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Classifying and Clarifying the Proof of Claim: Your Most Critical Questions Answered

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FORM AND SUBSTANCE OF THE PROOF OF CLAIM

After several years of debate and challenges, practitioners have recently observed some procedural changes that will impact the administration of consumer bankruptcy cases. The Federal Rules of Bankruptcy Procedure were amended effective December 1, 2017, and the amendments included significant changes to Rule 3002. Although these changes will impact the claims of all creditors, they will primarily impact the claims of secured creditors. Rule 3002 states as follows:

> **(a) Necessity for filing**. A secured creditor, unsecured creditor, or equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.
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> **(b) Place of filing**. A proof of claim or interest shall be filed in accordance with Rule 5005.
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> **(c) Time for filing.** In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered. But in all these cases, the following exceptions apply:
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>> **(1)** A proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under § 1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. The court may, for cause, enlarge the time for a governmental unit to file a proof of claim only upon motion of the governmental unit made before expiration of the period for filing a timely proof of claim.
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>> **(2)** In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.

(6) On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that:

> **(A)** the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a); or
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> **(B)** the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and the notice was mailed to the creditor at a foreign address.

(7) A proof of claim filed by the holder of a claim that is secured by a security interest in the debtor's principal residence is timely filed if:

> **(A**) the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed not later than 70 days after the order for relief is entered; and

> **(B)** any attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim not later than 120 days after the order for relief is entered.

Fed. R. Bankr. P. 3002.

A. SUBDIVISION (a)

The first notable change to Rule 3002 is in Subdivision (a). As amended, Subdivision (a) now requires a secured creditor to file a proof of claim in order for that creditor to have an "allowed" claim. The previous version of the Rule required an unsecured creditor or equity security holder to file a proof of claim before it would have an "allowed" claim, but secured creditors were omitted from this requirement. This omission led to conflicting opinions by courts regarding the deadline for filing a secured proof of claim. As one court explained, "[w]ithout a claims bar date, secured creditors could file a proof of claim at any time, which would disrupt distribution and lead to uncertainty of administration." *In re Dumain*, 492 B.R. 140, 148 (Bankr. S.D.N.Y. 2013). The Committee Notes explain that "Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim." Fed. R. Bankr. P. 3002(a) advisory committee note to December 1, 2017 amendment. This amendment resolves the debate regarding the deadline for a secured lender to file a proof of claim, and it promotes orderly case administration. It also makes clear that the only way for a secured creditor to receive distributions in a Chapter 7, Chapter 12, or Chapter 13 case is to timely file a proof of claim.

The second important amendment to Subdivision (a) is: "[a] lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim." Fed. R. Bankr. P. 3002(a). The Committee Notes explain, "[t]he amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void." Fed. R. Bankr. P. 3002(a) advisory committee note to December 1, 2017 amendment. This amendment codifies the opinion followed by a majority of courts that "[liens] pass through bankruptcy unless avoided on their merits." (citations omitted) *Shelton v. CitiMortgage, Inc., (In re Shelton),* 477 B.R. 749, 752 (B.A.P. 8th Cir. 2012). This amendment should answer any questions about whether the validity of a creditor's lien is dependent upon the filing of a proof of claim.

B. SUBDIVISION (c)

The next major change to Rule 3002 is to Subdivision (c), which changes the deadlines for filing a proof of claim and the claim attachments. Amended Subdivision (c) requires that a proof of claim in a Chapter 7, Chapter 12, or Chapter 13 case be filed no later than 70 days from the date the *petition* is filed. This Rule previously allowed creditors to file their claims 90 days from the first setting of the *meeting of creditors*. Since the claims bar date is now related to the *petition- filing* date, the time for creditors to file their proof of claims is reduced. The reduction is from almost four months to a little over two months. This change requires creditors to be vigilant with their practices and procedures to ensure that proofs of claim are filed timely. Rule 3002(c)(6) provides that creditors can move for an extension of 60 days to file the claim upon showing:

> **A)** the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a); or
> **(B)** the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and the notice was mailed to the creditor at a foreign address.

Fed. R. Bankr. P. 3002(c)(6).

Some mortgage creditors may view the new claim-filing deadline as onerous. However, Rule 3002(c)(7)(B) has also been amended. It extends the time for the filing of claim attachments to no later than 120 days after the order for relief is entered. The Committee Notes explain:

> Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 70 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief.

Fed. R. Bankr. P. 3002(c)(7)(B) advisory committee note to December 1, 2017 amendment. In cases where a mortgage creditor has difficulty locating the loan documents, the rule amendments permit the creditor to file its proof of claim, without attachments, before the new deadline. The creditor will then have an additional fifty (50) days to file the supporting documents as claim attachments. Although these rule amendments shorten the time for a creditor to file its claim and the claim attachments, the amendments did not change a creditor’s ability to amend a timely-filed proof of claim.

CONCLUSION

The amendments to Rule 3002 made practical changes and clarified some filing procedures. All creditors, including secured creditors, must file claims to receive distributions in Chapter 7, Chapter 12, or Chapter 13 cases. It is also now clear that the failure to file a proof of claim, by itself, will not void a secured creditor’s lien. The new filing deadlines under Rule 3002 are stringent, and they require creditors to diligently gather the necessary information to complete and file their proofs of claim timely.

