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WHEN IS IT NEVER TOO LATE TO FILE A PROOF OF CLAIM?

Bankruptcy is an event occurring at the instance of the debtor [1] —an event in which all creditors [2] are invited to participate. A creditor must, however, accept that invitation by filing proof of its claim with the clerk of the bankruptcy court. [3] , [4]

The rules for the filing of the proof of claim are clearly set forth in the Bankruptcy Code and Rules. [5] In cases filed under Chapter 7, [6] Chapter 12 [7] and Chapter 13, [8] an unsecured creditor [9] must memorialize its claim in a writing [10] filed with the clerk of the bankruptcy court within ninety days of the first date scheduled for the first meeting of creditors. [11] In ***305** cases filed under Chapter 11, [12] an unsecured creditor having had its claim listed in the debtor's schedule is "deemed" to have filed a proof of claim without the necessity or requirement of actually filing a written proof of claim with the clerk [13] unless the claim is scheduled as disputed, contingent or unliquidated. [14] If the claim is so designated, the creditor must memorialize its claim in a writing filed with the clerk of the court prior to any "bar date" fixed by the court. [15] The clerk must provide all creditors with 20 days' notice of any bar date fixed by the Court. [16]

This article analyzes issues arising when an unsecured creditor whose claim has been listed in the debtor's schedules, and who is required to file a proof of claim in order to participate in any distribution of the proceeds of the estate, fails to timely file its proof of claim with the clerk. This article shall not analyze the rights of unsecured creditors whose claims are not listed in the debtor's schedules and who had no actual notice of the debtor's filing of the bankruptcy petition. [17]

One might expect that it is only the relatively unsophisticated creditor, or the creditor's attorney who does not specialize in bankruptcy, who fails to timely file a proof of claim. Surprisingly, a substantial body of case law exists which manifests the frequency of this occurrence among sophisticated creditors and experienced bankruptcy practitioners.

After setting forth the statutory framework, this article shall analyze a ***306** principle of law created by courts for the allowance of claims where the written proof of claim has been filed after the statutory time limit expires. Some tangential legal issues and strategies will be explored and a brief commentary offered.

STATUTORY FRAMEWORK

In the first instance, the creditor is designated as the appropriate party for filing a proof of claim on its own behalf. [18] "A proof of claim is a written statement setting forth a creditor's claim," [19] and Congress has even provided Official Form 10 for the creditor's use in the filing of a proof of claim. In some jurisdictions, Official Form 10 is printed on the back of the clerk's notice [20] to the creditor which advises creditors of the filing of a petition listing the debtor's obligation to that creditor, of the date, time and place of the first meeting of creditors, and of the statutory requirement and deadline

to file a proof of claim in order to participate and receive any distribution from the proceeds of the estate. Thus, in most instances, the legal requirements of filing a proof of claim have been reduced to a mere ministerial task which can easily be accomplished by any literate creditor without the need for advice and assistance of legal counsel.

One purpose of the proof of claim filing requirements is to provide finality to facilitate the orderly administration of the bankruptcy case. [21] The concept of finality is illustrated in a Chapter 7 context where property of the estate includes the debtor's home which has substantial equity in excess of the liens against it. In such a case, the Chapter 7 trustee will often structure an agreement to sell the debtor (or a friend or relative of the debtor) the trustee's interest [22] in the home, subject to the existing ***307** liens, for an amount sufficient to satisfy in full the claims of all creditors entitled to participate in the distribution of proceeds of the estate. If there is $50,000 of equity in the home and only $10,000 of timely filed proofs of claim by unsecured creditors, the trustee can be confident in selling the trustee's interest in the home, subject to the existing liens, for a purchase price of $10,000 (plus an amount sufficient to pay the trustee's costs of administration). The trustee will sign a binding contract with the proposed purchaser after the expiration of the ninety-day claims-filing period for the amount so designated. The trustee cannot enter this agreement, however, if a creditor who has not timely filed its proof of claim is allowed to file out of time. Thus, the trustee must be able to rely on the finality of the ninety-day deadline for purposes of the orderly, efficient and equitable administration of the case.

The principle of finality is illustrated in a Chapter 11 reorganization where after the expiration of the claims-filing period, the debtor-in-possession files a plan of reorganization which proposes, in part, to pay a 25 percent distribution to unsecured creditors with timely filed allowed claims. This hypothetical plan also proposes that payment will be funded by the debtor-in-possession obtaining financing from a lender in an amount sufficient to make the 25 percent distribution. The claims-filing deadline fixes the amount of general unsecured claims and thereby allows the debtor-in-possession to seek financing in a definite amount. Without the finality of the claims-filing deadline, the debtor-in-possession cannot propose such a plan because it does not know the amount it has to borrow to satisfy the plan obligation of a 25 percent distribution. Obviously, the court cannot confirm such a plan because it lacks sufficient finality. [23]

Finally, in a Chapter 13 case, the principle of finality is demonstrated where the debtor files a plan which proposes to pay unsecured creditors a 25 percent distribution with monthly payments over a three-year period with funds generated from the debtor's future earnings. Again, without the finality of the claims-filing deadline, the court could not confirm such a plan because it would not know whether the debtor would have sufficient future earnings to make the necessary monthly payments.

PRINCIPLE ANALYSIS

Succinctly stated, the principle of law addressed by this article is that a creditor may file a formal, amended proof of claim out of time where it has filed an informal proof of claim within the statutory deadline. The formal, amended proof of claim is given retroactive effect to the date of ***308** the timely filed informal proof of claim. One leading commentator has described the principle as follows:

> The courts have endorsed a broad, elastic construction regarding what may be a "written statement setting forth a creditor's claim," and hence, a proof of claim under section 501 and Bankruptcy Rule 3001. As a rule, these cases concern the late filing of a proof of claim, with a party seeking to disallow the claim on the ground that it was not filed timely. The holder argues that the claim was filed timely, in that an "informal" proof was filed within the period of limitations, that this "informal" proof was amended with a conventional filing, and that this conventional filing, in turn, relates back to the date of the "informal" proof. The question thus is reduced to whether the "informal" proof may be deemed a proof of claim under section 501 and Bankruptcy Rule 3001. The courts have held that a variety of writings, even though not intended to qualify as a proof of claim, nevertheless may be such under the Code. These writings may include

> letters to counsel for an estate or pleadings seeking relief from stay. On balance, these rulings are equitable in nature, and tend to further the twin goals which underlie the claims process in bankruptcy cases, viz., larger participation by creditors and a fresh start for debtors. [24]

The principle manifests a tension, however, between the "twin goals which underlie the claims process" and the congressional intent to provide finality to the proceedings. Moreover, a dichotomy of form and finality splits with considerations of substance and equity in providing relief to a creditor who has actively participated from the inception of the proceedings [25] yet failed to satisfy the legal niceties, as simple as they may be, involved in filing a document with the clerk which is styled as and specifically intended to be a proof of claim.

