AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

CONCURRENT SESSION

Consumer Session

Lien on Me!

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2023

Consumer Session – Lien on me!

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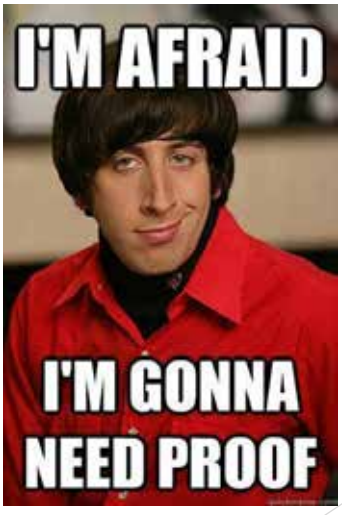
- When should I file a claim?
- Is there a downside to filing a claim?
- What should I attach to a proof of claim?
- What if I miss the bar date?
- Is my lien perfected?
- How can I retain my lien?
- When can my lien be stripped?
- Will I receive interest on my claim?
- When can I get stay relief?
- Rule 3002.1
- Reverse Mortgages
- Tax (priority) v. Penalty (no priority)

Fed. R. Bankr. P. 3002(a)

"A secured creditor, unsecured creditor, or equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim."



Rule 3002(c) Time for Filing

Voluntary chapter 7 case, chapter 12 case, or chapter 13, **not later than 70 days** after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13.

Involuntary chapter 7, **not later than 90 days** after the order for relief under that chapter is entered.

11 U.S.C. § 502(b)(9)

Claim will not be allowed if an objection is filed due to untimeliness, *except* to the extent tardily filed as permitted under

- 11 U.S.C. § 726(a)(1):
  on or before the earlier of—
  (A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or
  (B) the date on which the trustee commences final distribution under this section;

- 11 U.S.C. § 726(a)(2):
  tardily filed under section 501(a) of this title, if—
  (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and
  (ii) proof of such claim is filed in time to permit payment of such claim; or

- 11 U.S.C. § 726(a)(3):
  proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection; or

- under the Federal Rules of Bankruptcy Procedure.

Exceptions

Rule 3002(c)(1) Government Claims

The government has no later than 180 days after the date of the order for relief to file a proof of claim, other than for a claim resulting from a tax return filed under § 1308.

If the proof of claim results from a tax return filed under § 1308, then the government has 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return.

Court can enlarge the government's time period, but only on motion of the government made before the time period expires.

Charles v. Charles (In re Charles), No. 4:21-CV-2061, 2022 WL 4747499 (S.D. Tex. Sept. 30, 2022), *appeal docketed*, No. 22-20552 (5th Cir. Oct. 19, 2022)

- Debtor filed claim on creditor's behalf before the deadline for claims by governmental units but after the deadline for claims by all other creditors
- Unsecured creditor objected to claim as untimely
- Court rejected argument that claim for student loans was claim by governmental unit
- Loan servicer did not qualify as governmental unit or agent thereof because:
  - there was no evidence showing that the Department of Education:
  - owns the servicer,
  - provides it with financial support,
  - controls its operations,
  - regulates it extensively, or
  - has any meaningful connection with it beyond the servicing contract;
  - servicer could file proof of claim on its own, and
  - no evidence that agency principles could be used to bind the Department of Education to a proof of claim filed by the servicer

Rule 3002(c)(2) Infants or Incompetent Persons

Court may extend time for them "[i]n the interest of justice and if it will not unduly delay the administration of the case . . . ."

Rule 3002(c)(3) Judgment Claim

Within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property.

If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

Rule 3002(c)(4) Rejection of Executory Contract or Unexpired Lease of the Debtor

within such time as the court may direct

Rule 3002(c)(5) Payment of Dividends

"If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed."

Rule 3002(c)(6) Extensions of Time to File Proofs of Claims

- Creditor's motion, before or after expiration of time to file proofs of claims
- Time may be extended not more than 60 days from date of order granting motion
- Court finding that notice insufficient under circumstances to give creditor reasonable time to file proof of claim

Rule 3002(c)(7) Holder of Claim Secured by Debtor's Principal Residence

- not later than 70 days after the order for relief is entered; and
- not later than 120 days after the order for relief is entered to file any attachments required by Rule 3001(c)(1) and (d) as a supplement

Necessary Documentation

Rule 3001(f)

"A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."

What should I attach to a proof of claim?

Fed. R. Bankr. P. 3001(a)

Written statement setting forth the claim conforming substantially to the appropriate Official Form.

