IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re Cole,	)	Bankruptcy No. 81M-00299
In re Landers,	)	Bankruptcy No. 80M-02353
In re Phelps,	)	Bankruptcy No. 79M-01520
In re Mascaro,	)	Bankruptcy No. 81M-00565
Debtors.	)	MEMORANDUM OPINION

These cases present the question of 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. The Rule provides time limits for the filing of proofs of claims as follows:

> (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 grant 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 rule then lists exceptions not applicable herein.

The facts of these four cases are similar in that each involves one or more creditors who failed to file a proof of claim within the time limits prescribed by the rule. In Landers, the debtors filed their Chapter 13 petition on November 18, 1980; the meeting of creditors was held on December 19, 1980. Kennecott Credit Union was listed as a secured creditor in the debtors' schedules and was provided for in the plan. The debtors' plan was confirmed on March 10, 1981. There was no proof of claim on file for Kennecott and the trustee did not disburse funds to it. On February 3, 1982, Kennecott filed a motion to allow its late filing of a proof of claim, alleging that in February or March of 1981, a claim had been filed, but was apparently lost. The debtors objected to the motion to allow Kennecott's claim.

In Phelps, debtors filed their Chapter 13 petition on December 12, 1979; the meeting of creditors was held on January 2, 1980. Peoples First Thrift was provided for in debtors' plan as a secured creditor, to the extent of the value of its security. No proof of claim appeared on file and the trustee did not disburse any funds to Peoples. On June 3, 1982, the creditor made a motion to recognize a lost claim, filing an affidavit which stated that a proof of claim had been timely filed, but apparently lost. On July 19, 1982, this court ruled that, based upon the affidavit, the claim was deemed allowed; therefore, it

was unnecessary to consider a late-filed claim. On July 30, 1982, however, the trustee filed a motion seeking reconsideration of this order.

The Mascaro case was commenced on February 23, 1981, by the filing of a Chapter 13 petition. The §341 meeting was held on March 27, 1981. Debtors' plan, which was confirmed on September 1, 1981, provided for payment of two secured claims to Zions Bank. On November 20, 1981 and March 11, 1982, the debtors filed proofs of claims for Zions. On June 25, 1982, Zions filed its own proof of claim. The trustee objects to the claims filed by Zions and in its behalf.

In Cole the debtor filed his Chapter 13 petition on February 3, 1981. The meeting of creditors was held on March 6, 1981 and the plan confirmed on May 6, 1981. The plan provided for payments to Utah Central Credit Union as a secured creditor; however, no proof of claim was filed by this creditor until June 30, 1982. On May 3, 1982, a proof of claim was filed by the State Department of Recovery Services on behalf of Donna Rogers, the debtor's ex-wife.

The debtor's motion to amend his plan to include these two creditors was denied. Debtor then made a motion to permit the late filing of proofs of claims for these two creditors, as well as six other unsecured creditors.

On June 4, 1982, the Internal Revenue Service filed a proof of claim in the amount of $9,076.51 as an administrative claim, and a proof of claim for $19,194.00 as an unsecured priority

claim. On June 29, the court denied relief with respect to the Department of Recovery Services. But this order was later vacated, the claim to be considred with the other similarly situated claims under advisement.

There is a split of opinion in the reported case law as to whether Rule 13-302(e) applies to Chapter 13 cases filed under the Code. The problem is that the Rule was promulgated for Bankruptcy Act procedures, while significant changes in the substantive law under the Code have suggested new procedures. The Interim Rules and each court's local rules are intended to help fill temporarily the procedural lacuna created by major substantive changes. Section 405(d) of the Reform Act attempts to cover the remaining gap by providing that during the transition period the rules promulgated under the Act shall continue to apply to the extent not inconsistent with the Code. This is the point at which the courts have diverged: is Rule 13-302(e) inconsistent with the Code?

The cases holding that the Rule is inconsistent focus on the difference between Chapter XIII under the Act and Chapter 13 under the Code. In an Act case, the first meeting of creditors and the confirmation hearing were both held on the same day. Secured creditors had an absolute veto of the debtor's plan; confirmation required either that the secured creditor accept the plan or that he be dealt with outside the plan.

Under the Code, secured creditors no longer have life and death control over confirmation. The court may approve a plan notwithstanding creditors' rejection of the plan if the requirement of Section 1325(a)(5)(B) are met. The timing of the §341 meeting and the confirmation hearing no longer coincide. Depending upon each court's scheduling, the intervening time may be as short as one month or it may extend beyond six months.

Using this analysis, courts have reasoned that there is no longer any meaningful purpose for an early bar date for filing proofs of claims. In re Busman, 5 B.R. 332 (E.D.N.Y., 1980); In re Musgrove, 4 B.R. 322 (M.D.Fa., 1980); In re Isaacs, 19 B.R. 903 (D. Md., 1982); In re Beman, 18 B.R. 90 (S.D.N.Y., 1982); In re Corbett, 27 B.R. 442 (W.D. Mo., 1983).