Equitable considerations aside, nothing in the Code or the Rules specifically allows for the filing of an amended proof of claim, [26] even where the original proof of claim is "formal." [27] Nonetheless, it is universally accepted that a bankruptcy court is empowered with discretion to allow amendments to court filings, including proofs of claim, in appropriate cases. [28]

***309** The principle of the amendable, informal proof of claim is particularly crucial in Chapter 7, 12 and 13 cases since without this equitable principle, the creditor who fails to timely file a formal proof of claim with the clerk has no other legal theory upon which it may participate in the distribution of proceeds of the estate. In Chapter 11, however, the dilatory creditor has one other avenue of relief. More specifically, the rules do provide that a Chapter 11 creditor may file a proof of claim out of time where it can establish excusable neglect for its failure to timely file. [29] This avenue of relief, though previously formidable, has been eased greatly due to a recent Supreme Court decision which provides that excusable neglect, in appropriate circumstances, may include the mere carelessness or mistake of an attorney. [30]

CASE ANALYSIS

The Ninth Circuit Court of Appeals, with at least four reported decisions, has taken the lead in the development of the principle of the amendable, informal proof of claim in the context of present bankruptcy law. Three reported decisions of the Eleventh Circuit Court of Appeals demonstrate that the principle is adopted in that circuit as well. Two reported decisions of the Seventh Circuit Court of Appeals implicitly adopt the principle in cases dealing with unfiled proofs of claim but were decided on other legal grounds without specific analysis of the application of the principle to the facts in those cases. So too the Third Circuit Court of Appeals has referred to the principle in dicta in a case decided on the excusable neglect standard. Finally, two decisions issued by the Eighth Circuit Court of Appeals clearly demonstrate that the principle is adopted in that circuit.

The remaining circuits have issued no decisions directly on point, although there are reported opinions of the lower courts in every circuit which address the principle and its adoption or rejection therein. Cases decided under the Bankruptcy Act, in effect prior to the enactment of the Bankruptcy Code, demonstrate the long-standing history of this principle and form the underpinnings to present law.

As the following analysis demonstrates, in order for a creditor to establish the existence of an informal proof of claim capable of amendment, courts uniformly require that the informal proof of claim state the nature and extent of the claim and evidence an intent to hold the bankruptcy estate liable for the claim. The informal proof of claim must be in ***310** writing—no cases have permitted an informal proof of claim on a creditor's mere assertion of an out-of-court verbal communication. Courts have considered and rejected arguments that court appearances by creditors are sufficient in themselves to satisfy the elements necessary to establish the existence of an informal proof of claim. However, courts have considered court appearances in conjunction with written documentation to determine that an informal proof of

claim exists. Finally, some courts require that the written document purporting to be the informal proof of claim be filed with the bankruptcy court. Other courts have found it sufficient when the written document was submitted only to the trustee or only to the debtor-in-possession.

NINTH CIRCUIT

Two seminal cases defining the elements of the principle under the Bankruptcy Code were issued by the Ninth Circuit Court of Appeals in Pizza of Hawaii, Inc. v. Shakey's, Inc., [31] and Sambo's Restaurants, Inc. v. Peggy Wheeler, [32] which were decided within a four-month period in 1985. [33]

In Pizza of Hawaii, a general unsecured creditor who failed to timely file a proof of claim had previously filed a stay relief motion in order to join the debtor as a defendant in pending federal litigation. [34] The suit was for breach of a contract assigned to the debtor, and the debtor, as assignee, was liable in the event the breach was proven. [35]

The stay relief motion was denied but the bankruptcy court ordered that it would not entertain a plan of reorganization until the contract litigation had been adjudicated. Three years after the order denying the stay motion, the debtor filed a disclosure statement and plan of reorganization. The court approved the disclosure statement and in doing so, it effectively, although not explicitly, vacated its prior order. Two months later, the court confirmed the plan. [36]

The creditor appealed the bankruptcy court's order confirming the plan, claiming the plan failed to provide sufficient funding for the still-pending contract litigation claim. The debtor responded, arguing that the creditor failed to timely file a proof of claim and therefore the plan need not provide for payment of that claim. The district court ruled that the stay relief motion, the pleadings filed in the federal litigation, the creditor's filed objections to the disclosure statement and plan, and the creditor's active participation constituted an amendable, informal proof of ***311** claim. [37]

The debtor appealed this order to the Ninth Circuit, which affirmed, relying upon the Sambo's case. Specifically, the court found that,

> In its complaint for relief from the automatic stay, [the creditor] stated its desire to join the debtor as a defendant in the civil case, clearly evidencing its intent to hold the estate liable. Moreover, the documents attached to the complaint for relief from the automatic stay detail the nature and the continued amount of the claim . . . . We agree with the district court that the adversary matter contained all the necessary prerequisites to advise the bankruptcy court of [the creditor's] claim. [38]

In Sambo's, the court fixed a bar date in a Chapter 11 case filed in the central district of California. After the petition was filed, but before the bar date, the creditor instituted a tort action against the debtor in federal court in Alabama. The debtor's attorney advised the creditor's attorney of the pendency of the bankruptcy petition and demanded that the suit be dismissed. The creditor's attorney asked for two weeks to review all available options, and the two-week request was consented to in correspondence between counsel. [39] In that two-week period, counsel exchanged other correspondence; however, the debtor's attorney never provided notice of the claim's bar date. The debtor then moved in the Alabama district court to enforce the stay of the suit and transfer it to the bankruptcy court, and the creditor joined that motion. The Alabama district court denied the motion, instead dismissing the suit without prejudice to the creditor's ability to petition to reinstate the action once the automatic stay was dissolved.

The creditor failed to file a proof of claim before the bar date.

Five months after the bar date, the creditor filed a motion for leave to amend its informal proof of claim that had been "timely" filed. That motion was denied by the bankruptcy court but reversed by the district court. [40]

The district court's order was affirmed on appeal. In affirming, the appellate court set forth the rule that, in order for a creditor to establish the existence of an informal proof of claim, the papers relied upon "must state an explicit demand showing the nature and the amount of the claim against the estate and evidence an intent to hold the debtor liable." [41] The Ninth Circuit in Sambo's found these three criteria—nature of claim, extent of claim and intent to hold the estate liable—were satisfied. Specifically it found that the complaint filed in the civil litigation in Alabama set forth the nature and the amount of the claim and the joint ***312** motion in the Alabama district court evidenced the intent to hold the estate liable. [42]

The debtor argued that, at a minimum, an informal, amendable proof of claim must be filed with the bankruptcy court. [43] The Ninth Circuit rejected these arguments, relying instead upon Franciscan Vineyards, Inc., [44] which was a case decided under the former Bankruptcy Act. Franciscan provides a more liberal standard, the Sambo's court found, and thus the joint motion filed in the Alabama district court and submitted to the debtor-in-possession was deemed to establish the creditor's intent to file its claim with the bankruptcy court. [45] The Sambo's court summarized that,

> in the absence of prejudice to an opposing party, the bankruptcy court as courts of equity, should freely allow amendments to proofs of claim that relate back to the filing of the informal proof of claim when the purpose is to cure a defect in the claim as filed or to describe the claim with greater particularity. [46]

Thus, the Sambo's rule allows the creditor to file a formal, amended proof of claim where the informal proof of claim has merely been served upon the debtor-in-possession and not with the bankruptcy court. [47]

In Franciscan Vineyards, a petition was pending under Chapter XI of the now-repealed Bankruptcy Act, which required all creditors to file proofs of claim within six months following the first meeting of creditors. [48] The county failed to file a claim for taxes owed; however, the tax assessor did send two tax bills to the trustee with a letter stating that the county tax assessor understood the trustee was handling the debtor's affairs. [49] In reviewing the case to determine whether the county's letter should be deemed an informal proof of claim capable of being amended, the Ninth Circuit adopted the rule that the writing must supply "the substance of a proof of claim, and to warrant amendment to supply the ***313** absent items of proof," [50] that the paper must evidence an intent to hold the estate liable, [51] and that "there must have been presented within the time limit, by or on behalf of the creditor, some written instrument which brings to the attention of the court the nature and the amount of the claim." [52]

It is notable that the Franciscan Vineyards rule does not require that the written instrument be filed with the bankruptcy court clerk. Instead, under Franciscan Vineyards, it is sufficient if the written instrument is supplied to the bankruptcy trustee, as "there is no great burden on trustees in being required to read and to 'reasonably construe' those documents sent to them." [53] In so ruling, the Ninth Circuit expressly rejects an earlier Ninth Circuit opinion which required that the informal proof of claim must appear "upon the record in the bankruptcy proceeding." [54] Franciscan Vineyards also rejected a similar rule that the amended proof of claim must be found in the court's own files. [55]

In Sambo's, the written instruments constituting the amendable proof of claim were documents filed in another court otherwise not related to the bankruptcy proceeding. Those documents were also submitted to the debtor-in-possession.

