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UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

In re:	
KEVIN J. BRIGGS BONNIE L. BRIGGS	Bankruptcy Number 95B-23778
Debtors.	Chapter [13]

MEMORANDUM DECISION AND ORDER DETERMINING THE STATUS OF UNSECURED CLAIMS

Kevin and Bonnie Briggs, the chapter 13 debtors herein (Debtors) are before the Court seeking confirmation of their chapter 13 plan. The narrow issue is whether the Debtors filed informal proofs of claim for unsecured creditors by listing the creditors by name and the amounts owing to them in the Debtors' chapter 13 plan, and if so whether the claims are allowed unsecured claims that can be eliminated by an amendment to the Debtors' plan.

FACTS

The Debtors converted an existing chapter 7 case to one under chapter 13. The meeting of creditors was scheduled for December 14, 1995. The bar date for filing claims by non-governmental entities was fixed as March 13, 1996. The Debtors filed and circulated a plan dated November 16, 1995 (First Plan). The Debtors signed the First Plan under penalty of perjury that the terms of the plan were true, complete and accurate. The First Plan provided for 100% payment of

unsecured creditors' claims classified in Class 7 that included all "allowed unsecured claims not otherwise classified." *Chapter 13 Plan and Confirmation Hearing Notices* dated 11/7/95, page 2. The First Plan listed all Class 7 creditors by name and stated the amount of each unsecured claim as follows:

Associates	$ 373.36
AVC Financial	$ 1,118.41
Credit Bureau of Billing	$ 126.97
Discover Card	$ 1,523.60
First Security Bank	$ 4,948.02
First Union Visa	$ 498.09
GM Card	$ 5,100.00
Medical Reference Lab	$ 28.80
Norwest Bank	$ 527.53

Only three of the listed unsecured creditors filed claims with the Court utilizing Official Bankruptcy Form 10, or a similar form, before the claims bar date.

On April 4, 1996, twenty-two days after the expiration of the claims bar date, the Debtors' filed an amended plan (Second Plan). The Second Plan eliminated all unsecured creditors that had not filed proofs of claim (omitted unsecured creditors) from the list of Class 7 creditors. The amendment thus eliminated $7,245.63 in previously listed unsecured claims, but continued to provide a 100% return to the remaining Class 7 unsecured creditors.

At the uncontested confirmation hearing for the Second Plan, the Court inquired regarding the deletion of the omitted unsecured creditors. The Debtors' attorney indicated that: a) the language of both the First and Second Plans provided that only allowed unsecured claims would be paid, b) the omitted unsecured creditors did not file claims, and c) the listing in the First Plan did not constitute the filing of allowed unsecured claims for the omitted unsecured creditors. The Court continued the confirmation hearing to July 11, 1996, to allow the Debtors to file certain amendments

not relevant hereto, and to resolve the issue of whether the listing of the omitted unsecured creditors in the First Plan created allowed unsecured claims. This Court has jurisdiction to consider this core issue pursuant to 28 U.S.C. § 157(b)(2)(L).

ANALYSIS

The significance of the pending issue results from the longstanding practice in this jurisdiction of chapter 13 debtors filing what have become known as "Cole" claims by listing creditors and the amounts of their claims in chapter 13 plans to enable creditors to receive disbursements under the plans, although neither the creditors nor the debtors file formal proofs of claim. Chapter 13 plans list a variety of "Cole" claims for secured, priority, unsecured and "special" claims, e.g., child support, alimony, student loans, co-signed debt or other claims for which debtors want to ensure payment. This practice arose out of a 1983 ruling in four chapter 13 cases in which one or more creditors failed to file proofs of claim within the time limits prescribed by the applicable rules. *In re Cole*, No. 81M-00299 (Bankr. D. Utah June 23, 1983).[1]

In *In re Cole*, the standing chapter 13 trustee refused to pay creditors according to confirmed plans because the creditors failed to file timely proofs of claim. Either the creditors filed motions to allow the late filing of proofs of claim or to recognize lost claims, or the debtors filed

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[1] *In re Cole* reviewed the applicability of Rule 13-302(e) of the Bankruptcy Rules of Procedure, promulgated under the Bankruptcy Act, to the administration of Chapter 13 cases under the Code. In each of the four cases encompassed in *In re Cole*, debtors included secured creditors in their plans, despite the fact that the creditors failed to file claims, the claims were lost, or the debtors filed claims for the creditors. After determining that Rule 13-302(e) was not inconsistent with and continued to apply to the Code, the court found that where creditors had not filed claims, 11 U.S.C. § 501(c) gave the debtor or the trustee authority to file a proof of such claim reasoning that "[t]he deadline for filing in Rule 13-302(e) is for the benefit of the debtor, trustee, or co-debtor, not the creditor." *In re Cole*, No. 81M-00299 (Bankr. D. Utah June 23, 1983) at 8-9.

motions to permit the late filing of proofs of claim on the creditor's behalf.[2] The *Cole* opinion held that where the debtors' confirmed plans provided for the payment of listed secured claims, the express provisions amounted to consents and requests by debtors to have creditors participate under confirmed plans and had the same effect as the filing of a proof of claim by a debtor. Because of the language in *In re Cole* that the provisions in a debtor's plan had the same effect as the filing of a proof of claim by the debtor, the practice arose of including unsecured claims for payment in plans without the debtor filing a formal proof of claim on behalf of the creditors.

In this case the Debtors assert, contrary to the practice that has evolved because of the *Cole* ruling, that inclusion of the omitted unsecured creditors in the First Plan did not have the same effect as the filing of a proof of claim by the Debtors. As with all such issues, the beginning point is the language of the statute. The Code provides that a creditor may file a proof of claim. 11 U.S.C. § 501(a). If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim. 11 U.S.C. § 501(c).

The Federal Rules of Bankruptcy Procedure clarifies the method of filing claims in a chapter 13 case. Fed. R. Bank. P. 3001 provides:

> (a) **Form and Content**. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.
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> (b) **Who May Execute.** A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

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[2] In 1983, the Bankruptcy Rules of Procedure provided an unlimited amount of time for the debtor or the trustee to file claims for creditors. *In re Cole*, No. 81M-00299 at 8.

Fed. R. Bankr. P. 3002 states:

> (a) **Necessity for Filing.** An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.
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> (b) **Place of Filing.** A proof of claim or interest shall be filed in accordance with Rule 5005 [with the clerk in the district where the case under the Code is pending].
>
> (c) **Time for Filing**. In a . . . chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to §341(a) of the Code.[3]

Former Bankruptcy Rule 303 permitted only the filing of tax and wage claims by the debtor. However, 11 U.S.C. § 501(c) permits the filing of a claim by the debtor or trustee on behalf of any creditor, and Fed. R. Bank. P. 3004 was changed in 1987 to provide as follows:

> If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to §341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), which ever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant of Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee.

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[3] Former Bankruptcy Rule 13-302(e) stated:

(e) Time for Filing.

(1) Secured Claims. A Secured claim, whether or not listed in the Chapter XIII statement, must be filed before the conclusion of the first meeting of creditors in the Chapter XIII case unless the court, on application before the expiration of that time and for cause shown, shall granted a reasonable, fixed extension of time. Any claim not properly filed by the creditor within such time shall not be treated as a secured claim for purposes of voting and distribution in the Chapter XIII case. Notwithstanding the foregoing, the court may permit the later filing of a secured claim for the purpose of distribution by the debtor, the trustee, or a codebtor.

(2) Unsecured Claims. Unsecured claims, whether or not listed in the Chapter XIII Statement, must be filed within 6 months after the first date set for the first meeting of creditors in the Chapter XIII case.

The revisions of 1983 to the Fed. R. Bankr. P. changed the time limits for the filing of claims in chapter 13 cases from six months to ninety days after the first date set for the meeting of creditors. The special rule for early filing by a secured creditor in a chapter 13 case contained in former Rule 13-302(e)(1) was eliminated.

The first issue is whether the Debtors' First Plan should be construed as the filing of formal claims by the Debtors pursuant to Fed. R. Bankr. P. 3004. The Debtors' First Plan is timely because it was filed withing the 120-day limit set by Fed. R. Bankr. P. 3004. If a plan first listed a creditor's claim after the 120-day limit from the first date set for the meeting of creditors, 11 U.S.C. § 502(b)(9) as amended in 1994, provides that the claim would be disallowed as untimely. *In re Danielson*, 981 F.2d 296 (7th Cir. 1992), *reh'g denied*, (1993) (a pre 1994 amendment case holding the debtor or trustee must file a proof of claim on behalf of the creditor within thirty days referred to in Rule 3004 or the claim is barred absent a timely extension or showing of excusable neglect). A claim shall be in substantially the same form as the Official Form. The Official Form, often amended, contains a variety of information. To be in substantially the same form, the claim must contain similar information. In this case, the Debtors' First Plan does not list the omitted unsecured creditors as they would appear on Official Form 10. Much of the information is missing, such as the creditor's address, account number, the basis for the claim, the date the debt was incurred, or statement under penalty of 18 U.S.C. § 152(4). The Court concludes that the First Plan does not constitute formal debtor-filed proofs of claim forms for each of the omitted unsecured creditors that the Court could separately docket and for which the clerk could give the notice required by Fed. R. Bankr. P. 3004.