TOP CREDITOR MISTAKES

For many bankruptcy cases, properly filed proofs of claim are a critical component for successful case administration. "A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Official Form B410 is the proper form for filing a claim under Rule 3001, which also defines the supporting information and evidence of perfection that must be filed. The claim signatory represents under penalty of perjury that the information contained in the proof of claim is true to the best of his or her knowledge. Failure to file a proper proof of claim can result in disallowance of the creditor's claim, and misrepresentations on a proof of claim can result in sanctions or other penalties. Despite recent changes to the rules and forms, proof of claim mistakes continue to occur, including:

1. The electronic signature does not include /s/, which may change a binding signature into the informal listing of a representative's name.

2. On Form B410, the boxes that indicate secured or priority status are left unchecked, which may affect the treatment or distribution of the claim.

3. On Form B410, the box that indicates the filing is an amended claim is left unchecked, which may change the filing from an amended claim to a duplicate claim.

4. A creditor amends a claim to zero despite receiving previous distributions from the Chapter 13 Trustee, which may give the appearance of an overpayment and cause the Trustee to file an objection to the amended claim.

5. The claim is filed after the bar date, and is therefore a late-filed claim.

6. A secured creditor does not attach the supporting information as evidence that its security interest has been perfected.

7. A secured creditor attaches supporting documents, but they are incorrect or insufficient.

    a) The mortgage is attached but not the promissory note, or vice versa.

b) Although several assignments are included, the assignment to the transferee that filed the proof of claim is not attached.
c) The wrong collateral is listed on the documents.

d) The documents list a different debtor's name and belong in a different bankruptcy case.

e) The documents do not include an accurate itemization of interest, fees, charges, and costs.

8. The creditor does not redact the personally identifiable information (PPI) from supporting documents as required under Rule 9037.

9. The creditor's address on the proof of claim differs from the creditor's address entered into the CM/ECF claims register.

As discussed above, a proper proof of claim is necessary for a creditor to receive distributions in a Chapter 7, Chapter 12, or Chapter 13 case. Thus, creditors should take steps to ensure that claims are filed properly and timely. Attorneys who sign and submit claims to the court on behalf of their clients should be aware that Rule 9011 of the Federal Rules of Bankruptcy Procedure applies to the filing of claims. Many mistakes, especially clerical errors, can be avoided by reviewing the claims and the information on the supporting documents before they are filed with the court to ensure that they comply with the Bankruptcy Rules.

LATE-FILED CLAIMS IN CHAPTER 13

The issue arises frequently in Chapter 13 cases when payment of a late-filed claim is necessary to achieve the goal of the Chapter 13 plan.[1] Myriad problems are caused for debtors and creditors alike when late-filed claims are not allowed. For example, priority debts, such as income taxes, alimony, child support, and student loans are non-dischargeable if they are not administered through the Chapter 13 plan.[2] Further, if a secured creditor's late-filed claim is not allowed, no part of the claim will be paid in a "cramdown" situation and the arrearage will not be paid in the long-term cure situation so that the creditor in either case will be entitled to exercise its remedies without regard to the terms of the plan upon the debtor's discharge (except the personal liability is discharged).[3] In turn, these creditors will be precluded from participating in bankruptcy proceedings and will not receive any distributions from the Chapter 13 Trustee for up to five (5) years.

Pursuant to amended Bankruptcy Rule 3002(a), *all* creditors, both unsecured and secured, who wish to receive distributions under a Chapter 13 plan must file a timely proof of claim.[4] An "allowed claim is a prerequisite to receive distributions" under a Chapter 13 plan.[5] However, a

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[1]James L. Haller & Orlando Velazquez, *How to File a Late Claim in a Chapter 13 Case*, 36-APR Am. Bankr. Inst. J. 50 (April 2017).

[2]*See* 11 U.S.C. § 523; *See also Adams v. Internal Revenue Serv.(In re Adams)*, 502 B.R. 645, 649 (Bankr. N.D. Ga. 2013).

[3]*See In re Thompson*, 570 B.R. 336 (Bankr. E.D. Okla. 2017) (discussing issues re: secured creditor's failure to file a timely proof of claim); *Special Issues relating to proofs of claim in Chapter 13*, 2 Bankruptcy Law Manual § 13.12 (5th ed);

[4]Fed. R. Bankr. P. 3002(a).

