

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

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In re:

BRIAN TIMMER,

Case No. SG 97-07597

Chapter 13

Debtor.

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NOT FOR PUBLICATION

**NOTICE:** It is the policy of the United States Bankruptcy Court for the Western District of Michigan that its unpublished bankruptcy opinions and/or orders shall not be cited or used as precedent except to support a claim of res judicata, collateral estoppel or law of the case in any federal court within this Circuit.

**OPINION**

This action comes before the Court upon the objection of Brian Timmer (Debtor) to a claim filed by the Internal Revenue Service (IRS). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1334(b) and 157(b)(2)(B).

The following constitutes the Court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

Procedural Facts

The Debtor filed bankruptcy under Chapter 13 on September 4, 1997. In his petition he listed a disputed unsecured priority claim of \$35,000.00 owed to the IRS. This tax liability was an apparent trust fund deficiency for a corporation the Debtor previously operated.

The Chapter 13 plan was confirmed on January 12, 1998. The IRS filed its claim in the total amount of \$52,724.42 plus 8% interest on April 13, 1998. This figure included a \$15,001.00 secured claim, a \$37,707.42 priority claim and a \$16.00 unsecured claim.

On May 29, 1998, the Chapter 13 Trustee filed a Motion and Order to Allow Claims which specifically listed the late filed claim of the IRS. It was signed by the Clerk of the Bankruptcy Court on the same day. The Debtor filed an objection to the claim of the IRS on July 13, 1999. The IRS contends that its claim, although filed late should be allowed under the Order to Allow Claims filed by the Trustee.

### Analysis

The first step in the process of claims allowance requires the filing of a claim. In re Jones et al., 238 B.R. 338 (Bankr. W.D. Mich. 1999). The substantive rights of the parties to file claims are found in 11 U.S.C. §501(a) which states: “[a] creditor or an indenture trustee may file a proof of claim.”

Once filing is accomplished, the substance of a claim is considered under 11 U.S.C. §502 which states in pertinent part:

- (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.

Looking at §501 and §502 inclusively, we find that a prerequisite to being “deemed allowed” under §502 is filing under §501. See In re Zimmerman, 156 B.R. 192 (Bankr. W.D. Mich.1993) (en banc). “Section 501 creates the substantive right to file a claim and identifies the parties holding that right.” Zimmerman at 195. The merits of a claim will be analyzed under §502 only if the claim meets §501’s requirements.” Zimmerman, at 195.

Since §501 is silent as to the time limits in which to file, we must turn to Fed R. Bankr. P.

3002 to find these limitations:

(c) In a . . .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. . . . except as follows:

(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.

This is where our analysis must stop. The IRS filed a claim under §501. However, this claim was asserted well after February 18, 1998, the 180<sup>th</sup> day after Timmer filed bankruptcy. "Like an answer to a complaint, whether a claim is eligible to be considered under §502 at all depends upon its proper and timely filing." Zimmerman at 198.

Because the IRS failed to protect what it asserts as a secured claim, a priority secured claim and a general unsecured claim as required by the procedures and provisions of Fed. R. Bankr. P. 3002, the court cannot permissibly go to the next step of the claims allowance process. Simply put, the requirements of Rule 3002 have not been satisfied.

Jones et al., at 342.

The Effect of the Motion and Order for Allowance of Late Claim Filed by the Trustee

The IRS argues that the Trustee's Motion and Order for Allowance of Late Claim (Motion and Order or Order) transforms its tardy claim into a claim that has been properly and timely filed. We are unconvinced.

At the March 6, 2000 hearing, the Trustee stated the purpose of the Motion and Order was simply to give the Debtor and his attorney notice as to how the Trustee was going to pay claims. It was simply a procedural order from the Trustee, signed as a routine matter by the Bankruptcy Court Clerk. It was not intended to override the claims bar date. According to the Trustee, the Order was meant to inform the Debtor how claims were to be paid.<sup>1</sup> The Trustee admitted making a mistake by including the IRS on the list of allowed claims.