The second issue is whether the First Plan contains informal proofs of claim that could be amended by the applicable creditor to cure any defect in the formality of the claim. This Circuit has adopted the judge-made exception to the literal language of the Code and Bankruptcy Rules that in certain circumstances, a claim may be given the status of an allowed claim even if it does not contain the formality set forth in Official Form 10. In *Clark v. Valley Fed. Sav. & Loan*

Assoc. (In re Reliance Equities, Inc.), 966 F.2d 1338 (10th Cir. 1992), the Tenth Circuit adopted the doctrine that certain late filed claims should be considered merely as amendments of earlier, timely-filed informal claims. Informal proofs of claim, or claims that are in some way defective or lacking in the formal requirements of content and filing, can under certain circumstances, be construed by the court as sufficient to allow an amendment that cures the original defect and relates back to the original filing of the claim.

The informal proof of claim doctrine has its roots in the 1898 Bankruptcy Act and case law established close to the turn of the century. Justice Holmes held that a defective proof of claim that was timely filed with the court could be untimely amended after the time for filing expired. *Hutchinson v. Otis*, 190 U.S. 552 (1903) (creditor with a contingent claim filed a timely though defective proof of claim but was allowed to file a substituted proof of claim after the claims bar date since the claim upon which the original proof was made was the same as that ultimately proved). A parallel version of the doctrine allowed amendments of timely but defective claims filed with the trustee rather than the court. The Supreme Court ruled that creditors' claims were considered filed on the date of delivery to the trustee, if the original claims were timely filed with a trustee because the trustee was an officer of the court. *J.B. Orcutt Co. v. Green*, 204 U.S. 96 (1907) (General Order 21 providing that proofs of debt received by a trustee shall be delivered to the referee to whom the cause was referred, was not inconsistent with Section 57(c) of the Bankruptcy Act that provided that claims, after being proved, may be filed by the claimants in the court where the proceedings are pending, because the statute did not prohibit the claim being filed somewhere else prior to their allowance). *See also In re Kessler*, 184 F. 51, 53 (2d Cir.1910) (defective claims of creditors that did not contain a verification under oath, any statement of

consideration, or any statement whether any securities were held as collateral, forwarded to trustee by assignee under assignment for the benefit of creditors, contained facts sufficient to authorize amendment of defects although time for filing proofs of claim had expired).

Collectively, the line of cases evolved into the policy of liberality of amendments. This liberality was limited only by the provision that no new action could be alleged by amendment. *Conway v. Union Bank of Switzerland*, 204 F.2d 603, 606 (2nd Cir. 1953) *cert. dismissed*, 350 U.S. 978 (1956) (since *Hutchinson* it has been commonplace in bankruptcy that a claim may be amended to conform to the required formalities, provided the cause of action is the same); *Unioil v. H. E. Elledge (In re Unioil)*, 962 F.2d 988, 992 (10th Cir. 1991) (amendment of a proof of claim is freely granted, but the court should not allow truly new claims to proceed under the guise of amendments).

In sum, there is a lengthy history to the doctrine of informal proofs of claim based on equitable considerations. But all cases required some action on behalf of the creditor, or the creditor and debtor in concert, evidencing an intent to hold the estate liable before the document constitutes an informal proof of claim. *First Nat'l Bank of Woodbury v. West (In re Thompson)*, 227 F. 981, 983 (3rd Cir. 1915) (whether formal or informal, a claim must show, as the word itself implies, that a demand is made against the estate, and must show the creditor's intention to hold the estate liable). In *Reliance Equities*, the Tenth Circuit applied a five-part test to determine whether an informal proof of claim exists. The test is:

1. the proof of claim must be in writing;
2. the writing must contain a demand by the creditor on the debtor's estate;
3. the writing must express an intent to hold the debtor liable for the debt;
4. the proof of claim must be filed with the Bankruptcy Court; and
5. based on the facts of the case, it would be equitable to allow the amendment.

Reliance Equities, 966 F.2d at 1345. Applying the five-part test stated in *Reliance Equities* to this case indicates the following. The listing of the creditors in the First Plan was in writing. It was filed with the Bankruptcy Court and not a third party. The Debtors filed the Second Plan after the expiration of the claims bar date, and the possibility that the omitted unsecured creditors may have relied upon the listing in the First Plan makes it equitable that the First Plan be deemed to contain informal proofs of claim susceptible of amendment by the omitted unsecured creditors. The First Plan thus satisfies three of the five elements set forth in *Reliance Equities*. The First Plan cannot, however, meet the two remaining tests.

