

Dates Matter in Bankruptcy: As Two Recent Decisions Emphasize, Creditors Failing to Comply With Bankruptcy Deadlines Face Dire Consequences

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When a debtor commences a commercial bankruptcy proceeding, trade creditors, contract counterparties, and other parties with claims or potential claims against the debtor—liquidated or unliquidated—are generally aware of the requirement to file a “proof of claim” by the “bar date” deadline (“Bar Date”) established by an order of the bankruptcy court or, in some jurisdictions, local court rules. The Bar Date is usually set early on in Chapter 11 bankruptcy cases, with broad notice provided to creditors of the deadline to file claims for amounts owed as of the bankruptcy petition date. In many cases, a debtor may also seek approval to publish notice of the Bar Date in order to bind unknown creditors that cannot be readily identified in its books and records. This deadline is strictly enforced. Absent extenuating circumstances, creditors cannot pursue any recovery if they miss the Bar Date.

In addition to the Bar Date, creditors, creditors’ committees (which trade creditors often serve on in commercial Chapter 11 cases), and others face numerous other, less-well-known – but equally critical – dates and deadlines throughout the life cycle of a bankruptcy proceeding, such as:

- the deadline to object to “first day” and “second day” relief sought by the debtor at the outset of a Chapter 11 case, including interim and final deadlines to object to debtor-in-possession financing and use of cash collateral (assets of the debtor that are subject to its secured lenders’ liens);
- the challenge deadline for creditors, creditors’ committees, or other parties to bring a lien challenge and assert any other claims against the debtor’s secured lenders;
- the response deadline to a debtor’s or trustee’s objection to a creditor’s claim;
- the deadline for creditors and parties in interest to object to a Chapter 11 plan (including any non-consensual third-party release provisions);
- where a Chapter 11 plan contains “consensual” third-party releases, the deadline to opt into or out of the release, as applicable, which often coincides with the plan voting deadline;¹
- the answer deadline in preference adversary proceedings which, if missed, could lead to entry of a default judgment against the creditor; and
- the administrative claim filing deadline established and set in some bankruptcy cases through a Chapter 11 plan, a stand-alone court order, or both (in cases with multiple deadlines) for creditors to seek payment for goods or services provided to the debtor, or other claims arising, during the course of the bankruptcy case.

Two recent decisions, *Ellis v. Westinghouse Electric Co., LLC* (3d Cir. 2021) by the U.S. Court of Appeals for the Third Circuit and *In re Alto Maipo Delaware LLC* (Bankr. D. Del. Feb. 16, 2022) (Bench Opinion) by the Delaware Bankruptcy Court, demonstrate the serious and often irreparable consequences to creditors, creditors’ committees, and other parties that fail to take timely action in compliance with dates and deadlines established by bankruptcy courts. Below, we summarize these two recent cases and emphasize the onerous consequences of failing to comply with bankruptcy dates and deadlines.

*Ellis v. Westinghouse Electric Co., LLC – U.S. Court of Appeals for the Third Circuit*²

As discussed above, a Bar Date fixes the deadline for filing claims against a debtor that arose prior to the bankruptcy filing. However, until recently, no federal appeals court directly addressed the issue of whether a bankruptcy court is authorized to set a deadline for filing administrative expense claims arising *after* a Chapter 11 plan is confirmed but *before* the plan becomes effective (an “Administrative Deadline”).

¹ In some Chapter 11 plans, if a creditor or equity holders vote in favor of a plan and/or fails to elect to opt out of the plan release provisions, such party is deemed to have consented to (and be bound by) the releases. Such releases often release not only the debtor but also other identified third-party non-debtors (and often affiliates or related parties of such non-debtors).

² 11 F.4th 221 (3d Cir. 2021).

That changed with the Third Circuit's decision in *Ellis v. Westinghouse Electric*. In that case, Westinghouse Electric and its global affiliates, which operated a global nuclear power plant business, filed for Chapter 11 bankruptcy in the Southern District of New York in March 2017 following costly delays with several nuclear power projects. The bankruptcy court set a general Bar Date, by which creditors had to file proofs of claims for most *pre-petition* claims, of Sept. 1, 2017.

However, the Administrative Deadline for the filing of *post-petition* claims – which, if allowed, must be paid in full under a confirmed Chapter 11 plan – was fixed at 30 days following the effective date of the plan, substantially later than the general pre-petition claims Bar Date. The Chapter 11 plan further provided that creditors with administrative expense claims that failed to file a request for payment of such claims by the Administrative Deadline would be forever barred from asserting such claims against the debtors. The plan was confirmed by the bankruptcy court in March 2018 and became effective on Aug. 1, 2018.

In May 2018, Westinghouse terminated a Vice President of Operations, Timothy Ellis, allegedly on the basis that the department in which Ellis worked was being restructured. However, Ellis, 67 years old at the time, believed the firing was based on age discrimination. In October 2018, Ellis filed suit against reorganized Westinghouse in the U.S. District Court for the Western District of Pennsylvania. Westinghouse argued that the administrative claim arose during Ellis' employment during the debtors' bankruptcy case—and thus was an administrative claim—and moved for summary judgment on the basis that the claim was not timely filed by the Administrative Deadline of Aug. 31, 2018. The Pennsylvania District Court denied the debtors' motion, finding that post-confirmation administrative expenses are not dischargeable under the Bankruptcy Code.

Westinghouse appealed. The Third Circuit reversed the District Court, ruling and cautioning that “[d]ates matter in bankruptcy” and that bankruptcy courts are authorized by the Bankruptcy Code “to set and enforce bar dates for administrative expense claims, including claims arising after confirmation of a plan but before its effective date.” Accordingly, because Ellis failed to timely file an administrative claim by the Administrative Deadline (and absent any circumstances warranting relief from the Administrative Deadline, such as failure of the debtors to provide notice), his claim was barred and deemed released and discharged by the Chapter 11 plan.

