Chapter 13: How to Confirm Your Plan

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How to Confirm your Plan

Eric Goering, Moderator

Judge Gregory Schaaf

Margaret Burks

Faye English

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How to Confirm your Plan

Chapter 13 Best Practices:

1. The following needs to be available at the 341 meeting:
   a. Picture ID
   b. SS card or w2
   c. Bank Statement
   d. Filed stamped deeds & mortgages
   e. Car titles
   f. Retirement statements
   g. Life ins. policies
   h. Filed appraisals
   i. Filed liquidation analysis
   j. Signed petition pages
   k. Filed Plan
   l. Motion to avoid mortgage (if applicable)
   m. Motion to avoid lien (if applicable)
2. Know your **FILED** plan thoroughly and review the details with your client prior to 341 Meeting.
3. Make sure your plan is consistent and adds up
   a. Percentage needs to be consistent with liquidation 11USC1325(a)(4)
   b. Disposable income must be consistent with means test
   c. Monthly payments and length of plan
4. Step-payments: Make sure the Trustee and the Court understand when the payment is supposed to change.
   a. Make sure amended wage orders are filed to correspond to the step-payment.
   b. Failure to amend may cause plan default and result in a MTD
5. Use the Trustee's proffered language for 'special' provisions at the end of the plan
6. Know your Trustee
7. Know your Judge
8. Even though not required, in joint cases, note who owns the asset
   a. This will make reviewing exemptions much easier and reduce the possibility of an objection.
9. Do not claim the 100% FMV exemption where there is a cap on the exemption amount, claim the actual amount – the 100% option should be used rarely.
10. Ensure that Schedule I and the means test match, or note and explain any discrepancy on Schedule I.
11. Mark appropriately any changes in an amended plan (see LBR 3015-2).

12. Timely file and serve amendments
    a. Improper service can result in objections or inability for time to promptly begin tolling.
13. Amended schedules I & J
    a. When expenses or income are questioned, don't shuffle expenses or change the entire budget to avoid an increased plan payment.
    b. The budget should be accurate the first time – numerous adjustments may cause your client to be required to provide actual proof of expenses or cause a good-faith objection.
    c. This is the same for asset values – don't amend the value simply because the exemption is challenged – appraisals may be requested.
14. Provide documentation/explanation timely to the Trustee
    a. Ignoring the request will not make it go away, it will only hold up confirmation.
15. Verify that all tax returns have been filed.
16. Special Provisions – use Trustee approved language where appropriate.
    a. When drafting non-approved SP language, give enough information to make the request understandable, but not too much to make it confusing.
    b. Be careful what you ask for.
    c. *Espinosa* not only has a binding effect on silent creditors, but an option for the Court to issue sanctions on the debtor.
17. Business cases
    a. Provide all documentation to the Trustee – profit and loss statements, balance sheets, monthly operating reports, etc.
    b. Meet with the Trustee to review the documents prior to the 341 meeting (Cincinnati); provide requested documentation to the Trustee to possibly avoid the necessity of a business meeting (Columbus).
    c. Liquidation value/appraisal of business interest
    d. Insurance
18. Use the tools provided by the Trustee – Trustee's website, Position Statements, 13 Network, Chapter 13 Documents, etc.
    a. Look at Trustee issues on 13 Network to determine what is needed to get a favorable recommendation.
19. Review, review, review!!! Make sure what you are filing is accurate.
    a. 11 U.S.C §1327 has a binding effect on all parties upon confirmation. This includes the applicable commitment period and eligibility for a discharge.
20. Review Claims
    a. Tax claims should always be reviewed.
    b. Mortgage claims are complex and must be checked
21. Communicate, communicate, communicate!!! With your clients, objecting creditors, and the Trustee.
22. Business Cases
    a. Meet with the Trustee beforehand
    b. Profit and Loss Statements
    c. Balance sheets

New Form Chapter 13 Plan

Issues of note in the new Form Plan:

1. Valuation (Section 4)
2. Current DSO (Section 5.1.1)
   Arrearage (Section 5.2.2)
3. Mortgage Payments (Section 5.1.2)
   a. Modification (Section 5.1.3)
4. Secured Claims w/o monthly payments (Section 5.2.1)
5. Wholly unsecured Mortgages (Section 5.4.1 v. 5.4.3)
6. Wholly unsecured judicial liens
7. Interest Rate (Section 7)
8. Tax Returns (Section 8)
9. Windfall Income (Section 9)
10. Insurance (Section 10)
11. Attorney Compensation (see order)
12. **Vesting Property (Section 12)**
    a. Confirmation vests property in Debtor
    b. Property remains in estate until discharge
    c. See *In re Jackson, 04-40542 ID (2009)* (attached)
    d. See *In re Telfair 216 F.3d 133 (1996)* (attached)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
_____ DIVISION at _____

In re	)	Case No.
	)	
	)	Chapter 13
Debtor(s)	)	Judge

CHAPTER 13 PLAN

1. NOTICES

This is the Mandatory Form Chapter 13 Plan adopted in this District. Local Bankruptcy Rule ("LBR") 3015-1. "Debtor" means either a single debtor or joint debtors as applicable. "Trustee" means Chapter 13 Trustee. Section "§" numbers refer to sections of Title 11 of the United States Bankruptcy Code. "Rule" refers to the Federal Rules of Bankruptcy Procedure.

Unless otherwise checked below, the Debtor is eligible for a discharge under § 1328(f).
□ Debtor _____ is not **eligible** for a discharge.
□ Joint Debtor _____ is **not eligible** for a discharge.

□ **Initial Plan**.
□ **Amended Plan**. The filing of this Amended Plan shall supersede any previously filed Plan or Amended Plan and must be served on the Trustee, the United States trustee and all adversely affected parties. If the Amended Plan adversely affects any party, the Amended Plan shall be accompanied by a twenty-one (21) day notice. LBR 3015-2(a). Any changes (additions or deletions) from the previously filed Plan or Amended Plan must be clearly reflected in bold, italics, strike-through or otherwise in the Amended Plan filed with the Court.

If an item is not checked, the provision will be ineffective if set out later in the Plan.
□ **This Plan contains nonstandard provisions in Paragraph 13.**
□ **This Plan limits the amount of a secured claim based on a valuation of the collateral securing the claim. See Paragraph(s) 5.1.3 and/or 5.1.6.**
□ **This Plan avoids a security interest or lien. See Paragraph(s) 5.4.1 and/or 5.4.2.**

NOTICE TO CREDITORS: **You should read this Plan carefully, including Paragraph 13 (Nonstandard Provisions). Upon confirmation, you will be bound by the terms of this Plan. Your claim may be reduced, modified, or eliminated. Unless otherwise ordered by the Court, the confirmation hearing in this case shall include a valuation hearing under § 506 and Rule 3012. The Court may confirm this Plan if no objection to confirmation is filed within fourteen (14) days after the § 341 Meeting of Creditors is concluded or, if this is an Amended Plan, objections must be filed by the deadline in the twenty-one (21) day notice. LBR 3015-3 and 3015-2.**

2. PLAN PAYMENT AND LENGTH

2.1 Plan Payment. The Debtor shall pay to the Trustee the amount of $_____ per month. [Enter step payments, if any.] The Debtor shall commence payments within thirty (30) days of the petition date.

2.2 Unsecured Percentage.

□ **Percentage Plan.** Subject to Paragraph 2.3, this Plan will not complete earlier than the payment of ____ % on each allowed nonpriority unsecured claim.

□ **Pot Plan**. Subject to Paragraph 2.3, the total amount to be paid by the Debtor to the Trustee is $_____. Assuming all claims are filed as scheduled or estimated by the Debtor, payment on each allowed nonpriority unsecured claim is estimated to be _____ %. LBR 3015-1(c)(2).

2.3 Means Test Determination.

□ **Below Median Income.** Unless the allowed nonpriority unsecured claims are paid 100%, the projected length of the Plan must be a minimum of thirty-six (36) months but not to exceed sixty (60) months.

□ **Above Median Income.** Unless the allowed nonpriority unsecured claims are paid 100%, projected length of the Plan must be sixty (60) months.

3. PRE-CONFIRMATION LEASE PAYMENTS AND/OR ADEQUATE PROTECTION PAYMENTS

Pre-confirmation personal property lease payments governed by § 1326(a)(1)(B) shall be made as part of the total plan payment to the Trustee. LBR 3070-1(a). Pre-confirmation adequate protection payments governed by § 1326(a)(1)(C) shall be made as part of the total plan payment to the Trustee. LBR 3070-1(b). The lessor/secured creditor must file a proof of claim to receive payment. LBR 3070-1(a) and (b).

Name of Lessor/Secured Creditor	Property Description	Monthly Payment Amount

4. VALUATION OF REAL PROPERTY

Unless otherwise stipulated by the parties or ordered by the Court, the real property shall be valued at the amount set forth in the filed appraisal. If no objection is timely filed, the value of real property set forth in the filed appraisal will be binding upon confirmation of the Plan. If a creditor files a timely objection to valuation of real property pursuant to LBR 3015-3(a), the confirmation hearing shall include a valuation hearing under § 506 and Rule 3012, unless otherwise ordered by the Court.

5. PAYMENTS TO CREDITORS

SUMMARY OF PAYMENTS BY CLASS

Class	**Definition**	**Payment/Distribution by Trustee**
Class 1	Claims with Designated Specific Monthly Payments	Paid first in the monthly payment amount designated in the Plan
Class 2	Secured Claims with No Designated Specific Monthly Payments and Domestic Support Obligations (Arrearages)	Paid second and pro rata with other Class 2 claims.
Class 3	Priority Claims	Paid third and pro rata with other Class 3 claims.
Class 4	Nonpriority Unsecured Claims	Paid fourth and pro rata with other Class 4 claims.
Class 5	Claims Paid by a Non-Filing Co-Debtor or Third Party	Not applicable
Class 6	Claims Paid by the Debtor	Not applicable

Except as provided in Paragraph 3, the Trustee shall begin making distributions upon confirmation. To the extent funds are available, the maximum number of Classes may receive distributions concurrently. If at any time after confirmation of the Plan, sufficient funds are not available to make a full monthly distribution on all Class 1 claims, plus the statutory Trustee fee, the available funds will be distributed to the Class 1 creditors at the Trustee's discretion. Attorney fee distributions will be reduced before other Class 1 claims distributions are reduced. Notwithstanding the above, the Trustee is authorized within the Trustee's discretion to calculate the amount and timing of distributions as is administratively efficient.

5.1 CLASS 1 - CLAIMS WITH DESIGNATED SPECIFIC MONTHLY PAYMENTS

The following Class 1 claims shall be paid first in the monthly payment amount designated below.

5.1.1 Domestic Support Obligations (On-Going) - Priority Claims under § 507(a)(1)

If neither box is checked, then presumed to be none.
□ **Trustee disburse**
□ **Debtor direct pay**

The name of any holder of any domestic support obligation as defined in § 101(14A) shall be listed below. If the Debtor becomes subject to a domestic support obligation during the Plan term, the Debtor shall notify his or her attorney and the Trustee.

Name of Holder	State Child Support Enforcement Agency, if any	Monthly Payment Amount

5.1.2 Maintenance of Regular Mortgage Payments

Regular mortgage payments shall be calculated for payment starting the month after the filing of the petition. Arrearages shall be paid as Class 2 claims. Unless otherwise ordered by the court, if a mortgage loan modification is pending as of the petition date and the mortgage is in arrears, the mortgage will be paid by the Trustee. The mortgage will continue to be paid by the Trustee even if the subsequent mortgage loan modification states that the arrearage will be paid at the end of the mortgage. LBR 3015-1(e)(1).

Trustee disburse.

Name of Creditor	Property Address	Residence (Y/N)	Monthly Payment Amount

Debtor direct pay. Unless otherwise ordered by the Court, regular monthly mortgage payments may only be paid directly by the Debtor if the mortgage is current as of the petition date. LBR 3015-1(e)(1).

Name of Creditor	Property Address	Residence (Y/N)	Monthly Payment Amount

5.1.3 Modified Mortgages and/or Liens Secured by Real Property ["Cramdown/Real Property"]

The following debts either (1) mature during the pendency of the Plan term, (2) are secured by real property that is not the Debtor's principal residence, or (3) are secured by other assets in addition to the Debtor's principal residence. To the extent that a claim is in excess of the value of the property, the balance in excess of the value of the property shall be treated as a Class 4 nonpriority unsecured claim.

Name of Creditor	Property Address	Value of Property and Appraisal	Interest Rate	Minimum Monthly Payment
		$_____ ☐ Appraisal filed ☐ Appraisal forthcoming		

5.1.4 Executory Contracts and/or Unexpired Leases

The Debtor rejects the following executory contracts and/or unexpired leases.

Notice to Creditor of Deadline to File Claim for Rejection Damages:
A proof of claim for rejection damages must be filed by the creditor within ninety (90) days from the date of confirmation of the Plan. Rule 3002(c)(4). Such claim shall be treated as a Class 4 nonpriority unsecured claim.

Name of Creditor	Property Description

The Debtor assumes the following executory contracts and/or unexpired leases. Unless otherwise ordered by the Court, all motor vehicle lease payments shall be made by the Trustee. LBR 3015-1(d)(2). Any prepetition arrearage shall be cured in monthly payments prior to the expiration of the executory contract and/or unexpired lease. The Debtor may not incur debt to exercise an option to purchase without obtaining Trustee or Court approval. LBR 4001-3.

Trustee disburse.

Name of Creditor	Property Description	Regular Number of Payments Remaining as of Petition Date	Monthly Contract/ Lease Payment	Estimated Arrearage as of Petition Date	Contract/ Lease Termination Date

Debtor direct pay.

Name of Creditor	Property Description	Regular Number of Payments Remaining as of Petition Date	Monthly Contract/ Lease Payment	Estimated Arrearage as of Petition Date	Contract/ Lease Termination Date

5.1.5 Claims Secured by Personal Property for Which § 506 Valuation is Not Applicable ["910 Claims/Personal Property"]

The following claims are secured by a purchase money security interest in either (1) a motor vehicle acquired for the Debtor's personal use within 910 days of the petition date or (2) personal property acquired within one year of the petition date. The proof of claim amount will control, subject to the claims objection process.

Name of Creditor	Property Description	Purchase Date	Estimated Claim Amount	Interest Rate	Minimum Monthly Payment Including Interest

5.1.6 Claims Secured by Personal Property for Which § 506 Valuation is Applicable ["Cramdown/Personal Property"]

The following claims are secured by personal property not described above in Paragraph 5.1.5. Unless otherwise stipulated by the parties or ordered by the Court, the property shall be valued for purposes of § 506 at the lower of the creditor's representation on its proof of claim or the Debtor's representation below. LBR 3012-1(a). To the extent that a claim is in excess of the value of the property, the balance in excess of the value of the property shall be treated as a Class 4 nonpriority unsecured claim. If a creditor files a timely objection to the valuation of the property, the confirmation hearing shall include a valuation hearing under § 506 and Rule 3012 unless otherwise ordered by the Court.

Name of Creditor	Property Description	Purchase Date	Value of Property	Interest Rate	Minimum Monthly Payment Including Interest

5.1.7 Administrative Claims

The following claims are administrative claims. Unless otherwise ordered by the Court, requests for additional attorney fees beyond those set forth below will be paid after the attorney fees set forth below and in the same monthly amount as set forth below. LBR 2016-1(b).

Name of Claimant	Total Claim	Amount to be Disbursed by Trustee	Minimum Monthly Payment Amount

5.2 CLASS 2 - SECURED CLAIMS WITH NO DESIGNATED MONTHLY PAYMENTS AND DOMESTIC SUPPORT OBLIGATIONS (ARREARAGES)

5.2.1 Secured Claims with No Designated Monthly Payments

The following claims are secured claims with no designated monthly payments, including mortgage arrearages, certificates of judgment and tax liens. The proof of claim amount shall control, subject to the claims objection process. Class 2 claims shall be paid second and shall be paid pro rata with other Class 2 claims.

Name of Creditor	Estimated Amount of Claim

5.2.2 Domestic Support Obligations (Arrearages) - Priority Claims under § 507(a)(1)

If neither box is checked, then presumed to be none.
□ **Trustee disburse**
□ **Debtor direct pay**

The name of any holder of any domestic support obligation arrearage claim or claim assigned to or owed to a governmental unit and the estimated arrearage amount shall be listed below.

Name of Holder	State Child Support Enforcement Agency, if any	Estimated Arrearage

5.3 CLASS 3 - PRIORITY CLAIMS

Unless otherwise provided for in § 1322(a), or the holder agrees to a different treatment, all priority claims under § 507(a) shall be paid in full in deferred cash payments. § 1322(a). Class 3 claims shall be paid third and shall be paid pro rata with other Class 3 claims.

5.4 CLASS 4 - NONPRIORITY UNSECURED CLAIMS

Allowed nonpriority unsecured claims shall be paid a dividend as provided in Paragraph 2.2. Class 4 claims shall be paid fourth and shall be paid pro rata with other nonpriority Class 4 claims.

5.4.1 Wholly Unsecured Mortgages/Liens

The following mortgages/liens are wholly unsecured and may be voided. The Debtor shall file a motion for any mortgage/lien to be avoided. The motion shall be on or before the § 341 meeting of creditors and shall be served pursuant to Rule 7004. Optional form motions and orders are available on the Court's website at www.ohsb.uscourts.gov.

Name of Creditor	Amount of Wholly Unsecured Mortgage/Lien	Property Address	Value of Property and Appraisal	Total Amount of SENIOR Mortgages/Liens
			$_____ □ Appraisal filed □ Appraisal forthcoming	

5.4.2 Judicial Liens Impairing an Exemption in Real Property

The following judicial liens impair the Debtor's exemption in real property and may be avoided under § 522(f)(1)(A). The Debtor shall file a motion for any judicial lien to be avoided. The motion shall be filed on or before the § 341 meeting of creditors and shall be served pursuant to Rule 7004. Optional form motions and orders are available on the Court's website at www.ohsb.uscourts.gov.

Name of Creditor	Amount of Judicial Lien	Property Address	Value of Property and Appraisal	Amount of Exemption	Total Amount of all OTHER Liens	Amount of Judicial Lien to be Avoided
			$_____ ☐ Appraisal filed ☐ Appraisal forthcoming			

5.4.3 Mortgages to be Avoided Under 11 U.S.C. § 544

The following debts secured by a mortgage will be paid as unsecured claims concurrent with other Class 4 claims. The Debtor or the Trustee shall file an adversary proceeding to determine whether the mortgage may be avoided. To the extent that the Trustee has standing to bring such action, standing is hereby assigned to the Debtor, provided a colorable claim exists that would benefit the estate.

Name of Creditor	Action to be Filed By	Address of Property
	☐ Debtor ☐ Trustee	

5.5 CLASS 5 - CLAIMS PAID BY A NON-FILING CO-DEBTOR OR THIRD PARTY

The following claims shall not be paid by the Trustee or the Debtor but shall be paid by a non-filing co-debtor or third party.