Official Form 410:
https://www.uscourts.gov/sites/default/files/form_b_410.pdf

Fed. R. Bankr. P. 3001(c)

Supporting Information

Rule 3001(c)(1) Claim Based on Writing

- (c)(1) applies except if claim is based on open-end or revolving consumer credit agreement
- copy of writing
- if writing lost or destroyed, statement of circumstances of loss or destruction

Rule 3001(c)(2)
Cases in which Debtor is an Individual

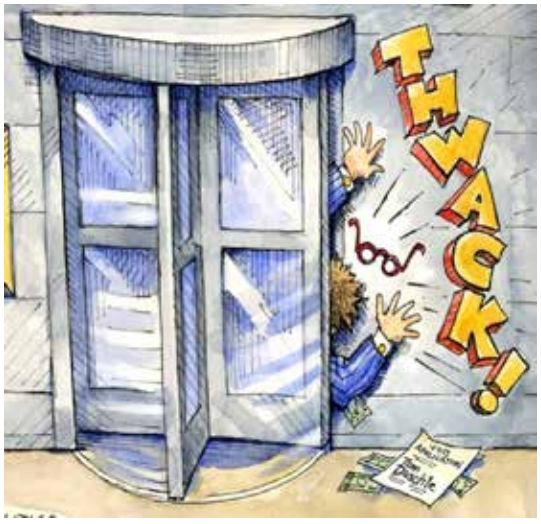
- if claim includes interest, fees, expenses, or other charges incurred before petition was filed, then an itemized statement of these items
- if security interest claimed in debtor's property, amount necessary to cure default as of date petition filed
- if security interest in debtor's principal residence, the attachment prescribed by the Official Form. If an escrow account was established in connection with the claim, the escrow account statement prepared as of the date the petition was filed and in form consistent with applicable nonbankruptcy law

Rule 3001(c)(2)(D)

If information required by 3001(c) is not provided:

After notice and hearing, court may

- preclude the holder from presenting the omitted information in any form as evidence unless failure was substantially justified or harmless; or
- award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure



Rule 3001(c)(3)

claims based on an open-end or revolving consumer credit agreement, but not ones in which security interests are claimed in debtor's real properties

Rule 3001(c)(3)(A)

Statement filed with proof of claim must include the following:

- entity from whom the creditor purchased the account;
- entity to whom the debt was owed at the time of an account holder's last transaction on the account;
- date of an account holder's last transaction;
- date of the last payment on the account; and
- date on which the account was charged to profit and loss.

If party in interest requests in writing information above, the holder of the claim must provide the requesting party a copy of the writing within 30 days after the request is sent.

In re Myers, No. 2:21-BK-11376-NMC, 2022 WL 3012567 (B.A.P. 9th Cir. July 19, 2022), *appeal docketed*, No. 22-60037 (9th Cir. Aug. 19, 2022)

- Even though proof of claim for credit card debt complied with Rule 3001(c)(3), claim was denied for insufficient documentation where the documentation was inadequate under Nevada law
- Nevada law required either an authenticated written credit card application or authenticated evidence that the debtors incurred charges on the account and made payments thereon
- Because the claim couldn't be enforced under Nevada law, it was denied, even though it complied with Rule 3001

But see *In re Barnes*, No. 22-10156-ABL, 2022 WL 4073309 (Bankr. D. Nev. Sept. 2, 2022) (court overruled debtor's objection to claim alleging that creditor failed to produce authenticated evidence of liability and amount owed as required by Nevada law for credit card purchasers because the debtor had scheduled the debt as undisputed and the creditor was an issuer, not a purchaser, of the credit card)

Rule 3001(d)

"If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected."

Rule 3001(e) Transferred Claims

Rule 3001(e)(1), (3) Transfers before Proof of Claim Filed

If for security, and not based on a publicly traded note, bond, or debenture, then the transferor or transferee or both may file a proof of claim for the full amount with a statement setting forth terms of transfer.

If for a claim other than for security, then proof of claim may only be filed by the transferee or an indenture trustee.

Rule 3001(e)(2), (4) Transfers after Proof of Claim Filed

If for security, and not based on a publicly traded note, bond, or debenture, then must file evidence of terms of transfer.

If for a claim other than for security, then must file evidence of transfer or terms of transfer.

For both types of claims, the clerk must notify the alleged transferor of the evidence of transfer. If the transferor objects, the transferor must do so within 21 days of the mailing or within any additional time allowed by the court.

Downsides to Filing Claims

What if I miss the bar date?

In re Luera & Paz, 647 B.R. 886 (Bankr. S.D. Tex. 2022)

- Amended proof of claim filed almost 900 days after the bar date
- Related back to timely-filed original proof of claim
- Amended proof of claim did not stray beyond perimeters of original claim, as it was merely correcting a calculation error
- Prejudice to debtors was the debtors' fault as the debtors' counsel waited 25 months after the amended proof of claim was filed to object to the claim

In re Wallace, No. 21-31506, 2023 Bankr. LEXIS 445 (Bankr. S.D. Ohio Feb. 9, 2023)

- Plan provided that the creditor must timely file its proof of claim no later than 90 days from the date the plan is confirmed
- Plan stated that if not filed within that deadline, then would be disallowed
- Proof of claim filed within 91 days of when court signed order confirming plan, but within 90 days of when the clerk of court entered the order
- Proof of claim was timely filed
- A judgment becomes effective when it is entered by the clerk on the docket
- Time runs from date of order's entry as noted by clerk on the docket, not the signing date

In re Connell, No. 20-30619-WRS, 2021 WL 811575 (Bankr. M.D. Ala. Mar. 2, 2021)

- Ex-wife's claim was disallowed as it was filed after the bar date and none of the exceptions to the rule setting the claims bar date were applicable

Mondríguez-Torres v. Lopez (In re Lopez), 629 B.R. 322 (B.A.P. 1st Cir. 2021)

- Bankruptcy courts may only enlarge the time for filing proofs of claims as stated in Rule 3002
- Court cannot extend claim deadline in Chapter 13 case based on excusable neglect under Rule 9006(b)(3).

In re Vrusho, 634 B.R. 660, 666 (Bankr. D.N.H. 2021)

- Court should consider following factors in deciding whether to extend claim filing deadline due to insufficient notice to creditors:
  - whether a chapter 13 plan was confirmed,
  - whether the failure to properly list the creditor was caused by inadvertence or was ill-intentioned,
  - whether the creditor acted diligently in bringing its motion under Rule 3002(b)(6),
  - whether the inclusion of the creditor's claim among allowed claims at that juncture in the case would significantly prejudice other creditors or make untenable the chapter 13 trustee's administration of the case,
  - whether the extension of the bar date would prove futile, and
  - whether denying the extension would likely subject the debtor to additional proceedings which might prove costly, frustrate the debtor's efforts to perform under the chapter 13 plan, or impair the debtor's fresh start should a discharge be obtained
  - whether the creditor had actual notice of the bankruptcy notwithstanding the failure to include or accurately list the creditor on the list of creditors
- Here, the creditor received sufficient notice where its attorney received notice of the bankruptcy, which contained the bar date, soon after the bankruptcy filing, and the attorney promptly notified it of the bankruptcy

Plan Provisions Control over Proof of Claim

In re Mastro-Edelstein, 645 B.R. 603 (Bankr. N.D. Ill. 2022)

- Creditor failed to object to confirmation of plan, which provided for specific amount to be paid to cure reverse mortgage
- After plan was confirmed, creditor timely filed proof of claim for several thousand dollars more than plan provided for claim
- Only objected to amount four years after plan was confirmed when the trustee sent the Notice of Payment of Final Mortgage Cure
- Chapter 13 plan controlled over proof of claim as plan provided that it would, and creditor did not object to confirmation of the plan (Unusual provision)

Options when the creditor misses the bar date:

- the debtor or trustee can file a claim on behalf of the secured creditor; *see In re Kielman*, 609 B.R. 818 (Bankr. E.D. Wis. 2019) (debtor may seek an extension of the deadline to file a claim under Rule 3004, which may be enlarged under Rule 9006(b)(1) for excusable neglect)
- the creditor can file an untimely proof of claim, and no party in interest objects
- a party files a motion to allow a late filed claim
- the creditor can file a motion for stay relief

Source: *Claims Secured by Personal Property* presentation by Pamela Simmons-Beasley, Esq., Dennis LeVine, Esq., and Michael J. Watton, Esq. (July 7, 2022, updated June 6, 2023).

Is my lien perfected?

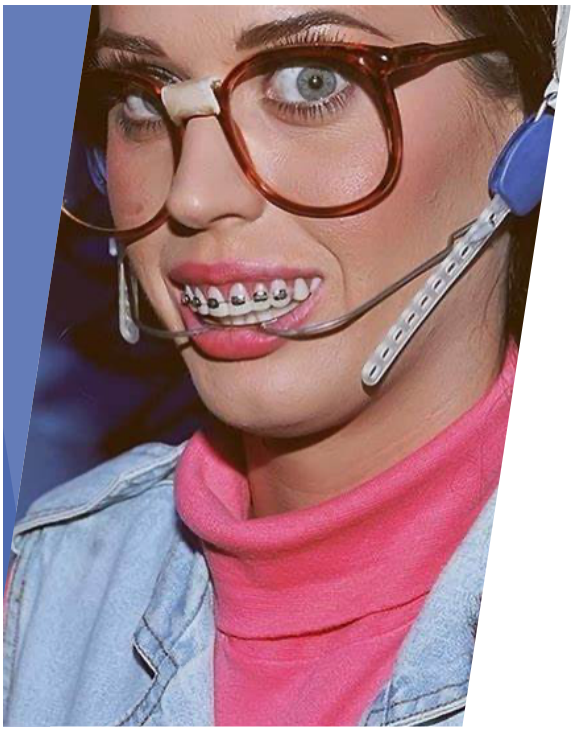
A rose by any other name would *not* smell as sweet….

1944 Beach Blvd., LLC v. Live Oak Banking Co. (In re NRP Lease Holdings, LLC), 50 F.4th 979 (11th Cir. 2022)

- because Florida does not use "standard search logic," a financing statement that does not correctly name the debtor as required by Florida law is "seriously misleading" under Florida Statute § 679.5061(2) and therefore ineffective
- Debtor identified on filing statements as "1944 Beach *Blvd.*, LLC," instead of its legal name, "1944 Beach *Boulevard*, LLC"
- Chapter 11 debtor filed a complaint asserting that the creditor's UCC-1 financing statements were "seriously misleading" under Florida Statute § 679.5061(2) and thus did not perfect the creditor's security interest

- Florida requires filing a financing statement with the Florida Secured Transaction Registry to perfect a security interest
- To be sufficient for protection, the financing statement must contain:
  (1) the debtor's name;
  (2) the secured party's name; and
  (3) a description of the collateral covered by the financing statement
  Fla. Stat. § 679.5011, Fla. Stat. § 679.5021(1)
- Fla. Stat. § 679.5031(1) allows a financing statement to be effective if it substantially complies, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading
- If a mistake is made in the debtor's name, then Florida provides a "safe harbor exception" in Fla. Stat. § 679.5061(3) that the financing statement will be effective to perfect a security interest if a search of the filing office's records under the debtor's correct name, using the filing office's "standard search logic," if any, would disclose the financing statement

- Florida's Registry did not have a "standard search logic" option. Thus, a search under the safe harbor provision of § 679.5061(3) is impossible
- Because it's impossible, there is no safe harbor, and until the Registry uses a standard search logic, a financing statement that fails to correctly name the debtor is "seriously misleading" and therefore ineffective
- 1944 Beach Blvd., LLC ≠ 1944 Beach Boulevard, LLC
- Live Oak's financing statements were "seriously misleading" under Fla. Stat. § 679.5061(2), because they did not sufficiently provide the name of the debtor in accordance with Fla. Stat. § 679.5031(1), and therefore were ineffective to perfect a security interest in the debtor's assets under Florida law



How can I retain my lien?

11 U.S.C. § 1325(a)(5)(B)(i)

The court shall confirm a plan if, with respect to an allowed secured claim, "the plan provides that—

(I) the holder of such claim retain the lien securing such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or
(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law . . . ."

In re Donnadio, 608 B.R. 507, 512 (B.A.P. 6th Cir. 2019)—bankruptcy court erred in confirming plan over creditor's objection when the plan did not provide that the creditor retains its lien on the car as § 1325(a)(5)(B)(i)(I) requires.

Creditor's failure to object to the plan may affect lien retention in Chapter 13 cases

In re Foley, 606 B.R. 790, 791–92 (Bankr. E.D. Wis. 2019)

- Plans included non-standard provisions that deviated from the lien-retention requirements in 11 U.S.C. § 1325(a)(5)(B): "Creditors with secured claims shall retain their mortgage, lien or security interest in collateral until the earlier of (a) the payment in full *of the secured portion* of their proof of claim, or (b) discharge under 11 U.S.C. § 1328." (Emphasis added.)
- No barrier to confirmation because the affected secured creditors accepted the plans
- 11 U.S.C. § 1325(a)(5)(A)—the court shall confirm a plan if, regarding an allowed secured claim provided for by the plan, the holder of the claim accepts the plan
- "[A] properly served secured creditor that declines to object to confirmation has accepted the proposed plan for purposes of § 1325(a)(5)(A)."

If it's a lien based on a mortgage on a debtor's principal residence secured by that residence, then the creditor does not have to do anything to retain the lien, based on the Code's "anti-modification" provision.

Mortgage Corporation of the South v. Bozeman (In re Bozeman), 57 F.4th 895 (11th Cir. 2023)

The Bankruptcy Code's "anti-modification" provision:

A confirmed plan may "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims . . . ."

11 U.S.C. § 1322(b)(2)

In re Bozeman, 57 F.4th 895 (11th Cir. 2023)

- Debtor's confirmed bankruptcy plan under Chapter 13 modified the secured creditor's rights regarding the mortgage on the debtor's residence
- Plan eradicated all remaining outstanding payments on the mortgage, beyond the claims for past-due arrearages
- After debts identified under her bankruptcy plan were paid off, the debtor moved to have the secured creditor's lien on her home dissolved
- Finality provision: "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a)
- Secured creditor filed a proof of claim for the past-due arrearages, and had notice of the plan but did not object to it
- Question was whether the debtor's payoff of her plan entitled her to satisfaction of the secured creditor's lien on her home

Which provision wins—anti-modification or finality—when the two clash?

Anti-modification Wins

- in § 1322, Congress three times expressly or implicitly protected from modification homestead-mortgage lenders' rights regarding their secured interests in the debtor's principal residence, when the final original payment schedule does not expire before the plan period ends
- declaring a homestead-mortgagee's lien satisfied before the debt the lien secures is paid in full constitutes an impermissible modification of the homestead-mortgagee's rights under the anti-modification provision
- Code's protections of primary-residential mortgage holders' rights forbid releasing a lien before the terms of the primary-residential mortgage are satisfied
- Even though the debtor paid the secured creditor's full arrearages claim through the plan, the secured creditor retains the right to receive the entire balance.
- The Code precludes the plan from modifying the amount that the secured creditor was entitled to under the primary residential mortgage

- the Code affords special protections to homestead-mortgage holders' rights. Although cases recognized the importance of finality, they also said that secured liens survive bankruptcy proceedings
- Distinguished *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) because *Espinosa* was brought under Rule 60(b)(4) and argument in *Espinosa* was that judgment was void
- because releasing the lien before the secured creditor receives full payment would impermissibly modify the secured creditor's rights, the lien must survive the bankruptcy proceeding
- While the finality provision confirms that it is too late to alter the plan, it is not too late for the secured creditor to invoke the Code's special protection for homestead mortgagees
- release of the lien before the loan is repaid in full violates the anti-modification provision
- Until the secured creditor is paid in full, its lien remains intact, and the finality provision does not change that fact

See also In re Ohlsson, No. 21-13936, 2022 WL 16985512 (11th Cir. Nov. 17, 2022)

- Pro se debtor in Chapter 7 case argued secured creditor's failure to file a proof of claim based on a mortgage lien on her residence should invalidate the lien
- Rule 3002 makes clear that failure to file a proof of claim does not invalidate a lien that secures the claim
- 11 U.S.C. § 506(d) provides that a lien securing a claim is not void due simply to the "failure ... to file a proof of such claim."
- failure to file a proof of claim has no effect on the validity of its mortgage lien
- Under Rule 2002(e), in a no-asset Chapter 7 case, no need to file a proof of claim

When can my lien be stripped?

Nat'l Cap. Mgmt., LLC v. Gammage-Lewis, No. 5:10-CV-468-F, 2012 WL 3561785 (E.D.N.C. Aug. 14, 2012), *aff'd*, 523 F. App'x 254 (4th Cir. 2013)

- Creditor's claim against the debtor's car in Chapter 13 case became void under 11 U.S.C. § 506(d) when its claim was disallowed as a secured claim and was allowed as a general unsecured claim
- Trustee objected to secured claim and asked that it be treated as unsecured due to creditor's failure to attach proper documentation that it had a perfected security interest in the car
- Creditor failed to respond to the objection, so bankruptcy court allowed objection, and, by operation of § 506(d), the bankruptcy court found that any claim the creditor may have had against the car became void
- Adversary proceeding may not be necessary where claim objection, in line with Rule 7001(2), "gives clear notice that the debtor is challenging the validity, priority, or extent of the lien and seeks to abrogate a creditor's right to look to its collateral, and the debtor complies with procedural safeguards set forth in Part VII of the Federal Rules of Bankruptcy Procedure."
- Claim objection did that here where it challenged the validity due to a lack of documentation indicating a perfected security interest and advised the creditor of its right to respond and request a hearing
- Based on that and that the Chapter 13 plan provided notice that general and unsecured claims would receive nothing, the objection was an appropriate affirmative action that provided sufficient clear notice to void the claim under § 506(d)

But see *Roman v. CitiMortgage (In re Roman)*, Case No. 14-03686 (ESL), Adv. Proc. No. 14-00255 (ESL), 2018 WL 4801933 (Bankr. D.P.R. Oct. 2, 2018)

- In debtor's second Chapter 13 bankruptcy case, bankruptcy court rejected argument that creditor's claim was unsecured because the claim was disallowed in debtor's first bankruptcy case based on the trustee's objection based on lack of documentation
- The claim arose from a stipulated state court judgment arising from a mortgage foreclosure
- The objection to the proof of claim was based on Rule 3001, which made it a procedural, not substantive, objection
- 11 U.S.C. § 502 provides the grounds for a substantive objection
- The failure to have an allowed claim does not affect the validity or perfection of the creditor's lien
- A discharge merely releases the debtor from personal liability on the discharged debt; when a creditor holds a mortgage lien or other interest to secure the debt, the creditor's rights in collateral, such as foreclosure rights, survive and pass through bankruptcy
- A procedural disallowance is not a substantive adjudication of the validity or extent of a lien
- In the first case, the debtor's request was limited to terminating the disbursement made to the creditor through the plan and didn't address the lien's validity
- *In Re Gammage-Lewis* is different because there, the plan contained a substantial challenge to the extent of the lien over the car and the objection language specifically requested disallowing the claim as a secured claim and to allow it as a general unsecured claim
- Here, no language in plan or objection could put the creditor on notice that its lien was at peril or that it could lose foreclosure rights

Will I receive interest on my claim?

Secured Claims

11 U.S.C. § 506(b)

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, *there shall be allowed to the holder of such claim, interest on such claim*, and any reasonable fees, costs, or charges *provided for under the agreement or State statute under which such claim arose.*

United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)

- Section 506(b) entitles a creditor to receive postpetition interest on a nonconsensual oversecured claim.

Equitable Life Assurance Soc'y v. Sublett (In re Sublett), 895 F.2d 1381 (11th Cir. 1990)

- An oversecured creditor is entitled to postpetition interest and a secured claim created pursuant to an agreement a right to reasonable fees, costs and charges provided for in that agreement under § 506(b), which cannot be disallowed.

Nuvell Fin. Servs. Corp. v. Dean (In re Dean), 537 F.3d 1315 (11th Cir. 2008)

- 910–claims are fully secured under section 1325(a)(5)(B) and not subject to bifurcation; thus, the creditor is entitled to the present value of the entire claim under § 1325(a)(5)(B)(ii), not the value of the collateral securing the claim, with interest calculated to ensure the creditor receives the present value of the claims.

Orix Credit All., Inc. v. Delta Res. (In re Delta Res., Inc.), 54 F.3d 722 (11th Cir. 1995)

- Oversecured creditor not entitled to receive periodic cash payments for accruing postpetition interest as part of adequate protection under 11 U.S.C. § 362(d)(1), to preserve the value of its equity cushion.

Unsecured Claims

11 U.S.C. § 1322(b)(10)—A chapter 13 plan may "provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims . . . ."

11 U.S.C. 101(14A)--"domestic support obligation" includes "interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title . . . ."

In re Moore-McKinney, 603 B.R. 855 (Bankr. N.D. Ga. 2019)

- § 1322(a)(2) mandates that a chapter 13 plan provide for full payment of all claims entitled to priority under § 507, thus requiring paying post-petition interest as part of a DSO claim under § 101(14A) and an exception to the general rule in § 1322(b)(10)

When can I get stay relief?

When the secured creditor lacks adequate protection.

11 U.S.C. § 362(d)

Weyer v. Valley Communities Credit Union, No. 19-CV-926-WMC, 2022 WL 1597293 (W.D. Wis. May 19, 2022)

- Secured creditor failed to file proof of claim in Chapter 13 case for loans secured by vehicles
- Debtors did not file proof of claim on secured creditor's behalf
- Debtors proposed payments to the creditor in the plan, but the trustee didn't make payments to the secured creditor because it didn't file a timely proof of claim
- Debtors also did not pay the secured creditor outside the plan, but retained possession of the vehicles, providing the basis for finding a lack of adequate protection
- Creditor filed a motion for relief from stay based on lack of adequate protection
- Failure to file a proof of claim does not override protections of § 362(d), requiring the court to grant relief from stay for cause, which specifically includes the lack of adequate protection

But see *Matter of Flores*, 649 B.R. 534 (Bankr. N.D. Ind. 2023)

- Disagrees with *Weyer*
- Relief from stay denied as confirmed plan provided to pay car debt in full with interest
- The creditor did not file a claim, so trustee moved to pay it nothing, the creditor failed to object to the motion, and the court granted the motion
- After this modification was granted the creditor filed a motion for relief from stay, but the court denied it as res judicata effect of confirmed plan prevented it from being granted
- Court did not think adequate protection argument had merit as it was a concept for period after filing but before confirmation
- No windfall to debtor because the lien will survive the bankruptcy and the debtor will have to deal with the lien and the car creditor's right to enforce it then

Rule 3002.1 Notice Re: Fees Secured by Security Interest in the Debtor's Principal Residence

In re Guerrero, No. 19-52605-CAG, 2021 WL 809770 (Bankr. W.D. Tex. Mar. 1, 2021)

- Rejects argument that Rule 3002.1 doesn't apply because part of the claim is paid as a total debt claim and the note matures during the plan
- Rule 3002.1 applies because (1) the debtor is in a chapter 13 case, (2) the note secures a claim on the debtor's principal residence, and (3) the debtor's plan provides for the trustee to make contractual installment payments on the mortgage
- Because the secured creditor sought post-petition fees and costs through a fee application and failed to give notice of its fees, expenses, and charges by filing Official Form 410S2 in the claim registry and thus not pursuant to the requirements of Rule 3002.1, the fee application was denied in its entirety

In re Ogar v. Propel Fin. Servs., No. 4:21-CV-1823, 2022 WL 4543198, at *3 (S.D. Tex. Sept. 28, 2022)

- Over-secured mortgage creditor filed a post-petition attorney's fee claim over two years after the work was complete
- The bankruptcy court disallowed the claim, finding that Rule 3002.1 applied, not § 506(b), and 180-day time limit in Rule 3002.1 barred the claim even when entire debt is to be paid through the plan
- District court affirmed, holding that the bankruptcy court acted within its discretion and equity powers

In re White, 641 B.R. 717 (Bankr. S.D. Ga. 2022)

- 3002.1 post-petition fees and expenses not allowed
- could be discharged when plan treated mobile home claim for agreed value with interest factor
- 3002.1 notice only applies in Chapter 13 cases to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments
- The debtor did not dispute that her mobile home was her principal residence
- The plan provision stating that the debtor will make contractual installment payments refers to payments made pursuant to the original contract between the debtor and the secured creditor
- Because the claim was bifurcated under the plan pursuant to § § 1322(b)(5) and 506(a), the creditor no longer enjoyed the benefit of its original contract negotiated with the debtor
- Because the payments weren't made pursuant to the original contract, Rule 3002.1 didn't apply
- The claimed fees were incurred post-petition and before the confirmed plan, thus the debtor will have satisfied the allowed amount of the secured claim and any balance remaining on the unsecured portion of the claim after payment; in accordance with the plan, debt will be discharged under § 1328(a)

Reverse Mortgages

In re Berry, 649 B.R. 319, 323 (Bankr. E.D. Wis. 2023)

- Debtor living in his mother's home was allowed to value reverse mortgage and pay it with an interest factor over five years
- By filing proof of claim, creditor couldn't oppose plan to pay claim by contending that court lacks jurisdiction or that plan's treatment of claim was proposed in bad faith, by means forbidden by law, or was infeasible
- plan does not modify the creditor's rights against the debtor's siblings or their property because it proposes to pay the full amount of the claim as determined by nonbankruptcy law, which is an amount equal to the value of the Property

Tax (priority) v. Penalty (no priority)

United States v. Alicea, 58 F.4th 155, 158 (4th Cir. 2023)

- "Shared responsibility payment" was a tax, not a penalty, and thus was allowed priority status
- Taxes are entitled to priority if they qualify as taxes measured by income or as excise taxes, but penalties are not entitled to priority and must "be dealt with as an ordinary, unsecured claim."
- A tax is an enforced contribution to provide for the support of government; a penalty is an exaction imposed by statute as punishment for an unlawful act
- Supreme Court precedent requires application of a functional analysis that ignores the label given to the exaction and instead considers whether the exaction operates as a tax or a penalty

- In determining claim priority in the context of bankruptcy, an exaction is a tax if it is
  - (a) an involuntary pecuniary burden, regardless of name, laid upon individuals or property;
  - (b) imposed by, or under authority of the legislature;
  - (c) for public purposes, including the purpose of defraying expenses of government of undertakings authorized by it; and
  - (d) under the police or taxing power of the state
- SRP is imposed by the government under its taxing power on a large, identifiable class of people (uninsured, nonexempt taxpayers)
- SRP is collected by the IRS as part of the regular income tax filing process
- SRP serves public purposes, as it raises some amount of revenue for the government and encourages individuals to maintain health insurance, which in turn reduces the expenses of providing medical care to the uninsured borne by governments and medical providers
- statute setting out the method for calculating the SRP, 26 U.S.C. § 5000A(c), contains formulas keyed to individual and household income and thus is a tax measured by income

See also *In re Szczyporski*, 34 F.4th 179 (3d Cir. 2022); *In re Juntoff*, 636 B.R. 868 (B.A.P. 6th Cir. 2022)

In re Clardy, No. 22-30089, 2022 WL 17366085, at *1 (Bankr. W.D. Ky. Dec. 1, 2022)

- Requirement to repay unemployment overpayments was penalty, not tax
- Functional approach using following six factors to determine whether government exaction is tax:
  - An involuntary pecuniary burden, regardless of name, laid upon individuals or property;
  - Imposed by, or under authority of the legislature;
  - For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it;
  - Under the police or taxing power of the state;
  - Pecuniary obligation is universally applicable to similarly situated entities; and
  - According priority treatment to the government claim will not disadvantage private creditors with like claims
- Debtor's liability arises solely by virtue of her inappropriate receipt of benefits. Thus, it is not a liability universally applicable to similarly situated persons or firms


SOOOOO...
ANY QUESTIONS?

Faculty

Hon. Tiffany Payne Geyer is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed by the Eleventh Circuit Court of Appeals on March 25, 2022. Previously, she was a partner with BakerHostetler in Orlando and practiced primarily in the areas of bankruptcy and creditors' rights. Judge Geyer represented both corporate and individual debtors in chapter 11 cases and individuals in chapter 7 cases, and her clients included health care businesses and medical professionals, investment bankers and financial advisors. She also represented clients in the hospitality sectors, assisted in representing debtors in the energy sectors, and negotiated multiple settlements of guarantor liability and assignments for the benefit of creditors. She also represented secured creditors, unsecured creditors, landlords and panel trustees. Judge Geyer has been listed in *Chambers USA* for Bankruptcy/Restructuring in Florida and in *The Best Lawyers in America* in 2020 for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. She began her legal career in Orlando clerking for Bankruptcy Judge Karen S. Jennemann, whose vacancy she filled upon her retirement, and she volunteered at a Florida nonprofit organization devoted to housing and educating young adults struggling with homelessness. Judge Geyer received her B.A. with honors in political science and public administration in 1998 from the University of Central Florida, and her J.D. in 2000 from the University of Florida Levin College of Law, where she received the Book Award for Legal Drafting and was a member of a trial competition team.

Linda B. Gore is a chapter 13 standing trustee in Gadsden, Ala. She previously clerked for Hon. L. Chandler Watson, and in March 1991, she was appointed the chapter 13 trustee and chapter 12 trustee for the Eastern Division of the Northern District of Alabama. Ms. Gore has taught business law for Jacksonville State University in Jacksonville, Ala., and she is an active member of the National Association of Chapter 13 Trustees (NACTT), having served as president, president-elect, vice president, treasurer and secretary; she currently serves on its board. In addition, she serves on the editorial board for the *NACTT Quarterly* and is an author of its case notes section. Ms. Gore has served as a subchapter V trustee since 2020. She received her undergraduate degree with honors from the University of Tennessee at Martin and her J.D. from Cumberland School of Law.

Pamela P. Keenan is a shareholder with Kirschbaum, Nanney, Keenan & Griffin, P.A., in Raleigh, N.C., where she practices in the areas of commercial/business litigation, creditor bankruptcy, and creditors' rights. She is licensed by both the North Carolina State Bar and the State Bar of Texas, and is admitted to practice in all North Carolina District Courts, the U.S. District Court for the Northern District of Texas, the U.S. Courts of Appeals for the Fourth and Fifth Circuits, the U.S. Tax Court, the U.S. Claims Court and the U.S. Supreme Court. Ms. Keenan is a member of the North Carolina Bar Association, the American Bar Association, ABI and the National Association of Chapter 13 Trustees, and she has served in various capacities with both the North Carolina Bar Association's Bankruptcy Council and the North Carolina Creditors Bar Association. She has also served as a contributing editor for the *North Carolina Bankruptcy Manual* and as a member of the Local Bankruptcy Rules Committee for the Eastern District of North Carolina. Ms. Keenan received her B.A. with highest honors from the University of Texas-Arlington and her J.D. from Southern Methodist University, where she was a member of the Order of the Coif.

W. Harrison Penn is an attorney with Penn Law Firm, LLC in Columbia, S.C., and is a certified specialist in Bankruptcy Law with the South Carolina Supreme Court, as well as a member of the South Carolina Bankruptcy Law Association and ABI. He regularly represents complex individual and business clients of varying sizes in chapters 7, 9, 11 and 12, including debtors, creditors, creditor committees, receivers, trustees and other plan-appointed representatives. Mr. Penn has represented clients in various small businesses and industries, including real estate developments, builders, landscape companies, golf courses, trucking companies, manufacturers, hospitals, doctors, grocery store chains, restaurants, churches and automobile dealers. He previously clerked for Hon. David R. Duncan in the U.S. Bankruptcy Court for the District of South Carolina. Mr. Penn is a 2015 Leadership Columbia graduate and volunteers his time serving as guardian *ad litem* for special needs youth, and through programs such as the South Carolina Bar's *Pro Bono* Program, Ask-a-Lawyer and the South Carolina CARE (Credit Abuse Resistance Education) program. Since being admitted to practice in 2008, he has represented clients in many large and complicated bankruptcies in the District of South Carolina. Mr. Penn received his B.A. in government in 2001 from Wofford College and his J.D. in 2008 from Charleston School of Law.