No.

In the Supreme Court of the United States

EDWARD LEON GORDON AND DORIS JEAN GORDON,
PETITIONERS

v.

BANK OF AMERICA, N.A., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order denying confirmation of a bankruptcy plan is appealable.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Douglas B. Kiel, Standing Chapter 13 Trustee, and Stephen Lindsey Pahs were parties to the proceeding in the court of appeals. The court of appeals dismissed Mr. Pahs' appeal as moot.

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Edward Leon Gordon and Doris Jean Gordon respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 743 F.3d 720. The opinion of the district court (App., *infra*, 11a-35a) is reported at 471 B.R. 614 (2012). The opinion of the bankruptcy court (App., *infra*, 36a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 158 and 1291 of Title 28 of the United States Code are reprinted in the appendix to this petition. App., *infra*, 66a-69a.

STATEMENT

This case presents the question whether a district court decision denying confirmation of a bankruptcy plan, like a decision granting confirmation of such a plan, is final and appealable. The federal courts of appeals have reached conflicting decisions on that question.

1.a. Congress designed Chapter 13 bankruptcy proceedings to enable a debtor with regular income to repay creditors in installments. 7 Norton Bankr. L. & Prac. 3d § 139:13. To do so, the debtor proposes a plan to repay all or part of the money owed to his creditors over three or five years, with the period usually depending on the debtor's "projected disposable income." 11 U.S.C. § 1325(b). The plan lists all priority and secured claims against the estate, allots a portion of the debtor's income to payment of unsecured claims, typically on a *pro rata* basis, and proposes a payment schedule to satisfy those claims. 11 U.S.C. § 1322. Once all payments have been made in accordance with the plan, all secured and unsecured debts provided for by the plan are discharged,

subject to certain limited exceptions. 11 U.S.C. § 1328(a). *See Nobleman* v. *American Savings Bank*, 508 U.S. 324, 327 (1993).

Among the debts not discharged are long-term obligations, whether secured or unsecured, for which the last payment on the obligation would become due after the completion of the plan, such as a lien on a primary residence. 11 U.S.C. § 1328(a)(1); 7 Norton Bankr. L. & Prac. 3d § 153:3. Although such long-term debts are not discharged upon completion of the plan, the debtor can use the plan to cure defaults on those debts. 7 Norton Bankr. L. & Prac. 3d § 149:10. Under 11 U.S.C. § 1322(b)(5), the plan may give the debtor a reasonable time in which to make payments to cure a default or arrears while also making regular payments on the underlying long-term debt. *Nobleman*, 508 U.S. at 330. The plan thus allows the debtor to "reinstate the original terms of an obligation." 7 Norton Bankr. L. & Prac. 3d § 149:10.

b. The debtor's obligations are established in two separate ways in the bankruptcy proceeding. The first is by means of the plan confirmation process. As in Chapter 11 proceedings, the bankruptcy court must hold a confirmation hearing at which creditors and other parties in interest can raise objections to the debtor's proposed plan. 11 U.S.C. §§ 1324-25. If the court is satisfied that the plan properly addresses any concerns, the court must confirm the plan. 11 U.S.C. § 1325. Once confirmed, the plan "bind[s] the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted,

or has rejected the plan." 11 U.S.C. § 1327(a). After confirmation, the debtor, the trustee, or unsecured creditors holding allowed claims may request modification of the plan. 11 U.S.C. § 1329(a).

The second means of establishing the debtor's obligations is the claims allowance process. Unsecured creditors, whose claims are not ordinarily itemized in the Chapter 13 plan, must file proofs of claim against the debtor's estate if they want to be repaid. Fed. R. Bankr. P. 3002(a). Secured creditors, by contrast, need not file a proof of claim at any time but may do so to establish the amount owed to them. 11 U.S.C. § 506(d)(2); Fed. R. Bankr. P. 3002(a) (by negative inference). Once a creditor submits *prima facie* evidence of the amount of a claim, the debtor must object if the debtor disagrees with the creditor's submission, and the bankruptcy court must resolve the dispute, often in an adversary proceeding. 11 U.S.C. § 502.

c. Unlike in Chapter 11, plan confirmation in Chapter 13 ordinarily occurs before the deadline for filing proofs of claim. Within fourteen days of filing a Chapter 13 petition, the debtor must propose a debt adjustment plan. Fed. R. Bankr. P. 3015(b). The United States Trustee then schedules a meeting of creditors at which the debtor is examined under oath, between 21 and 50 days after the petition is filed. Fed. R. Bankr. P. 2003. Within 45 days of that meeting of creditors, the bankruptcy court must hold a confirmation hearing on the debtor's proposed plan. 11 U.S.C. § 1324. Within ninety days of the meeting of creditors, unsecured creditors must file proofs of claim against the debtor's estate. Fed. R.

Bankr. P. 3002(a), (c).

2. On February 26, 2010, petitioners filed a voluntary petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of Colorado. Bank of America ("respondent") is a secured creditor. Petitioners' debt is secured by respondent's lien of a deed of trust on petitioners' primary residence. Pet. App. 16a.

The same day that they filed for bankruptcy, petitioners filed a proposed Chapter 13 debt adjustment plan. Pet. App. 16a; Chapter 13 Plan Including Valuation of Collateral and Classification of Claims, *In re Gordon*, No. 10-13885 EEB (Bankr. D. Colo. Feb. 26, 2010). Although Chapter 13 plans can be used to cure defaults on long-term debt, such as petitioners' debt to respondent, petitioners' plan stated that they were not in default on that debt and owed no arrears to respondent. Pet. App. 16a. They proposed only to continue making the regular payments to respondent required by the terms of the loan. Pet. App. 59a.

As required by the District of Colorado's local rules, petitioners used the model form for their Chapter 13 bankruptcy plan—Local Form 3015-1.1. That form contains a "modification rule" which would have required petitioners to submit a modified plan to account for claims allowed after plan confirmation.[1] Petitioners marked the modification rule

[1] "The debtor must file and serve upon all parties in interest a modified plan which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation. . . . The modification will be filed no later than one year after the petition date. Failure of the debt-

"NOT APPLICABLE" in their proposed plan. Pet. App. 45a-46a.

Drawing on Section 1322 of the Bankruptcy Code, which allows a plan to include "any other appropriate provision not inconsistent with [the Code]," 11 U.S.C. § 1322(b)(11), petitioners included what the courts below termed "non-standard language" in their plan. That language required secured creditors to object to plan confirmation if they disagreed with the amount of their claims listed in the plan. In the absence of any objection, the plan would have *res judicata* effect and would not be subject to modification. *See* Pet. App. 37a-38a (text of nonstandard object-or-forfeit provision). Unless they objected, secured creditors would forfeit their opportunity to contest the plan's terms, including, in this case, the absence of arrears on petitioners' mortgage. Pet. App. 38a-39a.[2] Without the object-or-forfeit provision, secured creditors could ignore the bankruptcy proceeding entirely and compel petitioners to pay the full amount of any lien and arrears even after dis-

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or to file the modification may be grounds for dismissal." Local Bankr. Form 3015-1.1, ¶ VIII (D. Colo.).

[2] Secured and priority claims must each be listed and valued in a Chapter 13 plan, but individual unsecured claims are not specifically listed. While a secured or priority creditor might therefore need to object to contest the value of his or her claim estimated in the plan, an unsecured creditor would not have the need or opportunity to do the same. The standard claims allowance process would govern the value of an unsecured creditor's claim—a process unchanged by the object-or-forfeit provision. Allowed claims entitle the unsecured creditors pro rata, fixed percentage, or even full payment from the funds the plan requires the debtor to pay each period.

charge. *See* Drake, Bonapfel & Goodman, Chapter 13 Practice & Procedure § 8.2, at 452, 467-68 (2011-2 ed.).

3. No creditors, including respondent, filed an objection to petitioners' Chapter 13 plan. Pet. App. 16a. The bankruptcy court, however, *sua sponte* requested briefs and oral argument on whether the object-or-forfeit provision conflicted with the Bankruptcy Code and on whether the local modification rule (marked inapplicable by petitioners) conflicted with the Bankruptcy Code. Pet. App. 35a.[3] The court observed that "[c]ourts are split" on the validity of the object-or-forfeit rule and similar approaches around the country, Pet. App. 48a, and it outlined the positions other courts had taken, Pet. App. 48a-60a. At a hearing in the companion *Pahs* case, the court observed that "this [i]s a very important issue for very, very many plans," and added that "hopefully, whoever loses will take this one up all the way to the Circuit because we really need some guidance in this area." Resp. C.A. Mem. Br. 7 (quoting bankruptcy court).

