invoke section 502(c)(1) of the Bankruptcy Code, which may result in the estimation of the claim for allowance at an amount significantly lower than the amount that the creditor would have chosen to assert. Even if the claim is estimated at a fair amount, the litigation regarding the estimation can be time-consuming and expensive.
- Certain contingent claims (for example, for reimbursement or contribution) may be disallowed in full under section 502(e)(1)(B) of the Bankruptcy Code.
- A claim may be disallowed in its entirety if it is unenforceable for any reason other than being contingent or unmatured (§ 502(b)(1), Bankruptcy Code).

From a practical perspective, the absence of a certain claim amount can either reduce or increase a creditor's leverage in the bankruptcy case. If:

- The creditor specifies a dollar amount, the proof of claim constitutes prima facie evidence of the claim's validity, and the burden lies on the debtor to contest the claim.
- No amount is specified, parties in interest may have no sense of the creditor's true stake in the Chapter 11 case until after the claim is liquidated or otherwise addressed.

While a claim should not be filed as contingent unless there is a basis for doing so, creditors should be counseled regarding the inherent benefits and drawbacks of asserting partially or fully contingent claims.

FILING AN INCORRECT OR INCOMPLETE PROOF OF CLAIM

FRAUD, PERJURY, AND ADMINISTRATIVE INCONVENIENCE

A proof of claim is a sworn statement representing that all of the information included is true to the best of the signatory's knowledge. The standard proof of claim form specifically and unequivocally notes that the signatory is representing under penalty of perjury. Proofs of claim include sworn declarations from a representative of the creditor setting out the basis for the claim asserted.

If a proof of claim is incorrect or needs to be updated, it can generally be amended without penalty if it:

- Corrects a defect of form in the initial claim.
- Describes the claim with greater particularity.
- Pleads a new theory of recovery on the facts set out in the original claim.

(See *Midland Cogeneration Venture Ltd. P'ship v. Enron Corp.* (*In re Enron Corp.*), 419 F.3d 115, 133 (2d Cir. 2005).)

However, amendments are subjected to "careful scrutiny to assure that there was no attempt to file a new claim under the guise of amendment" (see *Midland*, 419 F.3d at 133; *Mich. Funds Admin. v. DPH Holdings Corp.* (*In re DPH Holdings Corp.*), 494 F. App'x 135 (2d Cir. 2012); *In re Barquet Group, Inc.*, 477 B.R. 454, 464 (Bankr. S.D.N.Y. 2012)). For example, if the amended claim does not relate back to the original claim or otherwise attempts to assert new claims not asserted or preserved in the original claim, that amendment may be rejected by the court.

An incorrect proof of claim may constitute or include fraudulent statements while under oath, which can include perjury, fraud on the court, or dereliction of an attorney's duty of candor before the court. It is not enough to feign ignorance or to blame others for shoddy or incomplete information. The most serious risk inherent in filing a proof of claim is that the filer and any signatories to signed declarations run a risk of subjecting herself and others to personal liability because of material misrepresentations made under penalty of perjury.

SIGNING THE PROOF OF CLAIM ON BEHALF OF CLIENTS

Federal Rule of Bankruptcy Procedure 3001(b) provides that a proof of claim may be executed by the creditor or, with limited exceptions, by "the creditor's authorized agent." Given that outside counsel regularly prepares the proof of claim, it can be tempting for attorneys to simply sign the proof of claim as the creditor's authorized agent. However, doing so can be risky. The proof of claim constitutes a sworn statement representing that the information is true. Even if the client provides written confirmation of the accuracy of the proof of claim and the attorney's authority to execute the claim form, counsel could be liable if the client provided false information or made misrepresentations regarding the basis for the claim or the claim amount, whether intentionally or unintentionally.

Sanctions

If the claimant's attorney signs the proof of claim, the attorney may be subject to sanctions under Federal Rule of Bankruptcy Procedure 9011 if the court determines that there was, in fact, no reasonable basis for the claim (or worse, if there has been any fraudulent conduct in preparing the proof of claim (see Fraud, Perjury, and Administrative Inconvenience)). An attorney with no first-hand knowledge of the validity of the claim risks personal liability for these violations.

Fact Witness

At least one court has concluded that, in signing a proof of claim on behalf of a client, the attorney becomes a fact witness about the validity of the claim and therefore waives the attorney-client and work-product privileges concerning the facts set out in the proof of claim (see *In re Rodriguez*, 2013 WL 2450925 (Bankr. S.D. Tex. June 5, 2013) (noting that a proof of claim is not like a complaint because, under Federal Rule of Bankruptcy Procedure 3001(f), it inherently "constitute[s] prima facie evidence of the validity and amount of the claim")).

By becoming a fact witness, the attorney may subsequently be disqualified from representing the client in future litigation (see *In re Duke Invs., Ltd.*, 454 B.R. 414 (Bankr. S.D. Tex. 2011)). Even though the bankruptcy court in *Duke* did not disqualify the attorney because he was not a necessary witness, it may be best to avoid the risk of disqualification or even the possibility of creating any basis for an argument to that effect (*Duke*, 454 B.R. at 422-23).

While these scenarios are uncommon, where possible, attorneys should avoid any likelihood of incurring personal liability or disqualification simply by attempting to make a client's life marginally easier by signing and filing a proof of claim. The signatory to the proof of claim, whether

that is an attorney or an authorized signatory for the creditor itself, should take particular care in executing a proof of claim to ensure that all information is accurate and that she is capable of explaining the basis of the claim.

CLASS CLAIMS

Federal Rule of Bankruptcy Procedure 7023 provides that class action procedures may apply in bankruptcy litigation, potentially allowing for the administration of certain class action claims under the umbrella of a bankruptcy case. However, the Bankruptcy Code is silent about whether a class representative may file a proof of claim on behalf of a putative class, thereby asserting and preserving claims on behalf of a putative class of creditors with claims against the debtor.

Some courts have held that a class representative cannot file a proof of claim on behalf of a putative class (see *In re Standard Metals Corp.*, 817 F.2d 625, 630 (10th Cir. 1987) and Class Action Claim Cannot Be Filed). However, other courts have concluded that a "class action claim" can be filed in a bankruptcy case (see *Reid v. White Motor Corp.*, 886 F.2d 1462, 1472 (6th Cir. 1989); *Certified Class in the Charter Sec. Litig. v. Charter Co.* (*In re Charter Co.*), 876 F.2d 866, 873 (11th Cir. 1989); see also Class Action Claim Can Be Filed).

CLASS ACTION CLAIM CANNOT BE FILED

Restricting putative class claims in bankruptcy cases turns on the nature of the claims filing and allowance process. In a non-bankruptcy context, there is no centralized process for corralling and asserting similar claims against one or more entities. The class action process creates a mechanism for bundling and preserving those claims and for a streamlined process for resolving those claims.

However, the Bankruptcy Code and Bankruptcy Rules create a special process for filing and resolving claims against a debtor in bankruptcy. Bankruptcy's claim filing procedures, the various notices that must be distributed to known creditors, and publication notice for unknown creditors, are arguably sufficient to create a streamlined process for asserting or preserving claims against a debtor's estate, rendering the class action process less necessary, or even superfluous.

CLASS ACTION CLAIM CAN BE FILED

There are unique features of the class action process, such as class certification, opt-outs, and class settlements, that can prove useful even in bankruptcy. Congress or the courts may yet choose to create a uniform process for class claims in bankruptcy. In the meantime, those seeking to assert or preserve putative class claims in a bankruptcy case should take care to comply with applicable bankruptcy and non-bankruptcy law, or they run a risk of abandoning valuable claims because of the unique features of the bankruptcy case.

VIOLATIONS OF COURT ORDERS OR APPLICABLE LAW

Creditors should take caution to ensure that they are not seeking payment on debt that has been discharged in another bankruptcy case. The act of filing a proof of claim may constitute a violation of the discharge injunction in the prior bankruptcy case or of other applicable state or federal law, such as the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 to 1692p), and may subject the filer to sanctions for contempt or punitive sanctions (see *Green Point Credit LLC v. McLean*, 794 F.3d 1313 (11th Cir. 2015); *Crawford v. LVNV Funding LLC*, 758 F.3d 1254 (11th Cir. 2014)). The risk is apparent in Chapter 22 cases, where there is a subsequent filing by the same debtor. But the debtor's prior discharge may not be as apparent in circumstances where the debtor entity:

- Had not been the lead debtor and had simply been one of a laundry list of affiliated companies in a jointly administered Chapter 11 case.
- Changed its name on its emergence from bankruptcy.
- Was sold to a third party in the initial bankruptcy case.

BANKRUPTCY RULE 3006

The unintended consequences of filing a proof of claim cannot be cured by simply deciding to discontinue pursuit of the claim in the bankruptcy case. Federal Rule of Bankruptcy Procedure 3006 provides that "[a] creditor may withdraw a claim as of right by filing a notice of withdrawal." However, a creditor must first seek leave from the court to withdraw the claim, after notice and a hearing, if:

- The debtor objected to the claim.
- The debtor commenced an adversary proceeding against the creditor.
- The creditor had voted on the debtor's plan or otherwise "participated significantly in the case."

Derived from Rule 41 of the Federal Rules of Civil Procedure, which requires leave of the court to dismiss actions that are beyond the initial pleading stage, Bankruptcy Rule 3006 is designed to limit back-and-forth litigation tactics. Once the court and parties in interest have expended time and money on the issue, the creditor cannot simply opt out of the bankruptcy forum. If a creditor determines that it should not have filed a proof of claim, it can withdraw the claim as of right, but only if nothing material has happened concerning that claim or that creditor. Once the claim adjudication process has started, claim withdrawal is not so simple and not freely given.

For those reasons, by lodging an early objection to creditors' claims, savvy and diligent debtors can capitalize on errors made by creditors who were not sensitized to the considerations discussed here. By the same token, a debtor might lose its leverage if it fails to file a prompt objection to the claim or reaches out to negotiate with the creditor before filing a formal objection to the creditor's proof of claim.

12-16