

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF ARKANSAS  
LITTLE ROCK DIVISION**

**IN RE: WAYNE H. SCHULTZ, JR.,  
Debtor**

**CASE NO.: 4:04-bk-20602 E  
CHAPTER 7**

**ORDER DENYING DEBTOR'S MOTION TO MAKE ADDITIONAL  
FINDINGS OF FACT AND TO ALTER AND AMEND THE JUDGMENT**

Before the Court is Debtor's *Motion to Make Additional Findings of Fact and to Alter and Amend the Judgment* (the "**Motion**") filed on June 27, 2005, and the Trustee's response filed on July 7, 2005. Following a hearing held on June 14, 2005, the Court entered its *Order Striking Second Notice of Assets and Granting in Part and Denying in Part Debtor's Amended Objection to the Trustee's Request for Issuance of a Notice of Assets and For the Establishing of a Claims Bar Date* (the "**Order Regarding Second Notice**") on June 17, 2005. The Debtor asks the Court to make additional findings of fact and conclusions of law as to the allowance of certain late filed claims which the Court refused to disallow simply because they were tardily filed after the issuance of a second notice of assets.

**INTRODUCTION**

Debtor's Motion is brought under Bankruptcy Rule 9023,<sup>1</sup> which incorporates Federal Rule of Civil Procedure 59(e), and Bankruptcy Rule 7052(b), which allows the Court to amend its findings of fact, make new findings, and/or amend its judgment. The Eighth Circuit Court of Appeals has described the role of F.R.C.P. 59(e) motions as follows:

Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes in the time period immediately following entry of

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<sup>1</sup>All references to rules in this order refer to the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

judgment. Rule 59(e) motions serve a limited function of correcting “manifest errors of law or fact or to present newly discovered evidence.” Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.

*Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills*, 141 F.3d 1284, 1286 (8<sup>th</sup> Cir. 1998) (citations omitted) (emphasis added). In its Motion and Brief, the Debtor asserts that the late filed claims should be disallowed in this case because: (1) his due process rights were violated by the issuance of a second notice of assets without notice and a hearing; (2) the late claims should be disallowed as a matter of law; (3) the late claims should be disallowed on equitable grounds; and (4) policy reasons support the disallowance of the late claims.

## ANALYSIS

### I. Due Process.

First, the Debtor argues that the Court should have disallowed the claims filed after the Trustee issued an invalid *Second Notice of Assets and Deadline to File Proof of Claim* (the “**Second Notice**”) because the Second Notice was issued without notice and an opportunity for the Debtor to be heard. To support this argument, the Debtor cites Bankruptcy Rules 9013 and 9014 requiring notice and a hearing in certain circumstances. The Debtor argues that because the Trustee did not file a motion to have the Second Notice issued, and there was no hearing set prior to the issuance of the Second Notice on April 26, 2005, the Debtor’s due process rights were violated.

The Court disagrees. Rules 9013 and 9014 concern court orders, not notices. No court order was entered in this case authorizing the Second Notice, and the Second Notice, although somewhat misleading, did not actually affect the Debtor’s rights or the Debtor’s property in any way. As the Court previously stated in its Order Regarding Second Notice, and will discuss in more detail in section II below, the “late filed claims may in fact be allowed and distributions made thereon

pursuant to 11 U.S.C. § 726(a).”

The Debtor further asserts that the late filed claims would not have been filed but for the issuance of the Second Notice, despite the introduction into evidence of letters sent to the creditors by the Trustee informing them of their opportunity to file a tardy claim. Specifically, those letters state:

The original claims bar date in the above-referenced chapter 7 bankruptcy case is February 16, 2005. A recent ruling of the Court in this case establishes surplus funds in the case in excess of the timely filed claims and in excess of all claims scheduled by the Debtor.

To participate in distribution from this estate under a *tardily filed claim*, you need to file a claim within the time of the second bar date issued by the U.S. Bankruptcy Court Clerk which is May 30, 2005. There is a significant possibility that all allowed claims will be fully paid.

(Emphasis added.) Although the letters reference a new bar date for late filed claims which was established in the Second Notice, the Trustee could have sent such letters without referencing any bar date or court authority for a bar date. The Trustee can set any date he wishes for accepting late filed claims (provided he complies with his duty to expeditiously close the estate under 11 U.S.C. § 704). A trustee may choose to set such a deadline so that he may begin the estate closing process.<sup>2</sup> Accordingly, no matter how inappropriate or misleading the Second Notice might have been (as