***In re Alto Maipo Delaware LLC – Delaware Bankruptcy Court*³**

On Nov. 17, 2021, Alto Maipo Delaware LLC and Alto Maipo SpA filed Chapter 11 petitions in the U.S. Bankruptcy Court for the District of Delaware. The debtors owned a hydroelectric project in Santiago, Chile that had been under construction since 2013. Prior to their bankruptcy filing, the debtors and their senior secured lenders negotiated the terms of a consensual restructuring to restructure over \$2 billion of senior secured debt.

As part of the bankruptcy process, the lenders consented to the use of cash collateral (*i.e.*, the debtors' assets and proceeds in which the lenders held a lien). On Dec. 17, 2021, the bankruptcy court entered a final cash collateral order. As consideration for the use of the lenders' cash collateral, the lenders were granted certain protections under the final cash collateral order, including an agreement from the debtors regarding the validity and enforceability of the lenders' claims and first-priority liens. The debtors also agreed to release all rights to challenge the lenders' claims and liens.

As is typical, the debtors' agreement to the validity and enforceability of the lenders' liens and claims and the releases provided were subject to a 45-day period during which creditors, the creditors' committee (which had not yet been appointed), and other parties were given the right to challenge the validity of the lenders' liens and claims, which would expire on Jan. 31, 2022 (the “Challenge Deadline”).⁴

The creditors' committee in *Alto Maipo* was not appointed until Jan. 31, 2022, the day the Challenge Deadline was due to expire. The creditors' committee immediately contacted the debtors and the lenders seeking a consensual extension of the Challenge Deadline until April 2, 2022. The debtors and lenders offered a short-

³ See *In re Alto Maipo Delaware LLC, et al.*, Case No. 21-11507 (KBO), Docket No. 316-1, Transcript of Hearing (Bankr. D. Del. Feb. 16, 2022).

⁴ Challenge Deadlines are typically important in Chapter 11 cases, especially in cases where a debtor has limited assets available. In such cases, a potential lien challenge and other claims against secured lenders can often be a critical source of recoveries for unsecured creditors. The cost of a lien investigation is prohibitive for an individual unsecured creditor, but creditors' committees appointed in large commercial Chapter 11 bankruptcies will typically pursue such investigation and prosecute any relevant claims (the cost of which is funded by the bankruptcy estate).

er consensual extension of the Challenge Deadline, which the creditors' committee rejected. On Feb. 3, 2022, three days *after* the Challenge Deadline had already expired, the creditors' committee filed a motion asking the court to "extend" the Challenge Deadline for cause shown.

The debtors and lenders opposed the motion, arguing that because the Challenge Deadline had already expired by its own terms on Jan. 31, 2022, the creditors' committee was really asking the bankruptcy court to reconsider and amend the final cash collateral order that established the Challenge Deadline. Such relief could only be granted where extraordinary circumstances are present.

The Delaware Bankruptcy Court agreed and denied (in an oral ruling) the requested extension of the Challenge Deadline. The court noted that it did not matter whether the Challenge Deadline expired 1, 10, or 100 days prior to the relief being sought and that its ruling was "fairly simple" and consistent with those of other courts that refused to extend a deadline after it already had expired.⁵ The court further emphasized (a) the importance of the finality of its orders and deadlines, which "must be honored" for a variety of reasons, and (b) that the late appointment of the creditors' committee was not an extenuating circumstance that would qualify for relief from the Challenge Deadline.

Key Takeaways

First, as demonstrated by both the Third Circuit decision in *Ellis* and the Delaware Bankruptcy Court's decision in *Alto Maipo*, dates matter in bankruptcy. Creditors must be extremely vigilant about complying with *all* dates and deadlines in bankruptcy cases.

Among other things, creditors must timely:

- file proofs of claim for unsecured claims and requests for payment of administrative expense claims for goods or services provided during the course of a bankruptcy case (including "20-day" administrative claims under section 503(b)(9) of the Bankruptcy Code);
- file objections and/or responses to relief sought by a debtor;
- respond to objections to their filed claims;
- respond to preference complaints where they are named as defendants; and
- seek extensions of dates and deadlines *before* they lapse.

In *Alto Maipo*, had the request to extend the Challenge Deadline been timely filed prior to the expiration thereof, the Delaware Bankruptcy Court would most likely have granted the requested extension for cause shown. However, this more lenient standard only applies *before* a deadline has expired. The creditors' committee in *Alto Maipo* made a critical mistake by assuming that because the motion to extend the Challenge Deadline was filed only a few days after the deadline, the Delaware Bankruptcy Court would be lenient. However, the court made clear that absent extraordinary circumstances, deadlines fixed in bankruptcy court orders must be honored.

Finally, while creditors should not assume that relief from bankruptcy deadlines will be granted, to the extent extenuating circumstances arise and a deadline is missed, creditors should immediately consult with a bankruptcy attorney to determine whether such circumstances might warrant relief from any missed dates or deadlines.

⁵ On March 1, 2022, the creditors committee in the *Alto Maipo* case filed a notice of appeal of the Delaware Bankruptcy Court's ruling. That appeal remains pending as of the date of this article.

About the Author



Philip Gross is Counsel in Lowenstein Sandler's Bankruptcy & Restructuring Department. Philip provides creative and practical advice to debtors, creditors' committees, liquidating trustees, secured and unsecured creditors, and asset purchasers in commercial bankruptcy proceedings. He has extensive experience in bankruptcy hearings and trials around the country.



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