

# **PROTECTING THE CREDITOR'S RIGHTS DURING BANKRUPTCY**

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The legal summaries contained in this essay are intended for informational purposes only. Before using or relying on any of this information, you are encouraged to confer with appropriate counsel.

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## **I. CASE EVALUATION**

### **A. WHAT IS THE CREDITOR'S GOAL?**

Does the creditor simply want to get paid? Does the creditor want the property back? What is it the creditor is looking to achieve? As with all clients, this is perhaps the most important question to ask. Some creditors would be happy to receive any kind of money on their claim. Others have a basis for actions against the debtor to fully recover or to have the debt determined non-dischargeable. The main goal of the creditor will guide how you will approach the bankruptcy process and what actions you will need to best achieve these goals and gain a satisfactory, under the circumstances, result for you client.

### **B. WHEN DID THE DEBTOR FILE?**

The most important part of a bankruptcy is the automatic stay. Section 362 of the bankruptcy code enumerates what actions (collection and non-collection) are stayed by the filing of a bankruptcy. The most important determination of whether the stay applies is when the debt arose and when the debtor filed bankruptcy. Clearly, the automatic stay does not apply to those debts that arise after the filing of a bankruptcy. It can only apply to debts that arise prior to the filing of the case. If the debt did not arise prior to the bankruptcy filing, collection actions can continue. If not, most such collection actions are stayed by the bankruptcy. This makes the date of the filing very important.

### **C. WHERE DID THE DEBTOR FILE?**

This is more of a practical consideration. If the debtor filed in Arizona, you are most likely going to need to get an attorney who practices in Arizona to either be your local counsel or to do most of the work for you. Each District has a special set of rules and each District's rules will determine how you go about your next action, if any. Unless completely familiar with that District's rules and practices, it is probably going to be advisable to have a local attorney more fully involved in the matter.

### **D. WHAT CHAPTER DID THE DEBTOR FILE?**

This is perhaps the largest consideration in representing a creditor in a bankruptcy proceeding. The various Chapters of the code provide for different relief for different creditors. Some creditors' rights may be fully altered depending on the chapter filed by the debtor. Consideration of further actions will be guided by the appropriate type of relief available under each of the Chapters.

### **E. WHAT TYPE OF CLAIM DOES THE CREDITOR HAVE?**

In bankruptcy, there are really four main types of creditors. The treatment of each of these claims and the creditors' resulting rights vary as a result of the type of claim the

creditor has. Typically, a secured creditor will have more protections and more rights to proceed against the collateral in a bankruptcy than will an unsecured creditor. Special rights are further set forth as to how a priority claim must be treated. Claims based on leases further have different rights to pursue and further protections as a result of their unique situation. It is important to know the type of claim to be able to accurately determine a course of action that will accomplish the creditor's goals.

**F. HOW IS THE CREDITOR'S CLAIM BEING TREATED (WHAT IS THE DEBTOR'S INTENT)?**

Once you have determined what kind of claim the creditor has, how the claim is being treated is the next important question to pose. If you are a secured creditors, is the debtor proposing to surrender the property in full satisfaction of the claim (in a Chapter 13) or simply surrendering it. This is an important determination in reorganization cases – is the creditor being properly treated under the bankruptcy code or can an objection be filed because of the improper treatment of the claim?

**G. WHAT ARE THE IMPORTANT DATES IN THE CASE?**

A creditor must also accurately determine the appropriate dates in a bankruptcy proceeding before taking action. Besides the filing date, there are important dates to file claims, object to the plan, object to exemptions, objections to a discharge, and so on. Without knowing the appropriate dates, you cannot determine the priority of actions you must take.

**II. OVERVIEW OF CREDITOR'S RIGHTS UNDER EACH CHAPTER**

**A. CHAPTER 7**

In a Chapter 7 proceeding, the debtor is liquidating his/her assets. In such a case, a Trustee is appointed to administer the assets of a case, if any. A creditor's rights depend on the type of claim.

**1. Secured Claims – Debtor's Options**

In a Chapter 7, a secured creditor will want to determine whether the debtor is in default. If not, the creditor will want to decide whether the debtor wishes to reaffirm the debt and keep the subject property or whether the debtor intends to surrender the property to the secured creditors. This intent is usually easily to determine through the debtor's Statement of Intention filed with the bankruptcy court. This Statement is not binding on the debtor or the creditors, but usually gives the creditor a good indication as to the debtor's intention to the property.

