UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
Oxford Health Investors, LLC,	)	Case No. 00-80676
Harnett Health Investors, LLC,	)	Case No. 00-80677
Nash Health Investors, LLC,	)	Case No. 00-80678
Fuquay Health Investors, LLC,	)	Case No. 00-80679
Rocky Mount Health Investors, LLC,	)	Case No. 00-80680
Greenville Health Investors, LLC,	)	Case No. 00-80681
	)	(Cases Consolidated
	)	for Administration)
	)	

MEMORANDUM OPINION

These cases came before the court on December 18, 2003, for hearing upon the Trustee's objections to the claims of Centennial Healthcare Management Corporation. J. William Blue, Jr. appeared on behalf of the Trustee, John F. Isbell appeared on behalf of Centennial Healthcare Management Corporation ("Centennial") and Sara E. Cook appeared on behalf of ServiceMaster Management Services, LP ("ServiceMaster").

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) which this court may hear and determine pursuant to 28 U.S.C. § 157(b)(1).

FACTS

The following facts are contained in the Joint Stipulations of the parties. The Debtors (hereinafter sometimes referred to as "Oxford", "Harnett", "Nash", "Fuquay", "Rocky Mount" and "Greenville") are single purpose limited liability companies that were formed in 1997. Each Debtor was formed for the purpose of operating a single nursing home facility located in North Carolina. Effective December 31, 1997, each Debtor entered into a series of interrelated agreements pursuant to which each Debtor began to operate a specific long-term care nursing facility. Contemporaneous with those agreements, each Debtor executed a Long-Term Care Facility Management Agreement ("Management Agreement") with Centennial, pursuant to which Centennial agreed to manage the facility on behalf of the respective Debtor. Under the Management Agreements the Debtors were responsible for the expenses incurred in the operation of the facilities and were entitled to any profits derived from such operation.

On March 17, 2000, each Debtor commenced a Chapter 7 proceeding in this court, and John A. Northen was appointed as Trustee for each Debtor. On March 21, 2000, notice was sent by the clerk of the bankruptcy court to each creditor of the Debtors, including Centennial, setting July 19, 2000 (the "Bar Date") as the deadline for filing proofs of claim from all creditors other than governmental entities.

On May 19, 2000, the Trustee, on behalf of the Debtors, commenced an adversary proceeding against various parties, including Centennial, seeking the turnover of funds then held in escrow and arising from the prior operation of the facilities, and an accounting. (A copy of the complaint appears as Exhibit 3 in the Appendix to Joint Stipulation.) On July 6, 2000, Centennial filed its answer and counterclaims in the adversary proceeding. The counterclaims asserted claims for contractual, statutory and common law indemnification against Debtors Oxford, Harnett, Nash, Fuquay and Greenville. Centennial's counterclaim for contractual indemnification was based upon a provision of the Management Agreement that Centennial had executed with each Debtor, and the damages claimed by Centennial related to expenses incurred by Centennial defending litigation filed by ServiceMaster in the United States District Court for the Eastern District of North Carolina, as well as any liabilities arising out of that litigation. (A copy of the answer and counterclaim appears as Exhibit 4 in the Appendix to Joint Stipulation.) No counterclaims were filed against Rocky Mount.

On July 20, 2000, the day after the deadline set in the notice from the clerk of the bankruptcy court, Centennial filed a Proof of Claim in the bankruptcy proceedings of Oxford, Harnett, Nash, Fuquay and Greenville. The Proofs of Claim included an attachment setting forth the basis of the asserted claims. The claims as

described in the attachment were the indemnification claims asserted in the counterclaims. (A copy of the Proof of Claim by Centennial in the Oxford proceeding appears as Exhibit 6 in the Appendix to Joint Stipulation. The parties have stipulated that the claims filed in the other proceedings were substantially identical.) No proof of claim was filed by Centennial in the Rocky Mount proceeding on July 20, 2000.

On February 26, 2001, approximately seven months after the Bar Date, Centennial filed an Amended Proof of Claim in the Oxford, Harnett, Nash, Fuquay and Greenville bankruptcy cases. Each Amended Proof of Claim included an attachment which described the nature and basis of the claim. Each claim included the indemnification claim previously set forth and added a claim for working capital advances which Centennial alleged it had made on behalf of each Debtor. The amount of the working capital advance claimed against each Debtor was identical to the amount which Centennial had claimed in amended counterclaims which earlier had been filed by Centennial in the adversary proceeding on January 5, 2001. (A copy of the Amended Proof of Claim by Centennial in the Oxford proceeding appears as Exhibit 11 in the Appendix to Joint Stipulation. The parties have stipulated that the claims filed in the other proceedings were substantially identical, except that the amount claimed in each Amended Proof of Claim was as stated in the First Amended Counterclaim.) On February 26, 2001, Centennial also

filed a Proof of Claim in the bankruptcy proceeding of Rocky Mount. That Proof of Claim included an attachment which described the nature and basis of the claim. The claim as described in the attachment included a claim for repayment of working capital advances allegedly made by Centennial on behalf of Rocky Mount, as well as the claim for indemnification.

On February 13, 2002, Centennial again filed Amended Proofs of Claim against all six Debtors. With regard to the Amended Proofs of Claim against Oxford, Harnett, Rocky Mount, Fuquay and Greenville, the amendment slightly modified the nature of the indemnification claims and revised the amount of the working capital advances allegedly made on behalf of each Debtor. The amount of working capital advance claimed against each Debtor was identical to the amount which Centennial had claimed in its Second Amended Counterclaims earlier filed on February 8, 2002 in the adversary proceeding. The Amended Proof of Claim filed in the Nash proceeding did not reference any working capital advance and set forth only the indemnification claim which had previously been asserted. (A copy of the Amended Proof of Claim by Centennial in the Oxford case appears as Exhibit 16 in the Appendix to Joint Stipulation.)

On April 12, 2002, the Trustee filed objections to the Centennial proofs of claim, as amended, asserting that the claims of Centennial were filed after the Bar Date and should be treated

as tardily-filed claims under § 726(a)(3) of the Bankruptcy Code. On May 22, 2002, Centennial filed responses to the Trustee's objections denying that its claims should be treated as tardily-filed claims. In asserting that its claims should not be treated as tardily filed, Centennial relies upon the informal claim doctrine. Specifically, Centennial maintains that the amended proofs of claim that it filed after the Bar Date relate back to informal claims which it filed prior to the Bar Date.

DISCUSSION

Under the informal proof of claim doctrine, if a creditor filed or otherwise presented an informal proof of claim before the expiration of the claims deadline, the creditor is allowed thereafter to amend the informal proof of claim with a formal proof of claim complying with Rule 3001(a). See generally, 9 COLLIER ON BANKRUPTCY ¶ 3001.05 (15th ed. rev. 2004). In reality, the reference to the creditor filing an "informal proof of claim" is somewhat misleading because the doctrine arises where a document which was not intended to be a proof of claim when filed is treated as such for purposes of allowing a later filed amended claim to relate back to the filing of the so-called informal proof of claim. See In re Bargdill, 238 B.R. 711, 717 n.2 (Bankr. N.D. Ohio 1999).

Various documents and pleadings have been treated as informal proofs of claim, including an objection to confirmation of a debtor's Chapter 13 plan, a motion or complaint seeking relief from

the automatic stay, a complaint in an adversary proceeding objecting to dischargeability, a disclosure statement filed by a creditor in support of its plan, a motion for a valuation hearing pursuant to § 506 and a motion to set aside an order. See generally, 9 COLLIER ON BANKRUPTCY ¶ 3001.05[1] (15th ed. rev. 2004).

Whether a particular document will be treated as an informal proof of claim depends upon the contents of the document and the particular circumstances of the case. The cases vary somewhat in stating the prerequisites for an informal proof of claim. Frequently, it is said that the following elements are required: (1) it must be in writing; (2) it must contain a demand by the creditor on the estate; (3) it must express an intent to hold the debtor liable for the debt; (4) it must be filed with the bankruptcy court; and (5) the facts of the case must be such that allowance of the claim is equitable. Id. at ¶ 3001.05[2]. Another frequently stated standard is that an informal proof of claim exists when the document relied upon by the creditor states a demand showing the nature and amount of the claim against the estate and evidences an intent to hold the debtor liable. See In re Charter Co., 876 F.2d 861, 863 (11th Cir. 1989); In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1381 (9th Cir. 1985); In re Hall, 218 B.R. 275, 277 (Bankr. D.R.I. 1998); In re Anchor Resources Corp., 139 B.R. 954, 956-57 (D. Colo. 1992).

