

U.S. COURTS

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF IDAHO**

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**IN RE**

**Case No. 97-02722**

**RAYMOND T. WARE and  
RENDA E. WARE,**

**SUMMARY ORDER**

**Debtors.**

**Background.**

The Chapter 13 Trustee, L.D. Fitzgerald, objects to allowance of the proof of claim filed by creditors Brian and Cindy Peterson ("Petersons"). The proof of claim was not timely filed, however, Petersons contend that they were not notified of the bankruptcy proceedings prior to the deadline for filing their proof of claim. Following a hearing on November 9, 1998, the issues were taken under advisement.

**Facts.**

From the record, the following facts appear. Debtor Raymond Ware was a certified public accountant working with the firm of Ware, Nielson & Associates in Twin Falls. In 1993 and 1994, Petersons hired Mr. Ware's firm to

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advise them on tax matters and to prepare tax returns. In 1996, the Internal Revenue Service ("IRS") audited the returns filed by Petersons, prepared by Mr. Ware's firm. Errors and omissions were discovered in the returns, and Petersons were assessed additional tax liability, penalties, and interest totaling approximately \$25,000. Petersons then filed a complaint against Mr. Ware's firm and Debtor alleging professional malpractice and seeking damages. That action was stayed by the filing of the Debtors' Chapter 13 bankruptcy case on September 5, 1997. Debtors Chapter 13 plan was confirmed on February 18, 1998. Petersons filed their proof of claim with this Court on August 10, 1998, and the Chapter 13 Trustee filed his objection to that proof of claim on August 28, 1998.

**Issues.**

There are two issues to resolve. First, did Petersons receive sufficient notice of the filing of the bankruptcy case to satisfy the due process clause of the Fifth Amendment to the United States Constitution in disallowing their untimely proof of claim? Second, if Petersons did received adequate notice, should they be granted an extension of time within which to have filed their proof of claim under the Federal Rules of Bankruptcy Procedure?

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**Discussion.**

Following the filing of a bankruptcy petition, the clerk, or some person directed by the Court, must notify all creditors by mail of the commencement of the bankruptcy case and the time to file proofs of claim under F.R.B.P. 3002. F.R.B.P. 2002(f). In this District, the National Bankruptcy Noticing Center ("BNC") is the entity designated to provide notice to all creditors of the filing of a bankruptcy case. From a review of the file, it appears notice of the Debtors' filing was sent by the BNC to the creditors listed in Debtors' schedules on September 11, 1997. The BNC certificate of service specifically lists Brian Peterson, P.O. Box 600, Wendell, ID 83355, as one of those served with a notice by first-class mail. The written notice sent out in this case advises creditors of the commencement of the Chapter 13 case, and of the deadline for creditors, other than governmental units, to file a proof of claim. Here, the deadline, or bar date, was January 12, 1998.

"The due process clause of the Fifth Amendment requires that notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Citicorp Mortgage Inc. v. Brooks (In re Ex-Cel Concrete Company Inc.)*, 178 B.R. 198, 203 (9th Cir. B.A.P. 1995)(citing

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3 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The  
4 Federal Rules of Bankruptcy Procedure establish a 90 period within which  
5 proofs of claim must be filed in order to share in any distribution to creditors  
6 under a debtor's Chapter 13 plan. F.R.B.P. 3002(c). Due process requirements  
7 must be evaluated in light of this bar date.  
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9 A properly executed certificate of mailing creates a presumption of  
10 receipt of notice. *Moody v. Bucknum (In re Bucknum)*, 951 F.2d 204, 206 (9th  
11 Cir. 1991). A party asserting non-receipt has the burden of rebutting the  
12 presumption. *Id.* The claimant must present more than a declaration or affidavit  
13 stating that notice was not received. As the Ninth Circuit Bankruptcy Appellate  
14 Panel has explained:  
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16 Where the bankruptcy court record shows a  
17 certificate of mailing and a complaining party submits  
18 an affidavit declaring notice was not received, the  
19 weight of the evidence favors the court's certificate. If  
20 a party were permitted to defeat the presumption of  
21 receipt of notice resulting from the certificate of  
22 mailing by a simple affidavit to the contrary, the  
23 scheme of deadlines and bar dates under the  
24 Bankruptcy Code would come unraveled. For this  
25 reason, an allegation that no notice was received  
26 does not, by itself, rebut the presumption of proper  
notice.

23 *Osborn v. Ricketts (In re Ricketts)*, 80 B.R. 495, 497 (9th Cir. B.A.P. 1987)(citing  
24 *In re American Properties*, 30 B.R. 247, 250 (Bankr. D. Kan. 1983)). The

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presumption may only be overcome by clear and convincing evidence. *Moody v. Bucknum (In re Bucknum)*, 951 F.2d 204, 206 (9th Cir. 1991). Evidence sufficient to rebut the presumption might include proof that the notice sent by certified mail was returned unclaimed (*Herndon v. De La Cruz (In re De La Cruz)*, 176 B.R. 19, 22 (9th Cir. B.A.P. 1994)(citing *In re Carter*, 511 F.2d 1203 (9th Cir.1975)), or testimony of clerk's staff indicating that notice had not been sent (*Osborn v. Ricketts (In re Ricketts)*, 80 B.R. 495, 498 (9th Cir. B.A.P. 1987)(J. Jones, concurring)).