[5]*See Wells Fargo Bank, N.A. v. Heyden (In re Heyden)*, 570 B.R. 489, 493 (Bank. W.D. Penn. 2017) (citations omitted). *See also* Fed. R. Bankr. P. 3021 ("after a plan is confirmed,

secured creditor who does not wish to participate in a Chapter 13 plan or who fails to file a timely proof of claim does not forfeit its lien.[6] The deadline under amended Bankruptcy Rule 3002(c) for filing proofs of claim in Chapter 13 cases is seventy (70) days after the order for relief or the date of the order for conversion.[7]

Bankruptcy Code § 502(b)(9) provides for disallowance of a claim that is not timely filed if a party in interest objects. In the absence of an objection, § 502(a) provides that a filed proof of claim is "deemed allowed." Thus, a late-filed claim will be allowed unless an objection is made.[8]

The majority of courts have held that "the bar date for proofs of claim in Chapter 13 cases is a strict statute of limitations"[9] and "the bankruptcy court lacks the power to enlarge the

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distribution shall be made to creditors whose claims have been allowed …."); *In re Barker*, 839 F.3d 1189, 1191 (9th Cir. 2016) (holding that if a creditor wishes to participate in the distribution under a chapter 13 plan, it must file a timely proof of claim under Rule 3002); *In re Norton*, 2017 WL 354320, at * 2 (Bankr. N.D. Tex. Jan. 24, 2017) ("if a creditor elects not to file a claim, then it also elects not to be paid under the plan.") (citation omitted); *In re Thompson*, 570 B.R. at 342 ("all creditors, whether secured or unsecured, must file a proof of claim if they hope to have an allowed claim and participate in plan distributions.").

[6]Fed. R. Bankr. P. 3002(a) provides:

> (a) NECESSITY FOR FILING. A secured creditor, unsecured creditor, or equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any equity to file a proof of claim.

[7]Fed. R. Bank. P. 3002(c) provides:

> (b) TIME FOR FILING. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. ….

[8]11 U.S.C. § 502. *See also In re Rodriguez*, 567 B.R. 275, 278 (Bankr. S.D. Tex. 2017).

[9]*In re Burtanog*, 2017 WL 4570701, at *3 (Bankr .S.D. Ala. Oct. 12, 2017) (citations omitted). *See also* 9 COLLIER ON BANKRUPTCY ¶3002.03 (Alan N. Resnick & Henry J. Sommer eds. 16th

time for filing claims in Chapter 13 cases on any equitable basis."[10] Rather, these courts have held that "the late filing of proofs of claim, over objection, is prohibited except under the narrowly defined circumstances defined in Bankruptcy Rule 3002(c)."[11]

Bankruptcy Rule 3002(c) enumerates six (6) exceptions to proof of claim deadline. Governmental units may file a proof of claim within one hundred eighty (180) days after the petition date and such period may be extended for cause.[12] A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct,[13] and the court may extend the time for the filing of a proof of claim by an infant or incompetent person "in the interest of justice and if it will not unduly delay the administration of the case."[14] If a claim arises from the entry of a judgment against an entity for the recovery of money or avoidance of an entity's interest in property, the entity may file a proof of claim within thirty (30) days after the judgment becomes final.[15] If a notice of the bar date has been mailed to

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ed.) ("[t]he time for filing claims fixed by Rule 3002(c) works like a statute of limitations in that a claim filed thereafter will not … entitle its holder to receive distributions from the estate.").

[10]*In re Heyden*, 570 B.R. at 493 (citations omitted); *Solomon v. Wilmington Trust, N.A. (In re Solomon)*, 2017 WL 2543884, at *1 (Bankr. M.D. Ga. June 12, 2017) ("the Court does not have the authority to allow an untimely filed claim so that the creditor can receive distributions under the Chapter 13 plan.") (citing *In re Turner*, 157 B.R. 904, 906 (Bankr. N.D. Ala. 1993)).

[11]*In re Burtanog*, 2017 WL 457071, at *2 (citations omitted). *See also In re Lewis*, 565 B.R. 439, 441 (Bankr. M.D. Ala. 2017) ("the rule establishing the claims bar date provides for only limited exceptions for claims which are not timely filed, none of which apply here."); *In re Solomon*, 2017 WL 2543884, at *2 (citations omitted); *In re Rodriguez*, 567 B.R. at 280.

[12] Fed. R. Bankr. P. 3002 (c)(1).

[13] Fed. R. Bankr. P. 3002(c)(4).

[14] Fed. R. Bankr. P. 3002(c)(2).

[15] Fed. R. Bankr. P. 3002(c)(3).

a creditor at a foreign address, the court may extend the deadline by not more than sixty (60) days if the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.[16]

Prior to the amendments, Bankruptcy Rule 3002 did not provide an exception for late-filed claims where the creditor was not listed in the schedules and notified of the bankruptcy case in time to file a proof of claim. The majority of the courts held that the bankruptcy court lacked authority to consider late-filed proofs of claim under any circumstances even when notice was improper.[17] Support of this position was based on the literal reading of the Bankruptcy Code and Rules. A small minority of the courts adhered to a less rigid adherence to the literal language of the Bankruptcy Code and Rules and permitted late-filed claims where the creditor was not listed in the schedules focusing on the rights of creditors to due process and fundamental fairness and the debtor's ability to achieve a fresh start.[18]

"Subdivision (c)(6) [was] amended to expand the exception to the bar date for cases in which a creditor receive[s] insufficient notice of the time to file a proof of claim." [19] "The amendment provides that the court may extend the time to file a proof of claim if the debtor fails

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[16] Fed. R. Bankr. P. 3002(c)(6).