Each of these courts recognized, of course, that there must be some cut-off date for the filing of proofs of claims. The consensus found the date of the confirmation hearing to be the appropriate deadline although one court held that claims filed before the Chapter 13 case is closed may be allowed absent a showing of prejudice to the debtor. In re Corbett, supra.

The other line of cases holding that the Rule is not inconsistent with the Code relies upon legislative history as well as administrative considerations. In re Hines, 7 B.R. 415 (D. S.D., 1980); In re Remy, 8 B.R. 40 (S.P. Ohio, E.D., 1980); In re Deroche, 17 B.R. 536 (D. Maine, 1982); In re Pennetta, 19 B.R. 794 (D. Colo., 1982).

Section 501 states simply that "a creditor may file a proof of claim." While the legislative history indicates that this section is indeed permissive, comments by the House Judiciary Committee support the continuing validity of Rule 13-302.

> The Rule of Bankruptcy Procedure will set the time limits, the form, and the procedure for filing, which will determine whether claims are timely or tardily filed. The Rules governing time limits for filing proofs of claims will continue to apply under section 405(d) of the bill. H.R. Rep. No. 595, 95th Cong., 1st Sess. 351 (1977).

Collier interprets this history as follows:

> Accordingly, insofar as existing Rule 13-302(e)(2) fixes a time within which claims are to be filed in Chapter XIII cases under the 1898 Act, and since there is nothing in new chapter 13 comparable to the provisions of chapter 11 dealing with claims "deemed to be filed", it follows that until the rules are changed, a six-month period in chapter 13 cases will remain the rule for unsecured claims, and the date of the meetings of creditors under section 341 of the Code will remain the limit for the filing of secured claims. Collier on Bankruptcy, 15th Ed., 3:501.02 at 501-42.2.

The courts finding in favor of the Rule also draw support from policy considerations. The Rule serves to enhance the smooth administration of the estate, to facilitate formulation of a plan, and to distribute funds to creditors. Judge McGrath, in In re Pennetta, supra, explained:

> [T]here must be a specific time, after which the court, the debtor, the trustee, the creditor, and anyone else involved, will know that the last claim has been filed. Without a date certain, the

> - administration of a case would be unwieldly, at best, and chaos, at worst (citation omitted).

This court is persuaded that Rule 13-302(e) is not inconsistent with the Code; it is awkward, but not inconsistent.[1] Thus it continues to apply to Chapter 13 cases filed under the Code. The legislative history noted above compels this result. To find an inconsistency between the Code and the Rules, there must be some apparent or overt conflict. "Inconsistency cannot be inferred from Code silence. . . to the contrary, Code silence implies acquiescence . . ." In re Hines, 20 B.R. 44 (S.D. Ohio, W.D., 1982), at 48. Furthermore, while the Code has effectuated certain modifications in Chapter 13 cases, the necessity for a bar date for filing proofs of claims still remains. Rule 13-302(e) has already set a bar date: this court has no statutory authority to change it.

Accordingly, if a secured creditor has not filed his proof of claim before the conclusion of the meeting of creditors, his claim will not be treated as secured for purposes of distribution. An unsecured creditor who fails to file a proof of claim within six months of the §341 meeting will receive no disbursement under the plan.

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1 In the new --not yet effective--rules promulgated by the Supreme Court, Rule 3002(c) eliminates this awkwardness by providing that in a Chapter 13 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..."

The Code provides, however, that if a creditor does not timely file a proof of claim, the debtor or trustee may file a proof of such claim. 11 U.S.C. Section 501(c). There is no time limit in the Code or the Rules for the filing of such a claim.

The deadline for filing in Rule 13-302(e) is for the benefit of the debtor, trustee, or co-debtor, not the creditor. When the debtor or the trustee wants a claim to be included for purposes of distribution under the plan, the debtor or trustee need merely file a proof of claim on behalf of the creditor who has failed to file timely. Of course, practicalities will impose time limits on the filing of even these claims, but those limits do not apply to the facts before this court.

In Mascaro, the debtors did file proofs of claims on behalf of the secured creditor, Zions. Based upon this alone, Zions is entitled to payment of its secured claims.

Indeed, the debtors' plan, confirmed by the court, provided for the payment of these two secured claims. This express provision amounts to a consent and request by the debtor to have the creditor participate under the plan. It has the same effect as the filing of a proof of claim by the debtor. For purposes of determining whether a creditor will receive disbursements under a Chapter 13 plan, the specific inclusion of a creditor in the plan constitutes the filing of a claim by the debtor in behalf of that creditor. Such a claim may be later amended by the debtor, trustee, or creditor, consistent with the usual strictures on

claim amendments. This result comports with the policy of payment to creditors in a Chapter 13 case. Providing for payment of creditors out of future earnings is often the only effective way in which the debtor can resolve his financial problems. The Chapter 13 plan is developed and confirmed based upon the premise that the creditors listed in the plan will be paid the amounts provided for in the plan. The filing of proofs of claims is not a prerequisite to the confirmation of a plan. Confirmation depends upon the plan meeting the statutory criteria of Section 1325 and upon the projected ability of the debtor to fund the plan. Where the debtor has made a specific provision for a creditor in the Chapter 13 plan, there is no policy reason why such payment should not be made.

The secured claims in Landers, Phelps , Mascaro and Cole were filed by their inclusion in the debtors' plan and must be paid accordingly.

The unsecured claims at issue in the Cole case fall into two categories. Donna Rogers, Utah Power & Light and various medical bills were included in debtor's motion to allow late filing of proofs of claims. The Internal Revenue Service was not.

If the debtor wishes to pay certain pre-petition claims under his plan, he need only file the proofs of claims pursuant to Section 501(c). The claim of the I.R.S. merits separate treatment because the debtor did not file a proof of claim for

the creditor and does not wish to include it in the plan. The allowance or disallowance of the I.R.S. claim will depend upon whether the creditor's proof of claim was timely filed.

It is the position of the I.R.S. that its claim against the debtor is a post-petition claim within the definition of Section 1305(a)(1) for taxes that became payable while the case was pending. The I.R.S argues as follows: The tax claim against the debtor did not become payable until it was assessed. The taxes against the debtor were not assessed until after he had filed his tax returns. Since the tax returns for the years 1972-79 were filed in April of 1982 and the 1980 return in September of 1981, months after the filing of the petition, the taxes became payable while the case was pending. Section 1305 contains no time limit for the filing of proofs of post-petition claims and so the June 4, 1982 proof of claim filed by the I.R.S. is timely and should be allowed.

A determination of whether the government's reliance on Section 1305 is correct requires an analysis of the relationship between the date of assessment and the "become payable" language of the Code. "Date of assessment" is a well-established tax law concept and is generally defined as the earliest time at which the amount of tax is definitely ascertained. See United States v. Dixieline Financial, Inc., 594 F.2d 1311 (9th Cir., 1979). That is not to say, however, that there is no amount owing before the time it is definitely ascertained.

The Internal Revenue Code indicates that a tax is indeed payabale before it is assessed. Section 6151(a) of Title 26 states:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

The language of this statute leads to the inescapable conclusion that a tax is payable on the date the return is due.

This conclusion comports with a common sense approach to the problem. It is hard to conceive of the government arguing that a taxpayer owed nothing, that no tax was payable, because there had been no return filed. This, however, is the logical extension of the position taken in this case.

The proof of claim filed by the I.R.S. also militates against a finding that the tax arose post-petition. The document includes interest charges for 1972-79 as well as a penalty in the amount of $2,473.22. Apparently the I.R.S. considered the tax to be payable at a much earlier date and used such date as a basis for the imposition of the additional charges.

The relevant dates for purposes of determining when Cole's taxes became payable under Section 1305 are the dates when the returns are originally due--not the dates of assessment, and not the dates when the returns were filed. Taxes for the years

1972 through 1979 became payable on the 15th of April of each subsequent year. Consequently, all of these amounts are pre-petition debt.

As to its claim in Cole, the I.R.S. is an unsecured creditor and must comply with the time limitations for filing proofs of claims. As stated earlier, Rule 13-302(e) applies; since the I.R.S. proof of claim was filed later than six months after the meeting of creditors, the claim is disallowed. The taxes for 1980 became payable on April 15, 1981; the taxes for 1981 became payable on April 15, 1982. These amounts are post-petition claims within the parameters of Section 1305 and are therefore allowed.

DATED this 23 day of June, 1983

Ralph R. Mabey
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re	)	
	)	
LEROY JAY COLE,	)	Bankruptcy Case No. 81-00299
	)	
RONALD DENT LANDERS, SR. and MARY ELLEN LANDERS,	)	Bankruptcy Case No. 80-02353
	)	
RICHARD S. PHELPS and PATRICIA ANN PHELPS,	)	Bankruptcy Case No. 79-01520
	)	
LELAND JAMES MASCARO and SHERI DAWNE MASCARO,	)	Bankruptcy Case No. 81-00565
	)	
Debtors.	)	O R D E R

Pursuant to the motion of the standing chapter 13 trustee for an order clarifying the effective date and the applicability of the court's memorandum opinion, entered in the above-entitled cases, the court issues the following order:

The effective date of the opinion is July 8, 1983, the date upon which it was docketed. The opinion is not retroactive in that it has no effect on chapter 13 cases in which the plan was confirmed prior to July 8, 1983 with the exception of the cases set forth in the caption. However, chapter 13 cases which were filed before July 8, but in which confirmation of a plan was still pending as of July 8, would be subject to the memorandum opinion. A fortiori, cases filed after the effective date are subject to the opinion.

DATED this 14th day of September, 1983.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE