THE ART, SCIENCE AND STRATEGY OF PRESENTING UNSECURED CREDITOR CLAIMS

By: Howard C. Rubin
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Different types of claimants participate in bankruptcies. This article focuses on the unsecured creditor who may have provided goods and services before the bankruptcy is filed. Recent amendments to the Bankruptcy Rules and Texas case law highlight the need to be careful if you are asked to file a proof of claim for a trade creditor. Generally speaking, a creditor will not be paid anything unless it timely files a complete proof of claim.

This type of creditor establishes a right to payment through the filing of an official form B-10, available at every bankruptcy court's website. Bankruptcy Rules 3001 – 3002 deal with the procedural aspects of filing a claim. Bankruptcy Code Sections 501 and 502 establish the substantive legal basis for the filing of and allowance of general unsecured creditor claims. Whether a party should file a claim is dictated by whether there are assets to distribute and whether the creditor believes it can obtain a better result against third parties. In a chapter 7 (liquidation) case, if the debtor's schedules show that there are not likely to be assets to distribute, the notice of commencement of the case sent to scheduled creditors will state "Do Not File a Claim." If assets are discovered later, the creditors will receive another notice of the claim filing deadline. In a chapter 11 or 13 case, filing a claim that is eventually allowed gives a creditor a right to share in distributions from a plan. While the Bankruptcy Rules outline the deadlines for filing claims, more often than not, correspondence from the clerk or an order from the court notes a certain date for filing of claim.

By filing a claim, a creditor subjects itself to the jurisdiction and limits of the Bankruptcy Code. In rare circumstances, a creditor may consider simply going after the third party obligor. For example, in *In re Stonebridge Techs.*, 430 F.3d 260 (5th Cir. 2005), the court held that a landlord was not subject to the cap on damages set forth in 11 U.S.C. § 502(b)(6) when it drew down a letter of credit issued by a bank on behalf of a tenant because the landlord did not file a claim in the bankruptcy.

If your client sold goods in the ordinary course of business to a customer within 20 days of that customer's bankruptcy filing, your client may be entitled to an administrative priority under 11 U.S.C. § 503(b)(9). In that case, your client must file a claim for the amount owed for those goods to be entitled to treatment ahead of other unsecured creditors.

Under the 2011 amendments to Bankruptcy Rule 3001, a proof of claim must be signed under penalty of perjury that the information provided is "true and correct to the best of my knowledge, information and belief." Additionally, copies of the contract, statement of account, invoices and any other supporting documentation should be attached as exhibits. Some attorneys, like the writer, frequently attach to the form B-10 an "Explanation of Claim" that details the calculation of the claim hoping that a detailed explanation with supporting documentation may escape a meaningful objection.

While it is not uncommon for an attorney to sign the proof of claim for their client, two recent cases from the Southern District of Texas raise concerns about this practice. In the 2011 case of *Duke Investments LTD*., 454 B.R. 414, the court warned counsel "to think twice before signing proofs of claim for their clients" or risk possible disqualification by being a "fact witness." Last year, in *In re Rodriguez*, 2013 WL 2450925 (Bankr. S.D. Tex. 2013), the court did find that the attorney who signed the proof of claim made himself a fact witness, waived work-product and attorney-client privileges, and put himself in a position as a deponent in a contested matter. Consequently the better practice may be for the attorney to assist in the preparation of the claim, just as is done in the drafting of affidavits and declarations, but have the proof of claim signed by a client's representative with knowledge of the facts or account.

A local bankruptcy judge once opined that the filing of a claim should be no more than a routine five-minute task (*In re Great Western Cities Inc*., 88 B.R. 109, 114 (Bankr. N.D. Tex 1988). That has changed and will continue to change. Be vigilant and be careful!