**a. Reaffirmation Pursuant to 11 U.S.C. § 524**

If the debtor wishes to reaffirm the debt, the creditor must determine whether the creditor wishes to do so as well. There is no requirement that a creditor must reaffirm a specific debt to a debtor. If the creditor chooses not to reaffirm the debt, the creditor does may proceed against the collateral after filing a motion for relief from the automatic stay. In most cases, it is better for the creditor to allow the debtor to reaffirm the debt so that the creditor will have the individual “on the hook” for the debt and be able to pursue the individual for any default after the conclusion of the bankruptcy. Therefore, in most cases, a creditor will want to prepare and submit a reaffirmation agreement to the debtor. Section 524 sets forth the requirements for a reaffirmation agreement. The section provides the form that must be used for the reaffirmation. The form includes a certification where (if the debtor is represented by an attorney in the negotiation of the reaffirmation agreement) the debtor’s attorney can certify that he/she does not believe that the agreement poses an undue hardship on the debtor. The debtor must sign the reaffirmation agreement prior to a discharge order being entered. Said reaffirmation agreement is still subject to the bankruptcy court’s approval. If the agreement raises a presumption of an undue hardship for the debtor (that the debtor cannot afford to make the payments for one reason or another), a court can deny a reaffirmation agreement and void the agreement.

**b. Abandonment or Surrender of the Property**

If the debtor chooses to surrender the property to the secured creditor, the creditor will want to move to modify the stay so that the creditor can take its normal state court rights to protect and/or preserve the property. If the debtor is in default, the creditor again may want to modify the stay to go after the subject property. The filing of the chapter 7 does not provide the debtor a means to cure the default.

**c. Redemption Pursuant to 11 U.S.C. § 722**

Section 722 provides that a debtor may redeem any tangible personal property that is intended for personal, family or household use that is exempt. A debtor may file a motion to redeem the property by paying the secured creditor the full value of the secured claim at the time of the redemption.<sup>1</sup>

The preceding also assumes that the Trustee does not intend to take an interest in the subject property so that he/she may sell the property and distribute any equity for the benefit of the debtor’s creditors. If a Trustee intends to try to sell the subject property, he/she will object to the request for relief from the automatic stay so that the Trustee may protect and sell the property. In these cases, it is only sufficient for the Trustee if the secured creditor can be paid off by the sale of the property. If not, the Trustee will most likely not take an interest in the property.

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<sup>1</sup> 11 U.S.C. §722.

## **2. Real Estate Leases in a Chapter 7 and Chapter 11**

Once the automatic stay is in effect, the landlord is prohibited from the following:

1. evicting the debtor;
2. collecting unpaid rent;
3. terminating the lease; foreclosure;
4. enforcement of any liens;
5. setoff; and
6. any other act done in an attempt to gain control over the debtor's property.

A landlord's failure to obey the automatic stay can result in the debtor recovering any actual damages, including costs and attorneys fees, from the landlord. If the court finds the landlord's violation of the stay to be willful, under certain circumstances the debtor can recover punitive damages.

For a landlord who obtained a judgment of possession against the debtor prior to the bankruptcy filing, the filing of the case does not stay the enforcement of that order as to the property. 11 U.S.C. §362(a)(2). However, before doing this or any of the following, the landlord should file a motion to modify (or for relief from) the stay, to ensure that the stay is indeed not applicable and the landlord does not inadvertently violate the stay. Some courts have held that a debtor's failure to meet its post-petition lease obligations is "cause" to allow the landlord relief from the stay. A pre-petition (pre-filing) default is often cause enough to file a motion for relief. However, there have been some courts that not allowed a landlord relief under §362(d) but rather require the landlord to move for an order requiring the debtor to assume or reject the lease. In some cases, this relief is plead in the alternative.