[17]*See Pangaro v. Vito's Towing, Inc. (In re Pangaro)*, 567 B.R. 878, 880 (Bankr. M.D. Penn. 2017) ("neither Rules 3002 nor 9006 allow for late claims to be deemed timely by reason of not being scheduled in a Chapter 13 filing. 'The Rules are binding and the courts must abide by them unless there is an irreconcilable conflict with the Bankruptcy Code.'"); *In re Russell*, 2014 WL 228217, at *3 (Bankr. N.D. Miss. Jan. 21, 2014) (finding "no statutory or equitable authority to extend the bar deadline to permit [unscheduled creditor's] [c]laim.").

[18]*See In re Adams*, 502 B.R. 645, 647-48 (Bankr. N.D. Ga. 2013) (citing *In re Hairopoulos,* 118 F.3d 1240, 1246 (8th Cir.1997); *Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval),* 327 B.R. 493, 508 (1st Cir. BAP 2005); *In re Washington*, 483 B.R. 871, 872 (Bankr. E.D. Wis. 2012); *In re Simpkins,* 448 B.R. 84, 89 (Bankr. N.D. Ga. 2011); *In re Avery*, 134 B.R. 447, 449 (Bankr. N.D. Ga.1991)).

[19]Fed. R. Bankr. P. 3002(a)(6) advisory committee's note to December 1, 2017 amendment.

to file a timely list of names and addresses of creditors as required by Rule 1007(a)."[20] Amended Bankruptcy Rule 3002 (c)(6) states in pertinent part:

> TIME FOR FILING. In a voluntary chapter 7 case, chapter 12 case or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13…. But in all these cases, the following exceptions apply:
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> ….
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>> (6) On motion filed by a creditor before or after the expiration of time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that
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>>> (a) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a); ….

Aside from the exceptions discussed above, the Bankruptcy Rules do not permit the court to enlarge the time for creditors to file proofs of claim in Chapter 13 cases. Bankruptcy Rule 9006(b)(1) permits extensions of time for taking action under certain rules based on "excusable neglect."[21] Rule 9006(b)(3) expressly provides that the court cannot extend the time for filing

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[20] *Id.*

[21] Fed. R. Bankr. P. 9006(b)(1) provides:

> *In General*. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

proofs of claim under Bankruptcy Rule 3002(c) except to the extent that the rule permits.[22] Although a creditor may be able to invoke "excusable neglect" under Bankruptcy Rule 9006(b)(1) to permit the filing of a late-filed claim in a Chapter 11 case, in which Bankruptcy Rule 3003 controls, such relief is not available to a creditor in a Chapter 13 case.[23] Thus, under Bankruptcy Rule 9006(b)(3), bankruptcy courts are not permitted to authorize a late-filed claim on the basis of the excusable neglect standard of Bankruptcy Rule 9006(b)(1).[24]

Consequently, debtors and their attorneys must be vigilant in Chapter 13 cases to closely track whether creditors have timely filed their claims. The best practice is for debtor's attorneys to check filed proofs of claim soon after the claims bar date expires. Bankruptcy Rule 3004 provides a mechanism for a debtor or trustee to file a late claim for a creditor.[25] Claims filed by debtors must be filed within 30 days after the expiration of the Rule 3002 deadline.[26]

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[22]Fed. R. Bankr. P. 9006(b)(3). *See also In re Herrig*, 2017 WL 2729074, at *2 (Bankr. N.D. Ohio June 23, 2017).

[23]*See In re Burtango*, 2017 WL 4570701, at *2 (Bankr. S.D. Ala. October 12, 2017) ("[t]his Court now joins the other Bankruptcy Courts of the Eleventh Circuit in holding that "excusable neglect" is not available as grounds for leave to file an untimely proof of claim in a Chapter 13 case.") (citing *In re Jackson*, 482 B.R. 659 (Bankr. S.D. Fla. Oct. 25, 2012); *In re Stone*, 473 B.R. 465 (Bankr. M.D. Fla. June 14, 2012); *In re Zich*, 291 B.R. 883 (Bankr. M.D. Ga. March 31, 2003); *In re Weisheipl*, 2013 WL 5429931 (Bankr. N.D. Ga. Sept. 6, 2013); *In re Goodwin*, 183 B.R. 329 (Bankr. S.D. Ga. June 12, 1995); *In re Bobby L. Edwards*, 2010 WL 3807161 (Bankr. M.D. Ala. 2010); *In re Ford*, 205 B.R. 960 (N.D. Ala. Feb. 14, 1996)).

[24]*See In re Heyden*, 570 B.R. at 493 (citations omitted); *In re Dumbuya*, 2017 WL 486917, at *2 (Bankr. N.D. Ohio Feb. 6, 2017); *Special Issues relating to proofs of claim in Chapter 13*, 2 Bankruptcy Law Manual § 13.12 (5th ed).