The Sambo's court adopted and expanded the rule of Franciscan Vineyards in finding that an informal proof of claim had been filed.

The case before the Franciscan Vineyards court had a trustee in place. The trustee is familiar with bankruptcy proceedings and is specifically in place as a fiduciary to safeguard the interests of legitimate creditors. But for the institution of insolvency proceedings, the trustee would not exist. The Franciscan Vineyards finding that it was not unreasonable for the trustee to construe those documents presented to it as a proof of claim is a logical conclusion, since the trustee is receiving only documents relating to the administration of the case.

In contrast, in Sambo's the documents in question were presented to the debtor-in-possession. [56] A debtor-in-possession is not merely a creature of law appointed in a representative or fiduciary capacity like a trustee. A debtor-in-possession is also an entity or individual existing pre-bankruptcy, involved in a multitude of events post-bankruptcy that ***314** are only indirectly or incidentally related to the ongoing administration of the Chapter 11 case and substantive bankruptcy issues. Thus, while it is logical to assume that a writing submitted to a trustee who is in place specifically to safeguard the creditors' interests can be construed by the trustee to be a proof of claim, it does not necessarily follow that a writing delivered to a debtor-in-possession will be construed by the debtor-in-possession as a proof of claim.

The Ninth Circuit decision in In re: Anderson-Walker Industries [57] relied upon the decisions in Franciscan Vineyards and Sun Basin Lumber Co. v. United States, [58] another Bankruptcy Act decision, to decide that a letter requesting information about the status of distribution sent to the trustee during the period for filing a claim, which letter contained a statement of the amount due and an intent to participate in a distribution to unsecured creditors, was a sufficient writing to establish an informal proof of claim capable of amendment after the claims-filing deadline had passed. [59]

In In re: Halm, [60] the Ninth Circuit held true to form and determined that a disclosure statement filed by a creditor within the claims-filing deadline constituted an informal, amendable proof of claim in a Chapter 11 case, [61] since the disclosure statement set forth the nature and extent of the claim and since it evidenced an intent to hold the estate liable.

ELEVENTH CIRCUIT

Two weeks before the Ninth Circuit issued its opinion in Sambo's, the Eleventh Circuit Court of Appeals in In re: International Horizons, Inc. [62] considered a Chapter 11 case where the Internal Revenue Service (IRS) filed a proof of claim for $70,000 in withholding taxes within the bar date. The IRS filed an amended proof of claim after the bar date which included not only the withholding taxes, but also corporate taxes totalling in excess of $20 million. [63] Apparently, six months pre-petition, the debtor and the IRS met for an audit and the debtor was verbally advised that its tax returns were not correct. Four months after the bar date, the IRS filed a notice of deficiency for corporate taxes. [64] The IRS did not object to the plan, which was confirmed, which provided for payment of allowed tax claims. Three months after confirmation of the plan, the debtor objected to the IRS's amended claim, the objection was granted and the corporate tax claim of $20 million was expunged. [65]

***315** On appeal, the IRS argued that its pre-petition meetings with the debtor constituted an informal amendable proof of claim, as did the formal proof of claim that it filed for withholding taxes. While the Eleventh Circuit court adopted the principle of the informal amended proof of claim, [66] it insisted that mere knowledge through pre-petition verbal communication of the existence of the claim by the debtor, the trustee or the bankruptcy court is insufficient. [67] The court further held that "the informal proof of claim as a minimum must furnish the information that a formal claim would give. This includes the fact that the claimant has what it believes to be a legal claim for money owing." The court

indicated that, perhaps if the notice of deficiency had been given before the bar date, it would have sufficed as an informal proof of claim. Failing this, there was no informal proof of claim to be amended. [68]

Eight months after its decision in International Horizons, the Eleventh Circuit decided the case of In re: South Atlantic Financial Corp. [69] In this Chapter 11 case, the creditor's claim was listed in the debtor's petition as disputed and a bar date had been fixed. The creditor received notice of the bar date and the creditor's attorney filed a notice of appearance within the bar date [70] but never filed a formal proof of claim. On the creditor's motion for permission to amend its informal proof of claim, the court set forth that it clearly adopted the principle of the informal, amendable proof of claim as established in that circuit by International Horizons. But in this case, the court found that the mere filing of a document with the court does not suffice unless that document specifically apprises the court of the existence, nature and amount of the claim. [71] The notice of appearance did not meet these criteria. [72]

The Eleventh Circuit in deciding In re: Charter Co. [73] relied upon the South Atlantic decision for its definition of an informal proof of claim capable of amendment after the claims-filing deadline. In this particular case, the creditor had filed a stay relief motion with the bankruptcy court prior to the expiration of the claims-filing deadline, and the stay relief motion was resolved after the bar date by a written stipulation of the parties. The court held here that the stay relief motion by the creditor, and the creditor's actions after the bar date, including its submission of a stipulation with regard to the stay motion, demonstrated an "intent to hold the estate liable." This intent was sufficient for purposes of allowing the creditor to amend its informal proof of claim by filing a formal ***316** proof of claim after the expiration of the deadline. [74]

The Charter Co. case is unique in that it allows actions by the creditor which take place after the bar date to be coupled with documents filed prior to the bar date to satisfy the criterion that the informal proof of claim must evidence an intent to hold the estate liable for the debt. The stay motion alone, while it established the extent and amount of the claim, did not evidence an intent to hold the estate liable.

SEVENTH CIRCUIT

The Seventh Circuit Court of Appeals first considered this issue in Wilkins v. Simon Brothers, Inc. [75] This Chapter 13 case was filed under the Bankruptcy Code, but since the official bankruptcy rules had not yet been issued or adopted, the proof of claim requirements were governed by the rules of the former Bankruptcy Act. [76] The issue before the Wilkins court was whether the bankruptcy court abused its discretion in extending the time within which a proof of claim could be filed for a creditor who attended the first meeting of creditors and all subsequent meetings and contributed to plan revision but did not file a formal proof of claim until after the claims-filing deadline. [77]

The Seventh Circuit decided that the bankruptcy court had no discretion to extend the filing deadline and, accordingly, reversed the order of the bankruptcy court which had extended the deadline and allowed the late-filed claim. However, the case was remanded when the Seventh Circuit, on its own initiative and without argument of either party, determined that there might be a sufficient record to establish the filing of an amendable, informal proof of claim within the claims-filing deadline. On this basis, the case was remanded with instruction to the bankruptcy court to determine whether the creditor manifested an intent to assert its claim against the debtor and with instruction that, if the creditor did so, the creditor should be allowed to file an amended formal proof of claim. [78] The Wilkins court did not specifically require that the bankruptcy court find this intent to be manifested only if a writing which contains specificity as to the amount owed, the nature of the claim and the claimant's intent to hold the estate liable had been filed with the bankruptcy court.