This Court, under 11 U.S.C. §105(a), may sua sponte take any action or make any determination necessary or appropriate to prevent an abuse of process. We therefore rescind the Order signed on May 29, 1998 by the Bankruptcy Court Clerk as to the IRS' claim so as to review the allowance or disallowance of that claim under 11 U.S.C. §502(j).

Under 11 U.S.C. §502(j): “[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case.”

The IRS claims that the equities of the case are in its favor because the Debtor waited too long to file an objection to the claim. However, we find there is no set time period in which an objection must be filed.

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<sup>1</sup>The Trustee's office now prepares a Notice of Intent to Pay Claimants which gives the debtor an opportunity to review the claims to be paid.



Fed. R. Bankr. P. 3007 which governs objections to claims states: “An objection to the allowance of a claim shall be in writing and filed. . . at least 30 days prior to the hearing.” The Advisory Committee Note instructs:

While the debtor’s other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object is generally exercised by the trustee.

At the hearing, the Debtor stated that he had been in contact with the Trustee. When it became apparent the Trustee was not going to act, the Debtor filed an objection to claim on his own behalf. We find that the Objection to Claim filed by the Debtor was timely.

The IRS next argues that it has been prejudiced because it has relied on the Order allowing its claim. The IRS had the opportunity to file a timely claim. It chose not to. In addition to having double the time period an ordinary creditor has, the IRS had the right, upon a proper motion under Fed. R. Bankr. P. 3002(c)(1), to request an extension in which to file its proof of claim. It chose not to. The IRS also had notice and opportunity to object to plan confirmation. It chose not to. Had the IRS taken any of these steps, this issue would not be before us today.<sup>2</sup>

After missing all deadlines imposed by the Bankruptcy Code, the IRS now claims that it has been prejudiced by the Debtor’s behavior because the entire time this bankruptcy case has been pending, it could have been collecting the overdue taxes from the non-bankrupt spouse. The

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<sup>2</sup>This argument might be more persuasive had the Trustee’s Motion and Order to Allow Claims been received by the IRS prior to the February 18, 1998 bar date. It was not.

automatic stay applies to the Debtor. As far as we can see, the IRS could have been pursuing collection from the Debtor's spouse all along. It apparently has not done this either. It is completely incongruous that the IRS now blames the Debtor's slow response for its own failure to collect the debt when any number of avenues have been available for it to do so.

Consequently, we find that the Debtor's Objection to Claim is granted. The IRS filed a late claim that we refuse to declare timely. We rescind the Order to Allow Late Claims to the extent that it listed any untimely filed claim as being eligible for payment and find cause under 11 U.S.C. §502(j) to disallow the IRS' claim because there has been no prejudice to the IRS as a result of anyone's actions but its own.

We do not address here what, if anything, should be done about the payments the IRS has already received from the Chapter 13 Trustee.

Dated: April 10, 2000

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Honorable Jo Ann C. Stevenson  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

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**ORDER**

At a session of said Court, held in and for said District, at the United States Bankruptcy Court, Federal Building, Grand Rapids, Michigan this 10 day of April, 2000.

PRESENT: HONORABLE JO ANN C. STEVENSON

United States Bankruptcy Judge

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Order to Allow Late Claims filed on May 29, 1998 is hereby rescinded as to the Internal Revenue Service.
2. The late claim filed by the Internal Revenue Service is disallowed for cause pursuant to 11 U.S.C. §502(j).
3. The Debtor's Objection to Claim is granted.



IT IS FURTHER ORDERED that this opinion and order shall be served by first class United States mail, postage prepaid upon James H. Sullivan, Esq. Brian Timmer, Thomas P. Cole, Esq. and Carol S. Chase, Esq.

Dated: April 10, 2000

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Honorable Jo Ann C. Stevenson  
United States Bankruptcy Judge

Served as ordered:

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