The doctrine of informal proof of claim is recognized in the Fourth Circuit. If a creditor has made an "informal claim" during the filing period, then a late proof of claim may be treated as a perfecting amendment of the informal claim. See In re Hardgrave, 1995 WL 371462, at *1 (4th Cir.); In re Davis, 936 F.2d 771, 775 (4th Cir. 1991); Dabney v. Addison, 65 B.R. 348, 351 (E.D. Va. 1985). An "informal claim" exists when "sufficient notice of the claim has been given in the course of the bankruptcy proceeding . . . ." Fyne v. Atlas Supply Co., 245 F.2d 107, 107 (4th Cir. 1957). A party provides sufficient notice of the claim by undertaking "some affirmative action to constitute sufficient notice that he has a claim against the estate." Davis, 936 F.2d at 775-76.

In the Fourth Circuit, in deciding whether to permit an amendment based upon an informal claim, the court has discretion and may consider equitable factors such as whether the creditor's efforts have increased the value of the estate or any potential adverse impact on the debtor, the trustee, other creditors or the public. Hardgrave, 1995 WL 371462, at *3. However, affirmative action on the part of the creditor which reveals the existence of the claim and an intent to share in the estate is essential, and mere knowledge of the claim on the part of the trustee or the listing of the claim in the Chapter 7 or 13 schedules is not sufficient, standing alone, to constitute an informal proof of claim. Davis, 936 F.2d at 775-76; In re Wilkens, 731 F.2d 462, 465

(7th Cir. 1984); In re Glick, 136 B.R. 654, 656 (Bankr. W.D. Va. 1991).

In the present cases, the parties agree and have stipulated that the original counterclaim which was filed by Centennial on July 6, 2000, constituted an informal proof of claim against Debtors Oxford, Harnett, Nash, Fuquay and Greenville for indemnification in the amount of $84,763.47, representing the fees and costs incurred by Centennial in defense of the district court litigation commenced by ServiceMaster prior to the filing of the Chapter 7 cases. However, the amount being claimed by Centennial is not limited to the indemnity amount of $84,763.47. Although the original counterclaim filed by Centennial on July 6, 2000, was limited to the indemnity claim for the costs and expenses or other liabilities arising out of the ServiceMaster litigation[1], subsequent amended counterclaims and amended proofs of claim added an additional claim for unjust enrichment in which Centennial claimed in excess of $3,000,000.00 for working capital advances which Centennial allegedly made while managing Debtors' facilities. The Trustee contends that this claim was not included in the informal proof of claim (i.e., Centennial's original counterclaim) with the result

[1]Paragraph one of the counterclaims filed on July 6, 2000, states: "These Counterclaims are for indemnification and arise out of litigation commenced by ServiceMaster Management Services, LP, more fully described below." The amounts thereafter described in the counterclaims are "losses, claims, damages or other liabilities, including the costs and expenses incurred by Centennial in connection with the [ServiceMaster] Litigation. . . ."

that there was no relation back to such informal proof of claim when Centennial later filed untimely amended counterclaims and untimely amended proofs of claim asserting for the first time the unjust enrichment claim for the working capital advances.

In contending that none of its claim should be treated as tardily filed, Centennial first argues that its informal proof of claim should not be limited to the indemnity claim arising out of the ServiceMaster litigation, but should also include the claim for the working capital advances. Centennial argues that under Fourth Circuit case law the filing of a written document is not required in order to have an informal claim and cites various conduct in support of the alleged informal claim for the working capital advances. While the Fourth Circuit has recognized informal claims where there apparently was no written filing by the claimant, the Fourth Circuit cases make it clear that there must be affirmative action by the creditor prior to the bar date which is sufficient to provide notice that the creditor has a claim against the estate and that "mere knowledge of the claim on the part of the trustee is not sufficient notice to permit an amended claim, nor is the listing of the claim in the debtor's schedule." Davis, 936 F.2d at 776. Whether viewed separately or collectively, the conduct and circumstances relied upon by Centennial fell short of providing notice of any claim by Centennial for working capital advances. Centennial first points to a letter from Andrew Price, Vice President of Centennial Healthcare

