

CREDITORS NOT PUNISHED FOR LAWYER'S ERROR

Title 11 U.S.C. § 1111(a) requires a creditor to file a Proof of Claim in a Chapter 11 bankruptcy if its claim is scheduled by the debtor as "disputed, contingent, or unliquidated." Bankruptcy Rule 3003 (c) requires the Bankruptcy Court to set a deadline by which Proofs of Claim may be filed, but authorizes an extension of the time limit for "cause shown."

In the event a creditor does not make a request for an extension of the deadline before the Court's Ordered bar date, the Court only has discretion to extend the time for "excusable neglect."

Suppose, you are an experienced business person, for example a credit manager whose company has a general unsecured claim in a Chapter 11 bankruptcy for \$50,000.00, and you know there will be a dividend to unsecured creditors upon confirmation of the debtor-in-possession's Plan. Your company's claim, unbeknownst to you, has been scheduled as "disputed," but you have turned the case over to an attorney with expertise in commercial bankruptcy. You call your attorney at one point and ask if a Proof of Claim has been filed on your company's behalf, and you are informed that it is a matter of "no urgency." Relying on your counsel, you date your file another thirty (30) days and attend to other, more pressing, matters.

Thirty (30) days later, your file arrives from your date up system, and in reviewing it again you discover that as part of the initial "Notice for Meeting of Creditors", the Court had set a bar date for filing Proofs of Claim, which date is now already twenty (20) days past. You immediately call your counsel and find that no Proof of Claim has yet been filed. When you point out the bar date, your attorney proceeds to file a Proof with a Motion for Leave of Court to allow a late filing that same day. Will the Court allow your late Proof of Claim in a finding of "excusable neglect?"

In a case with these facts, the United States Sixth Circuit Court of Appeals recently held that it would be inappropriate for the Bankruptcy Court to penalize a creditor for the negligence of its attorney by denying a Motion for Leave to File a Proof of Claim out of time. See Brunswick v. Pioneer Investment, (943 F2d 673 (6th Cir) 1991.

The Court reasoned that because the ultimate responsibility for filing the Proof of Claim rested with the creditor's counsel, who had told his client it was of "no urgency," the claimant had not been guilty of negligence, bad faith, or culpable conduct. Because the creditor reasonably relied on the reassurance of counsel, the Court of Appeals did not punish the claimant for paying no further attention to the matter. The lower court had erred in ascribing the negligence of the claimant's counsel to the claimant.

Using a formula of factors developed under previous case law, the Sixth Circuit found that the policy of hearing

claims on the merits weighed in favor of allowing the creditor's claim to go forward. Quoting from a prior case, the Court stated, "A default judgment should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court." Because default in failing to meet the filing deadline was clearly attributable to the attorney and no prejudice would fall to the debtor by an extension of the deadline, the Sixth Circuit remanded the case and allowed for the late filing of the Proof of Claim.

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