[25]Fed. R. Bankr. P. 3004 provides:

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

Debtors may request enlargement of the time for filing proofs of claim for creditors.[27] If the debtor makes this request before the expiration of the original 30-day period or any previously granted extension has expired, the enlargement may be granted in a court's discretion "with or without motion or notice."[28]

Unfortunately, the missing claim is often discovered by the debtor or trustee beyond the 30-day period to file a proof of claim under Bankruptcy Rule 3004.[29] Even in this situation, the bankruptcy court can enlarge the period to file a proof of claim upon a showing by the debtor or trustee of excusable neglect.[30] Unlike Bankruptcy Rule 3002, Rule 3004 is not excepted from eligibility for enlargement under Rule 9006(b). Hence, under the authority of the Bankruptcy Code and Rules, "the court for cause shown may at any time in its discretion, after a motion, enlarge the time limit for a debtor filing a proof of claim on behalf of a creditor 'where the failure to act was a result of excusable neglect.'"[31]

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[26]*Id. See also In re Norton*, 2017 WL 354320, at * 3.

[27] Fed. R. Bankr. P. 9006(b)(1).

[28]*Id*.

[29]James L. Haller & Orlando Velazquez, *How to File a Late Claim in a Chapter 13 Case*, 36-APR Am. Bankr. Inst. J. 50 (April 2017).

[30]*See In re Norton*, 2017 B.R. 354320, at *3; James L. Haller & Orlando Velazquez, *How to File a Late Claim in a Chapter 13 Case*, 36-APR Am. Bankr. Inst. J. 50 (April 2017) ("Bankruptcy Rule 9006 (b)(1) does not apply to Bankruptcy Rule 3004. This means that a debtor can file a motion under Bankruptcy Rule 9006(b)(1) for an approval to file a claim beyond the 30-day limit of Bankruptcy Rule 3004").

[31]*See In re Norton*, 2017 B.R. 354320, at *3; *See also* Fed. R. Bankr. P. 9006(b)(1).

Excusable neglect is not defined in the Bankruptcy Code.[32] However, the Supreme Court, in *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd.*, 507 U.S. 380 (1993), set forth four (4) factors to determine whether a finding of excusable neglect is warranted under Bankruptcy Rule 9006(b)(1):

> [T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include … [1] the danger of prejudice to the debtor, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.[33]

Addressing these factors, the Supreme Court noted that despite not timely filing a proof of claim, the debts were already accounted for in the debtor's plan of reorganization.[34] There was no prejudice to the debtor or impact on the judicial proceedings.[35] The creditors' good faith was not challenged.[36] Such factors "weigh[ed] strongly in favor of permitting the tardy claim."[37] Debtors or trustees who wish to utilize Bankruptcy Rules 3004 and 9006(b)(1) should file a motion to extend time and set forth the facts and circumstances demonstrating the four *Pioneer* factors.[38]

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[32] James L. Haller & Orlando Velazquez, *How to File a Late Claim in a Chapter 13 Case*, 36-APR Am. Bankr. Inst. J. 50 (April 2017).

[33] *Id.* (citing *Pioneer Inv. Servs.*, 507 U.S. at 395).

[34] *Id.* (citing *Pioneer Inv. Servs.*, 507 U.S. at 397).

[35] *Id.* (citing *Pioneer Inv. Servs.*, 507 U.S. at 398).

[36] *Id.* (citing *Pioneer Inv. Servs.*, 507 U.S. at 397).

[37] *Id.* (citing *Pioneer Inv. Servs.*, 507 U.S. at 398).

[38] James L. Haller & Orlando Velazquez, *How to File a Late Claim in a Chapter 13 Case*, 36-APR Am. Bankr. Inst. J. 50 (April 2017).

Based upon the foregoing, creditors, debtors and trustees should be mindful of the importance of filing timely proofs of claim in Chapter 13 cases. A timely filed proof of claim is essential for a creditor's participation in a Chapter 13 plan, the debtor's interest in a fresh start and the trustee's orderly administration of the Chapter 13 case.

TREATMENT OF TIME-BARRED CLAIMS IN CHAPTER 13 AFTER *MIDLAND*

Debts aged beyond the applicable statute of limitations are often referred to as "stale debts," "time-barred debts," or "out-of-statute debts." In most states, "the expiration of a statute of limitations does not extinguish the claim and a right to payment remains subject to the assertion of a statute of limitations defense, which is subject to waiver if not timely asserted."[39] Generally, a debt collector is not prohibited from filing a civil action against a debtor based on a time-barred debt. However, in doing so, the debt collector may be exposed to liability under the Fair Debt Collection Practices Act ("FDCPA"). Under the FDCPA, such lawsuits have been found to "take unfair advantage of the consumer; to run afoul of the filing party's duty to undertake a reasonable investigation into the merits of the claim; and have been deemed false, deceptive and misleading."[40]

A. *HENSON v. SANTANDER*

This past June, the United States Supreme Court clarified the definition of a "debt collector" in the case *Henson v. Santander Consumer USA, Inc.*[41] In this case, the Court noted that "third party debt collection agents generally qualify as 'debt collectors' under the relevant statutory language, while those who seek to only to collect for themselves loans they originated generally do not."[42] As an example, the Court stated that the term "debt collector," as used in the FDCPA "embraces the repo man — someone hired by a creditor to collect an outstanding

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[39] *Freeman v. Resurgent Capital Serv. (In re Freeman-Clay)*, Case No. 14-41871, AP No. 16-4102, 2017 WL 3841739, at * 11 (Bankr. W.D. Missouri September 1, 2017).