Corporation, which referred to indebtedness that allegedly included the working capital advances. Centennial's reliance upon such letter is misplaced since the letter was sent before these cases were filed, was transmitted by Centennial Healthcare Corporation, not the claimant, and was not addressed to any of the Debtors or the Trustee. See In re A.H. Robins Co., Inc., 118 B.R. 436, 440 (Bankr. E.D. Va. 1990)(rejecting letter written prior to bankruptcy filing as basis for an informal claim). Centennial also relies upon a notice of appearance filed in these cases by its attorneys in these cases and two motions filed by the Trustee that describe the agreements that the Debtors entered into regarding the nursing home facilities and which state that under the Management Agreements the Debtors "became entitled to all income or revenues derived from (and assumed liability for all expenses or costs for) the operation of its respective Facility from and after said date." Centennial's reliance upon these filings likewise is misplaced. The notice of appearance merely identifies the attorneys as counsel for Centennial and Centennial Healthcare Corporation and requests that notices be sent to the attorneys. The notice of appearance does not state that Centennial is a creditor and, in fact, provides no information as to whether the nature of Centennial's interest was that of a claimant or a defendant and certainly provided no hint of a claim for working capital advances. The same is true of the two motions filed by the Trustee. While the motions included brief historical information

regarding the Debtors' involvement with the nursing home facilities, they did not purport to address in anyway whether the Debtors were indebted to Centennial or anyone else for operational expenses when these cases were filed and contain no statements that could be interpreted as indicating that the Debtors were indebted to Centennial for any amount when these cases were filed. Filings such as the notice of appearance and the motions in the present case which contain no indication of a claim by a creditor are insufficient to give rise to an informal claim. See In re Elleco, Inc., 295 B.R. 797, 801-02 (Bankr. D.S.C. 2002).

A factor that may be considered by the court in deciding whether an informal claim should be recognized is the extent to which the claimant has provided a benefit to the estate. See Hardgrave, 1995 WL 371462, *4. Although Centennial apparently made payments to suppliers and other creditors of the nursing home facilities after the Management Agreements were terminated and arguably reduced the claims in the cases, such payments were made voluntarily in order to serve the interests of Centennial by preserving Centennial's business relationships with the suppliers and service providers who received the payments. Any benefit to the Debtors or their estates from such payments was thus incidental and secondary. Additionally, it is clear from the Hardgrave and other Fourth circuit decisions that equitable considerations alone do not suffice and may become relevant only if sufficient notice of the

claim has been provided in the course of the bankruptcy proceeding. Moreover, in weighing the equities, the court also should consider the risk of prejudice to the Trustee or other creditors if such a claim is recognized. In the present case, the risk of prejudice to ServiceMaster as a result of ServiceMaster having relied upon the failure of Centennial to file a timely claim in settling with the Trustee outweighs any equitable consideration that can be claimed by Centennial as a result of the self-serving payments which were selectively made to the parties with whom it wished to maintain good business relations.

Centennial also refers to a hearing held in these cases on September 21, 2000, regarding a settlement between the Trustee and ServiceMaster under which ServiceMaster agreed that $1,100,000.00 which had been attached by ServiceMaster in the district court litigation would be turned over to the Trustee for distribution in the Debtors' Chapter 7 cases. This hearing occurred more than two months after the Bar Date had passed and obviously would not be the basis for a timely informal claim. At that point Centennial had filed its original counterclaims and hence the parties were aware that Centennial was claiming indemnification as to expenses and liabilities arising out of the ServiceMaster litigation. However, no issues regarding the validity of claims were before the court at the September 21 hearing, Centennial did not attend the hearing and it would not have been appropriate for the Trustee to examine

whether Centennial had a valid claim.

It is unclear why Centennial has cited the fact that the Trustee identified claims against Centennial as an asset of the bankruptcy estates and subsequently filed suit against Centennial as evidence or support for an informal claim. Such action by the Trustee cast Centennial in the role of a potential defendant and did not constitute an acknowledgment that Centennial was a creditor or had a valid claim in these cases. The adversary proceeding, of course, did result in the filing of Centennial's original counterclaim on July 6, 2000, which was before the bar date. However, the counts contained in the original and only timely filed counterclaim clearly and unequivocally specify only claims for indemnification as to losses, claims, damages or other liabilities incurred by Centennial in connection with the ServiceMaster litigation. There is nothing in the original counterclaim that suggests that Centennial had made working capital advances or other loans to the Debtors or that provides notice that Centennial had or was asserting claims to recover for working capital advances or any other type of loan.

Even if its informal proofs of claim are limited to the Stipulated Claim of $84,763.47, Centennial contends that its allowed claims should nonetheless include the working capital advances in all but the Rocky Mount case "because the subsequent amendments of the Stipulated Claims relate back to the filing of

the Stipulated Claims." The first proofs of claim filed by Centennial were filed on July 20, 2000, the day after the claims bar date, and were not filed as amendments. Rather, these proofs of claim were filed as original proofs of claim and were based on the identical grounds as the earlier counterclaims that were filed on July 6, 2000. Thus, Centennial's original proofs of claim, like the counterclaims, were limited to the indemnity claim for the costs and expenses or other liabilities arising out of the ServiceMaster litigation. The first proofs of claim that were designated as amendments were not filed until February 26, 2001. Although the bar date had passed seven months earlier, these amendments were filed without obtaining leave of court and were the first formal proofs of claim in which a claim for the working capital advances was stated. The new claims for working capital advances allegedly made to the various Debtors totaled in excess of $3,000,000.00. The issue that arises is whether the subsequent counterclaims and proofs of claim containing these new claims constitute amendments to the original indemnification claim which relate back to the original claim or whether the purported amendments constitute new claims that do not relate back to the original claim and hence are late filed claims.

As pointed out in ¶ 3001.04 of COLLIER ON BANKRUPTCY, no provision of the Bankruptcy Code or the Bankruptcy Rules

specifically addresses amendment of proofs of claim.[2] Nevertheless, courts have permitted the amendment of filed proofs of claims. The rules that have evolved from the cases vary, depending upon whether amendment is sought before or after the claims bar date. Prior to the bar date, amendment of a filed proof of claim is liberally permitted. See generally COLLIER ON BANKRUPTCY ¶ 3001.04[1] (15th ed. rev. 2004). After the bar date has passed, amendment is permitted to cure a defect in the claim as originally filed, to describe the earlier filed claim with greater particularity or to state a new theory of recovery on the facts as set forth in the original claim and such amendments relate back to the original claim. See In re Kolstad, 928 F.2d 171, 175 (5th Cir. 1991); In re Int'l Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985). However, amendments after the claims bar date "call for closer scrutiny, in order to make sure that the amendment does not disguise an attempt to file an entirely new claim, in violation of the statutory time limitations." Wheeling Valley Coal Corp. v.

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[2]Rule 7015, which is applicable in adversary proceedings, incorporates Rule 15 of the Federal Rules of Civil Procedure and makes Rule 15 applicable in adversary proceedings. Neither the filing of a proof of claim nor amending a filed proof of claim involves or arises in an adversary proceeding. However, an objection to a proof of claim gives rise to a contested matter and under Rule 9014(c) certain of the Part VII rules are made applicable in contested matters unless the court orders otherwise. However, Rule 7015 is not one of the rules enumerated in Rule 9014, although Rule 9014 does provide that the court may direct that one or more of the other Part VII rules shall apply in a contested matter.

Mead, 171 F.2d 916, 920 (4th Cir. 1949). "Amendments do not vitiate the role of bar dates: indeed, courts that authorize amendments must ensure that corrections or adjustments do not set forth wholly new grounds of liability." Kolstad, 928 F.2d at 175. The purported amendments by Centennial in the present case do not cure a defect in the original claim, nor do the purported amendments describe the claim that was originally filed with more particularity nor do the purported amendments state a new theory of recovery on the facts set out in the original claim. Rather, the purported amendments constitute entirely new claims and therefore do not relate back to the counterclaim containing Centennial's original claim.

Centennial's original claim, in both the counterclaim stating the informal claim (Ex. 4) and the formal proofs of claim filed shortly thereafter (Ex. 6), seeks only indemnification as to the costs, expenses or other liabilities arising out of the ServiceMaster litigation. The occurrence giving rise to this claim is the filing of a lawsuit. The operative facts for the claim consist of ServiceMaster having filed the suit against Centennial Healthcare Corporation, and Centennial Healthcare Corporation allegedly having a claim for indemnity to the extent that it incurred costs or liabilities in such litigation. The purported amendments do not seek to cure a defect in such indemnification claim nor do the purported amendments describe such indemnification

claim with more particularity. Furthermore, the purported amendments do not allege an alternative theory for recovery of expenses or liabilities arising out of the ServiceMaster litigation. In fact, the purported amendments do not mention the ServiceMaster litigation and have nothing at all to do with the indemnity claim for expenses and liabilities arising out of that litigation or any other litigation. Given the great difference between the original claim for indemnity as to losses arising out of the ServiceMaster litigation and the claim to recover advances or loans which was added by the purported amendments, there is no merit to Centennial's assertion that the purported amendments merely increased the amount of a previously stated claim.

Some courts have relied upon Bankruptcy Rule 7015 and Federal Rule 15(c) in articulating the test for deciding whether to allow an amended claim which will relate back to an earlier claim that was timely filed. See In re Brown, 159 B.R. 710, 714 (Bankr. D.N.J. 1993). Based upon the language of Rule 15(c)(2), an amendment of a timely filed claim will relate back to the filing date of the earlier claim "if the amendment 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original' claim." Id. (citing Fed.R.Civ.P. 15(c)(2)). Application of this test involves two concerns: that the amendment arose out of the same transaction or occurrence, and that other parties could have reasonably expected or anticipated

that the original claim would be altered in the manner of the later amendment. Id. Neither of these concerns is satisfied in the present case. The purported amendments involve a different type of claim, being asserted by a different entity and arising out of a different transaction or occurrence than the original claim. The original counterclaims set forth claims for indemnification for any losses arising out of litigation commenced by ServiceMaster. (Ex. 4, pp. 8). These counterclaims detailed that Centennial Healthcare Corporation (a separate entity from Centennial Healthcare Management Corporation, the claimant in the present case) was a defendant in litigation initiated by ServiceMaster in the United States District Court. These counterclaims further alleged that Centennial Healthcare Corporation was an "affiliate" of Centennial Healthcare Management Corporation, and as such, entitled to indemnification from the Debtors pursuant to the management agreement between the Debtors and Centennial Healthcare Management Corporation with respect to any losses or expenses incurred by Centennial Healthcare Corporation in the ServiceMaster litigation. The transaction or occurrence giving rise to the indemnification claim was the filing of the ServiceMaster litigation and, except for that proceeding and its resulting expense, no other loss or damage was alleged in the original counterclaims. Neither the original counterclaims nor the first proofs of claim filed shortly after the counterclaims were filed

made any reference to working capital advances nor did they refer to any other obligations allegedly owed by the Debtors to Centennial. The claim involving the working capital advances first appeared in Centennial's first amended counterclaims (Ex. 9, pp. 20-23), filed on January 5, 2001, where Centennial sought recovery of working capital advances based solely upon the theory of unjust enrichment. This unjust enrichment claim was not related in anyway with the ServiceMaster litigation and certainly did not arise out such litigation. The first amended counterclaim was followed by the purported amended proof of claim that was filed on February 26, 2001, which was the first formal proof of claim that included a claim for the alleged working capital advances. The loans or advances giving rise to this claim occurred while Centennial was managing the Debtors' facilities. These transactions, having occurred well before the filing of the ServiceMaster litigation and involving a different set of facts and having no relationship or nexus with the ServiceMaster litigation, do not constitute the same transactions or occurrence as gave rise to the indemnification claim involving the ServiceMaster litigation. Further, Centennial"s argument that upon the filing of the indemnification claim the Trustee and ServiceMaster could have reasonably anticipated that the claim might be amended is not valid. Certainly, there was nothing in the original counterclaim or the first formal proofs of claim that suggested that Centennial

intended to or might amend the indemnification claim. See In re Miller, 90 B.R. 317, 323 (Bankr. E.D. Tenn. 1988)("The first question should be whether the timely proof of claim by itself gave fair notice of the potential claim that the creditor wants to add by a late amendment."), aff'd 118 B.R. 76 (E.D. Tenn. 1989). Nor did the fact that the schedules filed by the Debtor listed Centennial as a creditor provide notice that an amended claim might be filed. The record reflects that there was great uncertainty about the accuracy of the business records pertaining to the nursing facilities and whether the Debtors were indebted to Centennial or whether Centennial was indebted to one or more of the Debtors, which led to the Trustee asserting a claim for $1,904,322.57 against Centennial in the adversary proceeding.[3] The original claim by Centennial was stated in both a counterclaim, in which Centennial would be expected to assert all of its claims against the Debtors, and by a later proof of claim, both of which were limited to an indemnification claim arising out of the ServiceMaster litigation. Thus, in two separate filings which preceded the amended counterclaim and amended proof of claim, Centennial mentioned only the ServiceMaster indemnification claim. The assertion that Centennial's belated "amendment" to the

[3]The accounting records maintained by Centennial concerning the nursing facilities contained accounting errors that led the Trustee to conclude that Centennial owed $1,904,322.57 to Fuquay following the termination of the management agreement. See Centennial Response to Claims Objection, pp. 5-6.

indemnification claim asserting additional claims for working advances exceeding $3,000,000.00 "could not have been a surprise" is unsupported by the record and unrealistic.