The bankruptcy court concluded that the local modification rule was invalid because it conflicted

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[3] Identical object-or-forfeit provisions were included in Chapter 13 plans proposed in three other cases. The bankruptcy court initially requested briefs and oral argument in one of them, *In re Pahs*, No. 10-15557 EEB (Bankr. D. Colo. May 5, 2011). The court determined, however, that the facts of this case presented the best vehicle to address the legal issues involved. The court deemed the briefs filed in *In re Pahs* as filed in this case and, after deciding this case, entered similar orders in each of the other cases. Pet. App. 36a n.1.

with 11 U.S.C. § 1329(a), which authorizes only "the debtor, the trustee, or the holder of an allowed unsecured claim"—but not the court acting *sua sponte*—to modify a plan. Pet. App. 46a. In considering the object-or-forfeit provision, the court held that it was valid, because "[i]f a proposed plan unambiguously informs a creditor that its claim will be affected, disallowed or valued in a certain way, the creditor may not ignore the confirmation process just because the claims bar date has not expired." Pet. App. 63a. The court therefore confirmed petitioners' Chapter 13 plan. Pet. App. 64a.

4. Respondent appealed to the district court, taking the position that it remained entitled to contest the amount of arrears owed by petitioners because it could still file a proof of its secured claim at any time. Pet. App. 17a. The district court had jurisdiction to hear respondent's appeal under 28 U.S.C. § 158(a)(1), which gives the court jurisdiction over "final judgments, orders, and decrees" of the bankruptcy court. Pet. App. 13a.[4] Confirmation of a plan is considered a final order in bankruptcy proceedings. *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010). The district court reversed the bankruptcy court's decision, holding that the local rule is valid, Pet. App. 29a-30a, that the object-or-forfeit provision is not, Pet. App.31a-33a, and that the plan accordingly could not be confirmed, Pet. App. 34a.

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[4] The district court consolidated respondent's appeal with the Standing Chapter 13 Trustee's appeal in *In re Pahs*. Pet. App. 12a.

4. Petitioners appealed the district court's decision to the Tenth Circuit, challenging the district court's determination that the object-or-forfeit provision was inconsistent with the Bankruptcy Code.[5]

The Tenth Circuit had previously held that an order denying confirmation of a proposed Chapter 13 plan is not a final, appealable order. *In re Simons*, 908 F.2d 643, 645 (10th Cir. 1990). In that case, the court held that to be final and appealable, an order in a bankruptcy case must "leav[e] nothing for the court to do but execute the judgment" and must not "contemplate[] significant further proceedings in the bankruptcy court." *Id.* *Simons* held that an order denying confirmation does not satisfy that standard, because the debtor "may always propose another plan for the bankruptcy court to review for confirmation." *Id.*

In petitioners' case, the court of appeals requested briefing on whether it had jurisdiction to hear the appeal. Respondent and the Trustee filed a joint brief in support of jurisdiction. They argued that *Simons* "departs from [the Tenth Circuit's] own precedent . . . , it conflicts with decisions of the Third and Fifth Circuits, it is unfair to debtors, and it stymies efficient use of judicial resources." Resp. C.A. Mem. Br. 10 (available at 2012 WL 1898996). They explained that "finality in bankruptcy is a pragmatic concept, not an inflexible one." *Id.* at 20. In their

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[5] Pahs also appealed the decision of the district court, but because Pahs failed to make payments under his plan while the appeal was pending, his bankruptcy case was dismissed, making his appeal of the district court decision moot. Pet. App. 2a-3a.

view, the finality determination should turn on whether the court order "finally resolves the discrete legal questions at issue" as well as on questions of fairness and judicial economy. *Id.* at 20-21. Petitioners filed a notice stating that they "concur in the conclusions reached by [respondent and the Trustee] and would otherwise adopt the position taken by [respondent and the Trustee] as their own." Notice of Concurrence, at 1.

The Tenth Circuit held that it "cannot overrule *Simons*," Pet. App. 6a, and therefore held it did not have jurisdiction to hear petitioners' appeal. The court stated that, as in *Simons*, "significant further proceedings" remained in this case because petitioners would be free to revise their proposed plan. Pet. App. 5a. As a result, "the bankruptcy court will have to give creditors notice of the new amended plan, permit time for any objections, and then conduct another confirmation hearing." Pet. App. 5a. The Tenth Circuit acknowledged the conflict within the circuits on whether denials of plan confirmation are appealable, but also stated that it "[saw] no reason to ask the en banc court to reexamine *Simons* at this time." Pet. App. 7a n.2. The court determined that the only avenues for considering the issue sought to be appealed would be "on appeal from a final judgment either confirming an alternative plan, or dismissing the underlying petition or proceeding." Pet. App. 6a (quoting *Simons*, 908 F.2d at 645).[6]

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[6] The Tenth Circuit declined to remand to allow petitioners to seek certification of an interlocutory appeal. Pet. App. 9a-10a.

REASONS FOR GRANTING THE PETITION

There has been an increasingly entrenched and acknowledged conflict in the courts of appeals on the appealability of denials of plan confirmation since at least 2000, and four circuits have weighed in on the issue in the last year alone. The issue, which is exceptionally important to bankruptcy practice nationwide, is squarely presented in this case and warrants this Court's review.

The court of appeals purported to rely on the principle that an order denying confirmation is not final and appealable because such an order contemplates further merits proceedings. But precisely the same thing is true of *grants* of plan confirmation, which this Court and others have uniformly held appealable. Parties have never been required to wait until the completion of all proceedings on the merits—three to five years until discharge in a successful Chapter 13 case—before an order in a bankruptcy case is final and appealable.

The Tenth Circuit's holding that orders denying plan confirmation are not appealable unjustifiably burdens cash-strapped debtors, who must instead pursue time-consuming, cumbersome, and uncertain avenues to obtain appellate review, and it wastes judicial resources. Indeed, although the issue involves debtors' rights to appeal, the Chapter 13 Trustee and even Bank of America, a creditor in this case and in many others, agreed (and argued vigorously below) that the court of appeals should reverse its own precedent and hold that debtors may appeal denials of plan confirmation. Further review is warranted.

I. THERE IS AN ENTRENCHED SIX-TO-THREE CONFLICT IN THE CIRCUITS ON THE APPEALABILITY OF DENIALS OF PLAN CONFIRMATION

Three circuits recognize that a denial of plan confirmation, like a grant of plan confirmation, is final and appealable under settled principles of finality that have long governed bankruptcy cases. The Tenth Circuit in this case agreed with five other circuits that have held that denials of plan confirmation are not appealable. Only this Court's review can resolve the conflict.

A. In Three Circuits, a Debtor May Immediately Appeal a Denial of Plan Confirmation

The Third, Fourth, and Fifth circuits allow debtors to appeal an order denying confirmation of their plan, rather than requiring them "to suffer dismissal or to waste resources on an amended plan before obtaining appellate review." *Mort Ranta* v. *Gorman*, 721 F.3d 241, 250 (4th Cir. 2013).

1. In *Mort Ranta*, a divided panel of the Fourth Circuit recently held that an order denying plan confirmation was "a final order for purposes of appeal even if the case has not yet been dismissed." 721 F.3d at 248. The debtor in *Mort Ranta* had argued in the bankruptcy court that "Social Security income is excluded from the calculation of 'disposable income'" under Chapter 13 and proposed a plan that did not take such income into account. *Id.* at 244. The bankruptcy court rejected the plan for failing to account for the debtor's social security income and also denied the debtor's motion for an interlocutory

appeal. *Id.* The debtor appealed to the district court, which affirmed. *Id*. at 245.

The court of appeals "conclude[d] that the bankruptcy court's denial of confirmation and the district court's affirmance are final orders" and that therefore "appellate jurisdiction [was] proper." 721 F.3d at 250. The court noted that it had long permitted *grants* of plan confirmation to be appealed by creditors or trustees, and "[b]y the same token, we have a long history of allowing appeals from debtors whose plans are *denied* confirmation." *Id*. at 245. Recognizing that the issue "has divided other circuits," the court concluded that "the bankruptcy court's denial of [the debtor's] proposed plan and the district court's affirmance are final orders for purposes of appeal." *Id*. at 246.

The court acknowledged that some other courts (including the Tenth Circuit in *Simons*) had treated denial of plan confirmation as nonfinal because "the debtor may propose an amended plan before the case is dismissed" on remand. 721 F.3d at 247. But the court noted that "the same can be said of a confirmation order," because "[e]ven after a plan is confirmed, the debtor is always free to propose a modification to the plan, which could substantially modify the terms of repayment and the rights of creditors." *Id*. at 248. Yet confirmation orders have always been held appealable. *See*, *e.g.*, *United Student Aid Funds,* 559 U.S. at 269.

The court also explained that "a contrary rule could leave some debtors 'without any real options.'" 721 F.3d at 248 (quoting *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000)). Without the ability to appeal

the denial of plan confirmation, the debtor would be "forced to 'choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal.'" *Id.* (quoting *Bartee*, 212 F.3d at 283). Filing an involuntarily amended plan "would waste 'valuable time and scarce resources,'" *id.* (quoting *McDow* v. *Dudley*, 662 F.3d 284, 287 (4th Cir. 2011)), and "the procedural oddity of allowing a debtor to appeal the confirmation of his or her own proposed plan raises questions regarding standing." *Id*. at 248 n.10. The alternative of dismissal risks losing the automatic stay that protects the debtor's estate and could "preclude[] [the debtor] from filing another bankruptcy petition for six months." *Id.* at 248. The court concluded that "as a practical matter, it makes little sense to deny debtors immediate appellate review simply because the case has not yet been dismissed and the debtor could propose an amended plan." *Id*.

2. In *Bartee*, the Fifth Circuit similarly held that a denial of confirmation of a Chapter 13 plan was appealable, because it "conclusively determined the substantive rights at issue and ended the dispute" over them. 212 F.3d at 283-84. In that case, a secured creditor objected to the "cramdown" of its claim under 11 U.S.C. § 506 and § 1325(a)(5); the bankruptcy court denied confirmation of the plan; and the district court affirmed. *Id.* The court of appeals explained that a bankruptcy court order is final and appealable if it is "a 'final determination of the rights of the parties to secure the relief they seek,' or a final disposition 'of a discrete dispute within the larger bankruptcy case.'" *Id*. at 282; *see*

also id. at 283 ("final denial of the relief sought by the debtor"). Thus, because the record did "not contain any indication that the bankruptcy court intended to take any further action on the objection to the claim or the objection to confirmation," *id.* at 283, the court held that its order was final and appealable, *id.* at 284. *See also In re Crager*, 691 F.3d 671, 675 (5th Cir. 2012) (reaffirming *Bartee* and holding that a denial of plan confirmation that finally resolves "a discrete dispute" is final and appealable).

The Fifth Circuit in *Bartee* viewed its conclusion as "all but compelled by considerations of practicality," since without a right to appeal, "the debtor is left without any real options in formulating his plan." 212 F.3d at 283. The court recognized that other courts of appeals (including the Tenth Circuit) had by that time held that denials of plan confirmation were not appealable. *Id.* at 282 n.6. But the court explained that it had "long rejected adoption of a rigid rule that a bankruptcy case can only be appealed as a single judicial unit at the end of the entire bankruptcy proceeding." *Id.* at 282 (internal quotation marks omitted). Indeed, "[s]eparate and discrete orders in many bankruptcy proceedings determine the extent of the bankruptcy estate and influence creditors to expend or not to expend effort to recover monies due them." *Id.* at 282-83 (quoting *England* v. *FDIC*, 975 F.2d 1168, 1171 (5th Cir. 1992)). Reversing such orders only after the termination of the entire case "would waste exorbitant amounts of time, money, and labor." *Id.* at 283 (quoting *England*, 975 F.2d at 1171).

3. In *In re Armstrong World Indus.*, 432 F.3d 507, 511 (3d Cir. 2005), a divided panel of the Third Circuit held that a denial of confirmation of a Chapter 11 plan is appealable. The district court had denied confirmation on the ground that certain provisions in the proposed plan violated the current codification of the absolute-priority rule, *id.* at 509, which requires that creditors be paid in full before stockholders are permitted to retain equity interests. *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999); 11 U.S.C. § 1129(b)(2)(B)(ii). The court noted that "[b]ecause bankruptcy proceedings are often protracted, and time and resources can be wasted if an appeal is delayed until after a final disposition," it had recognized the "policy . . . to quickly resolve issues central to the progress of a bankruptcy." 432 F.3d at 511. The court applied a four-factor test to determine that the denial of confirmation was final and appealable; the test considers "(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy." *Id.*

Under those four factors, appeal would be permitted in this case. Denial of confirmation here will have an impact on the assets of the bankruptcy estate, because the estate will be subject to claims for arrears by respondent if petitioners are forced to file the plan without the object-or-forfeit clause. There is no need for further fact-finding on remand, because the dispute over the validity of the object-or-forfeit clause is purely a matter of law. The appeal here, like the one in *Armstrong*, "would require [the

appellate court] to address a discrete question of law that would have a preclusive effect on certain provisions of the Plan," 432 F.3d at 511, since no plan with an object-or-forfeit provision could be confirmed under the district court's decision. Finally, the alternative to permitting an appeal now would be to require the debtors either to move for confirmation of an alternative plan and then seek to appeal the court's grant of their own motion, or to appeal a subsequent dismissal of the entire case on the ground that the object-or-forfeit clause they originally sought is legally valid. As the Fourth and Fifth Circuits have recognized, either course would be inefficient and wasteful—and possibly fail to bring the issue to the appellate court in any event.

B. Six Circuits Require Debtors to Propose Plans They Do Not Want or Incur Dismissal in Order to Obtain Review

The Tenth Circuit in this case joined five other circuits that have held that an order denying confirmation of a debtor's plan is nonfinal and nonappealable.

1. In *Maiorino* v. *Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982), a divided panel of the Second Circuit held that orders denying confirmation of bankruptcy plans are not final and may not be immediately appealed. In that case, after the bankruptcy court had sustained an objection to the debtors' Chapter 13 plan on state-law grounds, the debtors appealed directly to the Second Circuit under a since-repealed provision of Title 28. *Id.* at 89. The court of appeals held that an "order denying confirmation of the proposed plan is interlocutory only and

hence not appealable," because "for all we know, the bankruptcy court may very well confirm another plan" that does not include the contested provision. *Id.* at 90-91. In *In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996), the Second Circuit did later acknowledge that "the concept of 'finality' is more flexible in the bankruptcy context than in ordinary civil litigation." Nonetheless, *Flor* too held that the mere fact that it "cannot not rule out the possibility that an alternate plan may be confirmed" precluded appeal of a denial of plan confirmation. *Id.*

2. The Sixth Circuit has also held that "a decision rejecting . . . confirmation [of a] plan is not a final order appealable under" 28 U.S.C. § 158(d)(1), the statute specifically addressing appeals to the courts of appeals in bankruptcy cases. *In re Lindsey*, 726 F.3d. 857, 859 (6th Cir. 2013). In *Lindsey*, the debtor's Chapter 11 plan had been denied on the ground that it violated the absolute-priority rule. The Sixth Circuit held that the debtor could not appeal unless the remaining proceedings would be "of a ministerial character." *Id.* at 859. Because the debtor in *Lindsey* could propose a new plan, to which the creditors could object, the remand involved "[f]ar more than a few ministerial tasks[.]" *Id.* The court of appeals noted that it "join[ed] four other circuits" that at that time did not permit appeals of denials of plan confirmation, while "[t]hree other circuits have gone the other way." *Id.* Relying in part on the availability of discretionary review for interlocutory orders that are certified under 28 U.S.C. § 158(d)(2) and accepted by the court of appeals the court held that denials of plan confirmation are categorically nonfinal and nonappealable. 726 F.3d at 860.

3. The Eighth Circuit too has held that "a bankruptcy court order that 'neither confirms a plan nor dismisses the underlying petition, is not final.'" *In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993) (quoting *Lewis* v. *United States*, 992 F.2d 767, 772 (8th Cir. 1993)). In *Pleasant Woods*, the bankruptcy court held that the debtor's Chapter 11 plan should not be confirmed on several grounds relating to its feasibility and the lack of adequate cash reserves, but also held that an amended plan that included certain other provisions would be confirmable. The court of appeals concluded that the denial of plan confirmation was not final and appealable, because "the bankruptcy court has remaining tasks that are not purely mechanical or ministerial, such as considering any amended plan that may be proposed, or determining how to dispose of the case if no confirmable plan is proposed." *Id.* *Accord* *In re Fisette*, 695 F.3d 803, 805-06 (8th Cir. 2012).

4. In *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997), the Ninth Circuit rejected the contention of both parties that it had jurisdiction of an appeal from a denial of plan confirmation, categorically holding that "a bankruptcy court's decision denying confirmation of a Chapter 11 plan is interlocutory." In reaching that conclusion, the court cited *Flor*, *Pleasant Woods*, and the Tenth Circuit's decision in *Simons*. *Id.*

5. Finally, the First Circuit recently held in a Chapter 13 case that "[a]n order of an intermediate appellate tribunal [*i.e.*, a district court or bankruptcy appellate panel] affirming the bankruptcy court's denial of confirmation of a reorganization plan is not

a final order so long as the debtor remains free to propose an amended plan." *In re Bullard*, No. 13-9009, 2014 WL 1910868 at *3 (1st Cir. May 14, 2014); *see id.* at 14. The court acknowledged that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split." *Id.* at *2. The court aligned the circuits in precisely the split discussed above; it cited the Tenth Circuit's decision in this case; and it extensively discussed the opposing views of the Sixth Circuit in *Lindsey* and the Fourth Circuit in *Mort Ranta*. *Id.* at *2-*3 & n.4, *4-*5.

The First Circuit in *Bullard* did note that "[t]he analysis may differ in certain circumstances where the bankruptcy court confirmed a plan and the BAP or district court reversed," as occurred in the instant case. 2014 WL 1910868 at *5 n.9. But in each of the cases the court cited for that proposition, *Bourne* v. *Northwood Props.*, 509 F.3d 15 (1st Cir. 2007), and *Prudential Ins. Co.* v. *SW Boston Hotel Venture*, 2014 WL 1399418 (1st Cir. Apr. 11, 2014), there was a discrete issue separate from, but crucial to, plan confirmation on which the court held that appeal was proper. In each case, the court of appeals first decided that separate issue. In each case, the court then went on to reverse the intermediate appellate court's holding that the plan could not be confirmed, on the ground that the ruling on the separate issue "eviscerated [the] entire premise" of the intermediate appellate court's denial of plan confirmation. *Bullard*, 2014 WL 1910868 at *5 n.9. In the instant case, there is no discrete issue separate from the denial of plan confirmation on which appeal could be taken. Therefore, in light of the balance of the First Cir-

cuit's reasoning, which relied heavily on that of the Sixth Circuit in *Lindsey*, it appears that the First Circuit would hold that the instant case is not appealable.

C. The Conflict is Entrenched and Warrants Review

Since 2000, when the Fifth Circuit decided *Bartee*, the courts of appeals have reached conflicting conclusions on the question presented in this case. The Third, Fourth, and Fifth Circuits would have held that the district court's decision in this case was final and appealable, and they would accordingly have resolved the underlying legal dispute about the validity of the object-or-forfeit provision. The First, Second, Sixth, Eighth, and Ninth Circuits would agree with the Tenth Circuit that the denial of plan confirmation is not appealable. In the last year alone, four courts (the Tenth Circuit here, the Fourth Circuit in *Mort Ranta*, the Sixth Circuit in *Lindsey*, and the First Circuit in *Bullard*) have addressed the issue and come to conflicting conclusions. The courts of appeals have repeatedly acknowledged the conflict and expressly addressed the rationales offered by sister circuits. *See Mort Ranta*, 721 F.3d at 246; *Bartee*, 212 F.3d at 282; *Lindsey*, 726 F.3d at 859; *Bullard*, 2014 WL at *3-*5; Pet. App. 7a n.2. The conflict extends to Chapter 11 and Chapter 13 cases, and no court has distinguished between them in considering the appealability of plan denials.

The conflict is not likely to subside or be resolved by the courts of appeals themselves. The courts of appeals have applied a variety of different tests and

standards to decide the issue, and two of the key decisions—*Mort Ranta* and *Maiorino*—were decided by divided panels. Only this Court's review can resolve the conflict.

II. DENIALS OF PLAN CONFIRMATION ARE FINAL AND APPEALABLE

Denials of plan confirmation are final decisions subject to appeal. A long line of decisions has established that finality in bankruptcy is a broader concept than finality in ordinary civil litigation. Congress recognized that principle when it enacted 28 U.S.C. § 158(d)(1), the statute specifically addressing bankruptcy appeals, whose terms ("final decisions, judgments, orders, and decrees") are significantly broader than the terms ("final decisions") of 28 U.S.C. § 1291, which authorizes appeals from district court in *all* cases. Unlike other forms of litigation, bankruptcy proceedings in successful Chapter 13 cases ordinarily continue for three or five years before the court issues a single, final judgment that terminates the case (*i.e.*, the debtor's discharge). Yet no court has suggested that all appeals in bankruptcy cases must wait until that time.

Precluding appeals from denials of plan confirmation could insulate a host of potential legal errors from review and harm debtors. A debtor would be able to obtain review only by invoking the cumbersome and doubtful appeal-your-own-plan procedure or an equally difficult procedure in which the debtor would move for a voluntary dismissal and then appeal from the grant of the debtor's own motion. Either of those avenues prolongs the appeals process to the detriment of cash-strapped debtors, as well as

creditors who also have a vital interest in avoiding waste of the limited resources available in the bankruptcy estate. The same rationale that would preclude appeal of *denials* of plan confirmation would require reversal of the long-settled rule that *grants* of plan confirmation are appealable, since grants of plan confirmation too contemplate further proceedings on the merits of the bankruptcy case.

A. Some Orders in Bankruptcy Cases Are Final and Appealable Long Before the Bankruptcy Proceeding is Completed

"Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation." 16 Wright & Miller, Federal Practice & Procedure § 3926.2, at 270 (2d ed. 1996).[7] In ordinary civil cases, a final, appealable judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Orders in bankruptcy, however, are considered final for purposes of appeal where "they fi-

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[7] The courts of appeals have uniformly accepted that "[b]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation." *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989); *see*, *e.g.*, *Ritchie Special Credit Investments, Ltd.* v. *U.S. Trustee*, 620 F.3d 847, 852 (8th Cir. 2010); *In re Oakley*, 344 F.3d 709, 711 (7th Cir. 2003); *In re Millers Cove Energy Co., Inc.*, 128 F.3d 449, 451 (6th Cir. 1997); *Lewis*, 992 F.2d at 772; *In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990).

nally dispose of *discrete disputes within the larger case*," even though there may be more left for the bankruptcy court to do. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.). This broader concept of finality in bankruptcy proceedings is supported by the language of 28 U.S.C. § 158(d)(1), which governs bankruptcy appeals, as well as by this Court's holdings and the actual practice of the lower courts.

1. Sections 1291 and 158(d)(1) of Title 28 each independently authorize appeal of bankruptcy cases. *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Section 1291 provides general authority for appeals of "final decisions of district courts" in bankruptcy and other cases. Section 158(d)(1), however, which addresses only bankruptcy cases, authorizes appeal in broader terms, providing for appeal from "final decisions, judgments, orders, and decrees" of district courts and of bankruptcy appellate panels.[8] Congress's use of a broader phrase in the provision expressly addressed to bankruptcy appeals—which contains several, sometimes overlapping components ("final decisions, *judgments, orders, and decrees*")—demonstrates a broader notion of finality in bankruptcy and a broader array of judicial actions subject to appellate review.

Moreover, the term "order" in Section 158(d)(1)

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[8] 28 U.S.C. § 158(d)(1) provides in full: "The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." The referenced subsections in turn govern appeals from bankruptcy courts to district courts (subsection (a)) and to bankruptcy appellate panels (subsection (b)).

specifically encompasses a broader array of judicial acts than the term "decision" that is found in both statutes. A "decision" is "[a] judicial determination after consideration of the facts and law." Black's Law Dictionary 414 (7th ed. 1999). An "order," however, is defined more broadly as "the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings." *Id.* at 1123 (quoting 1 Henry Campbell Black, A Treatise on the Law of Judgments § 1, at 5 (2d ed. 1902)). This Court has frequently explained that statutes should be interpreted "so that no part will be inoperative or superfluous, void, or insignificant." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004). Congress's extension of appeal rights to final "orders," in addition to "decisions," in bankruptcy cases reflects its determination that appellate review should be available on a broader basis in bankruptcy proceedings than in other civil proceedings.

2. This Court's decisions confirm that the nature of bankruptcy proceedings warrants greater availability of appellate review than in other civil cases. Long before the modern Bankruptcy Code, this Court in *Forgay* v. *Conrad*, 47 U.S. 201 (1848), allowed an appeal from an order requiring the transferee of certain fraudulently transferred assets to deliver them to the bankruptcy trustee. Further proceedings to assess the accounts and rents on the transferred assets still remained, and therefore even the narrow dispute between the trustee and the transferee that was part of the bankruptcy case had not been finally resolved. *Id.* at 203. But the Court

held that appeal was nonetheless proper. *Id.* at 204.

Under the current Bankruptcy Code, this Court in *Howard Delivery Service, Inc.* v. *Zurich American Insurance Co.*, 547 U.S. 651 (2006), held that denial of priority status to a claim holder in bankruptcy was a final decision subject to appeal. While that ruling was just a step in the bankruptcy proceeding, the Court noted that it "effectively concluded the dispute between [the debtor] and [the particular creditor]" as a practical matter. *Id.* at 657 n.3. The Court in *Howard Delivery* relied on then-Judge Breyer's opinion for the First Circuit in *Saco*, which explained that "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long provided that orders finally settling creditors' claims are separately appealable." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *Saco*). For those reasons, this Court held that the order resolving the creditor's priority "qualifies as a final decision under 28 U.S.C. § 158(d)." *Id.*

3. The very nature of bankruptcy cases supports a broader rule of appealability than in other civil cases. Ordinary civil litigation usually ends with a single, final judgment that is relatively easy to identify and that terminates the proceedings on the merits. *Cf.* Fed. R. Civ. P. 58(a) (requiring that "[e]very judgment must be set out in a separate document"). By contrast, the "merits" of a bankruptcy case are not finally decided until the court conclusively determines what property belongs to the estate, how that property will be distributed among the debtor

and various claimants and interest holders, and whether the debtor is, in the end, entitled to a discharge. In a successful Chapter 13 case, the court does not grant such a discharge until the debtor has made all required payments, usually for a period of three or five years. 11 U.S.C. § 1328(a); *see United Student Aid Funds*, 559 U.S. at 264. By that time, the debtor's payments have been distributed to creditors in a process that would be difficult to undo, and a host of other disputes between a variety of parties has been resolved. It would be absurd to contend that all appeals in Chapter 13 cases must wait until the end of that three- or five-year period, and no court has so held.

B. Orders Denying Plan Confirmation Are Appealable

Orders finally denying confirmation of a given plan, like orders that finally grant plan confirmation, are appealable. They finally resolve a discrete dispute that frequently is decisive for the balance of the bankruptcy case. The debtor should not be required to engage in cumbersome and doubtful procedural maneuvers to obtain appellate review of a plan denial. Such a requirement, imposed by the Tenth Circuit and the courts that have agreed with it, places an unjustifiable hurdle in the paths of debtors and may effectively preclude their ability to obtain *any* review of meritorious claims.

1. As a practical matter, precluding appeals of denials of plan confirmation would likely foreclose review of some legal errors altogether. Under the Tenth Circuit's rule, a debtor would have only two ways to obtain appellate review of the denial of plan

confirmation. The debtor could move for confirmation of an amended plan that does not include the supposedly offending provision (if such a plan is available) and then appeal the bankruptcy court's grant of the debtor's own motion to confirm. Alternatively, the debtor could dismiss the case and appeal the dismissal. *See*, *e.g.*, *In re Simons*, 908 F.2d at 645. As the Fifth Circuit recognized in *Bartee*, however, both choices are "fraught with unintended inefficienc[y] . . . and other appellate pitfalls." 212 F.3d at 282 n.6.

Requiring the debtor to undertake the unusual procedure of moving for confirmation of an alternative plan (if one is available) and then seeking to appeal the court's grant of the debtor's own motion poses particular obstacles. Functionally, it may take months for a new, less attractive plan to be confirmed and then appealed; even if successful, the appeal could vindicate the debtor's legal position only "long after the [denied] plan c[ould] be revived." *Maiorino*, 691 F.2d at 95 (Lumbard, J., dissenting).[9]

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[9] In the Chapter 11 context, there is a risk that the appeal-your-own-plan stratagem would be completely unavailable under the doctrine of "equitable mootness." As the Fifth Circuit has explained, equitable mootness is based on "a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994). Accordingly, "a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that the effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." *Id.*; *see In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2021 (2013) (calling equitable mootness "a prudential doctrine

Moreover, the extra costs of filing a new plan and appealing confirmation of that plan would preclude many debtors from bringing meritorious challenges to faulty decisions; after all, debtors by definition are likely to be short of funds and therefore reluctant or unable to appeal. Finally, allowing the debtor to appeal a plan adopted on the debtor's own motion is in some tension with the underlying principle that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 333 (1980) (citations omitted); *see Mort Ranta*, 721 F.3d at 248 n.10.

Similarly, voluntary dismissal, which would be necessary if no other confirmable plan were available or acceptable to the debtor, could cause the debtor to lose the benefit of the automatic stay, which prohibits creditors from acting to collect debts owed from the property held by the debtor or the estate. *See* 11 U.S.C. § 362(c)(2)(B).[10] Loss of that protec-

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under which the district court may dismiss a bankruptcy appeal 'when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.'") (quoting *In re Chateaugay Corp.,* 988 F.2d at 325). Under any of the various standards by which courts of appeals have applied equitable mootness, the execution of a confirmed plan could operate to preclude appeal by a debtor seeking to change or revoke a plan on the ground that an earlier plan should have been confirmed.

[10] Denial of a debtor's reorganization plan could destroy prospects for acceptance of a plan entirely. For example, confirmation of a Chapter 11 reorganization plan requires, among other things, either that all classes of creditors whose rights are affected—"impaired"—by the plan vote in favor of its con-

tion could in turn change the debtor's financial circumstances substantially, favor certain creditors over others, and undermine the very purpose of filing for bankruptcy. *See* 1 Collier on Bankruptcy ¶ 1.05[1], p. 1-19 (16th ed. 2013). The dismissal could also jeopardize the debtor's ability to file a subsequent petition. *See* 11 U.S.C. § 109(g)(2) (providing that no person may be a debtor within 180 days of their voluntary dismissal following a creditor's request for relief from the automatic stay).

2. This Court held in *United Student Aid Funds*, 559 U.S. at 269, and the Tenth Circuit here recognized, *see* Pet. App. 4a, that *grants* of plan confirmation are appealable as of right. There is no basis to treat *denials* of plan confirmation any differently.

a. The court of appeals believed that a denial of plan confirmation is not final because "the debtor, unsuccessful with one reorganization plan, may always propose another plan for the bankruptcy court to review for confirmation." Pet. App. 6a. In the court's view, because the denial of confirmation

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firmation, *see* 11 U.S.C. § 1129(a)(7), or that at least one class of impaired creditors vote in favor of the plan, provided that the plain "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Thus, if the court erroneously rejects the only plan sufficiently agreeable to the classes of creditors required to vote for plan confirmation, the debtor could be left without any realistic alternative to dismissal or conversion. *Cf. In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 133 (8th Cir. 1993) (dismissing Chapter 11 debtor's case where it was "apparent that there [was] no plan Debtor could propose which the only impaired creditor . . . would approve").

therefore does not "end[] the litigation on the merits, leaving nothing for the court to do but execute the judgment" and "contemplates significant further proceedings in the bankruptcy court," it is not final. Pet App. 6a (quoting *Simons*, 908 F.2d at 644-45). That logic, however, applies equally to grants of plan confirmation, and would overturn the settled rule permitting appeals of such grants.

"[T]he confirmation of the plan is often just the first step toward finalization of the case. There are always issues to be resolved through additional litigation, such as avoidance actions, claims allowance, compliance with or consummation of the plan, and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94, 94 (1991). For example, in a Chapter 13 case, unsecured creditors must file claims in order to receive a portion of the debtor's periodic payments under the plan. *See* pp. 3-4 & 6 n.2, *supra*. But while the court has 45 days after the first meeting of creditors to hold a plan confirmation hearing, *see* 11 U.S.C. § 1324(b), creditors have 90 days after the first meeting to file their claims, *see* Fed. R. Bankr. P. 3002(c). Accordingly, "in the typical Chapter 13 case, . . . the plan is confirmed well *prior to* any deadline for filing proofs of claim." Pet. App. 41a.

Such claims, filed after plan confirmation, are plainly themselves filings on the "merits" of the bankruptcy case, since such claims may affect the debtor's payments, the discharge, and the distribu-

tion of the debtor's assets.[11] Moreover, if a creditor's claim is contested, the court "after notice and a hearing" must generally "determine the amount of such claim." 11 U.S.C. § 502(b). Such a hearing is also obviously a hearing on the "merits" of the Chapter 13 case.[12]

The conclusion is inescapable that, under the

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[11] When a new claim is allowed, either the amount each creditor will receive will decrease (if the already-confirmed plan provides for pro rata payments to unsecured creditors), or the amount the debtor must pay will increase (if the already-confirmed plan provides for payment in full or by a fixed percentage of the amount owed to each creditor). *See*, *e.g.*, *In re Roberts,* 279 F.3d 91, 92-93 (1st Cir. 2002) (payment of tax claims in full and percentage of unsecured claims). Indeed, in the latter situation, an increase in the amount owed by the debtor, who is already paying "all of [her] projected disposable income" to the trustee under the plan, *see* 11 U.S.C. § 1325(b)(1)(B), could cause the debtor to default and result in conversion to Chapter 7 or dismissal for cause. 11 U.S.C. § 1307(c)(6).

[12] The same conclusion follows for secured creditors under respondent's argument that the object-or-forfeit provision is invalid. If that provision is valid, plan confirmation will at least terminate claims for arrears by secured creditors, though it will leave open much other litigation in the bankruptcy proceeding. Respondent's argument that the object-or-forfeit rule is invalid, however, rests on the premise that the court *must* allow secured creditors to litigate the extent of arrears—*i.e.*, an issue that is undoubtedly on the merits of the bankruptcy case—*after* plan confirmation. *See*, *e.g.*, Resp. C.A. Br. 12. And under the local rule challenged here and defended by respondent, the plan itself must be modified by the debtor *after* plan confirmation to accommodate the results of the claims-allowance process—a proceeding that also is plainly at the heart of the merits of the bankruptcy case. Resp. C.A. Br. 17-19, 24-28.

court of appeals' test, a grant of plan confirmation is not final; it does not "end[] the litigation on the merits, leaving nothing for the court to do but execute the judgment" and it does "contemplate[] significant further proceedings in the bankruptcy court." Pet. App. 6a. Accordingly, under the reasoning adopted by the court of appeals, grants of plan confirmation, just like denials of plan confirmation, would not be appealable—contrary to the holdings of this Court and the uniform view of the lower federal courts.

b. Even aside from the claims process, plan confirmation contemplates a great deal of further litigation on the merits of the bankruptcy case. For instance, under 11 U.S.C. § 1329(a), debtors, creditors, or the trustee in a Chapter 13 case may seek to modify a confirmed plan. Additionally, as noted, in Chapter 13 cases, a debtor receives no discharge of debts until all plan payments have been made, which will ordinarily occur three to five years after plan confirmation. *See* pp. 26-27, *supra.* Even after plan confirmation, if the debtor fails to make payments, a court may dismiss or convert a case and reinstate creditors' claims to their original amounts. Charles Tabb, The Law of Bankruptcy 1274-75 (2d ed. 2009); 11 U.S.C. § 1307(c)(6). All of those proceedings are on the merits of the bankruptcy case, and all are expected to occur in the usual course after plan confirmation. The fact that further proceedings on the merits will occur after a plan is confirmed does not preclude appeal of an order confirming a plan, and it therefore should not preclude appeal of an order denying plan confirmation either.

c. Treating denials of plan confirmation as nonfinal also has significant and unfortunate consequences for the development of bankruptcy law. In Chapter 13 cases, only debtors may propose plans. *See* 11 U.S.C. § 1321.[13] A rule that debtors are precluded from appealing *denials* of plan confirmation, while *grants* of plan confirmation are appealable as of right, *see United Students Aid Funds*, 559 U.S. at 269, creates an unfair asymmetry. In addition, such disparate treatment may lead in the long run to the development of bankruptcy precedents only through creditors' appeals, which may predictably result in a creditor-favorable bias in bankruptcy law.

4. Finally, the existence of a mechanism for certified interlocutory appeals in 28 U.S.C. § 158(d)(2) (or in the narrower 28 U.S.C. § 1292) does not affect the availability of an appeal as of right from the denial of plan confirmation. Under Section 158(d)(2), the parties jointly, or the district court, bankruptcy appellate panel, or bankruptcy court, may certify that an interlocutory order "involves a question of law as to which there is no controlling decision" from a higher court, that it "involves a matter of public importance," that it "involves a question of law requiring resolution of conflicting decisions," or that "immediate appeal . . . may materially advance the progress of the case or proceeding in which the appeal is

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[13] While the Bankruptcy Code provides that in Chapter 11, parties other than the debtor—namely "[a]ny party in interest"—"may file a plan" under certain circumstances, *see* 11 U.S.C. § 1121(c), in fact the Chapter 11 plan is "typically proposed by the debtor." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012).

taken." 28 U.S.C. § 158(d)(2). If the court of appeals then provides authorization, appeal is permitted.

Although the certified-appeal mechanism of Section 158(d)(2) provides a useful safety valve to permit appeals in appropriate cases, it is highly restricted as compared to appeals as a matter of right. Indeed, this Court has recognized that certified interlocutory appeals were generally designed to be "exceptional." *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 74 (1996) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978)). Section 158(d)(2) provides no help in cases that do not qualify under its various provisions, nor does it substitute for appeal of right in cases in which the debtor is simply unable to convince his adversaries or the courts involved that the case satisfies Section 158(d)(2)'s standards.

III. THE ISSUE IS IMPORTANT AND SQUARELY PRESENTED

The question whether a debtor can appeal the denial of a proposed bankruptcy plan is vitally important to debtors and creditors. That issue was the sole basis for the Tenth Circuit's decision in this case, and it is ripe for this Court's review. A rule barring appeals of plan denials thwarts the Bankruptcy Code's interest in promptly granting a fresh start to debtors and prevents clarifying intervention by the courts of appeals.

1. For at least a century, this Court has noted the role of the bankruptcy system in getting people back on their feet promptly and fairly. *See Williams* v. *U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915). More recently, this Court has emphasized the need

to "facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start." *Schwab* v. *Reilly*, 560 U.S. 770, 793-94 (2010).

The rule embraced by the Tenth Circuit will impede resolution of bankruptcy proceedings by barring immediate appeal when a plan is rejected. That rule forces cash-poor debtors to pursue a complicated, lengthy, and expensive litigation strategy if they want to obtain review of the legal rulings leading to the denial. *See* pp. 27-30, *supra*.

2. Barring appeals at the time a bankruptcy plan is rejected can lead to ongoing uncertainty in the law. This case is a prime example. Referring to the validity of the object-or-forfeit rule, the bankruptcy court in this case observed that "this [i]s a very important issue for very, very many plans," and added that "hopefully, whoever loses will take this one up all the way to the Circuit because we really need some guidance in this area." Resp. C.A. Mem. Br. 7-8 (quoting bankruptcy court); p. 7, *supra*. In fact, both Bank of America (a creditor) and the Trustee agreed with petitioners and argued that the court of appeals had jurisdiction to review the issue. Despite the bankruptcy court's observation that "[c]ourts are split" on the object-or-forfeit rule around the country, Pet. App. 48a, and the fact that a different division of the same court reached the opposite conclusion, *In re Butcher*, 459 B.R. 115, 129 (Bankr. D. Colo. 2011), the Tenth Circuit held that it was unable to resolve the purely legal question presented to it.

Indeed, many of the cases in the courts of appeals cited above similarly involved pure issues of law on

which authority is split. In circuits permitting appeal of denials of plan confirmation, the appellate courts were able to resolve the issue, to the benefit of the parties to the case and other future cases. For example, on review of denial of plan confirmation in *Mort Ranta*, the Fourth Circuit reversed a bankruptcy court decision on whether social security payments could be included in income. It thereby set the case on proper footing on an issue of law that has arisen elsewhere, with conflicting results.[14] *Mort Ranta*, 721 F.3d at 253-54. Similarly, the Fifth Circuit in *Bartee* noted the "magnitude and evenness of the split in authority, . . . extend[ing] to the leading bankruptcy treatises," on the "cramdown" issue before it, but was able to resolve the issue on appeal of the denial of plan confirmation. 212 F.3d at 289. Those decisions each facilitated sound resolution of the case, while providing guidance on the issue for the district and bankruptcy courts in the circuit.

On the other hand, *Flor* involved "a disputed issue that [wa]s a question of first impression" and that was left unresolved by the Second Circuit's refusal to review the denial of plan confirmation. 79 F.3d at 284. The Sixth Circuit in *Lindsey* rejected an appeal of denial of plan confirmation on an issue regarding the absolute priority rule, 726 F.3d at 858—

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[14] *See*, *e.g.*, *In re Worthington*, 507 B.R. 276, 278 (Bankr. S.D. Ind. 2014) ("The majority of circuits which have addressed this issue have likewise ruled social security benefits are not includable."); *In re Melander*, 506 B.R. 855, 860 (Bankr. D. Minn. 2014) ("Debtors are essentially in control of the amount of Social Security that they are voluntarily willing to contribute to their plan.").

an issue on which courts had expressed opposing views that had been canvassed by the bankruptcy court. *In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn. 2011). The First Circuit in *Bullard* noted that the underlying question on which appeal was sought was "an important and unsettled question of bankruptcy law." 2014 WL 1910868 at *1; *see id.* at *2 n.1 ("a difficult, unsettled question"). This Court's review is essential to enable the courts of appeals to resolve important issues of bankruptcy law, to the benefit of debtors, creditors, and the judicial system itself.

3. Uniformity in this area is particularly important in light of the Constitution's grant to Congress of authority to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added). At present, debtors in the Third, Fourth, and Fifth Circuits may appeal an order denying confirmation, while their peers in the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits may not. The law in the remaining circuits leaves both debtors and creditors uncertain. Review of this important question of federal law is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 21, 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOS. 12–1140, 12–1143

IN RE EDWARD LEON GORDON; DORIS JEAN GORDON,
DEBTORS.

EDWARD LEON GORDON; DORIS JEAN GORDON, APPELLANTS,
v.
BANK OF AMERICA, N.A., APPELLEE.

IN RE STEPHEN LINDSEY PAHS, DEBTOR
v.
DOUGLAS B. KIEL, STANDING CHAPTER 13 TRUSTEE,
APPELLEE

Decided: Feb. 20, 2014

Before GORSUCH, EBEL, AND O'BRIEN, Circuit Judges

EBEL, Circuit Judge:

In these consolidated appeals from two Chapter 13 bankruptcy proceedings, Debtors challenge the district court's order reversing confirmation of their reorganization plans and remanding their cases to the bankruptcy court for further proceedings. Be-

cause we lack jurisdiction to consider these appeals, we dismiss them.

I. BACKGROUND

In two separate bankruptcy proceedings, Debtors Doris and Edward Gordon and Stephen Pahs sought Chapter 13 bankruptcy relief in the Bankruptcy Court for the District of Colorado. That court requires Chapter 13 debtors, when they file their plans for reorganization, to use the court's model Chapter 13 plan. See L.B.R. 3015–1.1. In this case, although Debtors used the model plan, they modified it. The bankruptcy court confirmed Debtors' modified plans.

On appeal, however, the district court held that Debtors could not modify the plan and, therefore, reversed confirmation of Debtors' plans and remanded these cases to the bankruptcy court "for the entry of plan confirmation orders and any related orders consistent with [the district court's] opinion." (Aplt. App. at 405.) Debtors appeal that determination to this court.

II. PAHS' APPEAL NO. 12–1143 IS MOOT

After Pahs filed his appeal with this court, he and the Chapter 13 trustee agreed, during a hearing before the bankruptcy court, that Pahs would continue to make the payments required by the originally confirmed Chapter 13 plan while this appeal remained pending. When Pahs failed to make those payments, however, one of his creditors moved for the dismissal of Pahs' bankruptcy. *See* 11 U.S.C. § 1307(c)(6). After no one objected to the motion, the bankruptcy court granted it, dismissing Pahs' bankruptcy and undoing

any action taken during the bankruptcy proceedings. In light of that dismissal, this court can no longer grant Pahs any relief and his appeal is, therefore, moot. *See Rajala v. Gardner,* 709 F.3d 1031, 1036 (10th Cir. 2013), *cert. denied,* 134 S. Ct. 164 (2013). For that reason, we dismiss Pahs' appeal and remand his case to the district court with directions for that court to vacate its decision as moot to the extent it addressed Pahs' confirmation plan. We further direct the district court then to remand the case to the bankruptcy court so that that court, too, can vacate its decision regarding Pahs' modification of the model plan. *See Dais–Naid, Inc. v. Phoenix Res. Cos. (In re Tex. Int'l Corp.),* 974 F.2d 1246, 1247 (10th Cir. 1992) (per curiam) (applying, *e.g., United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950)); *see also Camreta v. Greene,* 131 S. Ct. 2020, 2035 (2011).

III. WE LACK JURISDICTION TO CONSIDER THE GORDONS' APPEAL, NO. 12–1140

Because the Gordons' bankruptcy case remains pending, their appeal is not moot. But we, nevertheless, have no jurisdiction to consider this appeal because it is not taken from a final appealable decision and the parties have not invoked any mechanism that might permit an interlocutory appeal.[1]

As a starting point, the district court had jurisdiction, under 28 U.S.C. § 158(a)(1), to consider

[1] To the extent Appellees' response to Appellants' status report suggests we add the Chapter 13 Trustee as an appellee in the caption of the Gordons' appeal, we deny that request as moot.

Bank of America's appeal from the bankruptcy court's order confirming the Gordons' plan. Section 158(a)(1) gives a district court jurisdiction to hear appeals from bankruptcy courts' "final judgments, orders, and decrees." The bankruptcy court's order confirming the Gordons' reorganization plan was such a final, appealable order. *See Woolsey v. Citibank, N.A. (In re Woolsey),* 696 F.3d 1266, 1268–69 (10th Cir. 2012). "Indeed, in the world of bankruptcy proceedings—a world where cases continue on in many ways for many years and lack the usual final judgment of a criminal or traditional civil matter—confirmation of [a] ... plan 'is as close to *the* final order as any the bankruptcy judge enters.' " *Id.* (quoting *Interwest Bus. Equip., Inc. v. U.S. Tr. (In re Interwest Bus. Equip., Inc.),* 23 F.3d 311, 315 (10th Cir. 1994)).

28 U.S.C. § 158(d)(1) similarly gives this court jurisdiction to hear appeals from "all *final* decisions, judgments, orders, and decrees" entered by the district court in appeals taken from a bankruptcy court. (Emphasis added.) But, because the district court's order which the Gordons challenge on appeal reversed confirmation of their reorganization plan and *remanded* their case to the bankruptcy court for further proceedings, the district court's order was not a final order appealable under 28 U.S.C. § 158(d).

As a general rule, when a district court remands a case to the bankruptcy court for "significant further proceedings," that order is not final and appealable to this court. *HealthTrio, Inc. v. Centennial River Corp. (In re HealthTrio, Inc.),* 653 F.3d 1154, 1159

(10th Cir. 2011); *see also Strong v. W. United Life Assurance Co. (In re Tri–Valley Distrib., Inc.),* 533 F.3d 1209, 1214 (10th Cir. 2008) (per curiam). On the other hand, when the district court remands a case to the bankruptcy court for a "purely ministerial function," such as entering judgment for a party, or to "conduct additional proceedings involving little judicial discretion," that will not preclude the district court's decision from being final and appealable to this court under 28 U.S.C. § 158(d)(1). *Colo. Judicial Dep't v. Sweeney (In re Sweeney),* 492 F.3d 1189, 1190–91 (10th Cir. 2007); *Balcor Pension Investors V v. Wiston XXIV Ltd. P'ship (In re Wiston XXIV Ltd. P'ship),* 988 F.2d 1012, 1013 (10th Cir. 1993).

Here, the district court remanded the Gordons' case to the bankruptcy court "for the entry of plan confirmation orders and any related orders." (Aplt. App. at 405.) Although the district court's decision requires the Gordons, in proposing a new reorganization plan, to use the model Chapter 13 plan without modification, they would be free to revise the substantive portion of their plan. And, in any event, the bankruptcy court will have to give creditors notice of the new amended plan, permit time for any objections, and then conduct another confirmation hearing. All of which is to say, the district court remanded the Gordons' case to the bankruptcy court for "significant further proceedings," *In re HealthTrio, Inc.,* 653 F.3d at 1159.

We reached a similar conclusion in *Simons v. F.D.I.C. (In re Simons),* 908 F.2d 643 (10th Cir. 1990) (per curiam). In *Simons,* we held that a dis-

trict court's decision, affirming the bankruptcy court's order rejecting confirmation of a reorganization plan and remanding the case to the bankruptcy court in order to enable debtors to seek confirmation of a new plan, was not a final decision appealable under § 158(d)(1). In re *Simons,* 908 F.2d at 644–45. *Simons* noted that its conclusion

> is entirely consistent with two general principles regarding finality well-settled in this circuit, *i.e.,* (1) an order is not final unless it ends the litigation on the merits, leaving nothing for the court to do but execute the judgment, and (2) a district court order is not final if it contemplates significant further proceedings in the bankruptcy court.

Id. (citation omitted). "[S]o long as the bankruptcy proceeding itself has not been terminated, the debtor, unsuccessful with one reorganization plan, may always propose another plan for the bankruptcy court to review for confirmation, a prospect which negates any determination of finality under both principles cited above." *Id.* at 645 (citations omitted). "[T]he rejection of debtors' proposed plan may yet be considered on appeal from a final judgment either confirming an alternative plan, or dismissing the underlying petition or proceeding." *Id.* (citations omitted).

The parties concede that, under *Simons,* this court lacks jurisdiction to consider this appeal. But they argue that this court should overrule *Simons* because it "is incorrectly decided and in conflict with the law of other circuits." (Aple. Juris. Br. at 1.) This panel, however, cannot overrule *Simons. See Schrock*

v. Wyeth, Inc., 727 F.3d 1273, 1279 (10th Cir. 2013).[2]

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[2]The parties assert that *Simons* is contrary to the law of some other circuits. But that was true when this court decided *Simons* in 1990, when a panel of this court expressly chose to follow Second Circuit authority instead of cases from the Sixth (reviewing order denying confirmation without discussing jurisdiction) and Eighth Circuits. *See* 908 F.2d at 644–45. The circuits currently remain divided on this issue. The Second, Sixth, Eighth, Ninth and Tenth Circuits generally apply 28 U.S.C. § 158(d)(1)'s requirement, that the district court's decision be final before it can be reviewed, rigidly in order to avoid piecemeal appeals. *See Lindsey v. Pinnacle Nat'l Bank (In re Lindsey),* 726 F.3d 857, 858–61 (6th Cir. 2013); *Lievsay v. W. Fin. Sav. Bank (In re Lievsay),* 118 F.3d 661, 662 (9th Cir. 1997) (per curiam); *Pleasant Woods Assocs. Ltd. P'ship v. Simmons First Nat'l Bank (In re Pleasant Woods Assocs. Ltd. P'ship),* 2 F.3d 837, 837–38 (8th Cir. 1993) (per curiam); *In re Simons,* 908 F.2d at 644–45 (10th Cir. 1990); *Maiorino v. Branford Sav. Bank,* 691 F.2d 89, 90–91 (2d Cir. 1982). On the other hand, the Third, Fourth and Fifth Circuits emphasize, instead, saving judicial resources in a given case by deciding an issue that the parties have already appealed once from the bankruptcy court. See *Mort Ranta v. Gorman,* 721 F.3d 241, 245–50 (4th Cir. 2013); *In re Armstrong World Indus.,* 432 F.3d 507, 511 (3d Cir. 2005); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee),* 212 F.3d 277, 283 (5th Cir. 2000).

The parties here also contend that this court has never applied *Simons* in a published opinion. After the parties briefed this jurisdictional issue, however, this court applied *Simons* in *Woolsey,* 696 F.3d at 1268. This court has also applied *Simons* in several unpublished decisions. *See Wade v. Conner (In re Conner),* 37 F. App'x. 445, 446–48 (10th Cir. 2002) (unpublished); *Debias v. Zeman (In re Debias),* No. 98–1441, 1999 WL 1032968, *1 n. 1 (10th Cir. Nov. 15, 1999) (unpublished); *Simon v. Tip Top Credit Union (In re Simon),* Nos. 94–3304, 94–3312, 1996 WL 192977, at *2 (10th Cir. Apr. 22, 1996) (unpublished).

The parties argue that it would be a waste of judicial resources for this court not to hear the merits of their appeals now. However, this court "cannot take jurisdiction where none is to be had." *S. Ute Indian Tribe v. Leavitt,* 564 F.3d 1198, 1209 (10th Cir. 2009) (emphasis omitted). Debtors could have sought this court's immediate review of the district court's interlocutory remand order. See 28 U.S.C. § 1292(b); *see also Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 252 (1992); *In re Woolsey,* 696 F.3d at 1268. However, the Gordons did not seek § 1292 certification and we cannot certify on our own. *See In re Woolsey,* 696 F.3d at 1268 (in dicta, rejecting 28 U.S.C. § 1292(b) as a source of appellate jurisdiction because the parties did not invoke that procedure); *Crossingham Trust v. Baines (In re Baines),* 528 F.3d 806, 809 n. 2 (10th Cir. 2008) (same).