[40] Alane A. Becket & Jason A. Urey, *Supreme Court Breathes New Life Into Old Debts In Bankruptcy*, 36-JUL Am. Bankr. Inst. J. 12 (July, 2017).

[41] *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017).

[42] *Santander*, 137 S. Ct. at 1721.

debt."[43] "All that remain[ed] in dispute," the Court discerned, "[was] how to classify individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account."[44] The Court noted that the FDCPA "defines debt collectors to include those who regularly seek to collect debts 'owed … another."[45] Applying the plain meaning of the statutory text, the Court concluded that individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account are not "debt collectors" subject to the FDCPA.[46]

B. *JOHNSON v. MIDLAND FUNDING*

In July 2014, the United States Court of Appeals for the Eleventh Circuit ruled in the case of *Crawford v. LVNV Funding LLC*, that a debt collector's filing of a time-barred proof of claim in a bankruptcy case was "unfair," "unconscionable," "deceptive," and "misleading" within the scope of §§ 1692e and 1692f of the FDCPA.[47] After *Crawford*, the courts were split regarding the application of the FDCPA to time-barred proofs of claim filed in bankruptcy proceedings. The other circuit courts that addressed the issue declined to adopt the Eleventh Circuit's holding in *Crawford*.[48]

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[43] *Id*. at 1720.

[44] *Id*. at 1721.

[45] *Id*.

[46] *Id*.

[47] *Crawford v. LVNV Funding LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014).

[48] *See In re Dubois*, 834 F.3d 522 (4th Cir. 2016); *Owens v. LVNV Funding LLC*, 832 F.3d 726 (7th Cir. 2016); and *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749 (8th Cir. 2016).

Thereafter, in *Johnson v. Midland Funding LLC*, the Eleventh Circuit held that the filing of a time-barred proof of claim in a Chapter 13 case violated the FDCPA.[49] The Eleventh Circuit's holding in *Midland* led to a grant of certiorari by the United States Supreme Court.[50]

***Midland* in the Lower Courts**

The facts in *Midland* are as follows. In *Midland*, the debtor filed for Chapter 13 bankruptcy relief in the United States Bankruptcy Court for the Southern District of Alabama. A debt collector filed a proof of claim for an unpaid, ten-year-old credit card debt. On its face, the claim stated that the debt was barred by the statute of limitations, which had expired under Alabama law[51] before the filing of the bankruptcy case and the creditor's proof of claim. The bankruptcy court sustained the debtor's objection, and disallowed the creditor's claim.[52]

Thereafter, the debtor sued the debt collector in the United States District Court for the Southern District of Alabama alleging that the filing of the proof of claim was deceptive and misleading under § 1692e[53] and unfair and unconscionable under § 1692f[54] of the FDCPA. The

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[49] *Johnson v. Midland Funding LLC*, 823 F.3d 1334, 1340-41 (11th Cir. 2016), rev'd *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017).

[50] *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017).

[51] Ala. Code § 6-2-34 (2014) provides:

> The following must be commenced within six years:
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> …
>
> (5) Actions for the recovery of money upon a loan, upon a stated or liquidated account or for arrears of rent due upon a parol demise;
>
> ….

[52] *Midland*, 137 S. Ct. at 1412.

[53] 15 U.S.C. § 1692e provides:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.

District Court found that there was an irreconcilable conflict between the Bankruptcy Code and the FDCPA because a creditor could file a proof of claim on a time-barred debt under the Bankruptcy Code but the same creditor could not file the proof of claim without violating the FDCPA, as construed by *Crawford*. In other words, the District Court said, "the Code authorizes filing a proof of claim on a debt known to be stale, while the [FDCPA] (as construed by *Crawford*) prohibits that precise practice," and "those contradictory provisions cannot possibly be given effect simultaneously." In light of the conflict, the District Court ruled that the FDCPA "must give way" to the Bankruptcy Code.[55]

The Eleventh Circuit reversed the District Court and went one step further from *Crawford,* finding that the FDCPA was not precluded by the Bankruptcy Code and that the two statutes could be construed to coexist. Specifically, the Eleventh Circuit found no irreconcilable conflict between the Bankruptcy Code and the FDCPA and ruled that "[a]lthough the [Bankruptcy] Code certainly allows all creditors to file proofs of claim in bankruptcy cases, the Code does not at the same time protect those creditors from all liability. A particular subset of creditors – debt collectors – may be liable under the FDCPA for bankruptcy filings they know to be time-barred." In finding no conflict between the federal statutes, the Eleventh Circuit noted that when a debt collector files a time-barred proof of claim, the debt collector must "still face the consequences" imposed by the FDCPA for a 'misleading' or 'unfair' claim."[56]

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[54]11 U.S.C. § 1692f provides:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.

[55]*Johnson v. Midland Funding, LLC*, 528 B.R. 462, 470-473 (S.D. Ala. 2015).

[56]*Johnson,* 823 F.3d at 1340-41.