Any ambiguity created by the Seventh Circuit in Wilkins as to whether it required the informal proof of claim to exist in the form of a writing filed with the bankruptcy clerk was cleared up seven weeks later in its decision in the matter of Evanston Motor Co., Inc. [79] In Evanston, a letter was sent by the creditor in response to the Chapter 11 trustee's ***317** request that the creditor provide documentation to evidence its claim that it had a security interest in property of the estate. The documentation was provided with the letter, and the letter set forth the principal balance due. [80]

Since this case was under Chapter 11 and the creditor's claim was not listed as disputed, contingent or unliquidated, the debtor was not required to file a proof of claim. [81] However, the case was converted to Chapter 7 and the creditor failed to timely file a proof of claim. [82]

The bankruptcy court granted the creditor's motion for leave to file a formal amended claim, finding the letter sent to the Chapter 11 trustee constituted a timely filed informal proof of claim. Unlike the Sambo's rule of the Ninth Circuit, which allowed the informal proof of claim to be filed with the debtor-in-possession and not with the bankruptcy court, the Seventh Circuit in effect required that, while a document other than one specifically intended to be a proof of claim could be deemed an informal proof of claim, that document must nonetheless be filed with the bankruptcy court within the claims-filing deadline. Filing with the Chapter 11 trustee was insufficient.

The creditor argued that Bankruptcy Rule 5005(c) [83] allows for a paper intended to be filed with the court but erroneously delivered to the trustee to be deemed filed as of the date of original delivery in the interest of justice. [84] The appellate court rejected that argument, finding that that rule is "limited to those situations where the paper was 'intended to be filed"' with the court and to where the paper was "erroneously delivered" to the trustee, rather than merely received by the trustee. [85] The court found that the creditor did not intend for its letter sent to the trustee to actually be filed with the bankruptcy court. The court explained that, "while delivery of this proof of claim to the trustee may have resulted from an error in judgment, there was no erroneous delivery under the plain meaning of" the rule. [86]

It is interesting that the Sambo's court expressly rejected the Evanston Motor interpretation of Bankruptcy Rule 5005(c) in finding that the written instrument evidencing the informal, amended proof of claim need not be filed with the bankruptcy court. If a creditor is allowed to amend a timely filed informal proof of claim, it makes sense that the informal, timely filed proof of claim must actually be filed. For proofs of claim, filing is required with the bankruptcy court clerk, and it would seem clear that the only method to avoid this requirement is to rely upon ***318** Bankruptcy Rule 5005(c). Sambo's does not make this logical nexus, which is appropriate, for the written instruments upon which the Sambo's court relies to evidence an informal proof of claim were not filed with any person or entity identified in Bankruptcy Rule 5005(c) or its predecessor rule. In Sambo's, the written instruments were filed with a federal court not only outside of the district wherein the bankruptcy was pending, but also outside of the circuit within which the bankruptcy proceeding was pending. The Franciscan Vineyards decision follows more logically from this rule, and while it analyzes the rule differently from the Evanston Motors court, nonetheless, it still requires that the informal proof of claim be filed with the bankruptcy court clerk or, at a minimum, the trustee. [87]

THIRD CIRCUIT

The Third Circuit Court of Appeals has not decided a case directly on point with this issue. In In re: Vertientes, Ltd., [88] the appellate court affirmed a bankruptcy court and district court order which disallowed an extension of time for a creditor in a Chapter 11 case to file a proof of claim where that creditor's claim was listed as disputed and the court had fixed a bar date. In this case, the creditor's only claim was "lack of prejudice." The appellate court stated that this was insufficient cause and did not satisfy the excusable neglect standard of Bankruptcy Rule 9006(b)(1). [89]

Although no argument was made that this creditor had an informal, amendable proof of claim, the Third Circuit addressed this issue, stating, in dicta, "Moreover, before a court may permit a party to file an amended proof of claim, there must be something filed in the bankruptcy court capable of being amended." [90] This comment clearly shows that the Third Circuit is willing to entertain this principle and would likely allow the filing of a formal proof of claim out of time when an informal proof of claim was timely filed, so long as a writing filed with the bankruptcy court set forth the nature and amount of the claim and evidenced an intent to hold the estate liable.

EIGHTH CIRCUIT

The Eighth Circuit in the case of In re: Haugen Construction Services, Inc. [91] relied upon Franciscan Vineyards and Donovan Wyatt & Iron Co. [92] to establish that a letter sent by a claimant to the United States Trustee after conversion of the case to Chapter 7, which letter ***319** stated the amount of the creditor's claim, the nature of its claim and its desire to pursue the claim, was sufficient to establish an informal proof of claim capable of amendment. [93] The Eighth Circuit thus adopts the more liberal rule allowing the informal proof of claim to include documents not filed with the court but simply filed with the trustee. This decision does not extend quite as far as the Sambo's decision, which allowed for an informal proof of claim to be established on the basis of a written document served upon the debtor-in-possession.

BANKRUPTCY ACT CASES

The principle of the informal, amendable proof of claim enjoys a rich history since the adoption of the Bankruptcy Act in 1898. These cases track the development of the elements required to establish the existence of an informal proof of claim capable of amendment.

Cases under the Bankruptcy Act in the Ninth Circuit include one which required the informal, amendable proof of claim to be in writing and to supply "the substance of a proof of claim." [94] A case following ten years later added the element that the paper also evidence an intent to hold the estate liable. [95] Finally, the Ninth Circuit added to the intent element the requirement that the writing bring to the attention of the court the nature and the amount of the claim. [96]

The Second Circuit Court of Appeals addressed this issue under the Bankruptcy Act and specifically precluded the amendment of a claim delivered to the trustee. [97] This case was shortly followed with the Second Circuit's opinion that objections to the debtor's proposed "composition" (which, in effect, was an objection to the dischargeability of its claim) were sufficient to allow for the filing of a formal proof of claim out of time. [98] This court held that:

> The courts have shown great liberality in allowing amendments, and have held that it is not essential that a document be styled as a "proof of claim," or that it be filed in the form of a claim, if it fulfills the purpose for which the filing of proof is required . . . . It would be fanciful to suggest that the creditor objected for the sole purpose of preventing the discharge which accompanies confirmation of a composition, and with no intention of protecting his interest as a creditor in the bankruptcy estate. [99]

*320 BANKRUPTCY COURT AND DISTRICT COURT DECISIONS

Many more opinions on this issue have been rendered by the bankruptcy courts and district courts than by the circuit courts. This section of the article will attempt to highlight just some of these many decisions.

In the case of Drexel, Burnham, Lambert Group, Inc., [100] a Chapter 11 case in a court in the Second Circuit, a bar date was fixed and a creditor with a disputed claim sent a demand letter to the debtor-in-possession during the filing period. The creditor failed to timely file his proof of claim. The court found that the letter satisfied the "nature and extent" tests but did not satisfy the "intent to hold the estate liable" test because it was not filed with the bankruptcy court. The court held that "courts . . . look to see whether the informal proof of claim was filed with the bankruptcy court as evidence of an intent to hold the debtor's estate liable." [101] The court cited Pizza of Hawaii as a case where the documents were filed with the court and thus deemed an informal proof of claim capable of being amended. This court also looked to In re: AP Industries [102] as a case where a creditor filed a proof of claim three days late with nothing else on file with the bankruptcy court during the filing period. In that case, no extension was permitted.

The Drexel case is interesting in that it specifically finds that the document must be filed with the bankruptcy court in order to demonstrate an intent to hold the estate liable. This case is at odds with Sambo's and Franciscan Vineyards, which allowed the claim to be filed with the debtor-in-possession and trustee, respectively.

In a bankruptcy court decision out of the Ninth Circuit, it was decided that the filing of the informal proof of claim with the trustee was sufficient to establish that the creditor intended to hold the estate liable for payment of the claim. [103] In this case, the creditor had sent a letter to the trustee within ninety days of the first meeting of the creditors, and the letter stated the amount due and requested the trustee to release property that partially secured the claim of this debtor. This court found that the document need not be filed with the court to demonstrate the creditor's intent to hold the estate liable, but that the intent to seek recovery from the estate can be implicit in the language of the document itself. In this case, the letter stated that " the collateral has a negative value to the estate and further delay (of abandonment) will cause a larger deficit on the (debt)." [104] This decision is consistent with the rule of law established in Sambo's and Franciscan Vineyards.