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<sup>2</sup>Prior to the 1996 Amendments to the Bankruptcy Rules, the routine practice was for the chapter 7 trustee to request a second notice of assets which informed creditors of the surplus funds and set another deadline for filing claims. This notice was authorized by Bankruptcy Rules 3002(c)(6) and 2002(a)(4). Rule 3002(c)(6) formerly provided that the court may grant an extension of time to file claims if a surplus remained after all allowed claims had been paid, and Rule 2002(a)(4) provided for notice of a surplus to creditors who had failed to file claims. These provisions were abrogated after the Bankruptcy Reform Act of 1994 added § 502(b)(9). See generally 9 *Collier on Bankruptcy* ¶ 3002.RH[3] at 3002-18 - 3002-19 (15<sup>th</sup> ed. rev. 2004). Section 502(b)(9) and the 1996 Amendments to Rule 3002(c) are discussed more fully in Section II below.

explained in this Court’s Order Regarding Second Notice), one cannot conclude that none of the late filed claims at issue would have been filed had the Second Notice not been issued. The fact that the Trustee referred to the Second Notice in his letters does not negate the fact that the Bankruptcy Code specifically allows late filed allowed claims to be paid when there are surplus funds in a chapter 7 case, as discussed in section II below. Furthermore, nothing in the Bankruptcy Code nor Rules prohibit the Trustee from notifying creditors of a surplus, or even encouraging creditors to file late claims.

For these reasons, the Debtor’s due process rights are not implicated here. Furthermore, the Debtor did receive a hearing on this issue on June 14, 2005, prior to the Court’s entry of its Order Regarding Second Notice which specifically ruled that the late claims would not be disallowed solely because they were filed after the Second Notice was issued.

## **II. Allowance of Late Filed Claims.**

The Debtor also disagrees with the Court’s ruling that late claims may be paid pursuant to 11 U.S.C. §§ 726(a) and 502(b)(9). The Debtor asserts that § 502(b)(9) was “designed to overrule case law holding that tardily filed claims were allowable” (quoting 4 *Collier on Bankruptcy* ¶ 502.03[10][a] at 502-51 (15<sup>th</sup> ed.)). Debtor ignores the reference within § 502(b)(9) to § 726(a). Specifically, § 502(b)(9) provides that the court may disallow a claim with respect to which an objection has been filed if:

proof of such claim is not timely filed, ***except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title*** or under the Federal Rules of Bankruptcy Procedure, . . .

11 U.S.C. § 502(b)(9) (emphasis added). Paragraph 502.03[10][c] of *Collier on Bankruptcy*, titled Operation and Effect of Section 502(b)(9), provides:

Section 502(b)(9) preserves the distribution on tardily filed claims provided for under subsections 726(a)(1), (2), and (3). Under section 726(a), tardily filed claims in chapter 7 cases are not disallowed, necessarily, for distribution purposes but, rather, are generally subordinated to distributions on timely filed claims of the same priority.

*See 4 Collier on Bankruptcy* at 502-52 (15<sup>th</sup> ed. rev. 2004). Section 726(a)(3) addresses unsecured claims which are tardily filed by a creditor who had sufficient notice in time to timely file a claim, and places such claims third in line for payment in a chapter 7 case.<sup>3</sup> Prior to the Bankruptcy Reform Act of 1994, there was some dispute over whether the language in Rule 3002, which prohibited the late filing of claims, could be reconciled with § 726(a)(3), which provided for payment of late filed claims. *See 6 Collier on Bankruptcy* ¶ 726.02[3] at 726-10 (15<sup>th</sup> ed. rev. 2004). Rule 3002 formerly provided that claims would not be allowed unless filed “in accordance with this rule,” and since Rule 3002(c) set forth time limits for filing claims, it seemed that all late claims must be disallowed. The 1996 amendments to the Bankruptcy Rules resolved this dispute by deleting the phrase “in accordance with this rule.” According to the Advisory Committee Note to the 1996 Amendment, the phrase was deleted to “clarify that the effect of filing a proof of claim after the expiration of the time prescribed in Rule 3002(c) is governed by § 502(b)(9) of the Code,

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<sup>3</sup>*In re Stalf*, 252 B.R. at 168-169, provides the following general summary of the distribution scheme found in § 726(a):

In a Chapter 7 case, property of the estate is to be distributed first, in payment of claims specified in Section 507 (Priorities); second, in payment of allowed unsecured claims that were timely filed or that were tardily filed if the holder of the claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim, and if proof of such claim is filed in time to permit payment of the claim; third in payment of any allowed unsecured claim proof of which was tardily filed, but the holder of the claim had notice or actual knowledge of the case in time for timely filing a proof of claim; fourth, in payment of any allowed claim for certain fines, penalties or forfeitures; fifth in payment of interest on any claim paid under the aforementioned categories; and sixth, to the debtor.