The Supreme Court

The Supreme Court granted certiorari and reversed the Eleventh Circuit. The two (2) following issues were certified for appeal: (1) whether the filing of an accurate proof of claim for an unextinguished time barred debt in a bankruptcy proceeding violates the FDCPA; and (b) whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the FDCPA to the filing of an accurate proof of claim on an extinguished time-barred debt. Like the majority of the Courts of Appeal that had considered the issue, the Court concluded that the "filing of a proof of claim that on its face indicates that the limitations period has run does not fall within the scope of any of the five relevant words of the [FDCPA: false, deceptive, misleading, unfair, or unconscionable]."[57]

False, Deceptive or Misleading

In reaching its conclusion, the majority analyzed the FDCPA application in two (2) parts. First, Justice Breyer, writing for the Court, analyzed whether the filing of a time-barred claim is "false, deceptive or misleading." Initially, the Court noted that under the Bankruptcy Code, a "claim" is defined as a "right to payment" and relevant state law usually determines whether a person has such a right. The Court stated "Alabama law, like the law of many States, provides that a creditor has a right to payment of a debt even after the limitations period has expired."[58]

The Court rejected the debtor's attempt to redefine "claim" to require a claim be enforceable. The Court emphasized that "the word 'enforceable' does not appear in the Code's definition of 'claim.'"[59] Moreover, the Court rationalized that "§ 502(b)(1)[60] says that, if a 'claim'

[57]*Midland*, 137 S. Ct. at 1411.

[58]*Id.* (citations omitted).

[59]*Id.* at 1412 (citing 11 U.S.C. § 101(5)).

is unenforceable,' it will be disallowed…." It does not say that an 'unenforceable' claim is not a claim."[61] Similarly, the Court noted that "§ 101(5)(A)[62] says that a 'claim' is a 'right to payment,' 'whether or not such right is … fixed, *contingent*, … []or *disputed*.'"[63] This section, the Court stated, "makes clear that the unenforceable claim is nonetheless a 'right to payment,' hence a 'claim,' as the Code uses those terms."[64]

The Court emphasized that the provisions of the Bankruptcy Code "make clear that the running of a limitations period constitutes an affirmative defense, a defense that the debtor is to assert after a creditor makes a 'claim.'"[65] The Court recognized that "[t]he law has long treated unenforceability of a claim (due to the expiration of the limitations period) as an affirmative

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[60] 11 U.S.C. § 502(b)(1) provides:

> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
>
> > (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured ….

[61] *Id*.

[62] 11 U.S.C. §101(5)(A) provides:

> (5) The term "claim" means--
>
> > (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured…

[63] *Id*. (emphasis in the original).

[64] *Id*.

[65] *Id*. at 1412.

defense." The Court relied on the presence of the Chapter 13 trustee, and his or her understanding that "a proof of claim is a statement by the creditor that he or she has a right to payment that is subject to disallowance, including disallowance based on untimeliness," to conclude that filing a claim on a time-barred debt is neither misleading or deceptive.[66]

Unfair or Unconscionable

The Court then turned to whether the assertion of a time-barred claim is "unfair" or "unconscionable" under the FDCPA. The Court observed that this was a closer question but nonetheless rejected the debtor's argument. Like the majority of the lower courts which had examined the issue, the Court noted the differences between the context of a civil suit and that of a Chapter 13 bankruptcy proceeding.[67] The Court found that, unlike a civil suit, in most bankruptcy cases a trustee is appointed who "normally bears the burden of investigating claims and pointing out that a claim is stale."[68] Hence, in a Chapter 13 bankruptcy proceeding, the claims process makes it "considerably more likely that an effort to collect on a stale claim … will be met with resistance, objection, and disallowance" and minimize the risk to the debtor.[69]

The Court went on to address the debtor's arguments that it would be unfair and there was not "single legitimate reason" for allowing a creditor to file a time-barred claim. The Court was not persuaded by these arguments and, once again, noted that the "bankruptcy system … treats untimeliness as an affirmative defense." The Court was concerned that "a change in the

[66]*Id*. at 1413.

[67]*Id*.

[68]*Id*. at 1414.

[69]*Id*. at 1413-14.

simple affirmative defense approach, carving out an exception, itself would require defining the boundaries of the exception." [70]

The Court ruled that the Code does *not* preempt the FDCPA, finding the statutes "have different purposes and structural features."[71] The Court rejected the United States' amicus argument that the Advisory Committee on the Rules of Bankruptcy Procedure settled the issue when in adopted Bankruptcy Rule 9011, authorizing sanctions against a party submitting any paper that to the best of their knowing was not warranted by existing law. Instead, the Court noted that the Committee specifically rejected a requirement that a creditor certify that there is no valid statute-of-limitations defense.[72] Accordingly, the Court found that the practice of filing a time-barred proof of claim in a Chapter 13 bankruptcy case was not a "false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the [FDCPA]."[73]

In a dissent joined by Justices Ginsburg and Kagan, Justice Sotomayor disagreed with most of the majority's reasoning and rationalized that debt collectors act in bad faith by filing time-barred proofs of claim in bankruptcy proceedings. In response to the majority's view that the Chapter 13 trustees can serve as gatekeepers for the administration of claims, the dissent noted that time-barred claims have "'deluge[d]' the courts 'on debts deemed unenforceable under state statute of limitations'' and have "'manipulate[d] the bankruptcy process by systematically shifting the burden' to ['overworked'] trustees and ['ordinary and unsophisticated'] debtors to

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[70]*Id*. at 1414.

