

11 U.S.C. § 501
11 U.S.C. § 502
Bankr. R. 3002(c)

In re Andersen, Case No. 391-43600-elp13

12/5/95 ELP Unpublished

The State of Oregon, Employment Department's objection to debtors' discharge was denied. The Department had untimely filed a proof of claim for its priority debt. The court held that the failure to timely file a proof of claim constitutes a basis for disallowance of the claim in a Chapter 13 case. The opinion distinguishes In re Pacific Atlantic Trading Co., 33 F.3d 1064 (9th Cir. 1994), in which the Ninth Circuit had held in a Chapter 7 case that an untimely claim could be allowed.

P95-20(10)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:) Case No. 391-34600-elp13
)
ROBERT ELWYN ANDERSEN dba) MEMORANDUM OPINION
PARCHMAN FARM RESTAURANT and)
MARILYN PATRICIA ANDERSEN fka)
MARILYN ROBINSON ANDERSEN,)
)
)
Debtors.)

This matter is before the court on the objection of the State of Oregon, Employment Department ("the Department") to the entry of discharge in this case. For the reasons set forth below, I overrule the Department's objections.

BACKGROUND FACTS

The debtors filed their Chapter 13 petition on July 15, 1991. The debtors did not list the Department in their original schedules. The court set the bar date for filing proofs of claim as November 12, 1991. Although the Department did not receive notice of the bankruptcy at the commencement of the case, it does not dispute that it received adequate notice of the bar date.

On November 19, 1991, the bankruptcy court confirmed the debtors' plan, which provided for, among other things, payment of debts entitled to priority under 11 U.S.C. § 507 and a dividend of approximately 0% to creditors with allowed unsecured claims.

The Department filed a proof of claim on November 25, 1991, in the amount of \$1,910.21, and filed an amended proof of claim on January 13, 1992, in the amount of \$3,282.58. On March 31, 1992, the debtors amended their Schedule E to include the Department's claim. Neither the debtor nor the Chapter 13 trustee objected to the Department's claim during the approximately four years that this case has been pending.

The debtors made the payments under their plan. Pursuant to LBR 3002-3(a),¹ the trustee did not disburse any of the payments to the Department in payment of its late filed claim. On August 13, 1995, the court issued a Chapter 13 discharge, finding that the debtor had fulfilled all requirements under the plan. The Department filed an Objection to Entry of Order of Discharge. It contended that the mere fact that a

¹ LBR 3002-3(a), a local rule of the United States Bankruptcy Court for the District of Oregon, provides:

"The trustee shall not pay on a claim filed later than ninety (90) days from the first date set for the § 341(a) meeting of creditors, or one hundred twenty (120) days from such date if filed pursuant to BR 3004, without a court order having been obtained by the claimant allowing such claim."

priority claim is filed late is not grounds for the disallowance of and failure to pay the claim and that discharge should be denied because the debtors have not paid all allowed priority claims as required by their plan.

ISSUE

Whether, in a Chapter 13 case filed prior to the enactment of the Bankruptcy Reform Act of 1994, a priority claim can be disallowed and remain unpaid under a plan that provides for payment of allowed priority claims because the claim was not timely filed.²

DISCUSSION

The parties do not dispute that the Department failed to file its proof of claim by the deadline set forth in Fed. R. Bankr. P. 3002(c). The Department contends, however, that under In re Beltran, 177 B.R. 905 (9th Cir. BAP 1995), an untimely proof of claim does not preclude allowance of the claim. I reject this contention, because I find Beltran to be inconsistent with the earlier Ninth Circuit case of In re Tomlan, 907 F.2d 114 (9th Cir. 1990).

In Tomlan, the Ninth Circuit concluded that the IRS must file a timely proof of claim in order to obtain priority

² The Bankruptcy Reform Act of 1994, applicable to cases filed after October 22, 1994, created new section 502(b)(9), which specifically provides for disallowance if the proof of claim is not timely filed. This newly created provision, however, is not applicable in this case.

status. The court adopted as its own the opinion of the district court reported at 102 B.R. 790 (E.D. Wa. 1989). In Tomlan, the IRS had filed an untimely proof of claim in the debtor's Chapter 13 case. On the trustee's objection, the bankruptcy court determined that the IRS claim was not an allowed claim because it was not timely filed. However, in a separate proceeding, the bankruptcy court determined that the claim was not dischargeable because it was not provided for in the plan. The court reasoned that the plan stated that the debtor would pay 100% of the allowed claim of the IRS.

On appeal, the district court determined that the bankruptcy court erred in determining that the claim was not provided for in the plan. In reaching that conclusion, the district court rejected the argument, relied on by the bankruptcy court, that because the tax claim was entitled to priority, the only way the plan could provide for the claim would be to provide for full payment. 102 B.R. at 795-96. The district court reasoned that the tax claim was not entitled to priority because the IRS had not satisfied the conditions necessary for priority, in particular, the timely filing of a proof of claim. Id. The court stated that "[t]he law is clear and unchallenged here that the Bankruptcy Court has no discretion to allow a late-filed proof of claim." 102 B.R. at 795. The court concluded that, because the IRS's proof of claim was not timely filed, it was not

allowed and the plan was not required to provide for its full payment; it was sufficient that the plan made reference to IRS claims and provided for payment of only allowed claims.

