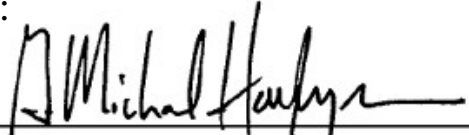




THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: October 2, 2015


G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In Re:

Ashley Phillips,

Case No. 14-29453-GMH

Debtor.

Chapter 13

CORRECTED DECISION AND ORDER

The United States, acting through its Department of Education, loaned Ashley Phillips money to attend Kaplan College in Milwaukee. Although Phillips still owed about \$11,000 when she filed this chapter 13 case, she neglected to schedule the debt or list either the Department or the loan servicer among her creditors. As a result, the Department did not receive notice that Phillips had filed for bankruptcy until about seven months later when she told the loan servicer about the filing during a telephone call. CM-ECF Doc. No. 32, 2.

Soon after the telephone call the Department filed a proof of claim. Claim No. 12. By that time, however, the deadline for filing claims, even by governmental

entities, had passed. The chapter 13 trustee objects to the Department's claim, noting that, putting aside inapplicable exceptions, 11 U.S.C. §502(b)(9) limits allowed claims to those that are timely filed.

Federal Rule of Bankruptcy Procedure 3002(c) sets the deadline for filing proofs of claim in chapter 13 cases. That rule, again ignoring inapplicable exceptions, provides, "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. . . . The **court may, for cause, enlarge the time** for a governmental unit to file a proof of claim **only upon motion** of the governmental unit **made before expiration of the period** for filing a timely proof of claim." Fed. R. Bankr. P. 3002(c)(1) (emphasis added). The United States concedes that it filed neither the Department's claim nor a motion to enlarge the time to file a claim within 180 days after the order for relief. Rule 3002(c) authorizes the court to extend the time in certain other circumstances but none of those circumstances exist here. And Rule 9006(b)(3), which authorizes the court to enlarge the time to comply with many rule-set deadlines, expressly limits the ability to enlarge Rule 3002(c)'s proof-of-claim deadline: "The court may enlarge the time for taking action under Rules . . . 3002(c) . . . only to the extent and under the conditions stated in those rules." Fed. R. Bankr. P. 9006(b)(3).

In sum, the Rule 3002(c) deadline for filing a claim expired. Rule 9006(b) limits the court's authority to expand the time to file a proof of claim to the exceptions listed in Rule 3002. None of Rule 3002's exceptions apply. And §502(b)(9) provides that late-filed claims are not allowed in a chapter 13 case. The United States does not contest any of this.

The United States instead argues that the court should craft an exception not provided in the Bankruptcy Code or in the Bankruptcy Rules. Parroting *In re Tarbell*, it advises that "some courts have extended the time for a creditor to file a proof of claim in a Chapter 13 case either under the equitable power of 11 U.S.C. § 105 or on due

process considerations, and such relief has most commonly been awarded when, as here, the creditor had no notice of the bankruptcy. Court[]s allowing late filed claims have coalesced around the rationale that the time limits in the Code implicitly assume that notice has been given.” CM-ECF Doc. No. 32, 3 (citations omitted). See *In re Tarbell*, 431 B.R. 826, 828 (Bankr. W.D. Wis. 2010). Acknowledging a disagreement among bankruptcy judges, the United States invites me to follow *In re Tarbell* and *In re Simmons*, No. 09-22826-svk, 2012 WL 6169877 (Bankr. E.D. Wis. Dec. 11, 2012), both of which allowed creditors to file a claim after the bar deadline because they lacked notice of a chapter 13 bankruptcy. For the reasons that follow, I decline the invitation.

Section 105(a) provides no avenue for relieving the government of Rule 3002(c)’s claim deadline. Section 105(a) authorizes bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” This is a gap-filler provision: it authorizes courts to act as they deem best to give effect to the statute when there is no applicable statutory provision or rule. Section 105(d), which addresses the court’s ability to issue case management orders, makes clear that §105’s authority is not intended to trump the Bankruptcy Code or the Bankruptcy Rules: “The court . . . **unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure**, may issue an order . . . prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically”. §105(d)(2) (emphasis added).

More important, the Supreme Court has instructed that §105(a) cannot be used to countermand congressional policy choices embodied in title 11. See *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) (“It is hornbook law that §105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.”) (internal quotations omitted). The Bankruptcy Rules, which are promulgated by the Supreme Court exercising a statutorily authorized delegation of legislative

power, stand on similar ground. See 28 U.S.C. §2075; see also *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 21 (1st Cir. 1991) (“The Federal Rules of Civil Procedure . . . have the same force and effect as federal statutory law”). Thus, neither §105(a) nor any inherent equitable authority bankruptcy courts may possess authorize them to expand Rule 3002(c)’s deadline. *Law*, 134 S. Ct. at 1194; *In re Greenig*, 152 F.3d 631, 635 (7th Cir. 1998) (“a bankruptcy court cannot use its equitable power to circumvent the law” (internal quotation marks omitted)).

That leaves the United States’ argument from “due process considerations”. The government does little to explain this argument. It stops short of contending that the Fifth Amendment’s due process clause authorizes its late-filed claim. Indeed, it is difficult to see how the United States is a “person” entitled to the protection of the Fifth Amendment. The Fifth Amendment protects persons from acts of the United States. It does not protect the United States from itself. See *United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1089 (6th Cir. 1990) (noting “the United States appropriately concedes that it has no right to due process”).

Even if the United States enjoyed due process protection, it still could not avoid Rule 3002(c)(1)’s deadline. The rule does not offend the due process clause because it does not work a deprivation of property without adequate process. See *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976).

First, claims of creditors who lack notice of the debtor’s bankruptcy filing in time to file a proof of claim are not discharged. 11 U.S.C. §1328(a)(2) (providing that a chapter 13 discharge does not discharge debts “of the kind specified in” §523(a)(3)). Second, the Code provides a procedure for late-notified creditors to seek immediate collection. Although §362(a) stays most creditors’ collection efforts until the bankruptcy case is over, creditors who are harmed by that delay can seek relief from the stay under §362(d)(1). 11 U.S.C. §362. These sections together seemingly provide late-notified creditors with a means of avoiding any deprivation of property that might

offend the due process guarantee. The United States, in all events, has not demonstrated that these procedures are inadequate to safeguard its interests under the present circumstances.

For these reasons, the trustee's objection to the United States Department of Education's proof of claim no. 12 is sustained.

So ordered.

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