

ORIGINAL

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN THE MATTER OF:)	
)	Chapter 13 Case 97-02722
WARE, RAYMOND T.)	
RENDA E.)	MEMORANDUM
_____)	

COME NOW the Creditors, Brian Peterson and Cindy Peterson, husband and wife, by and through their counsel of record, Eric R. Clark of the firm of Hutchinson, Lammers & Clark, and hereby provide this honorable Court with their Memorandum as directed by the Court in open court in Twin Falls, Idaho, on November 9, 1998.

ISSUES PRESENTED

1. Whether a Creditor who has not received notice of a Chapter 13 bankruptcy, and therefore, no notice of the bar date to file claims, is forever barred from submitting such claim after the bar date?

MEMORANDUM - 1

2. Whether unsecured creditors are prejudiced if the Bankruptcy Court allows the filing of a claim after the bar date, when the claimant has not received proper notice of the pending bankruptcy?

ARGUMENT

1. A CREDITOR WHO HAS NO NOTICE OF A CHAPTER 13 BANKRUPTCY, AND THEREFORE, NO NOTICE OF THE BAR DATE TO FILE CLAIMS, IS DENIED DUE PROCESS AND FUNDAMENTAL FAIRNESS IF HIS CLAIM IS NOT ALLOWED.

In *In Re Cole*, 146 B.R. 837 (D. Colo. 1992), the District Court, in overruling the Bankruptcy Court, concluded such claims must be allowed. The Court stated:

The central question in this case is whether a creditor who has not received notice of a Chapter 13 bankruptcy case or the deadline for filing proofs of claim must be permitted to file a late proof of claim. There is conflicting authority on this issue. In my opinion, however, the better reasoned cases hold that the notice requirements of the Code and Rules, due process and fundamental fairness all require the allowance of late proofs of claim in these circumstances.

146 B.R. at 839.

The Court discusses the applicability of the various bankruptcy chapter provisions concerning the late filing of claims and reasons that Chapter 13 creditors should be afforded the ability to file a late claim if the creditor did not receive notice.

Unlike cases under other Code chapters, no back door provisions under Chapter 13 otherwise allow the creditor with no notice to participate in distributions. For these reasons, a creditor who has received no notice in a Chapter 13 case should be entitled to file a late proof of claim, notwithstanding the provisions of Bankruptcy Rules 30029(c) and 9006(b).

146 B.R. at 842.

In this case, like the creditor in *In Re Cole*, the Petersons did not receive notice of the bankruptcy proceeding, and therefore, did not timely file a proof of claim. As notice is the fundamental issue, the Petersons have provided an Affidavit of Brian Peterson and an Affidavit of Eugene Fredericksen, of Fredericksen, Williams & Meservy, the Petersons' counsel during the time

periods at issue. Both Affiants swear that they never received any notice of the bankruptcy proceedings.

The Petersons argue that the legal reasoning expressed in *In Re Cole* is compelling and should be applied here. If the Court fails to allow their claim, such claim is forever barred, and the Petersons would lose the ability to recover any monies to which they may otherwise be entitled. The *In Re Cole* Court found that such a result is impermissible when the claimant has not been afforded notice of the bankruptcy. As the same result would occur in this case, the Petersons ask this Court to apply the reasoning articulated in *In Re Cole*, and allow their claim.

2 UNSECURED CREDITORS ARE NOT PREJUDICED BY ALLOWING THE CLAIM OF A CREDITOR WHO DID NOT RECEIVE NOTICE OF THE BANKRUPTCY.

As the Court noted at the hearing, there is a finite amount of money allotted to unsecured creditors. All things being equal, if each creditor receives notice and subsequently files a claim, then the creditor is entitled to a pro rata share of this finite amount. If a creditor does not receive proper notice, then all things are not equal and the creditors who do receive notice would receive a greater pro rata share than they would be entitled to had the debtor provided proper notice to all creditors. Consequently, by allowing a late claim of a creditor who did not receive notice, the creditors who had received notice are not prejudiced because they would then only receive the share to which they were actually entitled. The creditor who did not receive notice is obviously prejudiced if he is not allowed to file a late claim because he loses the opportunity to participate in the bankruptcy estate, and the creditors who had received a notice are unjustly enriched by the amount of this creditor's claim.

CONCLUSION

The holding in *In Re Cole*; "a creditor who has received no notice in a Chapter 13 case should be entitled to file a late proof of claim" is founded upon the principles of due process and fundamental fairness. As this holding is based upon established legal standards and is the product of sound legal reasoning, the Petersons ask the Court to apply this holding here.

Additionally, although the Court also indicated that allowing an additional claim after a deadline may in fact be prejudicial to other unsecured claimants, that does not appear to be the case.

when a creditor is not provided with the same notice as other unsecured claimants are afforded. As noted above, the situation actually is prejudicial to the claimant without notice as the claimants with notice would be unjustly enriched if a claimant without notice, like the Petersons, is not allowed to file a late claim. The Petersons very respectfully request, based upon the facts presented and the argument contained herein, that this Honorable Court apply the law as articulated in *In Re Cole* and DENY the Trustee's Objection to Claim #17 in its entirety.

Very respectfully submitted this 12th day of November, 1998.

BRIAN and CINDY PETERSON, Creditors

By: 
Eric R. Clark, Attorney for Creditors

CERTIFICATE OF SERVICE

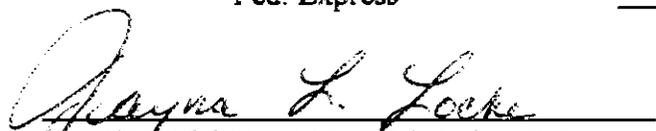
The undersigned hereby certifies that on the 12th day of November, 1998, a true and correct copy of the foregoing has been provided, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

Brent T. Robinson
LING, NIELSON & ROBINSON
P.O. Box 396
Rupert, ID 83350-0396

U.S. Mail	<input checked="" type="checkbox"/>
U.S. Mail (Certified)	<input type="checkbox"/>
Hand Deliver	<input type="checkbox"/>
FAX	<input type="checkbox"/>
Fed Express	<input type="checkbox"/>

L.D. Fitzgerald
TRUSTEE
P.O. Box 6199
Pocatello, ID 83505-6199

U.S. Mail	<input checked="" type="checkbox"/>
U.S. Mail (Certified)	<input type="checkbox"/>
Hand Deliver	<input type="checkbox"/>
FAX	<input type="checkbox"/>
Fed. Express	<input type="checkbox"/>


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

IN THE MATTER OF:)
) Chapter 13 Case 97-02722
WARE, RAYMOND T.)
RENDA E.) **AFFIDAVIT OF CREDITOR**
) **BRIAN PETERSON**

STATE OF IDAHO)
) ss.
County of Twin Falls)

Brian Peterson, being first duly sworn upon oath, deposes and states the following:

1. I obtained accounting services from Raymond T. Ware (Debtor) regarding my 1993, and 1994, Federal and State tax returns.
2. In 1997, I was notified by the Internal Revenue Service and the Idaho State Tax Commission regarding problems with my tax forms which were prepared by the Debtor's firm.
3. I first retained Eugene Fredericksen, of Fredericksen, Williams & Meservy of Jerome, Idaho, and Mr. Fredericksen contacted the Debtor.

4. Subsequent to retaining Mr. Fredericksen, we retained the services of Eric R. Clark of Hutchinson, Lammers & Clark in Twin Falls, Idaho, who then filed suit in this matter

5. At no time, did I receive notice from Mr. Ware or the Bankruptcy Trustee regarding a pending bankruptcy in this matter.

6. I did not receive notice of the bankruptcy proceedings until my counsel received a Notice of Filing Bankruptcy with regards to a Motion to Stay in our underlying accountant malpractice claim.

7. At that point, we sought and obtained a Stipulation to allow our bankruptcy claim.

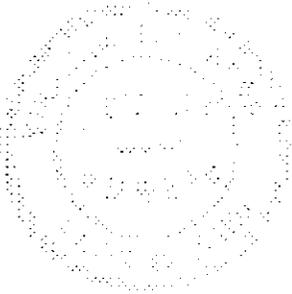
FURTHER YOUR AFFIANT SAYETH NAUGHT.

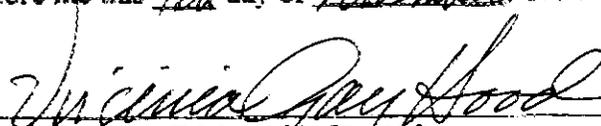
DATED this 9th day of November, , 1998.



Brian Peterson

SUBSCRIBED AND SWORN To before me this 9th day of November, 1998.





NOTARY PUBLIC FOR IDAHO
Residing at: ~~Twin Falls~~ Jerome
My commission expires: March 23, 1999