Based upon the foregoing, the court has concluded that the so-called amendments by Centennial in fact and law are not amendments at all, but constitute new claims that were first filed some seven months after the claims bar date in this Chapter 7 case. Because this is a Chapter 7 case, and because Centennial had notice of the bar date, this court cannot and should not ignore or extend the bar date and allow the new claims on equitable grounds as requested by Centennial.

The deadline for filing claims in a Chapter 7 case derives from Bankruptcy Rule 3002(c)[4], which requires that a proof of claim

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[4]Rule 3002(c) provides as follows:

> TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:
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> (1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the governmental unit.
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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

in a Chapter 7 case be filed not later than 90 days after the first date set for the § 341 meeting of creditors. The effect of filing a proof of claim after the expiration of the time prescribed in Bankruptcy Rule 3002(c) is governed by § 502(b)(9) of the Bankruptcy Code. This provision of the Code requires that a claim be disallowed if:

> (9) proof of such claim is not timely filed, except to the extent tardily filed as

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> a proof of claim by an infant or incompetent person or the representative of either.
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> (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.
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> (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.
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> (5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.
>
> (6) [Abrogated].

> permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedures may provide.

Bankruptcy Rule 9006 authorizes the extension of the bar date based upon excusable neglect under some circumstances. A careful reading of Bankruptcy Rule 9006, however, discloses it does not authorize any extension of the bar date in the present case, where no motion for extension was filed before the deadline. Bankruptcy Rule 9006(b)(1) provides that on motion made after the expiration of the specified period, the court may permit an act to be done where the failure to act was the result of excusable neglect. However, under Rule 9006(b)(3), there is an express limitation on the authority granted in Bankruptcy Rule 9006(b)(1). Rule 9006(b)(3) provides as follows:

> (3) ENLARGEMENT LIMITED. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules. (Emphasis supplied).

Bankruptcy Rule 3002(c) thus is one of the rules subject to limitation imposed by subsection (b)(3) of Bankruptcy Rule 9006. As a result, the authority of the court to extend the deadline specified in Rule 3002(c) is limited to the authority contained in Rule 3002(c). Because of such limitation, Rule 9006 may not be

used to expand such authority beyond the self-contained exceptions stated in Bankruptcy Rule 3002(c).[5]

Bankruptcy Rule 3002(c), which is quoted above, sets forth the five circumstances or exceptions in which the deadline contained in Bankruptcy Rule 3002(c) is not controlling. The situation presented in cases now before the court does not fall within any of these exceptions. Therefore, even if it could be said that the failure of Centennial was the result of excusable neglect, Centennial nonetheless may not be granted relief under Rule 9006 because the limitation contained in Bankruptcy Rule 9006(b)(3) precludes the court from doing so. See In re S.A. Morris Paving Co., Inc., 92 B.R. 161, 163 (Bankr. W.D. Va. 1988). Nor does the court have equitable power under § 105 to disregard provisions of the Bankruptcy Rules and grant an extension not permitted under the Rules. See In re Coastal Alaska Lines, Inc., 920 F.2d 1428, 1432-33 (9th Cir. 1990). As the court observed in Kolstad, 928 F.2d at 175, amendments do not vitiate the role of the bar date.

A different rule regarding the claims bar date prevails in cases arising under Chapter 11 of the Bankruptcy Code because in Chapter 11 cases the excusable neglect standard under Rule 9006(b)(1) is applicable. See Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 389, 113 S.Ct.

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[5] See generally 10 COLLIER ON BANKRUPTCY ¶ 9006.08 (15th ed. rev. 2004).

1489, 1495, 123 L.Ed.2d 74 (1993) ("The 'excusable neglect' standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in Chapter 7 cases."). Thus, in Chapter 11 cases the court is permitted to allow late filed claims based upon equitable considerations. Id. at 395, 113 S.Ct. at 1498 (determination of when to excuse neglect and allow late filing "is at bottom an equitable one, taking account of all relevant circumstances"). Because of this equitable discretion, some courts in Chapter 11 cases have utilized their equitable discretion to allow a late filed purported amendment even though the amendment in reality is a new claim. See In re Brown, 159 B.R. at 715-717. Cases such as Brown therefore appear to be distinguishable from the present Chapter 7 case in which a different rule is applicable when new claims are filed after the bar date. However, even if the so-called equitable test were applicable in this case, there would be no relation back between the purported amendments and the original indemnification claim. Under the equitable test, the court considers the following equitable concerns: (1) whether the debtors and creditors relied on the earlier proofs of claim or had reason to know that subsequent proofs of claim would be filed; (2) whether other creditors would receive a windfall if the court refused to allow the amendment; (3) whether the creditor intentionally or negligently delayed in filing the proof of claim; (4) the justification for the failure of the creditor to seek extension of

the bar dates; and (5) whether equity requires consideration of other facts and circumstances. See id. at 715-16. Consideration of these factors in the present cases does not support relation back. The record before the court reflects that there was detrimental reliance on the part of ServiceMaster prior to Centennial filing the purported amendments. In that regard, the evidence establishes that ServiceMaster considered and relied upon the amount of the claims that had been filed prior to the bar date in entering into a settlement with the Trustee in which ServiceMaster surrendered to the Trustee $1,100,000.00 which had been attached by ServiceMaster prior to the filing of these Chapter 7 cases. At the time of the settlement, the bar date for filing claims had passed. In fact, ServiceMaster waited for the bar date to pass before making the settlement and relied upon the number and amount of the timely-filed claims on record at that time in settling. The amount of the claims on file was crucial because the amount of the claims would determine the size of the dividend that ServiceMaster could expect to receive if the $1,100,000.00 were paid into the bankruptcy estates. Under the circumstances which existed at the time of the settlement as reflected in the evidence offered by ServiceMaster, the court finds that ServiceMaster's reliance upon the fact that the only claim by Centennial was the untimely indemnity claim was reasonable and that ServiceMaster would suffer significant detriment if Centennial now

were allowed to claim an additional $3,000,000.00 and thereby significantly dilute the dividend to be received by ServiceMaster in these cases. As discussed earlier, based upon the nature of the original counterclaim and the original proof of claim filed by Centennial and the other circumstances known to the parties at that time, neither the Trustee nor ServiceMaster had reason to know or expect that a new claim that was totally unrelated to the original indemnification claim would be asserted by Centennial seven months after the bar date. Under these circumstances, the court finds that ServiceMaster would not receive a windfall if the purported amendments by Centennial do not relate back to the original indemnification claim. No plausible explanation has been offered as to why the working capital advances were not included in the original counterclaim and original proof of claim filed by Centennial in July of 2000, nor has any plausible excuse or reason been offered for the seven-month delay in finally presenting the working capital advances as a purported amended claim. It is undisputed that Centennial was aware of the bar date, having received timely notice thereof. It also is undisputed that Centennial was fully aware of the working capital advances when the original counterclaim was filed and when the original proof of claim was filed. It thus appears that either Centennial initially did not intend to file such a claim and consciously did not file a claim for the working capital advances, or that Centennial was

negligent in not filing a claim prior to the bar date. Neither of these circumstances engenders equitable consideration that favors Centennial. Finally, the court has considered whether equity would require the court to consider other facts and circumstances in dealing with whether the purported amendments relate back and has concluded that such is not the case.

CONCLUSION

Based upon the foregoing findings and conclusions, the court has concluded that the Trustee's objection to the purported amended proofs of claim for working capital advances filed by Centennial on February 26, 2001, and February 13, 2002 should be sustained, with the result that such claims shall be adjudged to be tardily filed and having only the distribution rights provided for in § 726(a)(3) of the Bankruptcy Code.

This 10th day of June, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
Oxford Health Investors, LLC,	)	Case No. 00-80676
Harnett Health Investors, LLC,	)	Case No. 00-80677
Nash Health Investors, LLC,	)	Case No. 00-80678
Fuquay Health Investors, LLC,	)	Case No. 00-80679
Rocky Mount Health Investors, LLC,	)	Case No. 00-80680
Greenville Health Investors, LLC,	)	Case No. 00-80681
	)	(Cases Consolidated
	)	for Administration)
	)	

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) Centennial Healthcare Management Corporation is allowed unsecured, non-priority claims of $16,952.69 in the Oxford case, $16,952.69 in the Harnett case, $16,952.69 in the Nash case, $16,952.70 in the Fuquay case and $16,952.70 in the Greenville case, and such claims shall be treated as a timely-filed claims entitled to distribution pursuant to § 726(a)(2)(A) of the Bankruptcy Code; and

(2) The Trustee's objection is sustained as to all other amounts claimed by Centennial Healthcare Management Corporation and the claims for such other amounts shall be allowed as tardily-filed unsecured claims entitled to distribution pursuant to § 726(a)(3) of the Bankruptcy Code.

This 10th day of June, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge