# CLAIM ISSUES

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# Contents

## I. Standing to Object to Claims -- Generally

Bankruptcy Code § 502(a) provides that a claim, proof of which is filed under § 501, is deemed allowed unless a "party in interest" objects. See In re Greenig, 152 F.3d 631, 633 (7th Cir. 1998) ("Once the proof of claim is filed under § 501, the claim is deemed allowed unless, a party in interest objects."). While a "party in interest" clearly has standing to object to claims, the Code does not define "party in interest" (other than to state that it includes a creditor of a general partner in a partnership that is a Chapter 7 debtor). See Caserta v. Tobin, 175 B.R. 773, 774 (S.D. Fla. 1994) (stating that "Congress has not . . . defined the term 'party in interest.'"). Thus, it has been left for the courts to determine who is a party in interest for purposes of objection to allowance of a claim. While it is clear that a trustee has standing to object to a claim, there is less agreement among the courts as to when circumstances might exist so that another creditor or the debtor might have such standing.

### A. Standing to Object to Claims – Trustees

The trustee certainly is a party in interest within the meaning of Code § 502(a); the basis for the trustee's status as a party in interest is statutory. Code § 704, which sets out the duties of the trustee, provides that the trustee shall, "if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper." Bankruptcy Code § 704(a)(5). Bankruptcy Code §§ 1202(b)(1) and 1302(b)(1) assign to the Chapter 12 and Chapter 13 trustee many of the responsibilities of the Chapter 7 trustee, including the duty set forth in Bankruptcy Code § 704(a)(5) regarding objections to claims (if a trustee is appointed in a Chapter 11 case, Bankruptcy Code § 1106(a)(1) also assigns this responsibility to that the trustee). Therefore, it would appear that the trustee has not only a right, but also a duty to object to the allowance of any claim that is improper.

Bankruptcy Code § 704(a)(5), however, does provide a caveat to that obligation; a trustee need challenge a claim only "if a purpose would be served." Henry Hildebrand, the standing Chapter 13 trustee for the Middle District of Tennessee, recently observed that;

> Many chapter 13 trustees treat the allowance or disallowance of claims as a province of the debtor and not the trustee, recognizing that the trustee has no way of knowing whether a proof of claim accurately reflects an obligation of the debtor and whether the obligation is stated in the correct amount.

See Henry E. Hildebrand, *Chapter 13 Trustees' Obligations to Review Claims*, 28-SEP Am. Bankr. Inst. J. 38 (2009).

He does note, though, that the U.S. Trustee Program in March 2009 did issue "Guidelines for Reviewing Mortgage Proof of Claims" to Chapter 13 trustees, encouraging substantially increased scrutiny of claims in Chapter 13 cases. He explains that this was done "in recognition of the chain in ownership issues and other complexities found in claims by mortgage servicers, in response to an increasing number of cases dealing with mortgage servicing abuses in chapter 13 cases." Id. He believes that, in response to these guidelines, "most chapter 13 trustees have engaged in a detailed analysis based on the facial validity and accuracy of claims." Id.

**B. Standing to Object to Claim – Creditors**

Some courts have broadly stated that a party in interest is "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." See, e.g., In re FBN Food Servs., Inc., 82 F.3d 1387, 1391 (7th Cir. 1996); In re Ulz, 401 B.R. 321, 327 (Bankr. N.D. Ill. 2009), aff'd, 419 B.R. 793 (N.D. Ill 2009). Clearly, each creditor has a direct economic interest in the disallowance or reduction of every other creditor's claim, as this would mean a larger distribution for the allowed claims. In fact, if "parties in interest" are those who have some interest in the assets of the debtor being administered in the estate, the right of a creditor to object to another creditor's claim would seem to be indisputable. But courts have generally concluded that this obvious financial interest does not, alone, confer party in interest standing on a creditor.

While recognizing the pecuniary interest of a creditor, courts generally find that a creditor has standing to object only when no trustee has been appointed or the trustee has been asked to object but has refused. This judicial limitation on the apparently clear language of Bankruptcy Code § 502(a), which broadly allows any party in interest to object, stems from the belief that "the needs of orderly and expeditious administration do not permit the full and unfettered exercise of such right" and that these needs require that the trustee act as the "primary spokesman for all the creditors." See 4 Collier on Bankruptcy § 502.02[2][d] at 502-14 (Resnick & Sommers ed. 15th ed. rev. 2009). As explained in the 1983 Advisory Committee Note to Federal Rule of Bankruptcy Procedure 3007:

> While the debtor's other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object is generally exercised by the trustee. Pursuant to § 502(a) of the Code, however, any party in interest may object to a claim. But under § 704 the trustee, if any purpose would be served thereby, has the duty to examine proofs of claim and object to improper claims.

It should be noted, though, that creditors are free to bring to the attention of the trustee the grounds for objecting to other claims and to attempt to persuade the trustee to prosecute such objections. If the trustee refuses to object to the claim, the creditor can file a motion to compel the trustee to object to the claim, or, in the alternative, to permit the creditor to proceed with the objection. See Kowal v. Malkemus (In re Thompson), 965 F.2d 1136, 1147 (1st Cir. 1992) ("Leave to object is not generally accorded an individual creditor unless the Chapter 7 trustee refuses to object, notwithstanding a request to do so, and the bankruptcy court permits the creditor to object in the trustee's stead."); Fred Reuping Leather Co. v. Fort Greene Nat'l Bank (In re Honesdale Union Stamp Shoe Co.), 102 F.2d 372-373 (3d Cir. 1939) ("the overwhelming weight of authority in the other circuits is to the effect that a general creditor of a bankrupt has no right to contest another creditor's claim . . . unless upon application the trustee has refused to do so and the district court has authorized the creditor to proceed in the trustee's name."); In re Ulz, 401 B.R. 321, 327 (Bankr. N.D. Ill. 2009) ("a creditor is a 'party in interest' with standing to object to the claims of other creditors--provided no trustee has been appointed or the trustee has been asked to object but has refused"); Trauner v. Huffman (In re Trusted Net Media Holdings LLC), 334 B.R. 470, 476 (Bankr. N.D. Ga. 2005) ("several courts have held that where

a trustee is appointed to administer an estate, a creditor can object to the claim of another creditor only if, upon demand, the trustee refuses to do so and the court grants the creditor the right to act of behalf of the trustee"); In re Bakke, 243 B.R.753, 756 (Bankr. D. Ariz. 1999) (where trustee has been appointed, for a creditor or a debtor to obtain standing to object to another creditor's claim, "the objecting party must first request the trustee to object to the claim, the trustee must refuse to object to the claim, and the Bankruptcy Court may then authorize the creditor or debtor to proceed"); Eastgate Enters., Inc. v. Funk (In re Meade Land & Dev. Co., Inc., 1 B.R. 279, 282 (Bankr. E.D. Pa. 1979) ("Most jurisdictions have therefore adopted the general rule that once a trustee has been elected and qualified, no general creditor has standing to contest another general creditor's claim, unless the trustee, upon application, refuses to object and the court thereupon has authorized the creditor to proceed in the trustee's name."). But see In re Savidge, 57 B.R. 389, 392 (D. Del. 1986) ("The rule that general creditors should object through the trustee does not apply to secured creditors whose security interests are directly at stake."); First Bank Billings v. Feterl Mfg. Co. (In re Parker Montana Co), 47 B.R. 419, 421-22 (D. Mont.1985) (secured creditors are generally permitted to contest the claims of general creditors without first requesting the trustee to do so).

### C. Standing to Object to Claims – Debtors

In a typical Chapter 7 case, a debtor has no standing to object to claims because the debtor has no pecuniary interest in the distribution of assets of the estate. See Kieffer-Mickes, Inc. v. Riske (In re Kieffer-Mickes, Inc), 226 B.R. 204, 208-209 (BAP 8th Cir. 1998) (an objection to a proposed distribution affects how much each creditor will receive and does not affect the debtor's rights); In re Ulz, 401 B.R. 321, 328 (Bankr. N.D. Ill. 2009) (Chapter 7 debtor usually not a party in interest; success of objection does not affect debtor as debtor receives a distribution only after all creditors have been paid in full, and estate rarely has sufficient assets to do that); United States v. Jones, 260 B.R. 416, 418 (E.D. Mich. 2000) (almost every court that has dealt with a Chapter 7 debtor's standing to object has held that unless there is going to be a surplus, debtors do not have standing to object to a proof of claim).

Courts have recognized several exceptions to the general rule that a Chapter 7 debtor cannot object to claims. First, the debtor has a pecuniary interest in the outcome of any claims objection and so standing to object if there might be a surplus to be returned to the debtor after satisfying all debts. See In re Curry, 409 B.R. 831, 838 (Bankr. N.D. Tex. 2009). It is not clear how a court is to calculate whether a surplus exists in the estate. Several courts have simply looked to the debtor's schedules to determine if a surplus exists. See, e.g., In re Watson, No. 03-133355, 2004 WL 3244420, at *1 (Bankr. M.D. La. Sept. 29, 2004) ("The schedules indicate that this will not be a surplus case, because the debtor's liabilities are greater that [sic] his assets. . . ."); In re Toms, 229 B.R. 646, 651 (Bankr. E.D. Pa. 1999) ("the debtors' bankruptcy schedules . . . demonstrate that there will be no dividends at all payable to their unsecured creditors; moreover, the chapter 7 trustee agreed with this assessment."). Another court, after considering the claims register, the trustee's report of assets, and the fact that the trustee hired accountants to investigate the assets of the debtor, concluded that given the uncertainty of total assets and claims, the debtor had a pecuniary interest in the outcome of the claim objection. See In re Morgan, No. 05-34981-SGJ-7, 2007 WL 2669341, at *4 (Bankr. N.D. Tex. Sept. 6, 2007).

In addition, a Chapter 7 debtor may have standing to object to particular claims. For example, courts have recognized that standing may exist to object to nondischargeable claims. See, e.g., Willard v. O'Neil (In re Willard), 240 B.R. 664, 669 (Bankr. D. Conn. 1999). As the court explained in In re Toms, 229 B.R. 646, 651 (Bankr. E.D. Pa. 1999):

> [I]f there were a claim asserted in a chapter 7 case which would not be discharged and which is not likely to be paid in full by the trustee, then the chapter 7 debtor will be legally responsible for payment of any remaining claim after the bankruptcy case is concluded. Due to this continuing obligation, the debtor has a pecuniary interest in the disallowance of the claim. Were the claim disallowed or reduced in amount, the debtor's continuing liability after bankruptcy could be affected.

It also has been noted that a debtor may be afforded standing to object to an excessive dischargeable claim whose holder would receive distributions that otherwise would be made to the holder of a nondischargeable claim. The debtor certainly wants to maximize the distribution to the holder of a nondischargeable claim, because to the extent that this claim is satisfied, the debtor is relieved from some or all of the claim of that creditor which would survive the bankruptcy case. See 4 Collier on Bankruptcy § 502.02[c] at 502-13 (Resnick & Sommers ed. 15th ed. rev. 2009).

In Chapter 12 and Chapter 13 cases, the debtor quite clearly has a pecuniary interest and may be a party in interest with standing to object to a proof of claim. See, e.g., In re Chapter 13 Proceedings of Herrera, 369 B.R. 395 (E.D. Wis. 2007); In re Barton, 249 B.R. 561 (Bankr. E.D. Wash. 2000); Matter of Dooley, 41 B.R. 31 (Bankr. N.D. Ga. 1984); In re Roberts, 20 B.R. 914 (Bankr. E.D.N.Y. 1982). In both chapters, the success of the debtor's plan may depend upon eliminating or reducing some claims. For example, the plan's success may depend upon the debtor being able to successfully argue that a debt asserted as a secured claim or a priority claim, which generally must be paid in full, is excessive or invalid.

Just as with creditors, it would seem that "the demands of orderly and expeditious administration" would dictate that a debtor should be granted standing to object to a claim only when it has a pecuniary interest and when the trustee fails or refuses to object the claim. See In re Choquette, 290 B.R. 183, 188-89 (Bankr. D. Mass. 2003); In re SUN OK Kim, 89 B.R. 116, 117-18 (D. Haw. 1987); In re Bakke, 243 B.R. 753, 755 (Bankr. D. Ariz. 1999) (concluding that the line of cases which hold that when a trustee has been appointed, the debtor or other creditors do not have standing to object to claims of another creditor unless specifically granted by the bankruptcy court, are well reasoned). See also Mulligan v. Sobiech, 131 B.R. 917, 920 (S.D.N.Y. 1991) (court notes that trustee supported the ability of the debtor to object to creditor's claim).

## II. Claim Documentation

### A. Required Documentation – Rule 3001 and Unsecured Claims

Bankruptcy Code § 501(a) provides that "[a] creditor . . . may file a proof of claim." While the Code itself does not define "proof of claim," Federal Rules of Bankruptcy Procedure

3001(a) provides that "[a] proof of claim is a written statement setting forth a creditor's claim" and that it "shall conform substantially to the appropriate Official Form." The relevant form is Official Form 10. When a proof of claim is executed and filed in accordance with the provisions of Rule 3001 (including Official Form 10), it "constitute[s] prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). See also Caplan v. B-Line, LLC (In re Kirkland), 572 F.3d 838, 840 (10th Cir. 2009); In re Pursue Energy Corp., No. 0205339 JEE, 2009 WL 3489872, at *4 (Bankr. S.D. Miss. Oct. 23, 2009). The party objecting to such a claim has the initial burden of presenting evidence to overcome the prima facie showing made by the proof of claim. See In re Allegheny Int'l, Inc., 954 F.2d 167, 173-74 (3d Cir. 1992) ("In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency."). Once this is done by the objecting party, the burden of proof shifts to the creditor to establish the validity and amount of its claim, unless the objecting party would have had the burden of proof outside of bankruptcy, in which case the burden remains with the objecting party. See In re King, No. 08-13152-SLM, 2009 WL 960766, at *2 (Bankr. E.D. Va. April 8, 2009); In re Kincaid, 388 B.R. 610, 613-14 (Bankr. E.D. Pa. 2008).

Bankruptcy Rule 3001 would not appear to be particularly complicated or burdensome. See LTV Corp. v. Gulf State Steel. Inc. of Ala., 969 F.2d 1050, 1058 (D.C. Cir. 1992) ("Proofs of claim are not intended to be elaborately detailed documents."). One bankruptcy court has observed that "[a] proof of claim for an unsecured creditor requires little more than a listing of name, address, amount of claim (or a listing as 'unliquidated' or 'contingent') and a signature" and that " [i]t should take less than five minutes to fill out." See In re Great Western Cities, Inc. of N.M., 88 B.R. 109, 114 (Bankr. N.D. Tex. 1988), rev'd on other grounds 107 B.R. 116 (N.D. Tex. 1989). Basically, a properly executed proof of claim consists of (1) a creditor's name and address, (2) the basis for the claim, (3) the date the debt was incurred, (4) the classification of the claim, (5) the amount of the claim, and (6) supporting documentation. See In re Dow Corning Corp., 250 B.R. 298, 321 (Bankr. E.D. Mich. 2000). There have been numerous cases, though, considering what constitutes the necessary documentation supporting such claims, and how the lack of such documentation should be treated by the courts.

With regard to unsecured claims, there are no specific requirements for documentation, other than submitting a writing (or a duplicate thereof) if a debt is based on a writing. See Fed. R. Bankr. P. 3001(c); In re Thompson, 260 B.R. 484, 486 (Bankr. W.D. Mo. 2001). If the writing has been lost or destroyed, a statement explaining the circumstances of the loss or destruction should be filed with the claim. See Fed. R. Bankr. P. 3001(c). The term "based on a writing" is not defined in the Bankruptcy Code, and one court noted that the requirement to attach a writing is triggered if the claim was created by a writing. See In re Cluff, 313 B.R. 323, 332-33 (Bankr. D. Utah 2004), aff'd, No. 04-CV-978TS, 2006 WL 2820005 (D. Utah Sept. 29, 2006).

Courts do not always agree on what writings create the claim. For example, while courts generally agree that a claim for credit card debt is "based on a writing," and that it must, therefore, include such a writing or a duplicate thereof, courts disagree as to what document actually forms the basis of a credit card or consumer credit claim. Some courts have concluded that the credit card agreement itself forms the basis of the claim, and must be attached to the proof of claim. See, e.g., In re Tran, 351 B.R. 440, 447 (Bankr. S.D. Tex. 2006), aff'd, 369 B.R. 312 (S.D. Tex. 2007); In re Henry, 311 B.R. 813, 817 (Bankr. W.D. Wash. 2004). Others have

decided that the actual credit card charges themselves constitute the basis for the claim. See, e.g., In re Cluff, 313 B.R. 323, 334 (Bankr. D. Utah 2004) ("[I]t is not the underlying credit card agreement that creates the debt-for that only establishes a line of credit that defines the terms of the parties future transactions-it is the actual use of the line of credit that creates the obligation to repay."), aff'd, 2006 WL 2820005 (D. Utah Sept. 29, 2006). Yet others conclude that a credit card or consumer credit claim is based on both the credit card agreement and proof of the credit card's actual use. As the court explained in In re Kemmer, 315 B.R. 706, 714 (Bankr. E.D. Tenn. 2004):

> In establishing a debtor's line of credit under a credit card or consumer credit account, the underlying agreement sets forth the terms and conditions upon which the account is based. It is true that the creation of the account itself does not create a debt upon which a claim may be based. However, once the debtor agrees to the terms and conditions set forth in the underlying agreement and draws against the line of credit, i.e., uses the card or account, and creates the actual debt, he is still bound by the terms of the underlying agreement. Accordingly, the court agrees that a claim for a credit card or consumer credit account is based upon both the underlying agreement creating the account *and* the actual transactions creating the account.

See also Heath v. American Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 432 (BAP 9th Cir. 2005); In re Plourde, 397 B.R. 207, 219 (Bankr. D.N.H. 2008); In re Irons, 343 B.R. 32, 40 (Bankr. N.D.N.Y. 2006); In re Relford, 323 B.R. 669, 673-74 (Bankr. S.D. Ind. 2004).

Courts have recognized that, if the "writing" for credit card accounts includes not only the underlying credit card agreement but also the written or electronic records of every transaction on the account since the oldest unpaid obligation (or at least the monthly bills since that time), such records are likely to be voluminous. This would put an unduly onerous burden upon the creditor, as well as on the debtor and the trustee, who would need to sift through the produced documents in assessing the claim's validity. So, as the court in In re Kemmer, 315 B.R. 706, 715 (Bankr. E.D. Tenn 2004) explained:

> Accordingly, Official Form 10 allows for attachment of a summary of the claim, which falls in line with Federal Rule of Evidence 1006, allowing voluminous documentation to be "presented in the form of a chart, summary or calculation." . . . The presentation of a summary, however, does not relieve the creditor of the responsibility to produce the actual documentation, irrespective of the volume thereof, if requested by the debtor or Chapter 13 trustee. [internal citations omitted].

See also In re Relford, 323 B.R. 669, 674 (Bankr. S.D. Ind. 2004).

It has been noted that "[t]here is no uniform standard for what must be contained in a summary," and that while some breakdown of interest and other charges must be included, "it is unclear whether this should cover the entire account history, the last several billing cycles, or only those charges not reflected in the last prepetition monthly statement." See Heath v. American Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 432-33 (BAP 9th Cir. 2005). Many courts rely on the same (or very similar) guidelines set out by the bankruptcy court

in In re Cluff, 313 B.R. 323 (Bankr. D. Utah 2004), aff'd, 2006 WL 2820005 (D. Utah Sept. 29, 2006). That court stated:

> To provide parties with sufficient information to ascertain the basis and accuracy of the creditor's claim, the summary attached to the proof of claim should: (i) include the amount of the debts; (ii) indicate the name and account number of the debtor; (iii) be in the form of a business record or some other equally reliable format; and (iv) if the claim includes charges such as interest, late fees and attorney's fees, the summary should include a statement giving a breakdown of those elements. These requirements fulfill the purposes of both Evidence Rule 1006 and Official Form 10, and gives debtors and trustees sufficient information to ascertain the accuracy and basis of the claim asserted.

313 B.R at 335.

See also In re Irons 343 B.R. 32, 40 (Bankr. N.D.N.Y. 2006); In re Relford, 323 B.R. 669, 674-75 (Bankr. S.D. Ind. 2005); In re Kemmer, 315 B.R. 706, 715 (Bankr. E.D. Tenn. 2004); In re Armstrong, 320 B.R. 97, 106 (Bankr. N.D. Tex. 2005). But see In re Porter, 374 B.R. 471, 482 (Bankr. D. Conn. 2007) (agreeing with these guidelines generally, but disagreeing with the requirement that the summary be in the form of a business record).