Name of Creditor	Monthly Payment Amount	Name of Payor

5.6 CLASS 6 - CLAIMS PAID DIRECTLY BY THE DEBTOR

The following claims shall not be paid by the Trustee but shall be paid directly by the Debtor.

Name of Creditor	Monthly Payment Amount

6. SURRENDER OF PROPERTY

The Debtor elects to surrender the following property to the creditor that is collateral for the creditor's claim. Upon confirmation of the Plan, the stay under § 362(a) shall be terminated as to the surrendered property only.

Name of Creditor	Description of Property

7. INTEREST RATE

Unless otherwise stipulated by the parties, ordered by the Court or provided for in this Plan and except for claims treated in paragraph 5.1.2, secured claims shall be paid interest at the annual percentage rate of _____ % based upon a declining monthly balance on the amount of the allowed secured claim. Interest is included in the monthly payment amount. *See Till v. SCS Credit Corp. (In re Till)*, 541 U.S. 465 (2004).

☐ **This is a solvent estate.** Unless otherwise provided, all nonpriority unsecured claims shall be paid in full with interest at _____ % from the date of confirmation. If this box is not checked, the estate is presumed to be insolvent.

8. FEDERAL INCOME TAX RETURNS AND REFUNDS

8.1 Federal Income Tax Returns

If requested by the Trustee, the Debtor shall provide the Trustee with a copy of each federal income tax return filed during the Plan term by April 30 of each year.

8.2 Federal Income Tax Refunds

Notwithstanding single/joint tax filing status, the Debtor may annually retain the greater of (1) any earned income tax credit and/or child tax credit or (2) $3,000 of any federal income tax refund for maintenance and support pursuant to § 1325(b)(2) and shall turnover any balance in excess of such amount to the Trustee. Unless otherwise ordered by the Court, tax refunds turned over to the Trustee shall be distributed by the Trustee for the benefit of creditors. Any motion to retain a tax refund in excess of the amount set forth above shall be filed and served pursuant to LBR 9013-3(b).

9. OTHER DUTIES OF THE DEBTOR

9.1 Change of Address, Employment, Marital Status, or Child or Spousal Support Payments

The Debtor shall fully and timely disclose to the Trustee and file any appropriate notice, application or motion with the Court in the event of any change of the Debtor's address, employment, marital status, or child or spousal support payments.

9.2 Personal Injury, Workers Compensation, Social Security, Buyout, Severance Package, Lottery Winning, Inheritance, or Any Other Amount

The Debtor shall keep the Trustee informed as to any claim for or expected receipt of money or property regarding personal injury, workers compensation, social security, buyout, severance package, lottery winning, inheritance, or any other funds to which the Debtor may be entitled or becomes entitled to receive. Before the matter can be settled and any funds distributed, the Debtor shall comply with all requirements for filing applications and/or motions for settlement with the Court as may be required by the Bankruptcy Code, the Bankruptcy Rules or the Local Bankruptcy Rules. Unless otherwise ordered by the Court, these funds shall be distributed by the Trustee for the benefit of creditors.

10. INSURANCE

10.1 Insurance Information

As of the petition date, the Debtor's property is insured as follows.

Property Address/ Description	Insurance Company	Policy Number	Full/Liability	Agent Name/ Contact Information

10.2 Casualty Loss Insurance Proceeds (Substitution of Collateral)

If a motor vehicle is deemed to be a total loss while there is still an unpaid claim secured by the motor vehicle, the Debtor shall have the option to use the insurance proceeds to either (1) pay off the balance of the secured claim through the Trustee if the secured creditor is a named loss payee on the policy or (2) upon order of the Court, substitute the collateral by purchasing a replacement motor vehicle. If a replacement motor vehicle is purchased, the motor vehicle shall have a value of not less than the balance of the unpaid secured claim, the Debtor shall ensure that the lien of the creditor is transferred to the replacement motor vehicle, and the Trustee shall continue to pay the allowed secured claim. Unless otherwise ordered by the Court, if any insurance proceeds remain after paying the secured creditor's claim, these funds shall be distributed by the Trustee for the benefit of creditors.

11. EFFECTIVE DATE OF THE PLAN

The effective date of the Plan is the date on which the order confirming the Plan is entered.

12. VESTING OF PROPERTY OF THE ESTATE

Unless checked below, property of the estate does not vest in the Debtor until the discharge is entered. The Debtor shall remain responsible for the preservation and protection of all property of the estate.

☐ Confirmation of the Plan vests all property of the estate in the Debtor free and clear of any claim or interest of any creditor provided for by the plan. §§ 1327(b) and (c).
☐ Other _____

13. NONSTANDARD PROVISIONS

The nonstandard provisions listed below are restricted to those items applicable to the particular circumstances of the Debtor. Nonstandard provisions shall not contain a restatement of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules or the Mandatory Chapter 13 Form Plan. Any nonstandard provision placed elsewhere in this Plan is void and shall have no binding effect.

Nonstandard Provisions

By filing this Plan, the Debtor, if unrepresented by an attorney, or the Debtor's Attorney certifies that (1) the wording and order of provisions of this Plan are identical to those contained in the Mandatory Form Chapter 13 Plan adopted in this District and (2) this Plan contains no nonstandard provisions other than those set forth in Paragraph 13.

Debtor's Attorney

/s/_____

Date:_____

Debtor

/s/_____

Date: _____

Joint Debtor

/s/_____

Date:_____

U.S. Bankruptcy Court for the Southern District of Ohio

Form Motions and Orders

The Court is pleased to announce that the following Form Motions and Orders are available for use by the bar:

Category	Motion	Order
Wholly Unsecured and/or Avoidable Liens	Motion for Determination that Mortgage/Lien is Wholly Unsecured and Void [Motion M/L Void (12/14)]	Order Granting Motion for Determination that Mortgage/Lien is Wholly Unsecured and Void [Order M/L Void (12/14)]
	Motion to Avoid Judicial Lien on Real Property Pursuant to 11 U.S.C § 522(f)(1)(A) [Motion 522(f)(1)(A) (12/14)]	Order Granting Motion to Avoid Judicial Lien on Real Property Pursuant to 11 U.S.C § 522(f)(1)(A) [Order 522(f)(1)(A) (12/14)]
	Motion to Avoid Nonpossessory, Nonpurchase-Money Security Interest in Exempt Property of Debtor Pursuant to 11 U.S.C § 522(f)(1)(B) [Motion 522(f)(1)(B) (12/14)]	Order Granting Motion to Avoid Nonpossessory, Nonpurchase-Money Security Interest in Exempt Property of Debtor Pursuant to 11 U.S.C § 522(f)(1)(B) [Order 522(f)(1)(B) (12/14)]
Redemption	Motion to Redeem a Motor Vehicle [Motion 722 (12/14)]	Order Granting Motion to Redeem a Motor Vehicle [Order 722 (12/14)]

The Form Motions and Orders are intended to streamline work for both the bar and the bench. Borrowing heavily from the motions and orders already filed by the bar in this district, the Form Motions and Orders were developed by several law clerks from Cincinnati, Columbus and Dayton, under the

oversight of the bankruptcy judges.

Use of the Form Motions and Orders is NOT mandatory, however, their use is encouraged. **If you choose to modify a Form Motion or Order, please remove the naming watermark in the upper left hand corner of the document so the Court will know that the form has been modified**.

Although the Form Motions and Orders have been internally tested, it is possible that there may be some "bugs" in the forms, as well as opportunities for enhancement. Any comments regarding the Form Motions and Orders may be directed to Carolyn Buffington at carolyn_buffington@ohsb.uscourts.gov.

Tips for Using the Form Motions and Orders

- The forms have a button for each city. Selection of the city button will provide the user with pulldown options for the judges and trustees for that city.
- Required fields are displayed with a yellow background.
- Hovering over a blank will display a "tooltip" for that blank.
- Clicking on the "i" icon will display instructional information.
- There is a calendar pop-up tool to aid in entering dates.
- Dollar amounts will be automatically converted to a $0.00 format.

- PLEASE REMEMBER TO PRINT YOUR FORM MOTION OR ORDER TO PDF TO ENSURE THAT THE DOCUMENT IS IN THE PROPER FORMAT BEFORE FILING IT WITH THE COURT.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
_____ DIVISION at _____

In re	)	Case No.
	)	
	)	Chapter 13
Debtor(s)	)	Judge

ORDER CONFIRMING CHAPTER 13 PLAN AND AWARDING ATTORNEY FEES

This matter is before the Court on the Chapter 13 Plan submitted by the Debtor(s) and any amendments("Plan"). Having reviewed the Plan, and noting that any objections have been withdrawn, resolved or overruled, the Court finds that the Plan satisfies the requirements of 11 U.S.C. § 1325. The Plan is **CONFIRMED**, subject to the following:

1. Any stipulations or other orders entered in this case relating to the Plan are incorporated into this Order.

2. The Debtor(s) shall make monthly payments to the Trustee until the Plan is completed, for a period not to exceed sixty (60) months. The monthly payments shall be by payroll deduction, unless otherwise ordered by the Court or agreed to by the Trustee. Payments shall be sent to _____.

3. All property acquired by the Debtor(s) after the commencement of the case and before the case is closed is within the jurisdiction of the Court.

4. Except as provided by Local Bankruptcy Rule 6004-1(c)(3), the Debtor(s) shall not sell, dispose of, or transfer any property without the written approval of the Trustee or order of the Court. *See* Local Bankruptcy Rule 6004-1 (c) and (d).

5. The Debtor(s) shall fully and timely disclose to the Trustee and file any appropriate notice, application or motion with the Court in the event of any change of the Debtor(s)' address, employment, marital status, or child or spousal support payments.

6. The Debtor(s) shall keep the Trustee informed as to any claim for or expected receipt of money or property regarding personal injury, workers compensation, social security, buyout, severance package, lottery winning, inheritance, or any other funds to which the Debtor(s) may be entitled or becomes entitled to receive. Before the matter can be settled and any funds distributed, the Debtor(s) shall comply with all requirements for filing applications and/or motions for settlement with the Court as may be required by the Bankruptcy Code, the Bankruptcy Rules or the Local Bankruptcy Rules.

7. The Debtor(s) shall not incur any non-emergency consumer debt, including the refinancing of real property debt or purchases on credit in excess of $1,000, without the written approval of the Trustee or order of the Court. *See* Local Bankruptcy Rule 4001-3(b).

8. THE VIOLATION BY THE DEBTOR(S) OF ANY PROVISIONS OF THIS ORDER OR THE PLAN MAY RESULT IN DISMISSAL OF THE CASE, DENIAL OF DISCHARGE, AND/OR OTHER SANCTIONS.

9. Unless otherwise ordered by the Court, the attorney for the Debtor(s) is allowed the attorney fee set forth in the *Disclosure of Compensation of Attorney for Debtor and Application for Allowance of Fees in Chapter 13 Case* (LBR Form 2016-1(b)), provided the amount requested does not exceed $3,500. *See* Local Bankruptcy Rule 2016-1(b)(2)(A) and (B) (the "No Look Fee").

IT IS SO ORDERED.

Copies to:

All Creditors and Parties in Interest

UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re DEAN R. JACKSON, SR. aka BOB JACKSON dba JACKSON CARPETS dba JACKSON ENTERPRISES and PEGGY J. JACKSON, **Debtors.**	**Bankruptcy Case No. 04-40542-JDP**

MEMORANDUM OF DECISION

Introduction

In two motions, chapter[1] 13 debtors Dean and Peggy Jackson ("Debtors") seek an order setting aside a money judgment which was entered against them in state court, and avoiding any lien that attached to

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[1] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101 - 1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001 - 9036, in effect prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

their real property when their creditor, Mountain States Marketing and Sales ("Mountain States") recorded the judgment. *See* Docket Nos. 171, 174. The motions came on for hearing on December 23, 2008. L.D. Fitzgerald, the chapter 13 trustee,[2] and counsel for Debtors[3] and Mountain States appeared and offered argument. The Court took the motions under advisement, and as allowed by the Court, Mountain States and Debtors submitted post-hearing briefs. Docket Nos. 192, 193. This memorandum constitutes the Court's findings and conclusions,[4] and disposes of the issues raised by the motions.

Facts

Debtors filed a petition for relief under chapter 13 on March 19, 2004. Docket No. 1. Among its terms, their chapter 13 plan proposed

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[2] Following the hearing, on December 30, 2008, L.D. Fitzgerald retired and resigned from his position as the chapter 13 trustee assigned to this case. Kathleen McCallister was appointed by the U.S. Trustee to serve as the successor chapter 13 trustee. Docket No. 186.

[3] Because of inclement weather, counsel for Debtors appeared by telephone.

[4] *See* Fed. R. Bankr. P. 7052; 9014.

payments to the trustee over 60 months funded by income from Debtors' flooring business. The plan also contained a "check-the-box" option regarding vesting of property of the estate, in which Debtors selected the box which provided that "upon confirmation of this plan, all property of the estate . . . [s]hall vest in the debtor[.]" Docket No. 11.[5] The Court entered an order confirming Debtors' chapter 13 plan on June 30, 2004. Docket No. 23.

Following confirmation, Debtors continued to operate their business. In 2006, Mountain States sold materials and supplies to Debtors on credit. Debtors failed to pay for these goods. In March 2007, while Debtors were still performing their plan, Mountain States filed suit against Debtors in state court to recover the post-petition debt. Mountain States took this action without seeking relief from the automatic stay from this Court. In October, 2007, Mountain States and Debtors stipulated that a money judgment could be entered by the state court against Debtors in

[5] This District utilizes a "model" chapter 13 form plan. LBR 2002.5(e). The check-the-box feature in Debtors' plan regarding vesting of property was consistent with the model plan.

favor of Mountain States for $19,783.03 plus interest. After entry, on November 5, 2007, Mountain States recorded the judgment in Lemhi County.

When they filed their chapter 13 case, Debtors owned a home in Lemhi County. In addition, after confirmation, Debtors inherited two other parcels of real property in Lemhi County, the first in April 2007, approximately one month after Mountain States had sued them, and the second in October 2008, about one year after the judgment was entered in that state court action. Mountain States asserts a statutory judgment lien[6] against the inherited properties and the Debtors' home.

Discussion

I.

As noted at the hearing, the Court construes both of Debtors' motions as, collectively, a request that the Court order Mountain States' judgment liens avoided as against the two properties that Debtors

[6] Idaho Code § 10-1110 provides that when a judgment is recorded, it becomes a lien on all real property owned or thereafter acquired by the judgment debtor in that county.

inherited after their chapter 13 plan was confirmed. As explained in their motions and at the hearing, Debtors believe that, when they acquired them, these properties became property of their bankruptcy estate pursuant to § 1306(a). Debtors argue therefore, that Mountain States' actions in recording the judgment and thereby creating a statutory lien against the inherited properties was a violation of the automatic stay, in particular, §§ 362(a)(3), (4), and (5). Mountain States contends that, based upon the provisions of the their confirmed plan, these properties vested in Debtors, not the bankruptcy estate, and therefore its act of recording the judgment and creating the liens did not violate the stay, and its judgment liens are valid.

II.

A.

The automatic stay protects property of the bankruptcy estate from attachment or execution by a bankruptcy debtor's creditors, including post-petition creditors. 11 U.S.C. § 362(a)(3); *In re MacConkey*, 96.4 I.B.C.R. 152, 153 (Bankr. D. Idaho 1996). The automatic stay continues in effect

until property is no longer property of the estate. 11 U.S.C. § 362(c). Thus, with respect to the two parcels of property which Debtors acquired after their chapter 13 plan was confirmed, the critical question is whether those properties became part of the bankruptcy estate.

Under the Code, property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). However, in the context of a chapter 13 case, the bankruptcy estate also includes "all property of the kind specified in [section 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted . . . ." 11 U.S.C. § 1306(a)(1). If these provisions control, it would seem clear that the inherited real properties became property of the bankruptcy estate.

However, the Code also provides that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b). As indicated above, by checking the box, Debtors' confirmed plan provides that "upon confirmation of this plan, all property of the

estate . . . [s]hall vest in the debtor[.]" Docket No. 11. As a result, under their plan, all property of the estate revested in Debtors upon confirmation of their plan. But this observation begs the critical question here: was the property that "revested" only that property which existed at the time of confirmation, or does § 1327(b) and Debtors' plan provision also apply to property which they acquired after confirmation?

A variety of interpretations have been offered in the bankruptcy courts to address the seeming tension between § 1306(a) and § 1327(b). Some courts hold that gifts, inheritances, and causes of action acquired by a chapter 13 debtor post-confirmation become property of the bankruptcy estate, but others disagree. *See In re Wetzel*, 381 B.R. 247, 252 (Bankr. E.D. Wis. 2008) (collecting cases). However, neither the Ninth Circuit nor this Court have specifically addressed whether assets acquired by a debtor after confirmation of a plan but before the case is closed, dismissed or converted, should be treated as property of the estate.[7]

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[7] To be sure, the Court has addressed a similar issue involving a debtor's post-petition earnings. *See, e.g., In re MacConkey*, 96.4 I.B.C.R. 152, 153 (Bankr. D. Idaho 1996) (finding that the automatic stay will not generally protect a debtor's

As the bankruptcy court in *In re Wetzel* explained, to reconcile any conflict between § 1306(a) and § 1327(b), courts have adopted three basic approaches. Under the first, courts hold that the bankruptcy estate is extinguished when, by operation of a provision in a confirmed plan, property vests in the debtor upon confirmation. *See Oliver v. Toth (In re Toth)*, 193 B.R. 992 (Bankr. N.D.Ga. 1996); *In re Mason*, 45 B.R. 498 (Bankr. D. Or. 1984), *aff'd*, 51 B.R. 548 (D. Or. 1985). Under this approach, any property acquired by the debtor post-confirmation would no longer be protected by the automatic stay.

In stark contrast, other courts construe these statutes to provide that the bankruptcy estate continues in existence until the case is either closed, dismissed, or converted. However, according to these decisions, if the plan so provides, property in existence at the time of confirmation is "emptied" from the estate and revested in the debtor. The estate is then "refilled" with any property acquired by the debtor post-confirmation. *In*

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post-petition wages from post-bankruptcy creditor collection efforts); *see also In re Rhodes*, 95 I.B.C.R. 91 (Bankr. D. Idaho 1995).

re Holden, 236 B.R. 156, 163 (Bankr. D.Vt. 1999); *see also, Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1243 (11th Cir. 2008); *Barbosa v. Soloman*, 235 F.3d 31, 35 (1st Cir. 2000).

The courts adopting the third approach, described by some as the "middle ground," opine that only the post-confirmation property that is necessary to fund the payments under the confirmed plan is property of the estate. *See In re Ziegler*, 136 B.R. 497 (Bankr. N.D. Ill. 1992); *In re Root*, 61 B.R. 984 (Bankr. D. Colo. 1986).

All of these views have been criticized. For example, one court skeptically asks that if the bankruptcy estate is extinguished upon confirmation of the plan, as the first approach suggests, what then does a chapter 13 trustee thereafter administer? *See In re Root*, 61 B.R. at 985. This first approach also seems to ignore § 1306(a), a provision not found in chapter 7, which dictates that the bankruptcy estate continues until a chapter 13 case is closed, converted or dismissed.

In addition, though arguably the most pragmatic resolution, the third approach has been challenged because "no textual basis exists for

distinguishing between post-confirmation property that is 'necessary' and that which is 'not necessary' to funding the confirmed plan." *Annese v. Kolenda (In re Kolenda)*, 212 B.R. 851, 855 (Bankr. W.D. Mich. 1997). Moreover, courts have reached widely different conclusions regarding how broadly "necessary" should be construed in determining whether post-confirmation property should be included in the bankruptcy estate. *Id.* (citing *Chicago v. Fisher (In re Fisher)*, 203 B.R. 958, 963 (N.D. Ill. 1997)).

Given these perceived deficiencies in the first and third approaches, many courts gravitate to the second approach, which treats all post-confirmation property as property of the estate. *See United States v. Harcher*, 371 B.R. 254, 268 (Bankr. N.D. Ohio 2007) (describing this approach as the "growing majority"). As one court explained, this interpretation is "consistent with the language of sections 1306(a) and 1327(b), and avoids creating a distinction among types of post-confirmation property where there exists no textual basis to do so." *In re Fisher*, 203 B.R. at 962-63.

This Court agrees with this growing majority that this represents

"the most logical reconciliation of §§ 1306(a) and 1327(b)." *In re Wetzel*, 381 B.R. at 254. As the Court sees it, confirmation of a chapter 13 plan operates to adjust the rights of creditors and the debtor in relation to the assets existing at that time. However, because it necessarily takes years for a debtor to perform a plan, a debtor's acquisition of significant post-petition assets can not be seen to inure solely to the benefit of any post-petition creditors. The Code acknowledges that prebankruptcy creditors, held at bay while the debtor reorganizes, and the trustee, charged with administering the debtor's plan, are justifiably interested in a debtor's changed financial circumstances, including any new acquisitions of property. *See* 11 U.S.C. § 1329(a) (providing that either the debtor, trustee or unsecured claimants can request that a confirmed plan be modified to increase or decrease amount to be paid to creditors under the plan).

Because this interpretation best balances the interests of all creditors, the Court holds that, under § 1327(b), a provision in a confirmed plan that property "revest" in the debtor applies solely to property in existence at the time of confirmation. Any assets acquired by the debtor after

confirmation, but before the case is closed, converted or dismissed, become property of the bankruptcy estate under § 1306(a). In this case, the two parcels of property inherited by Debtors post-confirmation became (and continue to be) property of the bankruptcy estate.

B.

Having determined that Debtors' inherited properties are property of the bankruptcy estate, the Court's focus now turns to the propriety of Mountain States' collection actions. Debtors argue that Mountain States should not have sued them in state court without first obtaining relief from the automatic stay. Debtors also contend that, by recording its judgment, Mountain States created a lien on property of the estate, a further violation of the automatic stay.

Debtors' first contention can be disposed of quickly. At the hearing, in response to the Court's questions, Debtors conceded (correctly) that § 362(a) does not prohibit the prosecution of an action by a creditor against a debtor to collect a post-petition debt. *See* 11 U.S.C. § 362(a)(1) (prohibiting the commencement or continuation of judicial proceedings

against a debtor to "recover a claim against the debtor that arose before the commencement of the [bankruptcy case.]"). Mountain States did not violate the automatic stay by initiating the state court action against Debtors, nor in pursuing that action through entry of a judgment.[8]

However, while the automatic stay did not inhibit Mountain States' collection suit, its attempt to enforce its judgment by imposing a statutory lien against property of the bankruptcy estate was prohibited by § 362(a)(4) (preventing "any act to create, perfect, or enforce a lien against property of the estate[.]"). Under Idaho law, a lien attached to Debtors' inherited properties when Mountain States recorded its judgment in Lemhi County. By recording the judgment, Mountain States engaged in an act to create a lien against property of the bankruptcy estate in violation of the automatic stay. It is settled that acts taken in violation of the automatic stay are void. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *In re One Hundred Building Corp.*, 97.2 I.B.C.R. 56, 58 (Bankr. D. Idaho 1997).

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[8] Because the automatic stay was not an impediment to prosecution of Mountain States' lawsuit, the Court need not consider the implications of Debtors' stipulation consenting to the entry of a money judgment against them.

Therefore, Mountain States' recording of the judgment in Lemhi County without first obtaining stay relief was a void act, and any purported lien arising on property of the estate as a result of that action is also void.[9]

C.

Debtors' motions seek to avoid the lien "against real property owned by the Debtors." *See* Docket No. 171. Since this language is broad enough to include Debtors' residence, as well as the two inherited properties, the Court's analysis would be incomplete without a discussion as to the status of the Mountain States judgment lien on Debtors' home.[10]

As previously explained, the two inherited properties became property of the bankruptcy estate pursuant to § 1306(a) when Debtors acquired them, and remain so today. The same is not true, however, of the Debtors' home. When Debtors initiated this bankruptcy case, their home

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[9] Debtors have not sought damages from Mountain States for this stay violation. *See* 11 U.S.C. § 362(h). The Court offers no opinion as to whether such damages could be recovered under these facts.

[10] Debtors have not sought to avoid Mountain States' judicial lien under § 522(f) as one that impairs their homestead exemption.

became part of the bankruptcy estate pursuant to § 541(a). However, pursuant to the terms of their plan and § 1327(b), the home revested in Debtors upon confirmation, and was thereafter not part of the bankruptcy estate. As a result, the automatic stay did not prohibit the attachment of Mountain States' judgment lien with respect to Debtors' home. *See In re Petruccelli*, 113 B.R. 5, 17 (Bankr. S.D. Cal. 1990) (holding that § 362 did not prevent the IRS from collecting a post-petition debt by levying upon property of the debtor).[11]

Conclusion

Mountain States did not violate the automatic stay by initiating a lawsuit against Debtors to recover a post-petition debt. However, because the inherited properties were acquired by Debtors after confirmation of their plan, they became property of the estate by operation of § 1306(a). When Mountain States recorded its judgment in Lemhi County without

[11] Debtors' argument that the Mountain States judgment lien should be avoided as to their home as an unauthorized post-petition transfer of property of the estate under § 549(a) lacks merit, again, because when that lien attached, Debtors' home was not property of the estate.

first obtaining relief from this Court to do so, it created a lien which attached to property of the estate in violation of § 362(a)(4). Therefore, the Mountain States judgment lien is void with respect to the inherited properties.[12]

On the other hand, since Debtors owned their house at the time their plan was confirmed, and since their confirmed plan provides that all property of the estate "revested" in Debtors upon confirmation, that house was not property of the bankruptcy estate when Mountain States recorded its judgment. Accordingly, Mountain States' judgment lien against Debtors house is not void.

Counsel for Debtors shall submit an appropriate order, consistent with this decision, for entry by the Court. Counsel for Mountain States

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[12] As explained above, the automatic stay prohibits Mountain States from attempting to create or enforce liens on property of the bankruptcy estate, including the inherited properties. However, this chapter 13 case appears to be quickly drawing to a close. The automatic stay will terminate when the case closes, and Debtors' inherited properties are no longer property of the estate. 11 U.S.C. § 362(c)(1). Presumably, at that time, Mountain States can again act to enforce its judgment against Debtors' properties without impediment of the Bankruptcy Code.

shall approve the form of the order.

Dated: March 5, 2009

Honorable Jim D. Pappas
United States Bankruptcy Judge

216 F.3d 1333, 36 Bankr.Ct.Dec. 96, Bankr. L. Rep. P 78,220, 13 Fla. L. Weekly Fed. C 814
(Cite as: 216 F.3d 1333)

United States Court of Appeals,
Eleventh Circuit.
Eugene TELFAIR, Plaintiff-Appellant,
v.
FIRST UNION MORTGAGE CORPORATION,
Defendant-Appellee.

No. 99-10846.
July 7, 2000.

Chapter 13 debtor and his nondebtor wife brought adversary proceeding against mortgage company, alleging improper application of post-confirmation plan payments and breach of fiduciary duty. The Bankruptcy Court, John S. Dalis, Chief Judge, 224 B.R. 243, granted mortgage company's motion for summary judgment, and denied debtor's motion for class certification. On appeal, the United States District Court for the Southern District of Georgia, No. 98-00193-CV-1,William T. Moore, Jr. , J., affirmed. Debtor appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) Bankruptcy Code provision governing costs and fees for oversecured claims did not apply to mortgagee's application of postpetition mortgage payments to outstanding attorney fees incurred by mortgagee in curing debtor's defaults on several regular loan payments due after confirmation of Chapter 13 plan; (2) estate transformation approach would be adopted to govern vesting and protection of Chapter 13 debtor's post-confirmation earnings, under which only that property necessary for execution of plan will remain property of estate after confirmation; (3) debtor's regular mortgage loan payments, made outside of plan, were no longer property of the estate after confirmation, and mortgagee's application of payments to attorney fees thus did not violate automatic stay; (4) under Georgia law, mortgagee's administration of escrow account did not give rise to either a trust relationship or an agency relationship, of a kind which might support fiduciary duty claim in connection with force-placing of hazard insurance; (5) bankruptcy court did not abuse its discretion in considering summary judgment affidavit that was allegedly inconsistent with affiant's prior deposition testimony; and (6) it was within bankruptcy court's discretion to consider merits of claims before their amenability to class certification, and, with no meritorious claims, certification of those claims as a class action was moot.

Affirmed.

West Headnotes

[1] Bankruptcy 51 3770

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3770 k. Presentation of Grounds for Review. Most Cited Cases
Arguments that were not timely raised before the bankruptcy court would not be heard by Court of Appeals for the first time on appeal.

[2] Bankruptcy 51 2853.10

51 Bankruptcy
51VII Claims
51VII(B) Secured Claims
51k2853 Oversecurity
51k2853.10 k. In General. Most Cited Cases
"Oversecured claim" is one for which the collateral exceeds the debt. Bankr.Code, 11 U.S.C.A. § 506(b).

[3] Bankruptcy 51 2853.20(1)

51 Bankruptcy
51VII Claims
51VII(B) Secured Claims
51k2853 Oversecurity
51k2853.20 Fees, Costs, or Charges; Attorney Fees
51k2853.20(1) k. In General. Most

Cited Cases

Bankruptcy Code provision governing costs and fees for oversecured claims applies only from date of filing through the confirmation date, and, thus, statute did not apply to mortgage lender's application of postpetition mortgage payments to outstanding attorney fees incurred by lender in curing debtor's defaults on several regular loan payments due after confirmation of Chapter 13 plan. Bankr.Code, 11 U.S.C.A. § 506(b).

[4] Bankruptcy 51 ⚿2397(1)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(B) Automatic Stay
51k2394 Proceedings, Acts, or Persons Affected
51k2397 Mortgages or Liens
51k2397(1) k. In General. Most Cited Cases

Bankruptcy 51 ⚿3715(11)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(9) Effect
51k3715(11) k. Property of Estate. Most Cited Cases

Debtor's regular mortgage loan payments, made outside of his confirmed Chapter 13 plan, were no longer property of the estate after confirmation, and, thus, mortgage lender's application of mortgage payments to outstanding attorney fees, which were incurred by lender in curing debtor's defaults on payments due after confirmation, did not violate automatic stay; after confirmation, only the amount required for plan payments remained property of estate, while debtor's regular loan payments were made outside of the plan. Bankr.Code, 11 U.S.C.A. §§ 362(a), 1306, 1327(b).

[5] Bankruptcy 51 ⚿2532

51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General
51V(C)1 In General
51k2532 k. Interest of Debtor in General. Most Cited Cases

Bankruptcy 51 ⚿3715(11)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(9) Effect
51k3715(11) k. Property of Estate. Most Cited Cases

Estate transformation approach governs vesting and protection of Chapter 13 debtor's post-confirmation earnings, under which only that property necessary for the execution of the plan will remain property of the estate after confirmation; while filing of bankruptcy petition places all property of the debtor in control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to fulfillment of the plan. Bankr.Code, 11 U.S.C.A. §§ 1306(a)(2), 1327(b).

[6] Mortgages 266 ⚿200(1)

266 Mortgages
266IV Rights and Liabilities of Parties
266k200 Taxes and Assessments
266k200(1) k. In General. Most Cited

Mortgages 266 ⚿201

266 Mortgages
266IV Rights and Liabilities of Parties
266k201 k. Insurance. Most Cited Cases

Under Georgia law, mortgagee's administration of escrow account did not give rise to trust relationship of a kind which might support fiduciary duty claim premised on mortgagee's decision to “force place” hazard insurance on mortgaged property,

despite security deed's use of the word "trust," since there was no indication that mortgagors and mortgagee intended escrow funds to comprise a trust corpus, but, rather, mortgagee's retention of future tax and insurance payments inured to the benefit of both parties in protecting the secured property. O.C.G.A. §§ 53-12-20, 53-12-93(a).

[7] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases

Under Georgia law, agency results from the manifestation of mutual consent that one person will act on the other's behalf and subject to the other's control.

[8] Mortgages 266 ⚿200(1)

266 Mortgages
266IV Rights and Liabilities of Parties
266k200 Taxes and Assessments
266k200(1) k. In General. Most Cited

Mortgages 266 ⚿201

266 Mortgages
266IV Rights and Liabilities of Parties
266k201 k. Insurance. Most Cited Cases

In the case of escrow funds held by mortgagee for payment of tax and insurance payments on behalf of mortgagor pursuant to a security agreement, the mortgagee does not act as agent, under Georgia law, because the mortgagee acts neither for the sole benefit of the mortgagor nor under mortgagor's control.

[9] Mortgages 266 ⚿201

266 Mortgages
266IV Rights and Liabilities of Parties
266k201 k. Insurance. Most Cited Cases

Under Georgia law, mortgagee's administration of mortgagors' escrow account did not put mortgagee into role of agent, as might support fiduciary duty claim premised on mortgagee's decision to "force place" hazard insurance on mortgaged property following lapse of mortgagors' insurance; although terms of security deed constrained mortgagee's use of escrow funds, any insurance obtained with those funds had to meet mortgagee's approval, and mortgagors lacked authority to either direct use of the escrowed funds or to terminate mortgagee's control thereof.

[10] Bankruptcy 51 ⚿2164.1

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2164 Judgment or Order
51k2164.1 k. In General. Most Cited Cases

Bankruptcy court did not abuse its discretion in considering summary judgment affidavit that was allegedly inconsistent with affiant's prior deposition testimony, in connection with Chapter 13 debtor-mortgagor's fiduciary duty claim premised on mortgagee's force-placing of hazard insurance on mortgaged property, despite debtor's contention that affidavit of insurance company's former vice president, describing the insurance product, was inconsistent with deposition in which vice president had professed ignorance of many specifics of the product, where bankruptcy court accepted mortgagee's explanation that vice president had informed himself of the insurance policy's terms in the interval between his deposition and affidavit.

[11] Bankruptcy 51 ⚿2159.1

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2159 Parties
51k2159.1 k. In General. Most Cited Cases

It was within bankruptcy court's discretion to consider merits of Chapter 13 debtor-mortgagor's

claims against mortgagee before considering their amenability to class certification.

***1335** John B. Long,Dye, Tucker, Everitt, Wheale & Long, Augusta, GA, for Plaintiff-Appellant.

Wm. Byrd Warlick, Augusta, GA, Russell J. Pope, Pope & Hughes, Towson, MD, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

***1336** Before TJOFLAT, MARCUS and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

In this review of the bankruptcy court's grant of Appellee's motion for summary judgment we consider the propriety of an attorney's fees award to an oversecured creditor in a Chapter 13 bankruptcy proceeding and determine whether Georgia law imposes fiduciary duties on a mortgagee's administration of a mortgagor's escrow fund. Finally, we review the bankruptcy court's consideration of an affidavit purportedly inconsistent with the affiant's prior testimony as well as the bankruptcy court's denial of Appellant's motion for class certification. We affirm the district court's decision affirming the bankruptcy court on all grounds.

I. BACKGROUND AND PROCEDURAL HISTORY

Appellant Eugene Telfair and his wife obtained a Veteran's Administration (VA) guaranteed loan in 1984 from Appellee First Union Mortgage Corporation's ("First Union") predecessor-in-interest. Pursuant to a VA form Security Deed ("the Deed"), the Telfairs secured the loan with their home and agreed to make single monthly payments towards the principal and interest as well as to pay a *pro rata* share of the annual tax and insurance obligations to be placed in an escrow account.[FN1] First Union would make payments from this fund as they came due; any excess funds either would be refunded to the Telfairs or applied to future payments at First Union's discretion and the Telfairs would be responsible for any shortfall.[FN2] The Deed also provided that the Telfairs would be charged for any expenses and attorney's fees incurred by First Union in protecting the secured property, whether from default, foreclosure proceedings, or litigation.[FN3] Finally, the Deed obligated the Telfairs to maintain hazard insurance on their home continuously, the provider of which had to be approved by First Union. If the Telfairs failed to provide proof of such continuous coverage, the Deed authorized First Union to "force place" hazard insurance to protect its collateral.[FN4] First Union exercised this prerogative in 1988 when the Telfairs failed to provide proof of coverage.

FN1. *See* Security Deed ¶ 2, *in* BR, Part A, Tab 1, Ex. B.

FN2. *See id.* ¶ 3.

FN3. *See id.* ¶ 6.

FN4. *See id.* ¶ 8.

On December 7, 1992, Mr. Telfair filed a Chapter 13 bankruptcy petition in which he proposed a series of payments to satisfy the existing arrearage on the First Union mortgage; the plan was confirmed on May 3, 1993. Outside of the plan, the Telfairs remained responsible for making their usual monthly mortgage payments to First Union, a responsibility that was not always met. After confirmation, First Union filed three separate motions to lift the automatic stay imposed by 11 U.S.C. § 362(a) to recover its costs incurred in attempting to recoup the defaulted payments. First Union assessed attorney's fees incurred with these motions against the Telfairs' account, which created a delinquency following the Chapter 13 payments and discharge.[FN5] First Union then notified the Telfairs of its intent to foreclose on the property based upon this default.

FN5. Mr. Telfair and First Union dispute

> the nature of the funds First Union diverted to pay the attorney's fees. The bankruptcy court found that First Union had applied unspecified "post-petition payments" to pay the attorney's fees and we see no reason to delve deeper because it does not affect our disposition of this appeal.

The Telfairs responded by filing a two-count complaint against First Union in the ***1337** bankruptcy court asserting various violations by First Union in its assessment of attorney's fees and its forced placement of the hazard insurance. The Telfairs also sought certification of their claims for class action under Federal Rule of Civil Procedure 23. After First Union moved for summary judgment on both counts, the bankruptcy court held a class certification hearing during which it also entertained argument on the summary judgment motion. The bankruptcy court first concluded that Mrs. Telfair was not an appropriate class representative and dismissed her claim. The court then granted summary judgment to First Union on both substantive counts, rendering Mr. Telfair's request for class certification moot. The bankruptcy court also denied Mr. Telfair's motion to strike an affidavit submitted by First Union in support of its summary judgment motion. The district court affirmed the bankruptcy court on all grounds, and Mr. Telfair ("Telfair") timely appealed.

