UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

LARRY W. DeGEEST and
DEANNA M. DeGEEST

Case No. 99-15664 K

Debtors

ORDER AND MEMORANDUM OF DECISION

Claim #18 shall be "allowed as a late-filed claim." Proof of claim requirements are not mere formalities. They are profoundly substantive. The "form" may be relaxed in some instances (i.e., the "informal proof of claim" doctrine), but the substance may not be relaxed. A proof of claim says to other creditors (not just to a debtor), "I am owed money by this debtor. The basis of the claim is (thus and so) . I have no security (or, I have security in the form of . . .). I want to be paid from this bankruptcy case as an unsecured creditor (or as a secured creditor). I do (or do not) waive my lien on collateral. I do (or do not) hold a priority claim."

These statements are rendered subject to criminal prohibitions against false matters. Their importance is not necessarily self-evident. We will examine the statements, bearing in mind, again, that it may be another creditor, not a debtor, who is most affected by these statements.[1] The best method of examination is by means of considering someone who might choose not to file a claim. If I have a solvent co-debtor on the hook, or if the debtor is one

[1] Usually, any time that other creditors' pro rata share is reduced when another claim is allowed, the debtor has no interest in the matter. Some exceptions are where (1) non-dischargeable claims will be paid less from the estate, leaving more for the debtor to pay later, (2) allowance of another claim will extend the duration of a debtor's chapter 11, 12 or 13 plan, or (3) allowance will defeat confirmation of a proposed plan.

of several defendants I am suing, I might choose not to file a claim because that might give the co-debtor or co-defendants a basis upon which to delay me. If I have collateral that might have value, I might choose not to waive it by filing an unsecured claim. If my transaction costs for keeping the receivable "open" over the life of a plan will exceed the likely recovery, I will choose not to file the claim. If disclosing the basis of the claim on the public record will submit me to adverse consequences (e.g. as, I don't want my competitors to know how much credit I extended; I don't want to be humiliated; my claim arises out of illegal activities and I don't want to be investigated), I will not file a claim. If the legal theory behind my claim is too weak, or if the facts would be too expensive to prove up, I might choose not to file a claim. If I am prone to exaggerate or "pad" my losses to make it worth my while to prepare a claim that appends all of the requisite documentation, I should abandon the effort.

In Chapter 11, 12 or 13 cases, concerns or objections regarding feasibility or good faith are often resolved by waiting until the claims bar falls and then adjusting the Plan based on claims actually filed. As to "blanket" or "wraparound" mortgages (for example) it is common to wait to see what amounts are filed as "secured" and "unsecured." As to conventional mortgages, it is common to wait to see what is claimed as prepetition arrearages, and what as remaining principal balance. Debtors whose manufactured home sits on a lot rented from the lender who has a lien on the home need to see what is being claimed as past-due lot-rent, etc.

In Chapter 13 cases, "good faith" objections based on debts incurred through fraud are usually resolved by seeing whether enough claimants do not file, to permit the Plan to

propose a higher percentage to those who do file.[2]

The question of whether a claim is properly asserted as a "priority" claim or not is often dispositive of confirmability.

And so on. A small book could be written about the ways in which a decision to file or not to file a claim in a timely manner, and the content of the claim, may be of critical importance to others.

It necessarily follows that the mere fact that a creditor has made a demand for payment upon the debtor in some other forum cannot, of itself, constitute even an "informal" proof of claim. The demand must be made in the Bankruptcy Court, or upon an officer thereof (e.g. the trustee), and it must be made in a timely fashion, in the "sunshine," and subject to scrutiny by other participants in the bankruptcy case who may make their own decisions accordingly. The fact that the debtor would not be prejudiced by allowance of the late-filed claim because he or she was fully aware of the existence of the debt and of the fact that the creditor insisted on being paid, might be entirely irrelevant to the analysis.

This Court has held that even in the absence of a "written" demand, the "informal proof of claim doctrine" does avail the creditor who timely came before the court and placed the claim on the record in open court. This Court has also ruled, consistent with nearly all cases on point, that a written demand (formal or informal), does suffice if delivered to the trustee or a Chapter 11 or Chapter 12 debtor-in-possession, rather than to the Court. But here it is not

[2] The Buffalo division of the W.D.N.Y. does not require that the benefit of non-filing of claims flow to the creditors who did file claims. Rather, the benefit of non-filing of claims flows to the debtor, who then may pass that benefit on in settlement of objections, etc. filed by creditors who did elect to participate.

suggested that any demand was placed on the record before the Court, or was made upon the Trustee or the Debtor since the filing of this case, until after the running of the bar date.

The "informal proof of claim doctrine" is not satisfied in this case, and there is no claim of "excusable neglect" that would permit the tardiness of the claim to be forgiven under the case of *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 113 S.Ct. 1489 (1993).

Consequently, the claim will not be deemed "timely." But, as argued by the Creditor that does not require that the claim be "expunged" as the Trustee has requested. The cases cited by the Creditor correctly point out that "untimely" claims are not to be "disallowed" on that basis. Rather, unless they fail under some provision of 11 U.S.C. § 502, they are "allowed" as a "late-filed claim."

In Chapter 7 cases involving surplus assets, late-filed claims may share after timely-filed claims and before any surplus is returned to a debtor. (11 U.S.C. § 726).

In the rehabilitative chapters, the proponent of a Plan may propose to treat late-filed claims in some fashion. And, in theory at least, a failure of a Chapter 11, 12 or 13 debtor to make a good faith proposal for treatment of late-filed claims could, in some cases, itself support an objection to a Plan based on lack of "good faith" or failure to satisfy the Chapter 7 test.[3]

Apparently this 100% payment Plan is "driven" by the "projected disposable

[3] In *In re D.A. E lia Construction Corp.*, 246 B.R. 164 (Bankr W.D.N.Y. 2000), it was argued that the fact that the Chapter 11 case was a liquidating case that ended up with surplus funds commanded a distribution to late-filed claims. The Court found that it did not have to rule on that argument because the creditor was entitled to "setoff" regardless of whether its claim was timely or not. That decision is on appeal, challenged by both sides.

income" test. The Debtors' Schedules I and J reflect $1550/mo. excess income. Thirty-six months at that amount would pay all creditors more than in full, so they proposed the required 100%, but at only approximately $500 per month, to make the budget more comfortable. This would be a "no-asset" Chapter 7, it seems, but with $1550/mo. excess income, it is not clear that Chapter 7 would be available to these Debtors. (See 11 U.S.C. § 707(b) and the cases interpreting that provision.)

Under these circumstances, it would be inappropriate for the Court to direct or speculate upon what results, if any, must flow from this decision allowing the claim as an untimely claim -- such speculation or direction would enter the realm of advocacy. It is for the parties to determine how properly to bring before the Court the question of the appropriate treatment of this claim now that it is "allowed as a late-filed."

SO ORDERED.

Dated: Buffalo, New York
October 6, 2000

/s/ Michael J. Kaplan

U.S.B.J.