In In re Beltran, on which the Department relies, the Bankruptcy Appellate Panel reached a contrary result. The Panel followed the Ninth Circuit decision in In re Pacific Atlantic Trading Co., 33 F.3d 1064 (9th Cir. 1994), in which the Ninth Circuit determined that an IRS claim was allowed and entitled to priority distribution in a Chapter 7 case, notwithstanding the fact that it was untimely filed. The court examined sections 501 and 502 and determined that nothing in those sections required a timely proof of claim as a prerequisite to allowance. To the extent the time requirements of Fed. R. Bankr. P. 3002(c) provided for disallowance for untimeliness, that rule was inconsistent with the Code sections. The court then examined the effect of failure to comply with Fed. R. Bankr. P. 3002(c) on the order of distribution in Chapter 7 and concluded that priority claims are entitled to first distribution under section 726(a)(1) without regard to their timeliness. Pacific Atlantic Trading Co. did not mention the Tomlan case.

In Beltran, the Panel determined that the rule of Pacific Atlantic Trading Co. applied in Chapter 13 cases so that the untimely filing of a proof of claim could not provide the basis for disallowance of the claim in a Chapter 13 case filed

before the enactment of the Bankruptcy Reform Act of 1994. The Panel reasoned that the fact that the case was a Chapter 13 case rather than a Chapter 7 case did not affect the applicability of rule of Pacific Atlantic Trading Co. because that rule was based on a construction of sections 501 and 502, which are applicable in both Chapters 7 and 13. The Panel rejected the contention that Tomlan required a different result, asserting that the only issue decided on appeal in Tomlan was whether the plan failed to provide for the claim at issue; the district court did not rule on whether the claim was disallowed on the basis of untimeliness.

I conclude that Tomlan, rather than Pacific Atlantic Trading Co., controls in Chapter 13 cases. In In re Robert, 171 B.R. 881 (Bankr. N.D. Cal. 1994) the court analyzed the relationship of Tomlan and Pacific Atlantic Trading Co.. I agree with Robert's analysis. Although Tomlan did not specifically address sections 501 and 502 or Fed. R. Bankr. P. 3002(c), the the decision adopted by the Ninth Circuit stated, in rejecting the bankruptcy court's rationale, that "[t]his rationale ignores the well-settled rule that an untimely claim cannot be allowed, and that the Bankruptcy Court has no discretion to allow such claims where no motion for an extension of time was filed prior to the running of the filing period." 102 B.R. at 796. That rule was necessary to the decision because the untimeliness of the claim stood as the only bar to the IRS's entitlement to a

priority claim, which entitlement provided the basis for its argument on appeal.

Pacific Atlantic Trading Co. did not address and, therefore, cannot be interpreted as overruling Tomlan.³ Tomlan remains the law of the Ninth Circuit and the two cases must be harmonized. The proper way to harmonize the two cases is to recognize that Tomlan states the rule for Chapter 13 cases, while Pacific Atlantic Trading Co. states the rule for Chapter 7 cases. The existence of section 726 in Chapter 7, and the absence of a similar provision in Chapter 13, lends support to the argument that untimely claims may be treated differently in Chapter 7 and Chapter 13 cases.

More importantly, however, there are fundamental differences between Chapter 7 and Chapter 13 that make the rule of Pacific Atlantic Trading Co. inappropriate in a Chapter 13 case. See In re Chavis, 47 F.3d 818, 823-24 (6th Cir. 1995); In re Waindel, 65 F.3d 1307, 1313 (5th Cir. 1995) (Duhe, J., concurring). As the court stated in Tomlan:

"The purpose of Chapter 13 is `to serve as a flexible vehicle for the repayment of part or all of the allowed claims of the debtor.' . . . In order to effectuate this purpose, it is essential that all unsecured creditors seeking payment under the plan file

³ In addition, a prior decision of the Ninth Circuit may be overruled only by the court sitting en banc. Bowe v. INS, 597 F.2d 1158, 1159 n. 1 (9th Cir. 1979). Thus, to the extent that Pacific Atlantic Trading Co. is inconsistent, I would be compelled to follow Tomlan as the earlier controlling decision.

a proof of claim. A date certain for such filings is crucial to the ability to determine the full extent of the debts and evaluate the efficacy of the plan in light of the debtor's assets and foreseeable future earnings."

102 B.R. at 792 (emphasis in original; citations omitted). A date certain for such filings and the determination of allowable claims is necessary to determine whether the funds committed to the plan are adequate to make the payments required, to determine whether the plan can be performed within the maximum period permitted by 11 U.S.C. § 1322(c), for the trustee to effectively make distributions under a plan without facing the risk of making improper distributions, and for the other reasons set forth in Chavis and in Judge Duhe's concurrence in Waindel.

The facts of this case demonstrate how the impact of an untimely claim may differ in a Chapter 13 case. In this case, the court confirmed the debtors' Chapter 13 plan more than four years ago, on November 19, 1991. There is no evidence that the Department ever sought a court order directing payment of the claim before it filed its objection to entry of discharge, even though LBR 3002-3(a) expressly required the Department to obtain such an order if it wanted to receive distributions on its untimely claim. After the debtors completed performance of all of their obligations under the plan with respect to timely claims and the trustee distributed the funds to creditors, the Department asserts that its untimely claim should be allowed and

paid based on a new interpretation of the law regarding untimely claims.

CONCLUSION

For the above reasons, the rule of Pacific Atlantic Trading Co. does not apply in Chapter 13 cases and untimely filed claims shall not be allowed in Chapter 13 cases. The Department is not entitled to allowance of its late filed claim. The debtors' plan, therefore, did not require payment of the claim and the debtors made all payments required under their plan. The Department's objection to the entry of discharge will be overruled.

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This Memorandum Opinion shall constitute Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052 and they shall not be separately stated.

ELIZABETH L. PERRIS
Bankruptcy Judge

cc: Mary Lou Haas
Kelly K. Brown
Robert W. Myers