II. DISCUSSION

[1] In his appeal, Telfair challenges the bankruptcy and district courts' conclusions that First Union's appropriation of attorney's fees from the Telfairs' account did not implicate 11 U.S.C. § 506(b) or 11 U.S.C. § 362(a) and did not violate any fiduciary duties of First Union. We review the bankruptcy court's findings of facts for clear error and the legal conclusions of the bankruptcy and district courts *de novo*. *See In re Southeast Bank Corp.*, 97 F.3d 476, 478 (11th Cir.1996). Telfair also appeals the bankruptcy court's denial of his motion to strike an affidavit, which we will uphold unless it was an abuse of discretion. *See Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir.1997).[FN6]

> FN6. Telfair raised an assortment of other arguments before the district court and in his briefs submitted to this court, relying on such diverse provisions as Bankruptcy Rule 2016, REPSA, 12 U.S.C. § 2609, 24 C.F.R. 3500.17(b), and Ga.Code Ann. § 13-1-11. These arguments were not timely raised before the bankruptcy court, and we decline to hear them for the first time on this appeal. *See In re Daikin Miami Overseas, Inc.*, 868 F.2d 1201, 1206 (11th Cir.1989).

A. *Attorney's Fees*

[2] During the pendency of the Chapter 13 plan, the Telfairs defaulted on several regular loan payments. In order to recoup the costs incurred in attempting to cure these defaults, First Union filed three separate requests for attorney's fees. First Union voluntarily withdrew the first two requests in order to verify receipt of payments allegedly sent by the Telfairs. After the third filing, two money order payments could not be verified, and the bankruptcy court granted the Telfairs ninety days to trace the missing payments. The Telfairs declined to either trace or resubmit the payments. After the plan was discharged, First Union applied post-petition mortgage payments to the outstanding attorney's fees, an action which Telfair contends violated two provisions of the bankruptcy code: 11 U.S.C. § 506(b), governing costs and fees for oversecured claims,[FN7] and 11 U.S.C. § 362(a), the automatic stay provision.[FN8] Neither of these claims has merit.

> FN7. An oversecured claim is one for which the collateral exceeds the debt. *See In re Delta Resources, Inc.*, 54 F.3d 722, 724 n. 1 (11th Cir.1995).

> FN8. Before the bankruptcy and district courts, Telfair also argued that assessment of the attorney's fees violated the discharge

> provisions of 11 U.S.C. §§ 1328 and 524. Section 1328 provides that upon completion of plan payments, the bankruptcy court shall discharge any debts under the plan or disallowed under section 502 except for any debt provided for under section 1322(b)(5), which allows a homeowner to cure a default through a plan up until the time of foreclosure. *See* 11 U.S.C. § 1328 (1999). Section 524 clarifies that a discharge voids any conflicting judgments on discharged debt and bars any future claim for discharged debt. *See* 11 U.S.C. § 524 (1999). The bankruptcy and district courts found these provisions inapplicable to the post-confirmation attorney's fees sought by First Union because (1) they were not provided for under the plan; (2) they were not disallowed under section 502; and (3) they would be excludable in any event under section 1322(b)(5). Telfair does not appear to challenge this aspect of the courts' conclusion on appeal as he mentions it only in passing in his initial brief. Even if he had raised this issue, however, we would affirm the bankruptcy and district courts.

***1338** 1. Section 506

[3] Under his Chapter 13 plan, Telfair agreed to pay supplemental payments towards the arrearage owed to First Union. After this plan was confirmed on May 3, 1993, the Telfairs made all of the required plan payments and the plan was eventually discharged on April 23, 1997. During that time, however, the Telfairs had defaulted on several of their regular loan payments due after confirmation. The attorney's fees assessed by First Union were expended in curing these defaults and thus were allowed under the terms of the Deed. Telfair does not dispute that the Deed provided for the fees taken by First Union, but asserts that First Union should have requested them as part of an amendment to the plan under section 506(b), which provides:

> 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 under which such claim arose.

11 U.S.C. § 506(b) (1999). Holders of these oversecured claims are entitled, under this section, to any interest, fees, or costs provided for in the underlying debt instrument. Because First Union failed to secure an amendment to the plan before paying itself attorney's fees, Telfair contends that it removed assets from the estate in violation of the automatic stay.

The district court affirmed the bankruptcy court's conclusion that section 506(b) only governs fee petitions until the time of confirmation. Because the attorney's fees incurred by First Union arose from its attempts to cure post-confirmation defaults, the bankruptcy and district courts determined that the terms of the Deed, without reference to section 506(b), governed the award of fees. The Deed expressly provided for the attorney's fees assessed by First Union against Telfair.

In considering an oversecured creditor's claim for interest, the Supreme Court has stated that interest accrues under section 506(b) "as part of the allowed claim from the petition date until the confirmation or effective date of the plan." *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 2191, 124 L.Ed.2d 424 (1993).[FN9] The fact that the parties in *Rake* agreed that section 506(b) only applied in the post-petition, pre-confirmation period does not undermine the imperative effect of the Court's decision, and this court has recognized as such. *See In re Delta Resources, Inc.*, 54 F.3d 722, 727 (11th Cir.1995); *see also* 4 Collier on Bankruptcy ¶ 506.04[2] (Lawrence P. King et al. eds., 15th ed. 2000) (" Section 506(b) ... has no application to a secured creditor's entitlement to post-confirmation interest....").

FN9. *Rake* was overruled by statute on other grounds, but the new legislation did not affect agreements entered into before October 22, 1994, and so would not affect our disposition of this case in any event. *See In re Smith*, 85 F.3d 1555, 1558 n. 3 (11th Cir.1996).

Telfair relies on a pre-*Rake* decision for the proposition that a mortgagee should not divert maintenance payments to pay for attorney's fees without court approval. *See In re Rathe*, 114 B.R. 253 (Bankr.D.Idaho 1990). The creditor in *In re Rathe*, however, sought to include attorney's fees as part of its secured claim, and ***1339** could only do so under section 506(b). *See id.* at 256. To the extent that the reasoning of *In re Rathe* is inconsistent with the intervening *Rake* decision, it has been overruled.

Telfair next seeks to distinguish *Rake* on the ground that it involved interest accruing on claims prior to confirmation and only in dictum suggested that its holding would apply to attorney's fees. This court, however, can find no basis to distinguish *Rake* 's statement that section 506(b) "applies only from the date of filing through the confirmation date," 508 U.S. at 468, 113 S.Ct. at 2190, on the ground that it dealt with interest rather than attorney's fees. *Cf. In re Harko*, 211 B.R. 116, 119 (2d Cir. BAP 1997) ("There is nothing in the language of § 506(b) to suggest that interest, as opposed to fees, costs and charges, should be treated any differently and the majority of courts have so held."). Indeed, a contrary result would be inconsistent with the purpose of section 506(b), which allows oversecured creditors to include post-petition interest and certain fees as part of the secured claim they will receive upon confirmation of the plan. *See In re Delta Resources*, 54 F.3d at 729. In this case, the attorney's fees that First Union sought were not part of its secured claim; they arose apart from the plan and after confirmation.

Telfair's final argument is that the mutable nature of a Chapter 13 proceeding even after confirmation counsels in favor of bankruptcy courts using section 506(b) to maintain their control over post-confirmation awards of attorney's fees. Telfair suggests that without this instrument, "secured creditors in Chapter 13 cases are going to run amok" following confirmation.[FN10] We appreciate Telfair's concern, but are satisfied that the terms of debt instruments agreed to by debtors and creditors provide adequate protection for Chapter 13 debtors.[FN11]

FN10. Appellant's Br. at 32.

FN11. Section 1322, which also governs post-confirmation awards of interest or fees, provides further protection to homeowners and homestead lenders. *See* 11 U.S.C. § 1322 (1999).

2. Section 362(a)

[4][5] Pursuant to section 362(a), the filing of a bankruptcy petition acts as an automatic stay against actions or claims against the property of the bankruptcy estate. *See* 11 U.S.C. § 362(a) (1999).[FN12] Telfair contends that First Union's diversion of payments to recover attorney's fees ran afoul of the stay provision because the funds were property of his bankruptcy estate. Central to our consideration of this contention is a determination of what constitutes property of the estate following confirmation of a bankruptcy plan. According to section 1306:

FN12. The relevant portion of section 362(a) reads:

> [A] petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of-
>
> ...
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> ....
>
> 11 U.S.C. § 362(a) (1999).
>
> (a) Property of the estate includes, in addition to the property specified in section 541 of this title-
>
> ...
>
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.
>
> ***1340** (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 1306 (1999). A later section of the code provides that "[e]xcept as otherwise provided in the plan or order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b) (1999). Read together, these two provisions create a tension to the extent they govern the debtor's post-confirmation earnings: section 362 appears to protect those earnings while section 1327(b) would vest those same earnings in the debtor, thereby divesting them of the protection of section 362(a).

In resolving this conflict, courts have adopted one of three models: the estate termination approach, the estate preservation approach, and the estate transformation approach. Under the estate termination approach, all property of the estate becomes property of the debtor upon confirmation and ceases to be property of the estate. *See In re Petruccelli,* 113 B.R. 5, 15 (Bankr.S.D.Cal.1990). According to the estate preservation approach, all property of the estate remains property of the estate after confirmation until discharge, dismissal, or conversion. *See In re Kolenda,* 212 B.R. 851, 853 (W.D.Mich.1997). A compromise between these two extremes is struck by the estate transformation approach, which regards only that property necessary for the execution of the plan as remaining property of the estate after confirmation. *See In re Heath,* 115 F.3d 521, 524 (7th Cir.1997); *In re McKnight,* 136 B.R. 891, 894 (Bankr.S.D.Ga.1992).