The stay would also not prevent the landlord from drawing on a letter of credit, again as long as the issuer is not in bankruptcy and there is no requirement that the landlord demand payment from the debtor first. The stay also does not prohibit the landlord from seeking funds from the debtor's guarantors, assuming that the guarantors themselves are not in bankruptcy. It should be clear when any action is taken against the guarantor that the action is only against the guarantor and not the business (or other entity that filed bankruptcy). There is no co-debtor stay in a Chapter 7 or 11, so the stay does not apply to the guarantor. However, the action (or suit) should be based on the guaranty, not on the lease and should not be for possession of the property.

Section 365(d) of the Code allows the trustee or debtor in possession to "assume", "assign" or "reject" an unexpired lease for nonresidential property.

### **a. Assumption**

Assumption of lease means that the trustee or debtor in possession agrees to continue to perform its obligations under the lease agreement. Section 365(b)(1)(A) provides that in order for a debtor to assume the lease he must provide adequate

assurances of future performance. Under assumption, the debtor must assume the entire lease it is subject to approval by the court.

Section 365(b)(1) requires that before a debtor can assume a lease, he or she must cure all defaults, or at least provide adequate assurance that the defaults will be cured promptly. In addition, the debtor must compensate the landlord for actual pecuniary losses resulting from any default, or provide adequate assurances that such losses will be compensated promptly. "Default" as set forth in §365(d)(2) does not include a breach of a provision relating to the debtor's financial condition, the filing of the bankruptcy petition, the appointment of a trustee, the satisfaction of any penalty rate, or the debtor's failure to perform non-monetary obligations.

In Chapter 7 cases the trustee will seek to reject leases that are a drain on the estate and decrease the distributions to the creditors. In Chapter 11 cases, the debtor in possession will have to determine whether the leased space is necessary for its operations. In both Chapter 7 and 11 cases, the trustee or debtor in possession must assume or reject the lease for nonresidential property by the earlier of 120 days from the entry of the order for relief (usually the filing date of the bankruptcy petition) or confirmation of the plan. 11 U.S.C. 365(d)(4). If a debtor in possession does not assume the lease within 120 days, the lease is "rejected" as a matter of law. In many cases the debtor will seek an extension of time to assume or reject unexpired leases and these requests are routinely granted.<sup>2</sup>

#### **b. Assignment**

Section 365(d) also allows a debtor in possession or a trustee to assign the unexpired lease to a third party. However, in order for an assignment to take place, the debtor must assume the lease. In other words, the debtor must be able to meet all of the obligations discussed above. The only difference is that instead of the debtor be able to show adequate assurance of its own future performance, it must be shown that the assignee will be able to perform all of the lease obligations. Now some leases contain provisions that the property is not assignable or limiting the assignment. However, §365(f) these provisions are not enforceable in bankruptcy. Once a debtor assigns the lease, the debtor is not liable for any breaches of the lease by assignee. Instead, the landlord must try to recover any damages arising from a post-assignment breach of the lease from the assignee.

#### **c. Special Provisions for Shopping Centers**

Section 365(b)(3) of the Code contains special provisions regarding adequate assurance of future performance of a lease of real property in a shopping center, which are as follows:

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<sup>2</sup> Christopher A. Camardello. Protecting Landlords' Rights in Bankruptcy. Bench & Bar of Minnesota. Vol. 60, No. 5, May/June 2003.

- (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, as of the time the debtor became the lessee under the lease;
- (B) that any percentage rent due under such lease will not decline substantially;
- (C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
- (D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

**d. Rejection**

The last option for the debtor in possession and trustee is to reject the lease. Once a lease is rejected or deemed rejected as a matter of law, the trustee or debtor in possession must immediately surrender possession of the property. In the case of rejection, the landlord is entitled to lease-rejection damages, which are deemed to have occurred prior the petition. If however, the debtor has unpaid postpetition obligations, those obligations may be administrative expense claims and are in addition to the landlord's lease-rejection damages. Administrative claims are given priority ahead of general unsecured claims. Before a landlord decides to re-lease the property, he or she may need an order confirming<sup>5</sup> rejection of the lease, to show that the property is free from any leasehold interests.<sup>5</sup>

Section 502(b)(6) sets forth a limit on the amount of damages a landlord may claim. If the landlord's damages are below the limit, the limit does not apply and the landlord's claim will be the in the amount of the actual damage. If the landlord was able to mitigate his damages by leasing the property, then the actual damages would need to be reduced by the amount of rent paid by the new tenant. Section 502(b)(6) provides that a landlord is entitled to rejection damages equal to the greater of one year's rent or 15% of the rent reserved, not to exceed three year's rent. In order to calculate lease-rejection damages, landlords must compare three numbers: (1) one year's rent; (2) 15% of the rent remaining under the lease; and (3) three year's rent. These calculations should begin from the time the debtor surrenders the property or the date of the petition, whichever occurs first.

