THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

IN RE: ) Case No. 94-51612
)
BRION W. JURSIK ) Chapter 13
RANDI L. JURSIK )
) JUDGE MARILYN SHEA-STONUM
Debtors )
) **ORDER GRANTING TRUSTEE'S**
) **MOTION TO ALLOW CLAIM**

This matter came before the Court on the request of the debtors for a hearing on the chapter 13 trustee's Motion to Allow a Claim of the City of Barberton. That hearing was held on June 1, 1995, and in attendance were Sharon Sell, on behalf of Edwin Breyfogle, counsel for debtors; Marty Bodner, counsel for the City of Barberton; and Jerome Holub, chapter 13 trustee.

On October 14, 1994, debtors filed their chapter 13 bankruptcy petition. (Docket #1). The City of Barberton was not listed as a creditor in the debtors' schedules, and on Schedule E it was indicated that there were no creditors who held unsecured, priority claims. On October 18, 1995, the bankruptcy clerk's office mailed notice to all scheduled creditors of the time and place of the first meeting of creditors which was scheduled for November 17, 1994. That notice further indicated that the deadline for filing proofs of claim was February 17, 1995. (Docket #3). On January 26, 1995, debtors amended their Schedule E to

include the City of Barberton as a creditor who held an unsecured, priority claim. (Docket #24). The City of Barberton then filed its proof of claim on March 29, 1995 (claim #23), and the trustee filed a motion to allow that claim on April 4, 1995. (Docket #32). On April 25, 1995, debtors filed a request for a hearing on the trustee's motion.

During the hearing on this matter no evidence was presented. Each counsel made certain representations, not disputed by the other, and thus the Court will treat such undisputed representations of counsel as stipulations of fact. On January 11, 1995 the debtors sent a notice[1] of their bankruptcy petition to the City of Barberton. That notice was received by the city's income tax department on January 13, 1995. Although the claims bar date of February 17, 1995 was apparently referenced on the notice sent by the debtors, a proof of claim from the City of Barberton for $1,516.66 in unsecured, priority income taxes was not filed until March 29, 1995. (Claim #23). The city attributes the delinquency of its proof of claim filing to the fact that debtors and their counsel did not cooperate with the city in supplying the information needed to prepare the proof of claim. After two unreturned phone calls to debtors' counsel[2], the city, on February 6, 1995, contacted the debtors' employer to request copies of the necessary tax forms from which to calculate the amount of income taxes that

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[1] Debtors' counsel did not have a copy of the notice that was sent to the City of Barberton, and no copy of such notice was ever filed with the Court.

[2] Counsel for the City of Barberton represented that he made two phone calls to debtors' counsel, one on January 13, 1995, and one on January 31, 1995. Debtors' counsel was apparently unavailable during both of those phone calls.

the debtors owed.

The debtors contend that, because the claim at issue was filed after the scheduled claims bar date, it should be disallowed. The city suggests that because its claim was filed within the same amount of time as those claims filed by creditors who received notice of the initial bankruptcy filing, the claim should be allowed. Given that neither counsel supplied the Court with any legal authority upon which to make its decision, the matter was taken under advisement. Counsel were invited to draw any relevant statutory or case law authority to the Court's attention. To date, neither party has submitted any such legal authority to support its position.

Prior to the Bankruptcy Reform Act of 1994, the Bankruptcy Code, although providing that a creditor may file a proof of claim, did not specify the time limit within which that claim must be filed. *See* 11 U.S.C. §501(a). Those time limits were addressed in the Bankruptcy Rules which require that in a chapter 13 proceeding "a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to §341(a) of the Code."

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[3]

The legislative history of 11 U.S.C. §502 recognized that the procedural time limits for filing proofs of claim would be addressed through the Bankruptcy Rules and not the Code:

> The Rules of Bankruptcy Procedure will set the time limits, the form, and the procedure for filing, which will determine whether claims are timely or tardily filed. The [former] Rules governing time limits for filing proofs of claims will continue to apply under section 405(d) of the bill. These provide a six-month bar date for the filing of claims.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 351 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 61

B.R. 3002(c)[3]. Under the rules prior to the 1994 amendments, Rule 3002(c)(1) specifically provided: "On motion of the United States, a state, or subdivision thereof...the court may extend the time for filing a claim." The motion requesting such an extension must be filed before the claim filing deadline and will only be granted for cause. *Id.*[4] However, as discussed below, the 1994 amendment of 11 U.S.C. §502(b)(9) changed the time frame under which governmental entities are required to file proofs of claim.

The Sixth Circuit has addressed the issue of late filed proofs of claim, applying the law as it existed prior to the 1994 amendments, in *United States v. Ginley (In re Johnson)*, 901 F.2d 513 (6th Cir. 1990). In *Johnson*, the trustee objected to the IRS' proof of claim on the basis that the claim was untimely. In affirming the bankruptcy court's decision to bar the IRS' claim, the Sixth Circuit noted that although the IRS did not have all the information needed to file its claim by the filing deadline, "the IRS could have requested an extension of time as it is expressly permitted to do under Bankruptcy Rule 3002(c)(1)." *Johnson*, 901 F.2d at 522. Although the *Johnson* case dealt with a chapter 7 administrative claim that arose upon the conversion from a chapter 11 case, that decision clearly stood for the position that a bankruptcy court may disallow a proof of claim which has not been filed within the applicable time period.

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(1978); U.S. Code Cong. & Admin. News pp. 5787, 5847, 6307.

[4] Although Bankruptcy Rule 9006(b)(1) authorizes the Court to enlarge the time limitations on certain filings because of "excusable neglect," subsection (b)(3) of Rule 9006 provides that that rule cannot be used to expand the list of exceptions contained in Rule 3002(c). *See* B.R. 9006(b)(3) and 3002(c).