Urging this court to adopt the estate preservation approach, Telfair raises the specter of unscrupulous debtors "free to do whatever they please with their property when it is revested in them." [FN13] Telfair presents a fair challenge to the estate termination approach, which does not protect the post-confirmation obligations of the bankruptcy plan. The estate transformation approach, however, protects the interests of both the debtor and the creditors.

FN13. Appellant's Br. at 36.

Consideration of the case law and the general concerns of the bankruptcy code assures us that the estate transformation approach, adopted by the bankruptcy courts in the Southern District of Georgia, should be the law of this circuit. We therefore echo the conclusion of the Seventh Circuit and "read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan." *In re Heath,* 115 F.3d at 524. In this case, after confirmation, only the amount required for the plan payments remained property of the estate. Telfair's regular loan payments, made outside of the plan, were therefore no longer property of the estate and First Union's application of a portion of those payments to attorney's fees pursuant to the Deed did not violate section 362(a).[FN14]

FN14. Even if First Union technically applied plan payments to attorney's fees and then applied a regular loan payment towards the plan payments, our conclusion

would not be different because, ultimately, all the plan payments were properly applied, as evidenced by the bankruptcy court's discharge of Telfair's plan.

B. *Forced Insurance*

[6] Under the terms of the Deed, the Telfairs were required to maintain hazard insurance on their home, with a provision allowing First Union to "force place" hazard insurance if the Telfairs let their coverage lapse. In 1988, the Telfairs failed to provide proof of coverage and First Union ***1341** exercised its prerogative to "force place" insurance on the secured property. Rather than obtaining a policy with the Telfairs' previous insurance company, First Union arranged for coverage by Transamerica Premier Insurance Company and then, a year later, by Balboa Insurance Company ("Balboa"), both of which charged substantially higher premiums and paid considerable commissions to First Union. [FN15] First Union paid for these premiums with funds from the Telfairs' escrow account. Telfair contends that this arrangement violated First Union's fiduciary duties arising from either its administration of the Telfairs' escrow account as a trust or its role as the Telfairs' agent.

FN15. Telfair attributes a nefarious purpose to First Union's arrangement with Balboa; the change in coverage, however, was prompted by the Telfairs' own lapse and, according to First Union, discontinuation of coverage in Georgia by the Telfairs' previous carrier. In addition, although First Union alerted the Telfairs to the higher rates, the Telfairs did not secure replacement insurance until 1998, ten years after the initial lapse.

As evidence that the escrow account was an enforceable trust or obligated First Union as their agent, Telfair cites the Deed's requirement that he and his wife "pay to [First Union] as trustee (under the terms of this trust as hereinafter stated)" [FN16] tax and insurance payments that First Union would pay as they came due. Unpersuaded by this semantic argument, the bankruptcy court concluded, and the district court agreed, that, under Georgia law, a mortgagee's administration of an escrow account gives rise to neither a trust nor an agency relationship.

FN16. Security Deed, ¶ 2, *in* BR, Part A, Tab 1, Ex. B.

A trust born under Georgia law may be either express or implied. An express trust must be in writing and "shall have each of the following elements, ascertainable with reasonable certainty: (1) An intention by the settler to create a trust; (2) Trust property; (3) A beneficiary; (4) A trustee; and (5) Active duties imposed on the trustee, which duties may be specified in writing or implied by law." Ga.Code Ann. § 53-12-20 (1997). An implied constructive trust, as claimed by the Telfairs, is found "whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." *Id.* § 53-12-93(a).

As correctly found by the bankruptcy and district courts, there is no evidence that either type of trust was formed because there is no indication that the Telfairs and First Union intended the escrow funds to comprise a trust corpus. Rather, First Union's retention of future tax and insurance payments inured to the benefit of both parties in protecting the secured property. [FN17] *See Moore v. Bank of Fitzgerald*, 225 Ga.App. 122, 483 S.E.2d 135, 139 (1997) ("[A]bsent special circumstances ... there is ... no confidential relationship between lender and borrower or mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests.") (internal quotation marks and citation omitted). Although the Deed used the word "trust," the Georgia Court of Appeals has noted that

FN17. Telfair's citation to First Union employee's deposition testimony that the funds in the escrow accounts belong to the

> customers, *see* BR, Part J, Tab 111 at 20 (Pam Swallow Dep.), is unavailing. Although this testimony may have enlightened the bankruptcy court's consideration of whether, as a matter of Georgia law, the escrow funds comprised an enforceable trust, the bankruptcy court was not bound by it in reaching its ultimate conclusion.

> [t]he majority rule appears to be that funds paid by a mortgagor to an escrow account to be used by the mortgagee to meet tax and insurance obligations ... ***1342** do not constitute trust properties such as would render the mortgagee accountable to the mortgagor for any earnings or profits from the funds.

Knight v. First Fed. Sav. & Loan Ass'n, 151 Ga.App. 447, 260 S.E.2d 511, 515 (1979). This observation is in accord with the case law. *See* Ferdinand S. Tinio, Annotation, *Rights in funds representing "escrow" payments made by mortgagor in advance to cover taxes or insurance,* 50 A.L.R.3d 697 § 3, 1973 WL 33838 (1973); *see also Judd v. First Fed. Sav. & Loan Ass'n,* 710 F.2d 1237, 1241 (7th Cir.1983) (mere use of trust terminology in a VA form security deed does not create a fiduciary duty).

Liberty National Life Insurance Co. v. United States, 463 F.2d 1027 (5th Cir.1972), relied on by Telfair, is not to the contrary.[FN18] In *Liberty National,* the former Fifth Circuit concluded that a mortgagor's escrow funds created a trust asset of the mortgagee bank for federal income tax purposes. *See* 463 F.2d at 1029-30. Not only was this opinion decided on federal rather than state law, but the narrowness of its holding was recognized by this court five years later when it concluded that, for other tax purposes, mortgage escrow funds created "a contractual obligation and nothing more." *Southwestern Life Ins. Co. v. United States,* 560 F.2d 627, 634 (5th Cir.1977).

> FN18. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[7][8][9] The same reasoning compels the conclusion that First Union's administration of the Telfairs' escrow account did not thrust on them the role of agent. Under Georgia law, agency results from the manifestation of mutual consent that one person will act on the other's behalf and subject to the other's control. *See Smith v. Merck,* 206 Ga. 361, 57 S.E.2d 326, 332 (1950). In the case of escrow funds held by a mortgagee for payment of tax and insurance payments on behalf of a mortgagor pursuant to a security agreement, the mortgagee does not act as agent because the mortgagee acts neither for the sole benefit of the mortgagor nor under the mortgagor's control. *See Georgia Farm Bureau Mut. Ins. Co. v. First Fed. Sav. & Loan Ass'n,* 152 Ga.App. 16, 262 S.E.2d 147, 150 (1979) (a mortgagee does not act as the agent of its mortgagor when it sought insurance for the secured property). Here, for example, although the terms of the Deed constrain First Union's use of the escrow funds, any insurance obtained with those funds had to meet First Union's approval, and the Telfairs lacked the authority to either direct the use of the escrowed funds or to terminate First Union's control thereof. We therefore affirm the conclusion of the bankruptcy and district courts that administration of escrow funds such as the one here, without more, does not create an agency relationship under Georgia law.

C. *The de Gorter Affidavit*

[10] Telfair contends error in the bankruptcy court's consideration of an affidavit submitted by First Union. The affidavit of David de Gorter, Balboa's former Assistant Vice President for Marketing, describes Balboa's insurance product. Because de Gorter had professed ignorance of many specifics of the product during his previous deposition, Telfair maintains that the subsequent inconsistent affidavit should have been stricken as a "sham." *See Van T. Junkins & Assocs. v. U.S. Indus.,* 736

F.2d 656, 656 (11th Cir.1984) ("[A] district court may find an affidavit which contradicts testimony on deposition a sham when the party merely contradicts its prior testimony without giving any valid explanation."). The bankruptcy court, ***1343** however, accepted First Union's explanation of the disparity: that de Gorter had informed himself of the insurance policy's terms in the interval between his deposition and affidavit. This is a plausible explanation, and we cannot say that its acceptance by the bankruptcy and district courts was an abuse of discretion. In any event, de Gorter's familiarity was based only on other materials in the record, so it is difficult to see whence any prejudice would have come.

D. *Class Certification*

[11] After determining that none of Telfair's underlying claims had merit, the bankruptcy court came to the ineluctable conclusion that there were no claims to certify as a class action lawsuit.[FN19] It was within the court's discretion to consider the merits of the claims before their amenability to class certification. *See Cowen v. Bank United of Texas,* 70 F.3d 937, 941 (7th Cir.1995); *Wright v. Schock,* 742 F.2d 541, 543-44 (9th Cir.1984); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 758 (3d Cir.1974) (en banc). With no meritorious claims, certification of those claims as a class action is moot. Because we agree with the bankruptcy and district courts' disposition of the merits of Telfair's claims, we also affirm the denial of the motion for class certification.

FN19. The bankruptcy court also denied Mrs. Telfair's motion for class certification on the ground that her claims were not sufficiently representative, but she does not appeal this decision.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's decision affirming the bankruptcy court in all respects.

C.A.11 (Ga.),2000.

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