In another decision issued out of a bankruptcy court in the Ninth Circuit, a Chapter 13 creditor failed to timely file a proof of claim but did ***321** file an objection to the confirmation of the Chapter 13 plan. [105] The objection did not state the amount of the claim or the nature of the claim. The court found that the writing was insufficient to satisfy the Franciscan Vineyards standard and therefore the creditor's motion for leave to file a formal proof of claim was disallowed. [106] Moreover, the court found that mere participation in the proceedings (an appearance at the first meeting of creditors, several appearances on hearings on objections to the plan and the conducting of an examination of the debtor pursuant to Bankruptcy Rule 2004) was insufficient to establish the existence of an informal proof of claim. [107]

Implicit in the decision in In re: Solvation, Inc. [108] is that the principle of the amendable, informal proof of claim is recognized in the First Circuit. In this case, a Chapter 11 debtor listed a creditor's claim as contingent. The debtor and creditor had federal litigation pending at the time of the petition. The debtor had served notice of a bar date for the filing of claims on the creditor but the creditor failed to timely file a proof of claim. [109]

The court cited the decision in Pizza of Hawaii and thereby implicitly adopted the principle. The holding in the case, however, was that since the creditor had filed nothing in the bankruptcy court wherein the petition was pending, there was no informal proof of claim to be amended. Merely filing pleadings in the federal litigation was insufficient. [110]

As mentioned earlier, the Third Circuit in the Vertientes decision gave an indication that it would recognize the principle of the informal, amendable proof of claim as long as something was filed in the bankruptcy proceeding. However, in a decision rendered by one of the bankruptcy courts within the Third Circuit, the court in In re: Ungar [111] provided perhaps the most liberal rule with regard to the allowance of informal, amendable proofs of claim.

In that case, the court found that an objection to a Chapter 13 plan constitutes an informal, amendable proof of claim even where that objection fails to state an amount due or define the nature of the claim. The court first rationalized that a failure to state an amount due is not fatal because courts often allow an amendment to a properly and timely filed proof of claim in order to allow an increase in the amount due. Secondly, the court opined that the amendment should be allowed because it will not delay in the administration of the estate. [112]

Perhaps the most important finding in Ungar, though, was its adoption ***322** of a very old precedent [113] to rule that the law in the Third Circuit does not require that the informal proof of claim contain a statement of an amount due. The Ungar court held that the informal proof of claim must merely show a demand and an intent to hold the estate liable, but may be silent as to the amount due. [114]

The finding in Ungar is a significant departure from every other case decided under the Bankruptcy Code. All cases ruling directly on this point at the appellate level have required, at a minimum, that the amount of the claim be set forth with specificity as well as the nature of the claim. Some courts have loosened the requirement that the writing evidence an intent to hold the estate liable by finding that the intent may be evidenced by implication or by action of the creditor. However, the Ungar court is the only court to loosen the requirement that the amount of the claim be stated with specificity and the nature of the claim be stated as well.

In another unusual decision, the court in In re: Kelly [115] found the existence of an informal proof of claim by virtue of papers filed in the bankruptcy court by the debtor, not by the creditor. In this case, while in Chapter 11, the debtor filed a motion and attached thereto as an exhibit a copy of a state court complaint which had been filed by the creditor pre-petition. The creditor's claim does not appear to have been listed as disputed, liquidated or contingent and thus there was no requirement to file a proof of claim during the Chapter 11 case. The case was converted to Chapter 7 and thereafter the creditor never filed a proof of claim. [116]

The creditor moved for permission to amend its alleged informal proof of claim. The court found in fact that the state court complaint attached as an exhibit to the debtor's motion in Chapter 11 satisfied the requirement of an amendable informal proof of claim. The court indicated that “it would be an idle gesture” for the creditor to have filed a proof of claim, since the debtor submitted a copy of that complaint to the bankruptcy court. [117]

The finding of an amendable, informal proof of claim in a document filed by an entity other than the creditor is a finding unique to the Kelly case. As if this unique finding is not enough, the Kelly court went on to determine that, even though the creditor had an informal, amendable proof of claim in place, the formal amendment would not relate back to the date of the filing of the informal proof of claim because it would prejudice creditors who had timely filed proofs of claim and there was no just cause or other explanation for this particular creditor's lack of diligence. [118]

The findings in the Kelly case have no basis in the findings of any of ***323** the decisions of the appellate courts. The appellate courts simply look for the existence of the informal proof of claim. If it exists, then the formal proof of claim relates back to the date of the filing of the informal proof of claim. The creditor is never required to demonstrate sufficient cause for allowance of the claim to relate back or a lack of prejudice to other parties who timely filed proofs of claim. The existence of an informal proof of claim presumably demonstrates diligence, and whenever a claim is allowed, it adversely affects the distribution to other creditors.

Moreover, the Kelly court explained early in its decision that it would have been an idle gesture for this particular creditor to have filed a proof of claim. Later in its decision, the court's comment that the filing of a proof of claim in the Chapter 11 case would have been an idle gesture comes into question when the court indicates that the failure of the creditor to timely file a proof of claim is the very reason why the formal proof of claim will not relate back. Since the formal proof

of claim will not relate back, then the creditor will not have a timely filed proof of claim and it will not participate pro rata in the distribution to other unsecured creditors. Certainly, it would not have been an idle gesture if this creditor had timely filed its proof of claim.

THE EFFECT OF THE PROOF OF CLAIM

The filing of a proof of claim, or the failure to do so, has several effects on a creditor in bankruptcy. First and foremost, a creditor who fails to timely file a proof of claim in a Chapter 7 proceeding will not participate in any distribution made to general unsecured creditors who timely filed proofs of claim. Only if all general unsecured creditors are paid in full will the court allow a distribution to be made to creditors who file proofs of claim after the claims-filing deadline. [119]

In Chapter 11, there is ambiguity as to the treatment of a creditor who fails to timely file a proof of claim but does tardily file a proof of claim. In order for a Chapter 11 plan to be confirmed, an unsecured creditor who will receive less than full payment must receive at least as much as that creditor would have received if the case were pending under Chapter 7, [120] Thus, a Chapter 11 creditor who is required to file a proof of claim and files that claim late should receive a distribution in the event that there are sufficient funds available to pay in full all general unsecured creditors who timely filed proofs of claim.

In direct contrast to this analysis, Bankruptcy Rule 3003(c)(2) provides that a creditor who is required to timely file a proof of claim but fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution. This rule indicates that a Chapter 11 creditor who tardily files a proof of claim will not receive any distribution in the case, even if that creditor would have received a distribution ***324** if the case were pending under Chapter 7 and that creditor had tardily filed a proof of claim.

This tension between the Bankruptcy Code and the Bankruptcy Rule with regard to Chapter 11 cases is even further complicated when viewed in light of state or corporation law. As explained earlier, one of the requirements to confirm a Chapter 11 plan is that claim holders who receive less than full payment of their claims must receive treatment under the plan at least equal to the treatment they would receive if the case were pending under Chapter 7. Implicitly, this requirement adopts the priority scheme of Section 726 of the Code. This priority scheme requires that, after payment in full of all general unsecured creditors (whether they have timely or tardily filed proofs of claim), and after payment of interest on the claims of all unsecured creditors, then any remaining proceeds will be distributed to the debtor. [121]

In the case of a liquidating Chapter 11 plan, the debtor is not entitled to receive a discharge of its debts. [122] In accordance with the priority scheme set forth above, if liquidation results in sufficient funds to pay all general unsecured creditors with timely filed proofs of claim in full, plus interest, and if creditors with tardily filed proofs of claim are not permitted to participate in the distribution of the proceeds of the estate pursuant to Bankruptcy Rule 3003(c)(2), then a liquidating Chapter 11 plan must provide for the balance of the proceeds to be distributed to the debtor. Since the claim of the creditor who tardily filed a proof of claim has not been discharged, then immediately upon confirmation of the plan and closing of the case [123] and upon distribution of proceeds to the debtor, the creditor can institute suit in state court to obtain a judgment and to satisfy that judgment by execution against the funds distributed to the debtor through the terms of the Chapter 11 plan. Even if the creditor does not act quickly enough, and the distribution to the debtor is immediately disbursed to shareholders, the creditor can reach those funds. The corporations law for most states prohibits a corporation from making a distribution to shareholders that would render the corporation insolvent and unable to pay valid claims existing at the time of the distribution. [124] Based on this analysis, an argument could be made that, in enacting Bankruptcy Rule 3003(c)(2), the legislature did not intend that creditors with tardily filed claims in a liquidating Chapter 11 case be precluded from recovering a distribution if sufficient funds exist.

Conversely, it is arguable that tardily filing claimants of a debtor reorganized under Chapter 11 should be precluded from receiving a distribution under a confirmed plan. Chapter 11 debtors who reorganize receive ***325** a discharge of their debts. [125] In order to confirm a plan, the debtor needs to know exactly what the general unsecured creditor body is so that the debtor can demonstrate at the confirmation hearing of the plan, with sufficient certainty, that funds will be available to make the distribution to general unsecured creditors as proposed by the plan. If the debtor has sufficient cash on hand at the time of confirmation to pay in full all general unsecured creditors with timely filed proofs of claim, then the debtor will likely need any additional cash on hand to fund the operation of the reorganized debtor. Since the debtor is discharged of its remaining debts, then despite the fact that they received no distribution under the plan, creditors who failed to timely file proofs of claim will be unable to pursue collection of those claims in courts outside of bankruptcy. This is apparently the result the legislature intended when it enacted Bankruptcy Rule 3003(c)(2).

COMMENTARY

Some courts have observed that the bar date for the filing of a proof of claim is in the nature of a statute of limitations and must be strictly observed. [126] The practical necessity of finality to the creation of the creditor body militates towards a strict enforcement of the claims-filing rules and deadlines. Moreover, the simplicity with which a proof of claim may be filed, coupled with the fact that a basic form for the filing of a proof of claim is often supplied to the creditor with notice of the institution of bankruptcy proceedings, strongly suggests that courts should only in the most limited circumstances allow for the filing of a formal proof of claim after expiration of the filing deadline.

There is no statutory basis for allowing amendments to proofs of claim. The principle of the informal, amendable proof of claim existed for at least 70 years before the enactment of the present bankruptcy laws in 1978. The Code and the Bankruptcy Rules made wholesale and substantial changes to the prior Bankruptcy Act and the rules thereunder. Had Congress intended to allow the principle of the informal, amendable proof of claim to exist under present bankruptcy law, it would have been simple enough for the legislature to draft an appropriate statute and rule. The fact that Congress specifically drafted a rule that allowed for the amendment of bankruptcy documents and pleadings other than ***326** proofs of claim suggests that Congress specifically did not intend to allow for amendments of "informal proofs of claim" to be unearthed through judicial exploration.

A skeptical observer may suggest that many of the reported decisions, particularly at the bankruptcy court level, appear as transparent efforts by local judges to protect local practitioners from malpractice claims for failing to timely file proofs of claim on behalf of their clients. Since in many cases the circumstances are such that the estate has not in fact been prejudiced by the creditor's failure to timely file a formal proof of claim, and the concept of finality did not drive the critical decisions of the trustee or the debtor, then such a result seems appropriate, if not technically legal. [127]

Alternatively, these decisions are also driven by the sensitivities of bankruptcy judges who view their courts as courts of equity where equity dictates that a harsh result should not arise where it can be avoided without damage to other parties. Another equitable maxim is that "equity follows the law." By searching for and finding a document which can be construed as a proof of claim, even though it is not styled as a proof of claim, the courts have followed this maxim. The informal proof of claim arguably satisfies the spirit of the legal requirements of the Code and the Bankruptcy Rules.

Until Congress revises present law to either specifically accept or specifically reject the principle of the informal, amendable proof of claim, litigation will persist on this issue. Unfortunately, even the most experienced of bankruptcy practitioners find themselves in the precarious situation of having vigorously represented their clients with zeal and fervor yet somehow forgotten to prepare a simple form and mail it to the bankruptcy clerk for filing.

*327 CONCLUSION

Unsecured creditors in Chapter 7 and Chapter 13 cases must file proofs of claim with the bankruptcy clerk within ninety days of the first meeting of creditors in order for the claims to be treated as timely filed. Chapter 11 creditors must file a proof of claim only if the debtor's schedules list the claim as disputed, contingent or unliquidated.

The weight of judicial authority clearly suggests that a creditor who fails to timely file a proof of claim may obtain authority to file a proof of claim out of time, given the existence of certain critical circumstances. At a minimum, the creditor must demonstrate that a writing exists in which the nature and extent of its claim are set forth and which evidences an intent by the creditor to hold the bankruptcy estate liable for that claim. Some circuits will require that writing to be filed with the bankruptcy court prior to the claims-filing deadline, while other circuits merely require the writing to be submitted to the trustee or debtor-in-possession within that statutory period. Some circuits will require greater specificity as to the description of the extent and nature of the claim in the writing. Other circuits have found that a writing may implicitly evidence an intent to hold the bankruptcy estate liable for the claim, especially if the writing is coupled with the creditor's active participation in the proceedings.

Where a creditor's proof of claim is deemed timely filed, the creditor will receive a distribution from the bankruptcy estate in accordance with its statutory priority. In Chapter 7 cases, creditors with tardily filed proofs of claim will receive distributions only if the claims of creditors who timely filed proofs of claim have been paid in full.

In Chapter 11 cases, a creditor who is required to file a proof of claim but fails to timely do so is precluded from voting on a proposed plan or receiving any distribution under a plan.

The filing of a proof of claim clearly has a critical impact on the treatment a creditor receives in a bankruptcy proceeding. Because courts vary in their application of the principle of the informal, amendable proof of claim, Congress should consider enacting a fast and simple rule which defines with specificity the criteria which must exist for application of this principle.

Footnotes

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1 Arguably, even in an involuntary case instituted by a creditor under 11 U.S.C. §303, the bankruptcy is initiated by the debtor's actions of obtaining credit and failing to repay it.

2 As the term is used in this article, a “creditor” is an entity that has a claim against the debtor that arose at the time or before the order for relief concerning the debtor. 11 U.S.C. §101(10)(A). For purposes of this article a “claim” is a right to payment. 11 U.S.C. §101(5)(A).

3 Fed.R.Bankr.P. 5005(a).

4 A creditor is authorized to file a proof of claim pursuant to 11 U.S.C. §501(a). For a thorough discussion of this statutory provision, the reader is directed to 2 Collier on Bankruptcy, ¶501.1 at 501-5 (Lawrence P. King ed., 15th ed. 1992), which discusses the impact that filing a proof of claim has on a creditor's participation in a case, the effect of a filing of a proof of claim on the allowance of a claim, and the form and the content of a proof of claim.

5 Title 11 of the United States Code shall hereafter be referred to as the “Code.” Individual provisions of the Code will be referred to as “Section” and identified by number.