In this case, inadequate evidence is presented by Petersons to rebut the presumption created by the certificate of service in the bankruptcy file. They rely upon the affidavit of Brian Peterson alleging he did not receive the notice of Mr. Ware's bankruptcy proceeding, and the case law discussed above explains that this is not enough to allow the Court to disregard the presumption of receipt of notice created by the BNC certificate of service.<sup>1</sup>

The Court next considers whether an extension of the filing deadline should be granted to Petersons to file their proof of claim in light of the

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<sup>1</sup> Petersons also submitted the affidavit of Eugene Fredericksen, their state court attorney, stating that he did not receive notice of the bankruptcy. The certificate of mailing and bankruptcy schedules do not list Mr. Fredericksen, so the Court can conclude that the BNC did not give him notice of the filing. However, while it may have been prudent for Debtors to have listed Fredericksen to receive notice, it is not required, and notice to Mr. Peterson alone is sufficient. F.R.B.P. 3002. It is therefore not significant that Mr. Fredericksen did not receive notice.

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3 circumstances. As a Chapter 13 proceeding, in which timeliness of claims is an  
4 essential element in the reorganization process, this issue is governed by the  
5 strict time requirements set forth in the Federal Rules of Bankruptcy Procedure.  
6 *United States Internal Revenue Service v. Osborne (In re Osborne)*, 76 F.3d  
7 306, 307 (9th Cir. 1996). A proof of claim is required to be filed within ninety  
8 days of the first scheduled meeting of creditors. F.R.B.P. 3002(c). This time  
9 period may be enlarged by the Court upon request of a creditor if such request is  
10 made prior to the expiration of the original time period. F.R.B.P. 9006(b)(1).  
11 However, Rule 9006(b)(3) limits the Court's authority to enlarge the time for filing  
12 a proof of claim under Rule 3002(c) to only those situations specifically  
13 described in that Rule. F.R.B.P. 9006(b)(3). The circumstances here simply do  
14 not fit any of the five enumerated exceptions.<sup>2</sup> "Given that the plain language of  
15 the Rule specifically prohibits a creditor from filing a claim after the deadline  
16 imposed under Rule 3002 unless one of the six [currently five] exceptions is met,  
17 there is simply no basis for an extension of the excusable neglect standard to  
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22 <sup>2</sup> An enlargement of the 90 day filing requirement may be permitted for (1)  
23 claims filed by a governmental unit, in which such claim must be filed within 180 days  
24 from the order of relief; (2) an infant, incompetent person, or representative or either  
25 when the interests of justice dictate such and when doing so will not unduly delay  
26 administration of the case; (3) an unsecured claim from a judgment may be filed 30 days  
after the judgment becomes final; (4) claims arising from the rejection of an executory  
contract; and (5) when there is a change in the projected payment of a dividend by the  
trustee and new notice is sent out to all creditors. F.R.B.P. 9006(b)(3).

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claims filed by creditors under Rule 3002; a bankruptcy court cannot exercise its equitable powers in derogation of specific authority to the contrary." *In re Duarte*, 146 B.R. 958, 962 (Bankr. W.D. Texas 1992)(citing *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977)).

In their argument to this Court, Petersons rely upon *Internal Revenue v. Cole (In re Cole)*, 146 B.R. 837 (D. Colo. 1992), to support allowance of their late filed proof of claim. In *Cole*, the debtors directed that notice be sent to the Internal Revenue Service ("IRS"), a creditor, at the address of one of its servicing centers. When IRS asserted that it had not received notice of the bankruptcy proceeding prior to the claim bar date, the court addressed whether this method of notice to IRS was fair and reasonable under the circumstances of the case. The court held that, notwithstanding the strict provisions contained in Rules 3002(c) and 9006(b), "a creditor who has received no notice in a Chapter 13 case should be entitled to file a late proof of claim . . . ." *Cole* at 842.

This case is clearly distinguishable from the facts in *Cole*. This Court need not address the issue of whether an exception to the filing deadline exists beyond Rules 3002(c) and 9006(b) in a case where the creditor has received no notice of the Chapter 13 proceeding. Here, the Court finds that

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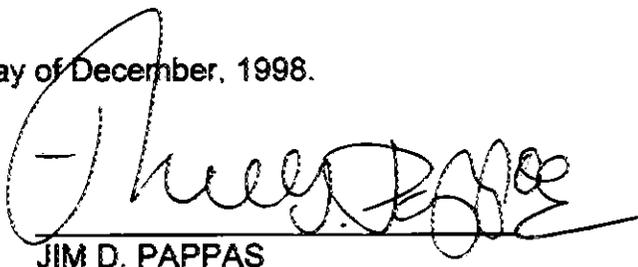
Petersons were given and received adequate notice of the bankruptcy filing, as appears from the BNC certificate of mailing. The *Cole* analysis is not applicable in this case.

**Conclusion.**

For the reasons set forth above, the Chapter 13 Trustee's objection to the proof of claim filed by Petersons must be sustained, and their claim must be disallowed for purposes of distribution of dividends to creditors under the confirmed Chapter 13 plan.

**IT IS SO ORDERED.**

DATED This 15<sup>TH</sup> day of December, 1998.



JIM D. PAPPAS  
CHIEF U.S. BANKRUPTCY JUDGE

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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

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CASE NO.: 97-02722

DATED: 12/15/98

CAMERON S. BURKE, CLERK  
U.S. BANKRUPTCY COURT

By Kendra F. Burke  
Deputy Clerk

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