Here is an example that illustrates this concept. Debtor and Landlord have a ten year lease running from 2004 to 2014. Under the lease, the debtor pays \$5,000 per month (\$60,000 per year) in rent. In 2006, the debtor files for bankruptcy protection and rejects the lease. The landlord's actual damages would be eight year's rent or \$480,000. Under §502(b)(6), the landlord's lease rejection claim would be the greater of one year's rent

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<sup>3</sup> Pursuant to section 105 the bankruptcy court has authority to enter any order necessary in the bankruptcy proceeding.

(\$60,000), or 15 percent of the rent reserved (\$72,000). Since \$72,000 is greater than \$60,000, and is not more than three year's rent (\$180,000), the landlord will have a lease-rejection claim for \$72,000.

In addition to the \$72,000, the landlord can add any prepetition obligations that the debtor did not pay. For example, if the debtor owed three months' rent on the day it filed for bankruptcy, the landlord would add \$15,000, for a total unsecured claim of \$87,000. In addition to the \$87,000 claim, the landlord may be able to add damages for the following claims for obligations other than pure rent such as common area maintenance charges, taxes, utilities, etc. The Ninth Circuit suggests that the section 502(b)(6) cap applies only to claims for loss of future rental income.<sup>4</sup>

These examples and issues, of course, presume that there is property in the bankruptcy estate that will be distributed to creditors. Oftentimes, there are no assets to the business and, therefore, no recovery for any claim in the bankruptcy, including the landlord.

Section 365(d)(3) requires that the trustee or debtor in possession, to timely perform all the obligations arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected. If a debtor fails to pay its rent in a timely manner, §365(d)(3) also allows landlords to make a claim for post-petition rent without meeting the requirements of §503(b)(1), which means that claims for rent are "allowed in the full amount of rent and other charges due under the lease without a showing by the landlord that the amounts are owed are reasonable or of a benefit to the estate." If a debtor fails to comply with its obligations, the landlord needs to file a motion to compel the debtor or trustee's compliance and/or a motion to modify the automatic stay.

### **3. Equipment Leases in a Chapter 7 and Chapter 11**

Leases intended as a security are subject to Article 2 (sales), while true leases are not. *See e.g. In re: Loop Hospital Partnership*, 35 B.R. 929 (N.D.Ill. 1983). The express and implied warranties under Article 2 pertaining to sales of goods will be deemed to apply to a lease intended as security. Furthermore, it should be noted that Article 2A extends the Article 2 warranties to true leases. *See* UCC §§2A-210 through 2A-216. True lease are subject to section 365 of the code. If the lease is found to be a disguised security agreement, in order to obtain possession of the equipment, the lessor must bring a motion or complaint to modify the automatic stay. Consequently, if the lessor moves to compel the debtor promptly to assume or reject the lease, the lessee may attempt to claim that the lease was actually a security agreement. Having the lease reclassified as a security agreement will make it more difficult of the lessor to regain possession of the leased equipment. In addition, if the lease is deemed to be a security agreement, pre-petition payment to the lessor may be recovered as a preference assuming the lessor's interest in the equipment is unperfected and the other factors indicative of a preference

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<sup>4</sup> *Saddleback Valley Community Church v. El Toro Materials Company (In re: El Toro Materials Company)*, 2007 WL 2888019 (9th Cir. Oct. 1, 2007).

are demonstrated under §547. This is particularly the case when a large arrearage is paid or reduced during the 90-day preference period.<sup>5</sup>

Finally, if the debtor lessee is successful in its claim that the lease was actually a security agreement, it may also be able to avoid the lessor's security interest under §544(a) of the code if the lessor's interest was not properly perfected.

#### **4. Unsecured Claims**

For the most part, all unsecured claims will be discharged in a Chapter 7 bankruptcy proceeding. About the only recourse for an unsecured creditor is to object to the debtors discharge (for objections to a discharge, look to 11 U.S.C §727(a) For the exceptions to a discharge, look to 11 U.S.C. §523(a). In order for an unsecured creditor to be able to pursue a claim against a debtor after the bankruptcy, the creditor must file an adversary proceeding based on Section 523 or 727.

#### **5. Priority Claims**

Generally speaking, priority claims are exactly what they sound like: claims that have priority over other unsecured claims. Section 507 sets out the claims that are entitled to priority. These claims will usually be paid first and in full prior to any other unsecured claims. As a creditor's attorney, the main type of priority creditor you may represent is those who hold claims for domestic support obligations. However, this is not the only type of priority claims, consult 11 U.S.C. §507 for further types.

##### **a. Domestic Support Obligations**

The starting point for a claim for a domestic support obligation is definition of the term. 11 U.S.C. §101(14A). The scope of this term is very expansive. The term "domestic support obligation" (DSO) is defined as:

- (14A) a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--
- (A) owed to or recoverable by--
    - (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
    - (ii) a governmental unit;
  - (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

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<sup>5</sup> Secured Transactions IICLE Handbook, 2001.

- (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of --
  - (i) a separation agreement, divorce decree, or property settlement agreement;
  - (ii) an order of a court of record; or
  - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
- (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. §101(14A).

The term “domestic support obligation”, therefore, appears to include not only child support and maintenance, but also debts owed to third parties such as credit card debt if the other spouse is obligated to pay that debt pursuant to the credit card agreement.

Domestic support obligations have the highest priority of all priority claims. All administrative and other priority expenses are now subordinate to domestic support obligations. *See* 11 U.S.C. § 507(a). This is important because domestic support obligations will now be paid first, to the detriment of all other priority claims. It is, therefore, important to ensure that debts are categorized as domestic support obligations during the divorce proceeding.

## **B. CHAPTER 13**

A Chapter 13 is a repayment plan by the debtor where, generally, all secured creditors must be paid in full, a lease deficiency cannot be cured, unsecured claim must receive at least what they would receive in a Chapter 7, and a priority claim must be paid in full. The debtor proposes a plan that will set forth how each of the creditors will be paid. For the details on what a plan must include, see 11 U.S.C. §1322.

### **1. Secured Claims**

As a secured creditor, the first thing to determine in a Chapter 13 is what the debtor’s intention as to the property is. Does the debtor intend to surrender the property? Does the debtor intend to keep the property? If so, is the debtor past due and proposing to repay any arrearage?

If the debtor proposes to surrender the property, the secured creditor should file a motion for relief from the stay so that the creditor can protect the interest in the collateral. *See* 11 U.S.C. §362(d). This will allow the creditor to proceed with its state court rights against the subject collateral. Notice of any motion for relief from the stay must include notice to the debtor individually as well as to the debtor’s attorney.

If the debtor is proposing to retain the property and repay any past due amounts, the creditor should carefully review the plan to determine whether the creditor's claim is proposed to be paid in full. Section 1325(a)(5) sets forth how a secured claim should be treated. The debtor should comply with all the relevant parts of this section. If not, the creditor should object to the plan and seek denial of confirmation of the plan.

## **2. Leases**

In a Chapter 13, lease issues are pretty simple. A debtor cannot propose to cure a lease default in a Chapter 13 plan. If the debtor is in default prior to the filing of the case, the creditor should again file a motion for relief from the automatic stay. Further, the model plan in the Northern District of Illinois provides that the debtor will assume all leases listed on their Schedules upon confirmation of the plan.

## **3. Unsecured Claims**

Unsecured creditors are only entitled to receive what they would in Chapter 7 proceeding. This Chapter 7 liquidation analysis means that if an unsecured creditor would receive a distribution of 40% of its claim were the debtor to file a Chapter 7, the debtor's plan must propose a payout of at least 40% to unsecured creditors in the debtor's plan. If an unsecured creditor were to receive nothing in a Chapter 7, theoretically, a debtor could propose to pay unsecured creditors nothing. However, in the Northern District of Illinois, most Trustees will not recommend confirmation unless the plan provides for at least 10% to unsecured creditors.

In addition, the Statement of Current Monthly Income that was added to the bankruptcy code with the 2005 revision to the code brings a new factor in determining what amount is to be paid back to unsecured creditors. The standing Chapter 13 Trustee's office does a good job of making sure the debtor complies with the requirements. *See* 11 U.S.C. § 707(b) for additional information.

If, based on the foregoing, the debtor is not paying the maximum back to his/her creditors, an unsecured creditor can object to the plan. Said objection must be made prior to the confirmation of the plan. If the plan is confirmed, said plan becomes binding on all creditors whether or not the plan has been provided for by the plan. 11 U.S.C. §1327(a).

## **4. Priority Claims**

Section 1322(a)(2) provides that all priority claims must be paid in full unless the holder of the particular claim agrees to a different treatment of the claim. It is imperative creditors read and understand the terms of the Chapter 13 Plan. If the creditor (holder of a domestic support obligation claim) disagrees with the classification and proposed payout on the claim, the creditor must file an Objection to the Plan. If no objection is filed, the claim will be bound by the classification and proposed payout, as set forth in the confirmed plan.

**a. Domestic Support Obligations**

The issue regarding domestic support obligations in a Chapter 13 bankruptcy is whether the debt is actually a domestic support obligation. Section 1328 of the Bankruptcy Code covers discharges in a Chapter 13 bankruptcy. Section 1328(a) provides as follows:

Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title...

11 U.S.C. §1328(a). Section 1328 states that all domestic support obligations must be paid prior to the issuing of a discharge by the Bankruptcy Court. The definition of domestic support obligation as stated in Section 101(14A) is essentially a debt that accrued before, on, or after the date of the order for relief in a bankruptcy case owed to or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative or is in the nature of alimony, maintenance, or support for such spouse, former spouse, or child of the debtor. 11 U.S.C. §101(14A).

**III. WHEN TO FILE A PROOF OF CLAIM: COMPARING THE DIFFERENT PROCEDURES FOR CHAPTERS 7, 11, AND 13**

Generally speaking, in order to receive funds from the bankruptcy estate, a creditor must file a proof of claim. A proof of claim is “a form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim).” Bankruptcy Form B10 (Official Form 10) Instructions, United States Bankruptcy Court for the Northern District of Illinois. This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed. This can be done by mailing the form to the Bankruptcy Clerk or filing a proof of claim via electronic filing (please note that in order to file a Claim electronically, the creditor or attorney must be certified by the Court). Section 501 of the bankruptcy code provides that:

- (a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.
- (b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

- (c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.
- (d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.

#### **A. Chapter 7**

File a Proof of Claim in a Chapter 7 case only when the creditor receives a notice stating that the case is an asset case. In every Chapter 7 case filed in the Northern District of Illinois, the first notice sent to all creditors will automatically state that there are no assets and that a Proof of Claim need not be filed. If the Chapter 7 Trustee determines that there may be assets to administer, a second notice will be sent to all creditors advising them to file a Proof of Claim. It may also be advisable to file a Proof of Claim for a domestic support obligation in a Chapter 7 case no matter whether there are any assets to administer to ensure that the Court and trustee is sufficiently advised of the existence of said claim.

When preparing a Proof of Claim it is also important to determine the deadlines to file a Proof of Claim and to file the claim timely. Generally speaking, deadline to file a Proof of Claim will be on the notice received from the Bankruptcy Court. It is also available on the Court's website via RACER. Once the creditor has decided to file a Proof of Claim and is preparing the form, which is provided on the Bankruptcy Court website, it is important to state the nature of the obligation and if any interest should be included. Also, if a Judgment exists then attach the entire document to the Proof of Claim. Any supporting documents regarding the claim should be attached to the Form when it is filed because, for a Proof of Claim to be facially valid, a party is required to attach documents supporting the existence of the claim. A summary of the amounts owed and the calculation of interest, if any, should be filed with the Proof of Claim.

#### **B. Chapter 13**

In a Chapter 13 proceeding, a creditor should always file a Proof of Claim. If a Proof of Claim is not filed in a Chapter 13 proceeding, the claimant will not be able to receive any payments from the bankruptcy estate. The bar date to filing a Proof of Claim is approximately 120 days after the filing of the case. Also, make sure to review the Chapter 13 Plan to determine whether the claim is being properly treated by the Debtor.