6 11 U.S.C. §701, et seq.

7 11 U.S.C. §1201, et seq.

8 11 U.S.C. §1301, et seq.

9 An unsecured creditor is a creditor without a lien on property of the estate. The Code defines a lien at Section 101 (37) as a "charge against or interest in property to secure payment of a debt or performance of an obligation." The extent of secured claims is determined pursuant to Section 506(a) in proceedings conducted pursuant to Bankruptcy Rule 7001(2).

10 Fed.R.Bankr.P. 3001(a).

11 Fed.R.Bankr.P. 3002(c). The first meeting of creditors, required by Section 341(a) of the Code, is scheduled by the court clerk pursuant to Bankruptcy Rule 2002(a)(1). Typically, notice is sent to each creditor listed by the debtor in the bankruptcy petition. Bankruptcy Rule 1007(a) requires the debtor to file a list containing the name and address of each creditor.

12 11 U.S.C. §1101, et seq.

13 11 U.S.C. §1111 (a). Prior to the 1987 Bankruptcy Rule amendments, an ambiguity existed as to whether a creditor whose claim was deemed filed in the Chapter 11 proceeding was required to file an actual claim in the event the case was converted to Chapter 7. The case of In re: Crouthamel Potato Chip Co., 786 F.2d 141 (3d Cir.1986), held that a creditor having had his claim deemed filed in a Chapter 11 did not have to file an actual claim once the case was converted to Chapter 7. This holding was based upon the language of former Fed.R.Bankr.P. 1019(4) that "all claims filed" included those "deemed filed" while the case was pending in Chapter 11. In 1987, an amendment to Fed.R.Bankr.P. 1019 clarified this confusion by specifically stating in Fed.R.Bankr.P. 1019(3) that all claims "actually filed" in Chapter 11 shall be deemed filed in Chapter 7. See, e.g., In re: Haugen Construction Services, Inc., 88 B.R. 214 (Bankr. D.N.D. 1988) for a further discussion of this issue.

14 11 U.S.C. §1111(a).

15 Fed.R.Bankr.P. 3003(c)(2). Some courts have a standing order to fix a bar date within a specified time of the first meeting of creditors in a Chapter 11 case. This order is carried out by the clerk giving creditors notice of the bar date at the same time notice of the first meeting of creditors is provided. If the particular court does not have such a standing order, then the debtor's attorney will move the court for an order fixing a bar date.

16 Fed.R.Bankr.P. 2002(a)(8).

17 Where a creditor has actual notice, but not written notice, of a bankruptcy filing, even if its claim is not listed in the debtor's schedules, that creditor is bound by the same claims-filing deadlines as creditors whose claims are listed and who received written notice. In re: Perpetual Corp., 112 B.R. 27 (Bankr. M.D. Tenn. 1940). For a discussion of the impact of the claims-filing deadline on creditors whose claims are not listed in the debtor's schedules and who receive neither written nor actual notice that a bankruptcy has been filed, see City of New York v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293 (1953), which provides that due process requires creditors in a bankruptcy case to be given "reasonable notice . . . before their claims are forever barred." Id. at 297.

18 11 U.S.C. §501(a). If a creditor does not timely file a claim, a co-debtor may file on behalf of a creditor pursuant to Section 501(b); and a debtor or a trustee may file on behalf of a creditor pursuant to Section 501(c).

19 Fed.R.Bankr.P. 3001(a).

20 This notice is required pursuant to Fed.R.Bankr.P. 2002. Official Form 9 is provided for the clerk's Fed.R.Bankr.P. 2002 purposes. This official form supplies the chapter under which the case is filed, states whether there are any assets in the case, and advises the parties in interest of the requirement and the date within which to file a proof of claim. Bankruptcy court clerks in the districts of New Jersey, Maryland, New York and Pennsylvania, among others, provide a copy of Official Form 10 with the issuance of their Fed.R.Bankr.P. 2002 notice on Official Form 9.

21 "The bar date for filing proofs of claim. . . is a mechanism intended by Congress to provide the debtor and its creditor with 'finality' [which is] (t)he Congressional goal. . . ." In re: Norris Grain Co., 81 B.R. 103, 106 (Bankr. N.D.Fla. 1987). The claims bar date provides a mechanism by which the trustee can estimate potential liabilities of the debtor, an estimate which is essential to formulation of a viable reorganization plan. In re: Pettibone Corp., 123 B.R. 304 (Bankr. N.D.Ill. 1990).

22 Property of the estate is determined pursuant to the provisions of Section 541(a) which provides that the estate is comprised, in part, of all legal and equitable interests of the debtor in property as of the commencement of the case. In this context, the

trustee's interest referred to is her interest in the equity in the real estate which is not encumbered by valid mortgages, real estate tax liens or other valid liens.

23 Section 1129(a)(11) requires a plan proponent to demonstrate that confirmation of the plan is not likely to be followed by liquidation or the need for further financial reorganization. Without information as to the specific amount the plan proponent is required to borrow to fund the plan, which amount will be viewed in light of the plan proponent's ability to obtain that financing, the court cannot make a determination as to whether confirmation of the plan will be followed by a need for further reorganization or liquidation.

24 2 Collier on Bankruptcy, ¶501.1 at 501-5 to 501-6, fn. 21 (Lawrence P. King ed., 15th ed. 1992).

25 The creditor would have to have participated from the inception of the proceedings. since even the “informal” proof of claim must be filed within the 90-day statutory deadline.

26 Conversely, Fed.R.Bankr.P. 1009(a) provides a debtor a general right to amend its petition, lists, schedules or statements at any time before the case is closed.

27 Here, a formal proof of claim is one that is filed with the clerk in a form similar to Official Form 10 and specifically styled as, and intended to be, a proof of claim—and nothing more or otherwise.

28 A timely filed claim may be later perfected by amendment even after the claims bar date. In re: Middle Plantation of Williamsburg, Inc., 48 B.R. 789 (D.C. Va. 1985). The decision as to whether to grant leave to amend a claim after the claims bar date is within a bankruptcy court's discretion, but the court must closely scrutinize the proposed amendment to ensure that it is a genuine amendment, intended to cure a defect in the claim as originally filed, and not an assertion of an entirely new claim. In re: AM Intern, Inc., 67 B.R. 79 (N.D. Ill. 1986).

29 Fed.R.Bankr.P. 9006(b)(2) specifically precludes enlargement of the time period within which proofs of claim may be filed in Chapter 7 and Chapter 13 proceedings. Fed.R.Bankr.P. 9006(b)(1) does allow for an extension of the time within which to file a proof of claim in a Chapter 11 proceeding on a motion made after the expiration of the claims-filing deadline upon the showing by the movant of excusable neglect for the failure to timely act.

30 Prioneer Investment Services, Inc. v. Brunswick Associates, 113 S.Ct. 1489 (1993).

31 761 F.2d 1374 (9th Cir.1985).

32 754 F.2d 811 (9th Cir.1985).

33 Sambo's was decided on February 13, 1985, and Pizza of Hawaii was decided on May 24, 1985.

34 The contract litigation was in a different district in a different circuit.

35 Pizza of Hawaii, 761 F.2d at 1375.

36 Id. at 1375-1376.

37 Id.

38 Id. at 1381.

39 Sambo's, 754 F.2d at 812.

40 Id.

41 Here, the Ninth Circuit, like the bankruptcy court below, relied upon the rule set forth in Franciscan Vineyards for the criteria to determine the existence of an informal, amendable proof of claim.