Other cases that have addressed this issue have held that if an entity protected under the provision of B.R. 3002(c)(1) does not invoke that protection by moving for an extension of time to file its proof of claim, then a late filed claim will be disallowed. *See*, *e.g.*, *In re Stoiber*, 160 B.R. 307, 310-311 (Bankr. N.D. Ohio 1993) (the claim filed in debtor's chapter 13 case was not allowed as "[t]he IRS had notice of the case and the bar date, yet no excuse was offered as to why no proof of claim was filed or no extension of time was requested"); *In re Zimmerman*, 156 B.R. 192, 199 (Bankr. W.D. Mich. 1993) (en banc) ("[t]he debtor and all timely filing creditors benefit from the claims bar date because the case can be administered much more efficiently...[while] no injustice results by barring late claims of unsecured creditors who have timely notice of the bar date"); *United States v. Owens*, 84 B.R. 361, 364 (E.D. Pa. 1988) ("IRS should have moved for an extension of time and, not having done so, should be barred from amending its 1983 claim to include 1981" in the debtor's chapter 13 plan). In these cases, however, the late-filing creditors received notice of the debtor's filing and of the corresponding claims bar date at the same time as all the other timely-filing creditors.

The creditor in this instance did not initially have notice of the debtors' bankruptcy, but that information was subsequently provided before the claims bar date.[5] The creditor explained that its delay in filing a proof of claim was due to its inability to gather the necessary information to prepare its claim and that

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[5] The City of Barberton received notice of debtors' bankruptcy, and perhaps of the claims bar date, approximately 35 days prior to the deadline. (*See* page 2, para. 1 ).

such inability was caused, at least in part, by the lack of cooperation by debtors and their counsel. However, assuming that the City of Barberton was on actual notice of the bar date, this lack of information may explain why the city might need an extension of the claims bar date, but it does not explain why no extension was ever sought pursuant to B.R. 3002(c)(1).

Bankruptcy courts have often used their equitable powers to allow claims filed after the claims bar deadline when the filing creditor received no notice of the bankruptcy prior to the bar date. *See*, *e.g.*, *United States v. Cardinal Mine Supply*, 916 F.2d 1087, 1089 (6th Cir. 1990); *United States v. Cole (In re Cole)*, 146 B.R. 837 (D. Colo. 1992); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dodd (In re Dodd)*, 82 B.R. 924, 928 (N.D. Ill 1987); *In re Anderson*, 159 B.R. 830, 837-39 (Bankr. N.D. Ill. 1993). Equity demanded the result reached in these cases as "[d]ue process...require[s] that when a creditor does not have notice or actual knowledge of a bankruptcy, the creditor must be permitted to file tardily when the creditor does so promptly after learning of the bankruptcy." *United States v. Cardinal Mine Supply*, 916 F.2d 1087, 1089 (6th Cir. 1990). In the case at bar, however, debtors' counsel asserts, although neither Mr. Breyfogle nor Ms. Sell have presented the Court with any supporting evidence, that the creditor received actual notice of the claims bar deadline in advance of the deadline's passage, and argues that, despite such notice, failed to move this Court for additional time to file its claim pursuant to B.R. 3002(c)(1). Under this line of argument, the due process concerns which demand the exercise of the court's equitable powers may not be present in this case.

For cases filed prior to October 22, 1994, the law would generally be clear

that unless a governmental entity takes advantage of the protections afforded to it by B.R. 3002(c)(1), its late filed claim cannot be allowed. In its amendments, however, Congress added a new provision to 11 U.S.C. §502(b) that states:

> (b)Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if [an] objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as the date of the filing of the petition, and shall allow such claim..., except to the extent that -
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>> (9)proof of such claim is not timely filed,..., *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 may provide.

11 U.S.C. §502(b)(9)(emphasis added). Therefore, the claim of a governmental unit shall be allowed if it is filed after the general claims bar deadline but before 180 days after the date on which the bankruptcy petition was filed. The new provisions of 11 U.S.C. §502 apply to cases filed after October 22, 1994, the date on which the Reform Act became effective,[6] and because the case at bar was filed on October 14, 1994, that new provision would not apply. However, while the foregoing discussion would generally end the Court's analysis as to which law should apply, the facts in this case do not make that application so clear.

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The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994), was passed by the House of Representatives as H.R. 5116 by voice vote on October 5, 1994, and was passed by a Senate voice vote on October 7, 1994. It was signed by President Clinton and became effective on October 22, 1994, but except as noted in particular provisions of the Act, does not apply to cases commenced before the date of enactment.

Debtors represented that the first notice of their bankruptcy filing was sent to the City of Barberton on January 11, 1995. However, because the debtors failed to provide the Court with a copy of said notice, there is no proof that the city was notified of the exact date upon which the bankruptcy petition was filed, and therefore whether the city should be held to the pre-amendment standard. Because the debtors, as the party objecting to the proof of claim, bear the burden of producing facts to defeat the claim, it was incumbent upon them to show that they gave sufficient notice of the law under which this case was operating. *See Juniper Dev. Group v. Kahn (In re Hemingway Transport, Inc.)*, 993 F.2d 915, 925 (1st Cir. 1993), *cert. denied,* 114 S.Ct. 303 (1993); *Holm v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *In re Camp*, 170 B.R. 610, 613 (Bankr. N.D. Ohio 1994).

Based upon the foregoing, the Court finds that the claim of the City of Barberton will be allowed. The trustee's motion to allow the claim of the City of Barberton is hereby granted and said claim is to be included for payment within debtors' chapter 13 plan.

**IT IS SO ORDERED.**

MARILYN SHEA-STONUM

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Bankruptcy Judge

**DATED: 8/30/95**