The First Plan is not a demand by the creditor on the debtor's estate, neither does it express an intent to hold the estate liable for the debt. The District Court of Colorado has held that a chapter 13 plan cannot serve as an informal proof of claim for an unsecured claim for which no proof of claim was timely filed. *In re Babbin*, 160 B.R. 848, 849 (D. Colo. 1993). The District Court, in reversing the Bankruptcy Court, stated:

> The critical element of this *[Reliance Equities]* test in this case is the second, which requires that the writing be a demand by the creditor on the debtor's estate. Only a debtor may file a Chapter 13 Plan. 11 U.S.C. § 1321. Because a Chapter 13 Plan does not include a demand by a creditor, it cannot serve as an informal proof of claim for an unsecured claim for which no proof of claim was timely filed.

Id at 849. *Accord Grubb v. Pittsburgh Nat'l Bank (In re Grubb)*, 169 B.R. 341, 348 (Bankr. W.D. Pa. 1994). Neither does the First Plan constitute a creditor's intent to hold the estate liable for the debt. Instead the First Plan expresses the Debtors' intent to pay the claim, or to provide a mechanism short of complying with Fed. R. Bankr. P. 3004, for satisfaction of the claim through payments under the plan. This kind of inclusion in a plan provides protection for debtors from creditors who may not share in the estate and thus seek payment from co-debtors, whose claims may not be

discharged, or from creditors who may seek to lift the stay to realize upon their collateral. But the First Plan does not evidence an intent that the estate be held liable as this concept has been used in the case law.[4]

The Debtors' First Plan did not create timely filed informal allowed unsecured claims for the omitted unsecured creditors under the *Reliance Equities* test. This result, however, is at odds with the prevailing practice in this jurisdiction. It is detrimental to creditors that may have been lulled into relying on the face of debtors' plans instead of filing proofs of claim. It may adversely affect the Chapter 13 Trustee who has paid creditors based upon the listing in confirmed plans, although those creditors have not filed proofs of claim. It may also adversely affect debtors who have protected themselves and co-debtors by listing creditors they wish paid in their plans, rather than timely complying with Fed. R. Bankr. P. 3004, as they should have and must do in the future.[5]

Therefore, to mitigate against any adverse impact to parties, this ruling will be effective generally beginning with chapter 13 cases filed on or after July 1, 1996. The ruling is not retroactive, nor does it effect any case specific rulings in any case filed before July 1, 1996.

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[4] *See e.g., In re Franciscan Vineyards, Inc.*, 597 F.2d 181 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980) (letter with two tax bills enclosed sent to trustee and not forwarded to referee were construed as an implicit intent to collect from the estate and therefore constituted an informal proof of claim for purpose of allowing amendment); *Sun Basin Lumber Co. v. U.S.*, 432 F.2d 48 (9th Cir. 1970) (although a creditor's purpose in submitting a timely filed objection to petition to sell real estate and to petition to reclaim property with the court was to recover the property covered by the mortgage and security agreements and not to assert a proof of claim, they constituted an implicit intention to collect from the estate).

[5] Debtors cannot complain that compliance with Fed. R. Bankr. P. 3004 is burdensome in that it requires a signature on proofs of claim under penalty of perjury. Chapter 13 plans have long been signed by debtors and their attorneys who do so under the provisions of Fed. R. Bankr. P. 9011 that requires investigation into the amount and nature of the claims listed in the plans.

CONCLUSION

The First Plan did not constitute the filing of allowed unsecured claims for the omitted unsecured creditors. Therefore, the amendment of the Second Plan, post bar date, does not constitute a bar to confirmation as the improper elimination of timely filed unsecured claims. However, given the prior practice in this jurisdiction, the omitted unsecured creditors may have relied to their detriment on the First Plan. It is therefore

ORDERED, that the Debtors in this case give specific notice to the omitted unsecured creditors of the changes between the First and Second Plans and the effect of those changes, so that the omitted unsecured creditors may file any objections, timely or otherwise, to the good faith of the Debtors' Second Plan or raise any other bars to confirmation.

DATED this 28 day of June, 1996.

JUDITH A. BOULDEN
United States Bankruptcy Judge

THIS ORDER/JUDGMENT
ENTERED

JUN 28 1996

DEPUTY CLERK
U.S. BANKRUPTCY COURT