42 Sambo's, 754 F.2d at 815.

43 The debtor also argued that Fed.R.Bankr.P. 5005 was not applicable. This rule requires that a paper intended to be filed with the clerk but erroneously delivered to the trustee, the attorney for the trustee, a bankruptcy judge, a district judge or the clerk of the district court be transmitted to the clerk of the bankruptcy court was not applicable. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk as of the date of its original delivery. The debtor here argued that this rule did not apply, relying upon Evanston Motor Co., 735 F.2d 1029 (7th Cir.1984), which provided that Fed.R.Bankr.P. 5005 applied only to the erroneous misdelivery of a paper to the trustee when it was intended to go to the bankruptcy clerk, not to an error in judgment by the creditor in addressing his claim to the trustee only. Id. at 1032.

44 597 F.2d 181 (9th Cir.1979).

45 Sambo's, 754 F.2d at 816.

46 Id. at 816-817.

47 Fed.R.Bankr.P. 5005(c) specifically excludes the "debtor-in-possession" as a person or entity which is required to deliver to the clerk a paper which was erroneously delivered to it.

48 Formerly 11 U.S.C. §§93(a), (n).

49 Franciscan Vineyards, 597 F.2d at 182.

50 This portion of the rule was adopted by the Franciscan Vineyards court from the case of In re: Patterson-McDonald Ship Building Co., 293 F. 190 (9th Cir.1923).

51 This portion of the rule was supplied by the case of In re: Hotel St. James Co., 65 F.2d 82 (9th Cir.1933).

52 Quoting from In re: Perry v. Certificate Holders of Thrift Savings, 320 F.2d 582, 590 (9th Cir.1963).

53 Franciscan Vineyards, 597 F.2d at 183.

54 Sun Basin Lumber Co. v. United States, 432 F.2d 48, 49 (9th Cir.1970).

55 In re: Brill, 52 F.2d 636, 638 (2d Cir.1931) (per curiam).

56 Under the Bankruptcy Act, there was no analogous entity or creature to the debtor-in-possession. In each case, a trustee was appointed. Under the present Bankruptcy Code, however, the debtor remains in possession and, pursuant to Bankruptcy Code §1107, has the powers and duties of a trustee as those powers and duties are set forth in the Bankruptcy Code.

57 798 F.2d 1285 (9th Cir.1986).

58 432 F.2d 48 (9th Cir.1970).

59 Anderson-Walker, 798 F.2d at 1286-1288.

60 931 F.2d 620 (9th Cir.1991).

61 Id.

62 751 F.2d 1213 (11th Cir.1985).

63 Id. at 1214-1215.

64 Id. at 1215.

65 Id.

66 The Eleventh Circuit Court of Appeals' adoption of the principle is based upon Wilkins v. Simon Brothers, Inc., 731 F.2d 462 (7th Cir.1984).

67 International Horizons, 751 F.2d at 1217.

68 Id. at 1218.

69 767 F.2d 814 (11th Cir.1985), decided August 5, 1985.

70 Id. at 815.

71 Id. at 819.

72 Id. at 820.

73 876 F.2d 861 (11th Cir.1989).

74 Id. at 863.

75 731 F.2d 462 (7th Cir.1984).

76 Id. at 464.

77 Id. at 463.

78 Id. at 465.

79 735 F.2d 1029 (7th Cir.1984).

80 Id. at 1030.

81 11 U.S.C. §1111(a).

82 Every unsecured creditor must file a proof of claim in Chapter 7 in order to participate in distribution of property of the estate. Fed.R.Bankr.P. 3002(c).

83 This creditor relied on former Fed.R.Bankr.P. 509(c), which is substantially similar to present Fed.R.Bankr.P. 5005(c).

84 Evanston Motors, 735 F.2d at 1031.

85 Id. at 1032.

86 Id.

87 See fn. 47, supra.

88 845 F.2d 57 (3d Cir.1988).

89 Id. at 58.

90 Id. at 59.

91 876 F.2d 688 (8th Cir.1989).

92 822 F.2d 38 (8th Cir.1987).

93 Haugen, 876 F.2d at 689.

94 In re: Patterson-McDonald Ship Building Co., 293 F. 190 (9th Cir.1923) at 192.

95 65 F.2d 82 (9th Cir.1933).

96 In re: Perry v. Certificate Holders of Thrift Savings, 320 F.2d 582 at 590.

97 In re: Brill, 52 180 (2d Cir.1931) at 183.

98 In re: Lipman, 65 F.2d 366 (2d Cir.1933).

99 Id. at 368.

100 129 B.R. 22 (Bankr. S.D.N.Y. 1991).

101 Id. at 26.

102 117 B.R. 789 (Bankr. S.D.N.Y. 1990).

103 In re: Basch-Sage Hardware Co., 56 B.R. 3 (Bkrtcy. D.Ore. 1985).

104 Id.

105 In re: Stewart, 46 B.R. 73 (Bankr. D.Ore. 1985).

106 Id. at 76.

107 Id. at 76-77.

108 48 B.R. 670 (Bankr. D.Mass. 1985).

109 Id. at 671-672.

110 Id. at 673.

111 70 B.R. (Bankr. E.D.Pa. 1987).

112 Id. at 522-523.

113 In re: Thompson, 227 F. 981 (3d Cir.1915).

114 Ungar, 70 B.R. 522-523.

115 95 B.R. 758 (Bankr. D.Mont. 1989).

116 Id. at 760.

117 Id.

118 Id. at 761.

119 11 U.S.C. §726(a)(3).

120 11 U.S.C. §1129(a)(7)(A)(ii).

121 11 U.S.C. §726(a)(6).

122 11 U.S.C. §1141(d)(3)(A).

123 Section 362(c)(2)(A) of the Code provides that the automatic stay dissolves upon the closing of the case.

124 For example, under Title 14A of the New Jersey Statutes, a corporation may not make a distribution to its shareholder if the corporation would thereby be unable to pay its debts as they became due. N.J.S. 14A:7-14.1(2)(a).

125 11 U.S.C. §1141(d)(1)(A).

126 In re: Kay Homes, Inc., 57 B.R. 967, 971 (Bankr. S.D.Tex. 1986). In this Chapter 11 case, the creditor's claim was not listed in the petition but the creditor did receive written notice of the requirement to file and of the bar date for filing proofs of claim. The creditor filed its claim three weeks after the bar date fixed by the court order. The court held that "these claims were not filed timely and cannot serve as the basis for a claim against the debtor. The result may be harsh, but the debtor's estate does

not include sufficient assets to pay all of the claims in full. Under these circumstances, strict compliance with the requirements imposed by the Code, the Rules and the orders of this Court regarding filing of claims must be observed. The bar date is in the nature of a statute of limitations and must be strictly observed." Id.

127 The case of In re: National Entertainment Centers, Inc., 103 B.R. 879 (Bankr. N.D.Ohio 1989), is a good example of this phenomenon. Here the claimant was listed in the debtor's Chapter 11 schedules and simply failed to file a proof of claim when the case was converted to Chapter 7. The case was converted as a result of a motion by the unsecured creditors' committee, of which the claimant was a member. The claimant admitted that it had received "numerous notices" of the Chapter 11 and Chapter 7 proceedings. The only document in this case was a letter sent while the case was pending in Chapter 11 by the claimant to the creditors' committee's attorney requesting that the attorney file a proof of claim for the claimant. The attorney responded immediately with correspondence explaining that the attorney could not perform this service. The attorney's letter directed the claimant to seek another attorney for his individual representation. Id. at 880.
The court then acknowledged the importance of the filing deadline for purposes of providing finality and its nature as a strict statute of limitations. The court nonetheless decided that the letter from the claimant to the creditors' committee attorney constituted an amendable, informal proof of claim. The court distinguished the overwhelming authority of case law which required a contrary result with a simple statement: "However, the facts in this case differ." Id. at 882.

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