#### **C. Chapter 11**

In a Chapter 11 proceeding, a creditor should always file a Proof of Claim. Again, if a claim is not filed in a Chapter 11, that claim (in all likelihood) will not be paid. In addition, a creditor will not be allowed to vote on a Chapter 11 Plan without filing a Claim with the clerk. Accordingly, a claim should be filed as soon as possible. The bar date for the filing of the claim is usually determined some time after the filing of

the case. The creditor should pay close attention to the important dates in the Chapter 11 proceeding to find out the bar date for Claims to be filed. Often, in larger Chapter 11 cases, there is a special procedure that must be followed for the filing of the Claim. It is possible that a creditor will not be allowed to file the Claim with the Court.

#### **IV. DEVELOPING AND MAINTAINING A TRACKING SYSTEM TO MONITOR BANKRUPTCY CASES AND TO COMPLY WITH FILING DEADLINES**

As with any type of case and because of the importance of deadlines in Bankruptcy as discussed above, it is important to have an effective tracking system to monitor the important dates in a case. There are many types of scheduling computer programs available which can be directed to give you reminders of upcoming deadlines. It is also a good idea to have a schedule book where you can keep a duplicate of all the important dates you have set up electronically.

Tickle the important dates immediately. When receiving a notice of a bankruptcy filing from the Bankruptcy Court, all your important dates are on one piece of paper. Tickle these dates immediately including the Meeting of Creditors date, the date to object to the Debtor's exemptions, the deadline to file and exception or objection to discharge, in a 13, confirmation dates, etc. Most deadlines in bankruptcy cases are statutory and can only be extended using proper and timely procedures.

#### **V. PRACTICE POINTERS**

1. Creditors should familiarize themselves with their rights and obligations under the bankruptcy code.
2. Know the powers of the automatic stay and the consequences of violating it.
3. If the debtor is not making payments, bring a motion to compel the debtor do so. In the alternative, the creditor can bring a motion seeking relief from the automatic stay in order to allow the creditor to exercise his or her rights to the subject collateral (if secured).
4. Get involved with the proceedings quickly. The creditor, through his attorney, will want to know all deadlines and prepare for said deadlines.
5. Pay attention to the bankruptcy proceedings.
6. Once a lease is rejected or deemed rejected the landlord should seek out a new tenant in order to mitigate their damages.
7. In a lease situation, determine if there are any individuals or entities who can be held liable for at least part of the rent based on a use and occupancy and/or unjust enrichment theory. If a secured creditor of the tenant or a bankruptcy trustee is

storing property on the premises the secured lender or bankruptcy trustee may be liable for use and occupancy charges. *See* George Elliot v. Villa Park Trust and Savings Bank 63 Ill. App.3d 714; 20 Ill. Dec. 529 (1978) where the Court held the Bank liable on use and occupancy charges. The Court's rationale was the following:

Viewing the acts of the bank against its legal right to possess the chattels, its conduct in asserting the security interest in June of 1975, its inventorying of the property, its removal of part of the property to a more protected place on the premises, dealing with it as property which the bank intended to sell, and finally authorizing Elliot to release it to a purchaser must be characterized as the taking of possession and control. From this an obligation to pay for the benefits conferred upon it could be implied. It was, of course, not necessary that the bank, as it contends, have ownership of title before it could be charged with possession and control. And we find no evidence to support the bank's claim that the plaintiff intended to release any claim for rent when it released the property to the ultimate purchaser.

We further conclude that the plaintiff under the circumstances in this record made out a case for recovery in implied contract for storing the personal property which the defendant with a security interest had within its possession and control.<sup>6</sup>

8. Give notice of the tenant bankruptcy filing to all guarantors and inform them that the Landlord reserves all rights against them under the terms of the guaranty.
9. If an extension or modification of the lease is made with the debtor-tenant, be sure to obtain the consent from all guarantors and from the bankruptcy court. Determine if there is a dispute as to ownership of personal property on the leased premises, if there is get this dispute resolved as quickly as possible. It is not unusual for a landlord to have a dispute with a secured lender as rights to the debtor's personal property.

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<sup>6</sup> Elliot v. Villa Park Trust and Savings Bank 63 Ill. App.3d 714; 20 Ill. Dec. 529 (1978)