rather than by [Rule 3002].” The 1996 Amendments also abrogated Rule 3002(c)(6) because it was no longer necessary to extend the deadline for filing claims (since late filed claims could be allowed in a chapter 7 case pursuant to § 502(b)(9)). As explained by *Collier on Bankruptcy*:

Rule 3002(c)(6) was abrogated. The former provision provided for the court to grant an extension for filing claims against a surplus after payment of all timely claims. As the amendments to the Code made clear, ***Rule 3002 deals with timeliness of filing of claims, rather than serving as a prohibition against late filing. Thus, there is no need for the court to extend the time for filing claims in the event of a surplus.***

See 9 *Collier on Bankruptcy* ¶ 3002.RH[3] at 3002-19 (15<sup>th</sup> ed. rev. 2004) (emphasis added).

Case law has also consistently provided that tardily filed claims may be allowed and distributions made thereon pursuant to § 726(a)(3). See e.g., *In re Patriot Co.*, 311 B.R. 71 (B.A.P. 8<sup>th</sup> Cir. 2004) (“As a tardily filed claim, [creditor’s] claim would still be paid after all priority claims and timely filed general unsecured claims.”); *In re Stalf*, 252 B.R. 168, 169 (Bankr. E.D. Mo. 2000) (Court held that although time for filing claims was improperly extended pursuant to a court notice, the claims filed during the extended period were “tardily filed claims, and are subject to allowance under Section 502, and distribution under Section 726(a)(2)(C) or Section 726(a)(3).”); *In re Armstrong*, 238 B.R. 438 (Bankr. E.D. Ark. 1999) (“[S]ection 726(a)(3) governs distribution to untimely proofs of claim generally, but provides a lower priority of distribution to the creditor who, although having notice, untimely files a claim that is allowed.”).

In sum, in a chapter 7 case, a tardily filed claim will not be disallowed merely because it was filed late. If funds are available after paying claims provided for under § 726(a)(1) and (2), tardily filed allowed claims may be paid. Again, it does not matter what may have induced certain creditors to file tardy claims; once they are filed, the Trustee may pay them if there are funds available and

such claims are allowed.<sup>4</sup>

### **III. Equity.**

Debtor alleges that the allowance of the late filed claims at issue (claims #15-21) “rewards the inequitable conduct of the Trustee and Clerk in the procuring and issuing of the Second Notice.” The Court has already addressed this issue and found nothing inequitable or improper about the issuing of the Second Notice. Its issuance was simply an error based on outdated procedures, and although it was an error to issue such notice, that error is harmless because the Code provides that a late filed claim will not be disallowed in a chapter 7 case just because it was tardily filed. Furthermore, as the Trustee points out in his response, it would be grossly inequitable to allow the Debtor to avoid paying claims, which he scheduled, when there are ample assets with which to pay such claims.

### **IV. Policy.**

Debtor asserts that policy reasons support disallowance of the late filed claims. To support his argument, the Debtor relies on numerous examples of deadlines that a Chapter 7 Trustee must meet, and examples of instances in which those deadlines may not be extended. Debtor asserts that allowance of the late filed claims is at odds with the deadline for filing claims. This argument has no merit. The Code and Rules have set forth the distribution scheme in a chapter 7 case, and regardless of any deadline for filing a claim, late filed claims may be allowed and paid in a chapter 7 case.

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<sup>4</sup>Pursuant to 11 U.S.C. § 502(a), a claim is deemed allowed unless a party in interest objects. The Debtor has not objected to the late filed claims apart from the objections raised in *Debtor’s Amended Objection to the Trustee’s request for Issuance of Notice of Assets And for the Establishing of a Claims Bar Date* and the Motion dealt with by this Order.

Debtor further argues that “the allowance of untimely filed claims has the unintended consequence of diminishing the Debtor’s discharge.” Debtor asserts that allowing an additional approximate \$10,000 in late filed claims to be paid will diminish the discharge he received on March 16, 2005. The Debtor acknowledges that in some circumstances, late filed claims could be allowed, but that in this case, the manner in which the claims were “obtained” diminishes the Debtor’s discharge. Once again, the Court is not persuaded by this argument because it does not find the Trustee or the Bankruptcy Clerk acted improperly or that the Debtor was denied due process.

**CONCLUSION**

For the reasons stated herein, it is hereby

**ORDERED** that the Debtor’s *Motion to Make Additional Findings of Fact and to Alter and Amend the Judgment* filed on June 27, 2005, is **DENIED**.

**IT IS SO ORDERED.**



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HONORABLE AUDREY R. EVANS  
UNITED STATES BANKRUPTCY JUDGE

DATED: July 26, 2005

cc: Richard Cox, Chapter 7 Trustee  
Scott Vaughan, attorney for Debtor  
U.S. Trustee