In a credit card transaction, documentation often consists of account statements that show interest accrued, late fees and other charges imposed under the terms of the agreement. The courts have not definitively answered whether the necessary summary should cover the entire account history, only the last several months, or only the charges not included in the last pre-petition statement. See, e.g., In re Henry, 311 B.R. 813, 818 (Bankr. W.D. Wash. 2004) (must, at a minimum, provide "a sufficient number of monthly account statements to show how the total amount asserted has been calculated"); In re Sandifer, 318 B.R. 609, 611 (Bankr. M.D. Fla. 2004) (two to four months of prepetition credit card statements attached to some amended proofs of claim were found to be adequate). Recognizing this lack of certainty, one court found that "it would be counterproductive to set out a specific checklist list of data that must be uniformly supplied in summary form in credit card account claims," and that "the information that must be provided may vary from case to case." See In re Herron, 381 B.R. 184, 189 (Bankr. D. Md. 2008).

When the claimant is an assignee of a debtor's original creditor, courts have disagreed on whether the claimant must attach evidence of the assignment to the proof of claim. Several courts, relying on Bankruptcy Rule 3001(e), have concluded that no evidence of the assignment need be attached to the proof of claim. These courts point out that Bankruptcy Rule 3001(e)(2) requires evidence of a transfer of a claim only if the claim is transferred *after* the original creditor filed a proof of claim. No similar requirement exists in Bankruptcy Rule 3001(e)(1) if the claim is transferred *before* a proof of claim is filed. Therefore, they reason, the transferee need not attach transfer documents to the proof of claim. See In re Cox, No. 06-11717-CAG, 2007 WL 4219407, at *4 (Bankr. W.D. Tex. Nov. 28, 2007); In re Griffin, No. 06-11130-FM, 2007 WL 1467145, at *2 (Bankr. W.D. Tex. May 17, 2007); In re Gonzalez, 356 B.R. 905, 906-907 (Bankr. S.D. Fla. 2006). Most courts, though, have found that a transferee does have an obligation under Bankruptcy Rule 3001 to document its ownership of the claim. See, e.g., In re Plourde, 397 B.R. 207, 220-21 (Bankr. D.N.H. 2008); In re Povey, No. 07-80076, 2008 WL

1376271, at *6 (Bankr. E.D. Okl. April 9, 2008); In re Kincaid, 388 B.R. 610, 616-617 (Bankr. E.D. Pa. 2008); In re Armstrong, 320 B.R. 97, 106 (Bankr. N.D. Tex. 2005); In re Hughes, 313 B.R. 205, 212 (Bankr. E.D. Mich. 2004). These courts conclude that Bankruptcy Rule 3001(e) was not intended to address what evidence or documentary support is required to prove ownership of a claim, but rather sets out a process for resolving claim disputes between a transferee and transferor. As explained by the court in In re Rochester, No. 03-32184-BJH-13, 2005 WL 3670877, at *3 (Bankr. N.D. Tex. May 24, 2005):

> Simply put, under Rule 3001(e), once a creditor has come forward and asserted a right to payment from the estate by filing a proof of claim, the rule requires that a different party asserting the same right must file evidence of the transfer in order to show that it now holds the right to payment. Rule 3001(e) provides that the clerk then sends notice and an opportunity to object to the original claimant (notably, not to the debtor), so that the original claimant may appear and contest the validity of the purported transfer. If, however, the original creditor has never asserted a right to payment from the estate by filing a proof of claim, then evidence of a transfer is not required. As the Advisory Committee Note makes clear, the intent of the drafters in amending the rule was to remove bankruptcy courts from the business of policing claims traffic. The bankruptcy court's role has been eliminated except where there is a dispute between a transferor and a transferee which affects the estate--*i.e.*, where both are claiming a right to payment. Therefore, no evidence of a transfer is required where no proof of claim has been filed prior to the transfer. The bankruptcy court will make a judicial determination as between competing claimants only where the transferor objects to the transferee's assertion that a transfer has taken place. In short, Rule 3001(e) simply addresses the relative rights of a claim transferee and transferor. In contrast, subsections (a), (b), (c) and (d) of Rule 3001 address what is required to assert a claim against the debtor, and to have the claim accorded *prima facie* effect.

### B. Required Documentation – Rule 3001 and Secured Claims

Failure to file a proof of claim does not affect the validity of any lien or security rights the creditor may have in the collateral. Bankruptcy Code § 506(d). Nevertheless, it often is advisable to file a proof of claim with proper documentation, especially if the creditor wishes to participate in distributions from the estate or plan. See In re Tarnow, 749 F.2d 464, 465, (7th Cir. 1985) (if there is doubt as to whether the collateral is adequate to satisfy the debt, creditor might want to file a proof of claim so that he will have a claim against the estate for the shortfall). See generally Carlson, *Proofs of Claims in Bankruptcy: Their Relevance to Secured Creditors*, 4 J Bankr. L. & Prac. 555 (1995) (discussing the reasons that secured parties file proof of claims).

Creditors with secured claims, like those with unsecured claims, are required to use Official Form 10 or a similar document that substantially conforms to that form. Bankruptcy Rule 3001(c) provides that "[w]hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim." Bankruptcy Rule 3001(d) states that "[i]f a security interest in property of the debtor is claimed, the proof of claim should be accompanied by evidence that the security interest has been perfected." See In re Immerfall, 216 B.R. 269, 272 (Bankr. D. Minn. 1998) (creditor asserting

security interest in property has burden of producing documentary proof of secured status). Thus, the proof of claim should be accompanied by the documents that support the secured claim, such as promissory notes, mortgages and security agreements, as well as satisfactory evidence that the security interest was perfected (e.g., a copy of a financing statement stamped as received by the secretary of state). Official Form 10 also directs creditors to attach an itemized statement if their claim includes "interest or other charges" in addition to the principal amount of the claim, which would apply to nearly all secured claims, as these obligations bear interest.

As one commentator has noted, in discussing the required documentation for mortgage claims:

> Requiring this trio of documentation (itemization, note, and mortgage) permits all parties in a bankruptcy case – debtor, trustee, and other creditors – to ensure the accuracy and legality of the claim. Without documentation, parties cannot verify that the claim is correctly calculated and that it reflects only amounts due under the terms of the note and mortgage and permitted by other applicable law. A lack of documentation hampers efforts to ensure that any payments on mortgage claims are made in accord with the Bankruptcy Code.

See Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121, 146 (2008).

Professor Porter's empirical study examining the behavior of mortgage companies in consumer bankruptcy cases reveals that mortgage companies frequently do not comply with bankruptcy law. She found that "[a] majority of mortgage claims are missing one or more of the required pieces of documentation for a bankruptcy claim" and that "fees and charges on claims often are poorly identified, making it impossible to verify if such fees are legally permissible or accurate." Id. at 121. In spite of these irregularities, she found that "mortgage claims in bankruptcy are contested infrequently." Id. at 121. But see Mortgage Elec. Registration Sys., Inc. v. Agin, No. 09-CV-10988-PBS, 2009 WL 3834002 (D. Mass. Nov. 17, 2009) (omission of the name of the mortgagor in the certificate of acknowledgment of a mortgage rendered the mortgage avoidable in bankruptcy under § 544). Another commentator has noted that many proofs of claim asserting secured status, which include sloppy or incomplete documentation, "are based on wishful thinking or a hope that the claims are not too closely examined." See Henry E. Hildebrand, *Chapter 13 Trustees' Obligations to Review Claims*, 28-SEP Am. Bankr. Inst. J. 38 (Sept. 2009). Courts have not agreed on the proper response to a proof of claim with inadequate documentation.

### C. Effect of Failure to Provide Required Documentation

Courts agree that a claim that lacks the required documentation does not enjoy the benefits of Bankruptcy Rule 3001(f), which provides that a claim that is filed in accordance with Rule 3001 "shall constitute prima facie evidence of the validity and amount of the claim." Beyond that, though, neither the Bankruptcy Code nor the Rule expressly addresses the consequence of filing a proof of claim that fails to meet all of the Rule's requirements.

Bankruptcy Code § 502(a) provides that once a proof of claim is filed, it is "deemed allowed" unless a party in interest objects to it. Bankruptcy Code § 502(b) provides that, once an objection is lodged, the court "after notice and a hearing, shall determine the amount of such claim...." and further states that the court "shall allow" the claim, except to the extent that if falls within one of the nine enumerated categories of prohibited claims. The statute does not list among the grounds for disallowance the proof of claim's failure to adhere to the requirements of the Federal Rules of Bankruptcy Procedure, namely Rule 3001.

Most court have found that an objection based solely on a proof of claim's failure to include the required documentation, and not on one of the statutory grounds set out in the Bankruptcy Code, does not constitute a ground for disallowance of the claim, frequently stating that § 502(b) provides the exclusive basis for the disallowance of claims. See, e.g., In re Heath, 331 B.R. 424, 435 (BAP 9th Cir. 2005) ("Noncompliance with Rule 3001(c) is not one of the statutory grounds for disallowance….The statute's provisions cannot be enlarged or reduced by the Rules."); Dove-Nation v. eCast Settlement Corp. (In re Dove-Nation), 318 B.R. 147, 150-51 (BAP 8th Cir. 2004) ("[S]ection 502(b) sets forth the sole grounds for objecting to a claim and directs the court to allow the claim unless one of the exceptions applies….The rules are designed to supplement the statute, not replace it."); In re Burkett, 329 B.R. 820, 831 (Bankr. S.D. Ohio 2005) ("[L]ack of documentation, alone, is not a statutory basis for disallowance of a claim nor can Rule 3001 and Official Form 10 expand on the statutory bases for disallowance."); In re Cluff, 313 B.R. 323, 331 (Bankr. D. Utah 2004) ("Bankruptcy Rule 3001 does not provide substantive grounds for disallowance . . . . Courts have no discretion to disallow claims for reasons beyond those stated in the statute [§ 502(b)]."), aff'd, 2006 WL 2820005 (D. Utah Sept. 29, 2006); In re Shank, 315 B.R. 799, 812 (Bankr. N.D. Ga. 2004) ("[A]n objection to a proof of claim based solely on the lack of attached documents provides no basis for disallowance of a claim …. At a minimum, the bankruptcy rules must be interpreted as requiring that a challenge to a proof of claim assert a basis for its disallowance or reduction under 11 U.S.C § 502(b)-the existence of at least a potential dispute-before the procedures governing the determination of disputes in the claims allowance process are even invoked."); In re Kemmer, 315 B.R. 706, 716 (Bankr. E.D. Tenn. 2004) But see In re Gilbreath, 395 B.R. 356, 364 (Bankr. S.D. Tex. 2008) (an objection complaining that the creditor has offered no documentation in support of its claims necessarily asserts that the claim is "unenforceable against the debtor… under... applicable law" under §502(b); no court, for example, would enforce a credit card agreement without proof of the underlying agreement).

Several courts have concluded that, even without the required documentation, the proof of claim itself should be accorded evidentiary weight, and that the objecting party must come forward with evidence to overcome the statements on the proof of claim rather than merely objecting to the lack of documentation . See In re Cluff, 313 B.R. 323, 340 (Bankr. D. Utah 2004), aff'd, 2006 WL 2820005 (D. Utah Sept. 29, 2006) ("Proofs of claim are more than mere pleadings or allegations--they are some evidence. To overcome a proof of claim the Debtors must come forward with 'some evidence' to 'meet, overcome, or at least equalize' the statements on the proof of claim. A debtor's formal objection alone is not sufficient."); Dove-Nation v. eCast Settlement Corp. (In re Dove-Nation), 318 B.R. 147, 152 (BAP 8th Cir. 2004) ("Even if the proofs of claim are not entitled to prima facie validity, they are some evidence of the Claimant's claims….Here, the Debtor never presented any evidence to contradict the claims, much less any

evidence that the claims fall within one of the exceptions set forth in Section 502(b); therefore, the claims' validity stands.").

It should be noted that in almost all of those cases in which courts have found that an objection based solely on the failure to provide required documentation does not warrant disallowance of a claim, the debtor was the objecting party. Also, in those cases the debtors scheduled the debts as undisputed and/or admitted that they had no substantive problem with the claim. See, e.g., In re Heath, 331 B.R 424 (BAP 9th Cir. 2005) (debtors objected only because the claims did not attach supporting documentation; debtors listed the claims as undisputed in their schedules); Dove-Nation v. eCast Settlement Corp. (In re Dove-Nation), 318 B.R. 147 (BAP 8th Cir. 2004) (The debtor initially conceded that she had no valid underlying basis to object to the claims under §502, having originally scheduled the debts as undisputed. Debtor amended her schedules to list the claims as disputed only after filing objections to the claims. In addition, the Chapter 13 trustee testified he had examined the claims and found no reason to object to them.). In such a case, to prevent debtors from filing objections based on a technicality, it seems appropriate to require more than an objection based solely on inadequate documentation. See, e.g., In re Habiballa, 337 B.R. 911, 916 (Bankr. E.D. Wis. 2006) (debtors who file objections should not be relieved of their obligations on claims based on a "technicality" when debtors have acknowledged the debt on their schedules); In re Moreno, 341 B.R. 813, 818 (Bankr. S.D. Fla. 2006) ("[T]his court joins other courts which have criticized the tactic of filing an objection to an undisputed scheduled claim."); In re Shank, 315 B.R. 799, 814 (Bankr. N.D. Ga. 2004) (suggesting that a debtor may be violating Rule 9011 and the good faith requirement for confirmation of a Chapter 13 plan by objecting to a scheduled claim). Cf. In re Bohrer, 266 B.R 200, 201 (Bankr. N.D. Cal. 2001) ("Statements in bankruptcy schedules are executed under penalty of perjury and when offered against a debtor are eligible for treatment as judicial admissions.").

But a different situation is presented when the debtor has not scheduled the debts as undisputed, or when it is the trustee who is raising the objection. See Caplan v. B-Line, LLC (In re Kirkland), 572 F.3d 838, 840-41 (10th Cir. 2009) (bankruptcy court correctly determined that debtor's schedules "were of no evidentiary value against the Trustee"); In re Jorczak, 314 B.R. 474, 482 (Bankr. D. Conn. 2004) (schedules constitute an admission binding upon the debtor, but not binding upon the trustee). This was pointed out by the dissenting opinion in B-Line, LLC v. Kirkland (In re Kirkland), 379 B.R. 341(BAP 10th Cir. 2007), rev'd, 572 F.3d 838 (10th Cir. 2009). Judge Michael pointed out that § 502(b) provides the only basis for *disallowing* a claim, but says nothing about the basis for *objecting* to a claim, and that allowing a Chapter 7 trustee to object to a claim filed without supporting documents does no violence to § 502(b). 379 B.R. at 355. The judge had "no issue with decisions that stand for the principle that debtors are not allowed to game the system," but expressed his strong opinion that a Chapter 7 trustee, exercising her discretion and when a purpose would be served, should be allowed to object to a claim which is filed without any supporting documentation. Indeed, the judge noted that objecting to such a claim "involves a Chapter 7 trustee's obligation to perform his or her statutorily defined duties." 379 B.R. at 367, 370. Judge Michael concluded:

> Someone who seeks payment from a bankruptcy estate should be required, upon request, to prove their legal right to the funds. If a creditor attaches the documentation required by the Rules, the claim itself becomes the first, and perhaps final, step in the process-it

> stands as *prima facie* evidence of the claim. If a claimant does not comply with the Rules, and cannot supply other evidence to support its claim, upon objection by the trustee, the claimant loses-hardly a controversial result.

379 B.R. at 370.

The judgment of the BAP was later reversed, with the Court of Appeals finding that the creditor, who failed to provide either supporting evidence for its proof of claim or an explanation for its failure to provide supporting evidence, failed to meet its burden of proof. See Caplan v. B-Line, LLC (In re Kirkland), 572 F.3d 838 (10th Cir. 2009). It is important to note that it was not the mere failure to attach the required documentation that warranted disallowance of the claim, but it was the failure, after an objection was made, to attach the documentation or otherwise provide supporting evidence of the claim that warranted disallowance. The creditor simply had failed to meet its burden of proof.

Several courts, while finding that a Chapter 13 debtor's objections to proofs of claim for inadequate documentation did not warrant disallowance, also have recognized that a different analysis and conclusion might be warranted if a Chapter 7 or 11 trustee was making the objection. For example, the bankruptcy court in In re Cluff, 313 B.R. 323, 343 (Bankr. D. Utah 2004), aff'd, 2006 WL 2820005 (D. Utah Sept. 29, 2006) stated:

> [I]t is important to distinguish these Chapter 13 cases from Chapter 7 or 11 cases in which the trustee reviews a proof of claim asserting the debtor owes a debt, but the claim does not attach documents supporting the claim. Unless claims are already listed as disputed, unliquidated, or contingent on a debtor's statement and schedules, a Chapter 7 or 11 trustee must examine the debtor's books and records to determine which claims are truly owed and which claims are objectionable. The Chapter 7 or 11 trustee is not privy to the personal history of the debtor and does not have first-hand knowledge of the debtor's debts. A mere formal objection from a Chapter 7 or 11 trustee does not raise the same issue of bad faith which may arise when a debtor, who has personal knowledge of a debt and who has admitted that debt, later object to the undisputed claim based on a technicality.

See also In re Mazzoni, 318 B.R. 576, 579 n.14 (Bankr. D. Kan. 2004).

When a creditor has failed to provide the required documentation, courts have generally provided the claimant an opportunity to supplement its documentary support. See In re Stoecker, 5 F.3d 1022, 1028 (7th Cir. 1993) ("A creditor should therefore be allowed to amend his incomplete proof of claim …to comply with the requirements of Rule 3001, provided that other creditors are not harmed by the belated completion of the filing."); In re Kincaid, 388 B.R. 610, 615 n.4 (Bankr. E.D. Pa. 2008) (most courts will provide the claimant an opportunity to supplement its documentary support); In re Relford, 323 B.R 669, 677 (Bankr. S.D. Ind. 2005) (court refused to disallow claim, giving creditor 30 days to amend the claim to include documentation establishing it as the actual holder of the claim). But see In re Shanks, 315 B.R. 799 (Bankr. N.D. Ga. 2004) (court would not order creditor to amend deficient proofs of claim that lacked sufficient documentation when debtor had scheduled those claims, and debtor's only objection was purely formal objection to lack of documentary support). But when the creditor is

given the opportunity to amend by supplying proper documentation and fails to do so, and provides no evidence in support of its claim, then the court may find that the creditor failed to carry its burden of proof, and may disallow the claim. As explained by the court in In re McCarthy, No. 04-10493-SSM, 2004 WL 5683383, at *8 (Bankr. E.D. Va. July 14, 2004):

> [W]here objection is made to a proof of claim based on the creditor's failure to attach the writing on which the claim is based, the creditor, prior to the hearing on the objection, should be allowed to file an amended proof of claim that cures the deficiency or, even without so amending, to appear at the hearing and prove its claim. But unless the claim is amended to comply with Rule 3001, it does not have the benefit of the prima facie validity conferred by Rule 3001(f). This means that if the creditor presents *no* evidence in support of its claim, it has necessarily failed to carry its burden of proof, and the claim must be disallowed.

It should be recognized that courts are becoming increasingly "irritated" with the sloppy and incomplete documentation often supplied by claimants. See, e.g. In re Prevo, 394 B.R. 847, 851 (Bankr. S.D. Tex. 2008) ("Based upon hearings in this and other cases, the Court believes that certain members of the mortgage industry are intentionally attempting to game the system by requesting undocumented and potentially excessive fees and then reducing those fees in amended proofs of claim only after being exposed by debtor's counsel."); In re Coates, 292 B.R. 894, 903 n. 14 (Bankr. C.D. Ill. 2003) (Litton Loan's last minute filing of a new proof of claim is reminiscent of a carnival shell game and is indicative of an intent to avoid inquiry into its claimed fees and expenses."). The court in In re Prevo viewed the habit of submitting proofs of claim without adequate documentation as a by-product of fixed fee arrangements, explaining:

> If an attorney is getting paid a flat amount for each proof of claim filed and the system places the burden on debtors to file objections, it is in the attorney's financial interest to spend as little time as possible on each proof of claim and submit the most barren claim possible.

394 B.R. at 851 n. 7. Courts have chastised claimants for providing inadequate documentation, and have even threatened sanctions. See generally Henry E. Hildebrand, *Chapter 13 Trustees' Obligations to Review Claims*, 28-SEP Am. Bankr. Inst. J. 38 (September 2009).

## III. Post-Confirmation Modifications of Secured Claims

A Chapter 13 debtor often chooses to retain an encumbered motor vehicle or other personal property. The confirmed plan generally provides for modification of the claim under Bankruptcy Code § 1322(b)(2) and for "cramdown" treatment in accordance with Bankruptcy Code § 1325(a)(5)(B). The plan bifurcates the claim into secured and unsecured portions pursuant to Bankruptcy Code § 506(a), and provides for payments on the secured portion of the claim during the term of the plan with post-confirmation interest, so that the secured creditor receives the present value of its allowed secured claim (i.e., of the encumbered property). Often, little or nothing is paid on the unsecured portion of the claim. Of course, in the case of a motor vehicle where the "hanging paragraph" to section 1325(a) applies, the debtor cannot bifurcate the claim and the plan must provide for payments with a present value equal to the total amount of

the debt; the debtor must pay the entire amount of the claim with plan interest. See Daimler Chrysler Financial Services v. Barrett (In re Barrett), 543 F.3d 1239, 1243 (11th Cir. 2008).

Sometimes, after confirmation, a debtor may desire to surrender the encumbered property (usually a motor vehicle), discontinue payments on the secured claim, and treat the creditor's deficiency claim as an unsecured claim, for which the plan may provide little or nothing. A debtor may wish to do this because of a change of circumstances since confirmation, such as illness or job loss, or may need to apply the payments that were being made on that secured claim to other claims. A debtor may want to surrender a motor vehicle because it is having mechanical problems and needs repairs, and the debtor cannot afford to pay for these repairs, or the car simply may have depreciated faster than expected. In some instances, a debtor's defaults under the plan may result in the secured creditor getting relief from the automatic stay and foreclosing on the encumbered property. Whether the collateral has been surrendered or foreclosed upon, the debtor may seek to modify the plan to treat the deficiency as an unsecured claim.

The courts are divided on the question of what happens to a secured claim in a Chapter 13 case after a post-confirmation surrender or seizure of the collateral, when the debtor then seeks to modify the plan to treat the deficiency as an unsecured claim. The only circuit level authority appears to come from the Sixth Circuit. In Chrysler Financial Corp. v. Nolan (In re Nolan), 232 F.3d 528 (6th Cir. 2000), a debtor experienced post-confirmation car trouble and wished to surrender the car to the secured party, who could then resell it. Any deficiency would then be considered an unsecured claim. The court gave several reasons for refusing to allow the deficiency to be reclassified as an unsecured claim, most of them based on its statutory interpretation of various sections of the Bankruptcy Code. The court concluded that § 1329(a)(1), which allows for a modification to "increase or reduce the amount of payments on claims," does afford the debtor a right to request alteration of the amount or timing of specific payments, but it "does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim." 232 F.3d at 532. The court noted that the terms "claim" and "payment" have two different meanings under the Bankruptcy Code, and § 1329(a)(1) clearly permits modification of the "amount of payments" and not of the "amount of claims." 232 F.3d at 434-35. The court also was concerned that the proposed modification would violate § 1325(a)(5)(B), which provides for determination of the value of the encumbered property at the time of confirmation, and would contravene § 1327(a), which makes the provisions of a confirmed plan binding on the debtor and creditor. 232 F.3d at 533. Confirmation of the plan thus has a preclusive effect with regard to the valuation and treatment of the claim as secured; later alteration of the claim is prohibited.

The Nolan court also discussed at some length the injustice of a debtor's opportunity to manipulate the system by using the collateral post-confirmation and then surrendering it and modifying his plan after the collateral has been significantly devalued. 232 F.2d at 533-34. Noting that a secured creditor is not permitted under the Bankruptcy Code to seek to reclassify its claim if the collateral appreciates, it is "inequitable" for the debtor to be able to revalue or reclassify its claim when the collateral depreciates. 232 F.3d at 534.

The court therefore held that a debtor could not modify a plan under § 1329(a) by surrendering the collateral to a creditor, having the creditor sell the collateral and apply the

proceeds to the claim, and having any deficiency classified as an unsecured claim. 232 F.3d at 535. The same court in Ruskin v. Daimler Chrysler Servs. N. Am. LLC (In re Adkins), 425 F.3d 296 (6th Cir. 2005), extended its holding to cover the situation in which property is repossessed and the debtor is seeking to have the remaining claim deemed unsecured.

A number of other courts, both before and after the Nolan decision, have also concluded that a debtor cannot modify a plan to reclassify a secured claim when he surrenders encumbered property. See, e.g., In re White, No. 07-30212-DHW, 2008 WL 5071762 (Bankr. M.D. Ala. Nov. 25, 2008); In re Wilcox, 295 B.R. 155 (Bankr. W.D. Okla. 2003); In re Goos, 253 B.R. 416 (Bankr. W.D. Mich. 2000). Some of these cases are based on res judicata grounds. See, e.g., In re Torres, 336 B.R. 839, 842 (Bankr. M.D. Fla. 2005) (the principles of res judicata preclude reclassification); In re Banks, 161 B.R. 375, 378 (Bankr. S.D. Miss. 1993) (debtor's confirmed plan is res judicata as to claims determinations); In re Abercrombie, 39 B.R. 178, 179 (Bankr. N.D. Ga. 1984) (permitting a debtor to reclassify a previously allowed secured claim as an unsecured claim after a plan has been confirmed would be to circumvent the principles of res judicata which bind the debtor and creditor). But see In re Townley, 256 B.R. 697, 699 (Bankr. D.N.J. 2000) (binding effect of the plan is subject to the ability to modify the plan under section 1329). Other courts base their decisions largely on the language of the Bankruptcy Code. See, e.g., In re Coffman, 271 B.R. 492, 496 (Bankr. N.D. Tex. 2002) (section 1329(a) does not expressly permit a modification that reclassifies or changes the nature of a claim; that section only permits the debtor to alter the amount or the timing of specific payments); In re Coleman, 231 B.R. 397, 400 (Bankr. S.D. Ga. 1999) ("[S]ection 1329(a)(1) . . . cannot be read so broadly as to authorize the reclassification of claims."). Some of these courts also have expressed concerns about allowing such modifications based on equitable grounds. See, e.g., In re Arguin, 345 B.R. 876, 881 (Bankr., N.D. Ill. 2006) "[I]t hardly seems appropriate, 'according to the equities of the case,' to allow the Debtors, who have had possession and use of the Vehicle, to change the negotiated deal made with the Creditor at confirmation. . . ."); In re Holt, 136 B.R. 260, 260-61 (Bankr. D. Idaho 1992) ("[I]t does not appear to be fair and equitable to allow a debtor the continued ability to retain or return secured property during the full term of the plan.").

Many other bankruptcy courts, however, find that reclassification of the deficiency claim as unsecured is permissible, most often by reading Bankruptcy Code § 1329, which permits modification under certain circumstances, in conjunction with Bankruptcy Code § 502(j), which provides that a "claim that has been allowed or disallowed may be reconsidered for cause," and that a reconsidered claim "may be allowed or disallowed according to the equities of the case." These courts find that, pursuant to Bankruptcy Code § 506(a), a creditor cannot have a secured claim without encumbered property. After surrender of the collateral, there is cause to reconsider the secured claim and to disallow it, according to the equities of the case. See, e.g., In re Sellers, 409 B.R. 820 (Bankr. W.D. La. 2009); In re Davis, 404 B.R. 183 (Bankr. S.D. Tex. 2009); In re Disney, 386 B.R. 292 (Bankr. D. Colo. 2008); In re Lane, 374 B.R. 830 (Bankr. D. Kan. 2007); Bank One, N.A. v. Leuellen (In re Leuellen), 322 B.R. 648 (S.D. Ind. 2005); In re Mason, 315 B.R. 759 (Bankr. N.D. Cal. 2004); In re Knappen, 281 B.R. 714 (Bankr. D.N.M 2002); In re Zieder, 263 B.R. 114 (Bankr. D. Ariz. 2001).

For example the court in In re Davis, 404 B.R. 183 (Bankr. S.D. Tex. 2009), explained that Bankruptcy Code § 1329(a)(3) expressly provides that "the amount of the distribution to a

creditor" in a Chapter 13 plan may be modified to "take into account any payment of such claim other than under the plan." The court noted that a debtor's surrender of collateral to a creditor is unquestionably a form of "payment," and concluded that "§ 1329, when read in conjunction with § 502(j) and § 506(a), allows a plan to be modified in order to reclassify secured claims as a matter of equity." The court reasoned that, "to hold otherwise necessarily embraces the unwieldy concept that a creditor who has repossessed its collateral continues to have a secured claim." 404 B.R. 190, 194-95.

Similarly, in In re Zieder, 263 B.R. 114, 117 (Bankr. D. Ariz. 2001), following the Chapter 13 debtors' post-confirmation surrender of a vehicle and creditor's liquidation of that vehicle, the court, after noting that § 502(j) permits reconsideration of claims "according to the equities of the case," concluded:

> On the facts here, this Court concludes that the liquidation of the collateral by the secured creditor is adequate cause to reconsider a previously allowed secured claim, even after confirmation of the chapter 13 plan and commencement of payments. Both § 506(a) and the equities of the case dictate that Ford's secured claim must now be disallowed.

It should be noted, though, that several courts have found that, while Bankruptcy Code § 502(j) permits reconsideration of allowance or disallowance, it does not permit reclassification of that claim. See In re Adkins, 425 F.3d 296 (6th Cir. 2005); In re Coffman, 271 B.R. 492 (Bankr. N.D. Tex. 2002).

A party seeking post-confirmation modification of a secured claim must comply with the good faith requirements of Bankruptcy Code § 1325(a)(5), and Bankruptcy Code § 502(j) permits reconsideration only for "cause" and according to the "equities of the case." See In re Lane, 374 B.R. 830, 839 (Bankr. D. Kan. 2007) (What constitutes cause according to the equities of the case is an adaptable standard which reflects bankruptcy laws' roots in equity jurisprudence); Day v. Systems & Servs. Techs., Inc. (In re Day), 247 B.R. 898, 903 (Bankr. M.D. Ga. 2000) ("[T]he requirements for postconfirmation modifications, which include a good faith requirement, have the needed protection to ensure that secured claimants are adequately protected."). The court in In re Sellers, 409 B.R. 820, 830 (Bankr. W.D. La. 2009), listed the following as factors that courts should consider in determining whether a proposed modification unfairly prejudices the affected creditor:

- the extent of any post-confirmation depreciation in the collateral securing the affected creditor's claim, and whether the depreciation is the fault of the debtor;
- whether the debtor failed to maintain insurance as required by a loan agreement or an adequate protection order;
- the proposed treatment of the creditor's deficiency claim (if any such claim exists);
- whether the debtor is current on plan payments; and
- the length of time between plan confirmation and the filing of the proposed modification.

Another issue arises if the secured claim is subject to the "hanging paragraph" which prohibits the application of § 506(a) to 910 day-vehicle claims. When the debtor chooses to retain the 910 day-vehicle, it is clear that the debtor is liable for the entire amount of the debt. See Bankruptcy Code § 1325(a)(5)(B)(ii). The effect of the "hanging paragraph" when the debtor chooses to surrender the collateral under Bankruptcy Code § 1325(a)(5)(C), is less clear. The majority of bankruptcy courts have decided that, since the debtor cannot bifurcate the claim into secured and unsecured components, and the entire claim is secured, surrender of the vehicle fully satisfies the claim. See, e.g. In re Thompkins, 391 B.R. 560 (Bankr. S.D.N.Y. 2008); In re Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006); In re Moon, 359 B.R. 329 (Bankr. N.D. Ala. 2007).

Other courts, including several appellate courts, have concluded that because § 506(a) does not apply, state law applies. See, e.g., Capital One Auto Fin. v. Osborn, 515 F.3d 817 (8th Cir. 2008); In re Long, 519 F.3d 288 (6th Cir. 2008); In re Wright, 492 F.3d 829 (7th Cir, 2007); Silvers v. Wells Fargo Auto Fin., No. 407CV-00012-HLM, 2007 WL 1812628 (N.D. Ga. May 10, 2007); In re Hoffman, 359 B.R. 163 (Bankr. E.D. Mich. 2006). These courts find that the Uniform Commercial Code plus the law of contracts entitle the creditor to assert an unsecured claim after surrender of the collateral for any balance due, unless the contract itself provides that the loan is without recourse against the debtor. It is unclear whether courts adopting the majority view will take the same position (that the claim is fully satisfied) when a debtor seeks to modify the plan by surrendering a 910 day-vehicle in full satisfaction of a claim.

Finally, the court in In re Johnson, 247 B.R. 904 (Bankr. S.D. Ga. 1999) suggested that when a debtor is allowed to reclassify a deficiency claim as unsecured upon surrender or repossession of property, a creditor may be able to assert an administrative expense claim under Bankruptcy Code § 507(b) based on failure of the plan to provide adequate protection. The court explained:

> A secured claim in a confirmed chapter 13 plan is for an amount equal to the value of the collateral. 11 U.S.C. § 506(a). Each secured claim is, in theory, adequately protected because the payment of the debt through the plan keeps pace with the depreciation of the collateral. However, the existence of a deficiency amount demonstrates that the creditor's claim was *not* adequately protected. The collateral did not realize the dollar amount of the secured claim. The plan did not adequately protect the creditor. Therefore, the creditor may seek allowance of a claim for an administrative expense caused by this failure of adequate protection. 11 U.S.C. § 503(b) . . . [citations omitted]. Payment of such an administrative expense has priority over unsecured claims and is paid in full. 11 U.S.C. § 507(a)(1) & (b).

Id. at 909.

Similarly, the court in In re Jefferson, 345 B.R. 577 (Bankr. N.D. Miss. 2006), permitted chapter 13 debtors to modify their confirmed plan in order to surrender a motor vehicle securing a creditor's claim, and to reclassify any deficiency claim possessed by the creditor as an unsecured claim. The court permitted the creditor to recover and liquidate the collateral, and concluded:

> If the depreciation to the vehicle between the date of confirmation and the date of liquidation exceed the total amount paid by [the debtors] to [the creditor] through the Chapter 13 plan then the excess depreciation should be given an administrative expense priority pursuant to § 507(b) of the Bankruptcy Code as if it were failed adequate protection.

Id. at 583.

It should be noted, though, that the language of § 507(b) suggests that it applies only when "the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor. . . ." This led the court in In re Ziedler, 263 B.R. 114 (Bankr. D. Ariz. 2001) to deny administrative expense priority to a deficiency claim that had been reclassified after surrender of a vehicle. The court explained:

> [I]f [creditor] is relying on § 507(b) as authority to promote its claim to superpriority status, it has not demonstrated that § 363(e) applies postconfirmation, when the protections of §§ 361 and 363 are supplanted by § 1325(a)(5), [citation omitted]. Administrative expense status is generally not accorded prepetition secured lenders simply because they did not receive all the payments promised by a plan. *In re Williams,* 246 B.R. 591, 595 (BAP 8th Cir. 1999). [Creditor] has not suggested any other authority on which its claim could be promoted to priority status to the detriment of other creditors.

Id. at 119-120.

As is discussed in the next section of this paper, provisions added by BAPCPA now require pre-confirmation adequate protection payments to persons holding allowed claims secured by personal property in certain circumstances. Bankruptcy Code § 1326(a)(1)(C). In addition, Bankruptcy Code § 1325(a)(5)(B)(iii)(II) now requires that payments under the plan to a holder of a claim secured by personal property be in an amount sufficient to provide adequate protection during the period of the plan. It is still unclear what effect, if any, this express statutory obligation on the debtor to make adequate protection payments will have on courts deciding whether to give administrative expense priority to these deficiency claims.

## IV. Required Adequate Protection Payments

### A. Pre-Confirmation Adequate Protection Payments

In a Chapter 13 case, several BAPCPA changes affect how secured creditors are paid. One of those changes found in Bankruptcy Code § 1326(a)(1)(C) requires pre-confirmation adequate protection payments with regard to "an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief." These adequate protection payments are to begin "not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier." Bankruptcy Code § 1326(a)(1). It is the earlier of the two events that starts the 30 days running, and the filing of the petition commences the case and this commencement of the case constitutes an order for relief. See Bankruptcy Code § 301. Therefore, it would seem that the 30 days will always run from the filing of the petition. The

payments must be made "to a creditor holding an allowed claim secured by personal property." Bankruptcy Code § 1326(a)(1)(C). Unless a creditor files a proof of claim it does not have an "allowed claim," as a claim is "deemed allowed" when it is filed unless there is an objection, Bankruptcy Code § 502. Because a claim is rarely filed on the date of the petition, this raises some timing issues. If the claim is filed on the 29th day after the petition is filed, is payment due the following day? If it is filed on the 35th day after the petition is filed, is payment due immediately? The courts will need to address these issues. See generally *Getting to the Finish Line: Current Issues in Chapter 13 Plan Confirmation, Implementation and Discharge*, 041207 ABI-CLE 343 (2007).

There is some difference in opinion regarding how to calculate these pre-confirmation adequate protection payments. Some districts require that it be a nominal percentage amount of the collateral's worth at the time of the filing, typically 1-2%. See, e.g., Hampton v. Capital One Auto Fin. (In re Hampton), 383 B.R. 560, 563 (Bankr. S.D. Ga. 2008) (1% of the collateral value is customary in our district); In re Hill, 397 B.R. 259, 265 (Bankr. M.D.N.C. 2007) (in this district, pre-confirmation adequate protection payments are typically in the amount of one percent of the value of the collateral; if the secured creditor objects, adjustments may be made); In re DeSardi, 340 B.R. 790, 795 n. 2 (Bankr. S.D. Tex. 2006) (employing 1.5% of value of collateral as provided by the district's local rule). Other courts do not believe that adequate protection should simply be set at the same fixed percentage for all collateral. While recognizing that some courts determine adequate protection as a fixed percentage of the collateral's value (typically 1%), the court in Thompson v. GMAC (In re Thompson), No. 08 13 2560, 2008 WL 2157163, at *3 (Bankr. N.D. Ill. May 23, 2008), reasoned that:

> Without evidence, however, there is no reason to believe that all property depreciates at the same rate, or that the supposedly uniform rate is 1% of the property value. The fixed percentage method is no more than an expedient and, apart from saving time and providing predictability, has nothing to recommend it.

That court calculated the adequate protection payments by looking at the N.A.D.A. guide to compare the value of the collateral at the time of filing the petition with the value of the collateral in the month immediately after filing. See also in re Marks, 394 B.R. 198, 202 (Bankr. N.D. Ill. 2008).

Bankruptcy Code § 1326(a)(1)(C) provides that the debtor shall provide adequate protection "directly to the creditor holding an allowed claim secured by personal property," which would indicate that payments must be made directly to the creditor. But Bankruptcy Code § 1326(a)(1) begins with the phrase "unless the court orders otherwise," and a number of courts have allowed these payments to me made through the trustee. Se, e.g., In re Butler, 403 B.R. 5, 11 (Bankr. W.D. Ark. 2009) (local order requires that all adequate protection payments be made directly to the trustee prior to confirmation); Drive Fin. Servs. v. Brown (In re Brown), 348 B.R. 583, 591 (Bankr. N.D. Ga. 2006) (overruled creditor's objection to payments coming through the trustee; practical considerations and ease of administration provide compelling reasons for permitting debtors to make pre-confirmation adequate protection payments to the Chapter 13 trustee for disbursement to creditors); In re Beaver, 337 B.R. 281 (Bankr. E.D.N.C. 2006) (pre-

confirmation payments made by Chapter 13 trustee to the secured creditor are an acceptable method of providing adequate protection).

**B. Post-Confirmation Adequate Protection Payments**

Prior to BAPCPA, the Bankruptcy Code did not deal explicitly with the question of post-confirmation adequate protection, though, if a secured party was not adequately protected, it could object to confirmation of the plan. In addition, a secured party could, at any time, request relief from the automatic stay under Bankruptcy Code § 362(d)(1) for cause, including lack of adequate protection. Bankruptcy Code § 1325(a)(5)(B)(iii)(II) now clearly requires post-confirmation adequate protection and specifies that it must be in the form of money. Therefore, payments under the plan must always at least equal the amount of depreciation of the collateral.

**C. Adequate Protection and Equal Month Payments**

In addition to both pre-confirmation and post-confirmation adequate protection, as a result of BAPCPA, when periodic payments are made to secured creditors, these payments must be "in equal monthly amounts." Bankruptcy Code § 1325(a)(5)(B)(iii)(I). The court in In re Erwin, 376 B.R. 897, 901 (Bankr. C.D. Ill. 2007), explained the purpose behind this equal payment provision as follows:

> Prior to BAPCPA, it was not uncommon for some Chapter 13 plans to provide for backloaded payments, such as balloon payments. Another form of backloading involved graduated or step-up payment plans, where the payments started out smaller and increased over time. Secured creditors, particularly those secured by a vehicle, viewed this as unfair, exposing them to undue risk in light of the constant depreciation of their collateral.
>
> Other plans, filed by debtors whose employment is seasonal, provided for reduced payments or no payments at all during certain months of the year, or called for payments to be made quarterly or semi-annually, rather than monthly, based upon the peculiarities of the debtor's income stream. Secured creditors had similar complaints with those plans.
>
> In response to those creditor concerns, Congress enacted the equal payment provision and a companion provision extending the concept of adequate protection, formerly a preconfirmation requirement, to postconfirmation plan payments [citation omitted]. The equal payment provision prevents debtors from backloading payments to secured creditors or paying them other than on a monthly basis.

Courts have agreed that a plan that provides for periodic payments that do not amortize the claim during the term of the plan followed by a "balloon" payment are not confirmable. See, e.g., In re Luckett, No. 07-24706-SVK, 2007 WL 3125278 (Bankr. E.D. Wis. Oct. 24, 2007); In re Wallace, No. 07-10729, 2007 WL 3531551 (Bankr. M.D.N.C. Nov. 12, 2007); In re Lemieux, 347 B.R. 460 (Bankr. D. Mass. 2006); In re Wagner, 342 B.R. 766 (Bankr. E.D. Tenn 2006). But see In re Schultz, 363 B.R. 902 (Bankr. E.D. Wis. 2007) (a plan violating the equal payment

rule could be confirmed in the absence of an objection from the affected creditor, who was deemed to have accepted the plan). There has been disagreement among the courts, however, as to whether a plan may defer the commencement of equal monthly payments after confirmation until administrative expenses, particularly the debtor's attorney's fees, have been paid, with the secured creditor receiving only adequate protection payments as required by Bankruptcy Code § 1325(a)(5)(B)(iii)(II) in the meantime.

Bankruptcy Code § 1325(a)(5)(B)(iii) which provides for the requirement for equal monthly payments states:

> (a) Except as provided in subsection (b), the court shall confirm a plan if –
> . . .
> (5) with respect to each allowed secured claim provided by the plan –
> . . .
> (B)(iii) if –
>
> (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
>
> (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide the holder of such claim adequate protection during the period of the plan.

Several courts have noted that clause (II) explicitly requires payments be not less than the amount to provide adequate protection "during the period of the plan," but that no similar language in found in clause (I). They have concluded, therefore, that "during the period of the plan" modifies "adequate protection" but does not modify "such payments." Reading the Code in this way, these courts recognize that if the property to be distributed to a secured creditor under the plan takes the form of periodic payments, then those payments "shall be in equal monthly amounts." But while the "equal payment" provision requires payments to be equal once they begin, and to continue to be equal until they cease (when the creditor is paid in full or the debtor receives a discharge), these courts conclude that it does not require that such payments start as of the effective date of the plan, or that they continue over the life of the plan. Exactly when these equal payments should begin requires a case-specific inquiry. See, e.g., In re Butler, 403 B.R. 5, 14 (Bankr. W.D. Ark. 2009); In re Marks, 394 B.R. 198, 203-205 (N.D. Ill. 2008); In re Chavez, No. 07-36007-H3-13, 2008 WL 624566, at *4 (Bankr. S.D. Tex. Mar. 5, 2008); In re Hill, 397 B.R. 259, 268-69 (Bankr. M.D.N.C. 2007); In re Blevins, No. 06-10978A13, 2006 WL 2724153, at *2 (Bankr. E.D. Cal. Sept. 21, 2006); In re Sardi, 340 B.R. 790, 805-806 (Bankr. S.D. Tex. 2006).

In concluding that equal payments can begin some time after confirmation, several courts found that requiring equal payments with the first payment would conflict with the provisions of the Bankruptcy Code requiring priority treatment of administrative expenses. Bankruptcy Code § 1326(b)(1) provides that "[b]efore or at the time of each payment to creditors under the plan, there shall be paid any unpaid claim of the kind specified in section 507(a)(2). . . ." Section 507(a)(2) gives administrative expense priority to those claims described in section 503(b),

including a Chapter 13 debtor's attorney's fees. See Bankruptcy Code § 503(b)(2) (incorporating section 330(a)(4)(B)). Some courts interpret this language to mean that no payment may be made to any other creditor under the plan unless unpaid administrative expenses (including attorney's fees) are paid in full, either first or at the same time. See, e.g., In re Sardi, 340 B.R.790, 808, 809 (Bankr. S.D. Tex. 2006); In re Harris, 304 B.R. 751, 757 (Bankr. E.D. Mich. 2004) ("[W]hen the Chapter 13 Trustee makes here first monthly disbursement after confirmation, she may not disburse any payment to secured or unsecured creditors unless at the same time, the Trustee pays, *in full*, the unpaid, allowed attorney fees of Debtors' counsel."). Other courts have found that the Bankruptcy Code § 1326(b)(1) does not require that unpaid administrative expenses, including attorney's fees, be paid in full prior to payments to creditors, but that it simply requires that they be paid before or contemporaneously with payments to creditors. See, e.g., In re Sanchez, 384 B.R. 574, 577-78 (Bankr. D. Ore. 2008); In re Hill 397 B.R. 259, 271 (Bankr. M.D.N.C. 2007); In re Cook, 205 B.R. 437, 443 (Bankr. N.D. Fla. 1997). Whether one decides that administrative fees must be paid before or concurrent with payments to creditors, when this is considered with the requirement that adequate protection payments must be made within 30 days of filing, the result may be that there is not enough money at confirmation to meet both of these requirements. If the equal monthly payment rule requires that all post-confirmation payments on a secured claim be the same, so that it prohibits post-confirmation payments of only adequate protection until the attorney's fees are paid, the timely payment of debtor's attorney's fees becomes even more of a problem. A number of courts, therefore, have decided that "adequate protection payments" may continue post-confirmation in one amount, with "equal monthly payments" replacing them at a higher amount at some later time during the plan. See, e.g., In re Butler, 403 B.R. 5 (Bankr. W.D. Ark. 2009); In re Marks, 394 B.R. 198 (N.D. Ill. 2008); In re Chavez, 2008 WL 624566 (Bankr. S.D. Tex. March 5, 2008); In re Hill, 397 B.R. 259, (Bankr. M.D.N.C. 2007); In re Blevins, 2006 WL 2724153 (Bankr. E.D. Cal. Sept. 21, 2006); In re Sardi, 340 B.R. 790 (Bankr. S.D. Tex. 2006). This allows debtors' attorneys to be paid on an expedited basis.

Other courts, however, have found that "periodic payments . . . in equal monthly amounts" refers to *all* payments made on allowed claims after confirmation, and that those payments must begin with the trustee's first distribution under a confirmed plan. In re Sanchez, 384 B.R. 574 (Bankr. D. Ore. 2008); Wells Fargo Fin. Ga., Inc. v. Baxter (In re Williams), 385 B.R. 468 (Bankr. S.D. Ga. 2008); Royals v. Massey (In re Denton), 370 B.R. 441 (Bankr. S.D. Ga. 2007). These courts conclude that equal monthly payments must begin with confirmation and continue until the secured claim is paid in full. For example, the court in In re Denton rejected the view that "periodic payments" in section 1325(a)(5)(B)(iii)(I) is a defined term meaning "payments on an amortized debt," instead finding that "periodic payments" refers without distinction to *all* regularly-recurring post-confirmation payments on an allowed secured claim. The court therefore concluded that "such payments shall be in equal monthly amounts" means that *all* regularly occurring post-confirmation payments on an allowed secured claim must be in equal monthly amounts, and that "pre-confirmation adequate protection payments may not be extended beyond the date of confirmation when the monthly amount of the adequate protection payment is less than the monthly amount of payment on the allowed secured claim under the plan." See 370 B.R at 445-46.

In agreeing with the court in In re Denton that all post-confirmation payments on an allowed secured claim must be in equal monthly amounts, the court in In re Sanchez, 384 B.R. 574, 579 n. 11 (Bankr. D. Ore. 2008) explained:

> While this court's holding may appear to undercut the speed at which a Chapter 13 debtor's attorney's fees may be paid, this isn't necessarily so. The type of stepped payments Debtors propose are not, per se, non-confirmable. A secured creditor may always accept its proposed treatment under § 1325(a)(5)(A). If the creditor objects to stepped payments, debtors are not precluded from making room for payment of attorney's fees by modifying the plan to amortize the secured claim at a lower (but equal) monthly payment over a longer period. All that is required under § 1325(a)(5)(B)(iii) is that the proposed equal monthly payments pay the secured claim and be sufficient to adequately protect the creditor's interest.

## V. Termination of Automatic Stay

### A. Relief from Stay upon Request of a Party

Generally, Bankruptcy Code § 362(a) imposes an automatic stay of most litigation involving a debtor and of most acts to obtain possession of property from the bankruptcy estate. Bankruptcy Code § 362(d) does provide that a party in interest may seek relief from the stay by having the stay terminated, annulled, modified or conditioned by the court, but this relief may only be granted "after notice and a hearing." Therefore, this relief can be granted without an actual hearing only if notice is properly given and if: (1) such a hearing is not requested timely by a party in interest, or (2) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act. Bankruptcy Code § 102(1). In addition, Bankruptcy Code § 362(f) provides that relief from the stay may be granted, with or without a hearing, if it is necessary to prevent irreparable damage to the entity's interest in the property. Even if such ex parte relief is not available, Bankruptcy Code § 362(e) provides for an expedited hearing process in stay relief cases.

Under some circumstances, though, the automatic stay of Bankruptcy Code § 362(a) can terminate independent of a judicial determination made under section 362(d).

### B. Repeat Filers – Termination under Section 362(c)

To address concerns about individuals who file multiple petitions, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added subsections (c)(3) and (c)(4) to Bankruptcy Code § 362. Subsection (c)(3) deals with debtors who had one other bankruptcy proceeding that was dismissed during the year prior to the filing of their current petition. With the exception of a case refiled under a chapter other than Chapter 7 after dismissal under section 707(b), subsection (c)(3)(A) states that if a single or joint case of an individual was dismissed within one year of the filing of a new case under Chapter 7, 11 or 13, then "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case." This provision is self-executing. Pursuant to subsection (c)(3)(B),

the court may extend the automatic stay, but only on motion "after notice and a hearing completed before the expiration of the 30-day period," and "only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed." This language suggests that, if a motion to extend the automatic stay is to be granted, it can occur only after a properly noticed hearing completed within 30 days of the filing of the case.

Subsection (c)(4) deals with individual debtors who had two or more prior bankruptcies that were dismissed during the previous year. This subsection provides that if a single or joint case is filed by an individual debtor, and two or more single or joint cases of that debtor were pending within the previous year but were dismissed (other than a case refiled under § 707(b)), the automatic stay "shall not go into effect upon the filing of the later case." Thus, for multiple repeat filers, the automatic stay does not even go into effect upon the filing of the later case. When subsection (c)(4) applies, however, a party in interest may seek the imposition of the stay, pursuant to a request made within thirty days of the bankruptcy filing. Pursuant to Subsection (c)(4)(B), "if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors," but only "after notice and a hearing," and "only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed." Thus, in contrast to subsection (c)(3)(B), in order to impose the stay in the case of a multiple repeat filer, subsection (c)(4)(B) only requires the filing of a motion within 30 days of the filing of the later case and does not require that notice and a hearing be completed within the initial 30 days post-filing.

The courts have been called upon to decide a number of issues relating to Bankruptcy Code §§ 362(c)(3), (c)(4) and (j). For example, most courts have noted that the clear language of subsection (c)(3) provides that the stay terminates under that provision only "with respect to the debtor." Therefore, if there has been a stay termination based on the operation of subsection (c)(3) in a case filed within a year of a prior dismissal, most courts find that the automatic stay provided under § 362(a) continues to apply in that case as to actions against property of the estate; the stay is terminated only as it applies to debts or property of the debtor, and not to property of the estate. See, e.g., In re Ajaka, 370 B.R. 426, 429 (Bankr. N.D. Ga. 2007); In re Tubman, 364 B.R. 574, 581-583 (Bankr. D. Md. 2007); Jumpp v. Chase Home Fin., LLC (In re Jumpp), 356 B.R. 789 (BAP 1st Cir. 2006). But see In re Jupiter, 344 B.R. 754 (Bankr. D.S.C. 2006) (upon filing of second bankruptcy petition, stay terminates 30 days after filing as to both debtor and property of the estate).

A number of courts have had to determine the effect, if any, of an untimely motion to extend the automatic stay. As noted above, Bankruptcy Code § 362(c)(3)(A) is self-executing and serves to terminate the stay "on the 30th day after the filing of the later case." Several courts have concluded that, pursuant to subsection (c)(3)(B), if a party desires the stay to continue beyond that period, the burden is on that party to ensure that the motion and hearing are completed "before the expiration of the 30-day period." See, e.g., In re Tubman, 364 B.R. 574, 581 (Bankr. D. Md. 2007) (motion must be filed early enough to allow for adequate notice and a hearing to be held within the proscribed accelerated time frame; the moving party retains the ultimate burden of ensuring the timely filing of the motion and then its prompt scheduling); In re Williams, 346 B.R. 361, 370 (Bankr. E.D. Pa. 2006) ("[I]f a debtor seeks to extend the stay beyond thirty days as permitted by section 362(c)(3)(B), it is incumbent upon him to insure that

his motion is filed and heard within the thirty-day window."). These courts reason that once a stay expires by operation of section 362(c)(3)(A), the stay cannot be re-imposed under section 362(c)(3)(B) as if it had never terminated.

Several courts have allowed a one-time repeat filer to seek imposition of a stay under § 362(c)(4) where the motion to extend the stay was filed within 30 days of the petition being filed but it was impossible to conduct a hearing on that motion within the 30-day post-petition period. See In re Toro-Arcila, 334 B.R. 224 (Bankr. S.D. Tex. 2005) (debtor filed motion pursuant to both §§ 362(c)(3) and 362(c)(4) at 8:33 p.m. on the 30th day post-petition and court allowed debtor to proceed pursuant to section 362(c)(4)); In re Beasley, 339 B.R. 472 (Bankr. E.D. Ark. 2006) (where one-time repeat filer files its motion within 30 days, but motion is not determined within the 30 day period as required by § 362(c)(3)(B), the stay may nevertheless be imposed under § 362(c)(4)). Most courts, though, have found that § 362(c)(4)(B) is not applicable to one-time repeat filers, and that a hearing on a motion to extend the automatic stay pursuant to § 362(c)(3)(B) must be held in compliance with the provision of that section and not those of § 362(c)(4)(B). See, e.g., In re Norman, 346 B.R. 181, 184 (Bankr. N.D. W. Va. 2006).

When a one-time repeat filer fails to meet the requirements of § 362(c)(3)(B) and the stay is terminated under § 362(c)(3)(A), several courts have concluded that they have the authority, under proper circumstances, to re-impose the stay using the equitable powers granted to bankruptcy courts under Bankruptcy Code § 105(a) "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.". See, e.g., Whitaker v. Chapter 13 Trustee, (In re Whitaker), 341 B.R. 336, 346-48 (Bankr. S.D. Ga. 2006); In re Reed, 370 B.R. 414, 417 (Bankr. N.D. Ga. 2006); In re Williams, 346 B.R. 361, 371-373 (Bankr. E.D. Pa. 2006). Other courts, however, have found that the bankruptcy court may not use its general equitable powers under § 105(a) to re-impose a stay that Congress has declared must terminate if the requirements of § 362(c)(3)(B) are not met. See In re Garrett, 357 B.R. 128, 131 (Bankr. C.D. Ill. 2006); In re Jumpp, 344 B.R. 21, 27 (Bankr. D. Mass. 2006).

### C. Debtor's Failure to File Statement of Intention and Take Timely Action

Section 521(a)(2)(A) generally requires individuals to file a "statement of intention with respect to the retention or surrender" of property subject to a security interest within 30 days of filing of their Chapter 7 petition. BAPCPA then added several confusing and apparently inconsistent provisions.

Section 521(a)(2)(B) requires the debtor to "perform" his stated intention within 30 days of the first date set for the meeting of creditors. When the secured creditor has a purchase money security interest in the personal property of the debtor, however, § 521(a)(6) requires the debtor to enter into a reaffirmation agreement with the creditor holding the security interest, redeem the property, or surrender the property to the creditor within 45 days of the first meeting of creditors. If the debtor does not take this action within the 45 day period, § 521(a)(7) provides that the automatic stay is terminated with respect to the personal property, the property shall no longer be property of the estate, and the creditor "may take whatever action as to such property as it permitted by applicable nonbankruptcy law," unless the court determines on motion of the trustee filed within the 45 day period that the property is of consequential value or benefit to the

estate. These provisions, when combined, seem to place the debtor in some kind of default if he or she has not performed the stated intention within 30 days of the meeting of creditors, but provides a practical remedy for that failure only if it continues for another 15 days.

BAPCPA also added § 362(h), which partially terminates the stay in cases involving individual creditors who fail to comply with the obligations imposed by § 521(a)(2). Section 362(h) provides that automatic stay is terminated with respect to personal property, and it is no longer property of the estate, if the individual debtor fails, within the applicable time set by § 521(a)(2), to timely file a statement of intentions as required by § 521(a)(2) or take the action specified in such statement. Section 362(h) suggests that the trustee may actually only have 30 days, not 45 days, from the meeting of creditors to file a motion to protect the bankruptcy estate's interest in the property.

**D. Requirement for Stay Termination Hearing**

Bankruptcy Code § 362(j) provides that "[o]n request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated." The "subsection (c)" referred to is subsection 362(c). A similar provision is found in § 362(c)(4)(A)(ii), stating that, "on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect." The qualifying phrase "after notice and a hearing" is absent from Bankruptcy Code §§ 362(j) and 362(c)(4)(A)(ii). This would suggest that a creditor can obtain an *ex parte* ruling that the automatic stay has terminated without notice and an opportunity to be heard in opposition. But several courts considering this issue have disagreed with such a reading.

In In re Rice, 392 B.R. 35 (Bankr. W.D.N.Y. 2006), a case involving a one-time repeat filer, creditors filed motions under Bankruptcy Code § 362(j) to confirm the termination of the automatic stay. The creditors did mail copies of their respective motions to the debtor, his counsel, and the trustee, but they asked the court to grant relief without notice of an opportunity for a hearing. The court first noted that the stay was terminated only "with respect to the debtor" and that all other aspects of the stay remained operative. Id. at 38. With regard to whether an *ex parte* ruling was appropriate that the stay had terminated with respect to the debtor, the court concluded that, "absent some demonstrated exigency that would have allowed *ex parte* relief under Bankruptcy Rule 4001(a)(2), confirmatory orders under section 362(j) should be granted only on motion with notice and an opportunity for hearing to debtors and their counsel." Id. at 38. The court explained:

> Bankruptcy Rule 9014(a) states that in a "contested matter" not otherwise governed by the Bankruptcy Rules, "relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." The advisory notes for this rule provide clarification that "[w]henever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter." . . . . Here, the motion to confirm stay termination is a contested matter, not as to any basis for stay relief under section 362(d), but as to whether circumstances satisfy the necessary predicate for application of section 362(c)(3). In special instances, a debtor might wish to assert defenses based on theories of estoppel or waiver. The matter in contest may be limited in scope, but that scope of

> potential contest will nonetheless require that the debtor enjoy and opportunity for hearing.

Id. at 38-39.

The court stated that before considering any motion under § 362(j) to confirm the termination of the automatic stay in a case, it would require that the moving creditor give notice of hearing to the debtors, their attorney, and the trustee. Id. at 39.

Similarly, the court in In re Kissal, No. 06-10264-SSM, 2006 WL 1868513 (Bankr. E.D. Va. June 29, 2006), considered whether it was appropriate to issue an *ex parte* ruling that an automatic stay had terminated. In that case, the debtor filed a Statement of Intention with his petition stating that he intended to "retain" a certain motor vehicle that he claimed was exempt, and did not check either the column stating that the property would be redeemed or that the debt would be reaffirmed. The party with a security interest in the vehicle moved for an order confirming that the automatic stay terminated as a matter of law 30 days after the petition was filed. The motion was served on the debtor, debtor's attorney and the trustee, but it was not accompanied by a notice of motion and did not request a hearing. The issue before the court was not the harmonization of §§ 362(a)(2), 362(a)(6) and 362(h), nor whether the automatic stay had terminated, though the court did note that even the 45 day period had apparently expired. The court considered the issue before it to be "whether a creditor may obtain an *ex parte* ruling [that the stay had terminated] without notice and an opportunity to be heard in opposition." Id. at *3.

The creditor in that case pointed out that the qualifying phrase "after notice and a hearing," which is present in § 362(d), is absent from § 362(j), and argued that this omission indicates that Congress intended to authorize ex parte consideration of motions for confirmatory relief. The court rejected this argument, explaining:

> The inference to be drawn from silence, however, is a weak one, especially as *ex parte* relief is expressly addressed in another part of the statute. Specifically, § 362(f) allows a bankruptcy court, "with or without a hearing," to grant such relief from the automatic stay as is necessary "to prevent irreparable damage" to a movant's interest in property "before there is notice and an opportunity for a hearing." *See also* Fed. Rule Bankr. P. 4001(a)(2) (requiring that motion for *ex parte* relief from the automatic stay be supported by an affidavit setting forth "specific facts" showing that "immediate and irreparable injury, loss or damage" will result "before the adverse party can be heard in opposition," together with a certification of the efforts to give notice and the reasons why notice should not be required.).

Id at *3. The court concluded that, at least in the absence of some concrete showing that irreparable harm would otherwise result, the ordinary requirement for service, notice, and opportunity for a hearing apply to motions for an order confirming termination of the automatic stay. Id. at *3.