[71]*Id*. at 1414-15.

[72]*Id*. at 1415.

[73]*Id*. at 1415-16.

object" to such claims.[74] The dissent discerned that "[d]ebt collectors do not file these claims in good faith: they file them hoping and expecting that the bankruptcy system will fail."[75] Such practice, the dissent stated, "is 'unfair' and 'unconscionable' in violation of the FDCPA."[76]

C. CONCLUSION

Midland settles an issue that led to tremendous litigation throughout the country – a creditor in a Chapter 13 case no longer faces FDCPA liability for filing a proof of claim that indicates on its face that it is barred by the applicable statute of limitations. The time-barred proof of claim, however, may be disallowed in the Bankruptcy Case as unenforceable. Further, it is important to note that several unanswered questions remain after the Court's ruling in *Midland*.

Bankruptcy Rule 9011 and Bankruptcy Code § 105

In *Midland*, the Court implied that time-barred proofs of claim do not violate Bankruptcy Rule 9011. Since *Midland*, Judge Dennis R. Dow, held in *In re Freeman-Clay*, that Bankruptcy Rule 9011 does not bar the filing of time-barred proofs of claim. This bankruptcy court also ruled that the filing of such claims is not sanctionable under § 105 of the Bankruptcy Code or the court's inherent power.[77]

In this case, the United States Trustee (the "UST") sought sanctions against a claims servicer, based upon, among other things, the filing of time-barred claims. The UST characterized the practice as abusive and maintained that it improperly shifted the burden of

[74] *Id*. at 1418-19.

[75] *Id*. at 1419.

[76] *Id*.

[77] *In re Freeman-Clay*, 2017 WL 3841739, at * 13-14.

assessing the validity of the time-barred claims onto the debtors and trustees, reallocated distributions away from creditors with valid claims and relied upon the failure of the debtors and trustees to object to obtain recoveries that could not be realized in any otherwise.[78] Judge Dow rejected the UST's arguments and concluded that "the filing of a stale proof of claim in a bankruptcy proceeding, even by an entity that knows the claim is barred, is not sanctionable conduct and, even if it were, the remedies sought by the UST are inconsistent with the Bankruptcy Code and Rules and otherwise inappropriate."[79]

The bankruptcy court held that "Bankruptcy Rule 9011 does not bar the mere filing of [time-barred] claims but applies only if the claimant continues to assert the claim after the defense has been raised."[80] Likewise, the bankruptcy court found that the UST's attempt to use § 105 or this Court's inherent powers to do so is impermissible. Judge Dow emphasized that "[w]hen the Bankruptcy Code and Rules contain specific remedies for violation of a specific section of the Code or Rules, the Court should not use § 105 to create additional remedies." Neither § 105 nor this Court's inherent power, the bankruptcy court stated, is applicable unless bad faith is proven and alleged which is not the case here.[81] It will be interesting to see if other courts follow Judge Dow's ruling.

Applicable State Law Statute of Limitations

The applicable state-law statute of limitations played an important role in the Court's conclusion in *Midland* that the debt collector held a "claim" under the Bankruptcy Code. In the wake of the Court's ruling in *Midland*, debt collectors must continue to be mindful of the effect

[78] *Id*. at *10.

[79] *Id*.

[80] *Id*. at *26.

[81] *Id*.

of the applicable state's statute of limitations on a time-barred debt. Whether a particular state's statute of limitations extinguishes the underlying right to payment will be relevant to a determination of whether the filing of a proof of claim may implicate the FDCPA. Before filing a proof of claim on a time-barred debt, debt collectors should determine whether under the applicable statute of limitations the claim is merely time-barred or extinguished.

Application of Midland to Chapter 7 Cases

Additionally, *Midland* was a Chapter 13 case. The Supreme Court did not address how time-barred proofs of claim are to be treated in Chapter 7 cases. Consequently, debt collectors may choose to consider all of the possible consequences of filing time-barred proofs of claim in Chapter 7 proceedings.

Failure to Indicate that the Claim is Time-Barred on the Proof of Claim

Additionally, the Court did not address whether the result would have been different if the debt collector's proof of claim had not expressly indicated that the debt was time-barred. For debt collectors who continue to file proofs of claim for time-barred debts, disclosing that the debt is barred by the statute of limitations will be the more transparent and cautious approach for submitting such claims to the bankruptcy court.

In sum, as a result of the *Midland* holding, debt collectors in Chapter 13 cases who file claims that disclose the time-barred nature of the debts are less likely to face liability for violating the FDCPA. However, time-barred claims may nonetheless be disallowed as unenforceable. The ruling in *Midland* is limited, and debt collectors should be aware that several issues and questions remain unanswered. They should also be aware that the filing of an action to collect a time-barred debt outside of bankruptcy court may have a different result.