The parties now request that, if this court dismisses this appeal for lack of appellate jurisdiction, we remand this case to the district court so the parties can seek certification of the district court's nonfinal remand order as appealable under 28 U.S.C. § 1292(b). Although we employed such a procedure in *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson,* 968 F.2d 1003, 1005 (10th Cir. 1992), we did so under more compelling circumstances. In *Temex,* the bankruptcy court entered a final order granting summary judgment to one party in an adversary proceeding. *Id.* at 1004. The district

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It seems to use that *Simons* is based upon sound principles of finality and we see no reason to ask the en banc court to reexamine *Simons* at this time.

court reversed that decision, remanding because the bankruptcy court needed to make "a *de novo* determination of the facts." *Id.* The losing party appealed that determination to this court. *Id.* At that time, Tenth Circuit case law foreclosed use of the 28 U.S.C. § 1292(b) mechanism, for certifying an interlocutory decision as immediately appealable, in the bankruptcy context. *Temex,* 968 F.2d at 1004. While the *Temex* appeal was pending, however, the Supreme Court, in *Germain,* 503 U.S. at 252, held that § 1292(b) was available to permit interlocutory appeals to circuit courts in the bankruptcy context. *See Temex,* 968 F.2d at 1004–05. In those circumstances, this court dismissed the appeal in *Temex* for lack of jurisdiction because the district court's decision was not final, but remanded the case to the district court to let that court "decide whether it wishes to certify this appeal for interlocutory review under § 1292(b)." *Temex,* 968 F.2d at 1005. It made sense for us to remand that case so the district court could decide, as an initial matter, whether or not to certify an immediate appeal under § 1292(b) because the district court had not previously "been given the option to consider certifying an interlocutory appeal." *Id.*

The circumstances presented here, however, do not warrant employing the same procedure. The § 1292(b) certification process for an immediate appeal was always available. Had the Gordons wanted to pursue an appeal immediately, instead of returning to the district court to propose a new plan, they could have requested § 1292(b) certification. They did not do so. And Bank of America had no basis to

do so because it prevailed in the district court. These circumstances do not warrant a remand to permit the district court to consider certifying its earlier order for an immediate appeal.

IV. CONCLUSION

For the foregoing reasons, we DISMISS Pahs' appeal, No. 12–1143, as moot and remand his case to the district court with directions to vacate that court's decision as it pertains to Pahs, and further to remand this case to the bankruptcy court with directions to vacate that court's decision addressing Pahs' modification of the model Chapter 13 plan. We also DISMISS the Gordons' appeal, No. 12–1140, because we lack jurisdiction to consider their appeal from a non-final order.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CIV ACTION NOS. 11-CV-00960-AP,
11-CV-01340-AP

IN RE EDWARD LEON GORDON AND DORIS JEAN GORDON, DEBTORS.

BANK OF AMERICA, N.A., APPELLANT,
v.
EDWARD LEON GORDON AND DORIS JEAN GORDON,
APPELLEES.

STEPHEN LINDSEY PAHS, DEBTOR
SALLY ZEMAN, STANDING CHAPTER 13 TRUSTEE,
APPELLANT
v.
STEPHEN LINDSAY PAHS, APPELLEE.

March 27, 2012

ORDER REVERSING JUDGMENTS

BLACKBURN, District Judge.

These consolidated cases present a web of related issues. The essential question presented is this: in a

Chapter 13 bankruptcy, what procedures are proper to make a binding determination of the value and treatment of a secured creditor's claim? The bankruptcy court held that the Chapter 13 plan confirmation process is a proper procedure to determine the value and treatment of a secured creditor's claim and to bind a secured creditor to that valuation and treatment. In some cases, the court held, such a determination may preclude determination and valuation of a claim via the claim procedures provided in the United States Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.[1] The appellants challenge that holding, arguing that the bankruptcy claims process established in the Code is the proper procedure to determine the value of a secured creditor's claim. The claims procedure, the appellants contend, may not be trumped by the Chapter 13 plan confirmation procedure.

In these consolidated cases, the appellants, Bank of America, N.A. and Sally Zeman, the Standing Chapter 13 Trustee, timely appeal final judgments of the United States Bankruptcy Court for the District of Colorado. These appeals concern orders of the bankruptcy court confirming the Chapter 13 plans of the debtors. The appellants challenge identical language in the confirmed Chapter 13 plans in both cases, as well as the bankruptcy court's orders approving that language and confirming those plans.

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[1] Unless noted otherwise, references to "§ " or "section" are to Title 11 of the United States Code, references to "Code" are to the United States Bankruptcy Code, and references to "Rules" are to the Federal Rules of Bankruptcy Procedure.

For the reasons discussed in this order, I reverse the orders of the bankruptcy court.

The parties' arguments are presented in the **Opening Brief of Appellant Bank of America, N.A.** [# 14][2] filed June 14, 2011, the Appellees' Response Brief on Appeal [# 23] filed July 13, 2011, and the Reply Brief of Appellant Bank of America, N.A. and the Standing Chapter 13 Trustee, Sally J. Zeman [# 30] filed August 10, 2011. In addition, on October 19, 2011, Bank of America and Ms. Zeman filed a notice of supplemental authority [# 32].[3]

I. JURISDICTION

Under 28 U.S.C. § 1334, United States District Courts have original jurisdiction in all civil proceedings arising in cases under Title 11, United states Code, the United States Bankruptcy Code. I have jurisdiction to adjudicate this bankruptcy appeal under 28 U.S.C. § 158(a) and (b)(1).

II. STANDARD OF REVIEW

I am bound by the bankruptcy court's findings of fact, unless they are clearly erroneous. FED. R. BANKR. P. 8013; *In re Branding Iron Motel, Inc.,*

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[2] "[# 14]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

[3] The issues raised by or inherent to this appeal are fully briefed. Oral argument would not assist me materially in the resolution of those issues. Therefore, the appeal stands submitted on the briefs and the record.

798 F.2d 396, 399 (10th Cir. 1986). No findings of fact are at issue in this case. I review the bankruptcy court's conclusions of law *de novo. In re Mullet,* 817 F.2d 677, 678 (10th Cir. 1987). This appeal concerns the bankruptcy court's conclusions of law.

III. BACKGROUND

My introductory summary of the key questions presented by this case belies the complexity of the interwoven provisions of law at issue here. The key order in question is the **Order Approving Plan Language** (Order) entered by the United States Bankruptcy Court for the District of Colorado. In this case, that order can be found at [# 14–1], pp. 15–29. In that order, the bankruptcy court describes clearly and thoroughly the issues, the differing positions of various courts on these issues, and the reasoning behind the ultimate holding of the bankruptcy court.[4]

On September 20, 2011, a different division of the bankruptcy court issued an order addressing the same issues. *In re: Butcher,* 459 B.R. 115 (Bankr. D. Colo. 2011). The *Butcher* court describes clearly and thoroughly the issues, the differing positions of various courts on these issues, and the reasoning behind its ultimate holding. Both of these orders provide a valuable foundation for an understanding and evaluation of the issues. Interestingly, the two courts reach different conclusions. Ultimately, I adopt the analysis reflected in the *Butcher* order.

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[4] I cite to the order of the bankruptcy court by the page number(s) used in the original order, e.g. *Order,* p. 1.

The debtors in these consolidated cases proposed Chapter 13 plans which included non-standard language. The language in question is non-standard because it deviates from the language of the standard Chapter 13 plan form required in this district, Local Bankruptcy Form 3015–1.1. As summarized in the Order, the non-standard language essentially warns "secured creditors that, if they do not object to the plan's proposed treatment of their liens and/or the amount of arrearages stated, then the plan will have a *res judicata* effect as to both their lien and claim amount." The bankruptcy court held that this plan language is permissible under the Code. In addition, the court held that certain language in the standard Chapter 13 plan form conflicts with the Code and, therefore, is not properly part of a Chapter 13 plan.[5]

The briefing describes the facts and circumstances of the Gordon case, but provides no details about the Pahs case. Shortly after the Pahs case was filed in this court, it was consolidated with the Gordon case. In its **Order Approving Plan Language,** the bankruptcy court concluded that the same non-standard plan language was at issue in the Pahs case, and concluded that the facts in the Gordon case are best suited to highlight the legal issues presented in both the Gordon and Pahs cases. Order, p. 1 n. 1. The court indicated that a separate order in accordance with the **Order Approving Plan Language** would enter in the Pahs case. *Id.* Relying on

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[5] After summarizing the legal context of this case, I will quote fully the standard and non-standard language at issue.

the same reasoning stated in the Order in the Gordon case, the bankruptcy court approved the non-standard language in the Pahs case and confirmed the Chapter 13 plan in that case. Opening brief [# 14], pp. 10–11.

The Gordons filed a petition for Chapter 13 bankruptcy relief on February 26, 2010. Objections to the Gordons' proposed Chapter 13 plan were due on April 10, 2010. The deadline for creditors to file a proof of claim was August 25, 2010. On March 25, 2011, the bankruptcy court entered its order confirming the Gordons' Chapter 13 plan, including the non-standard plan language. Bank of America filed this appeal in the Gordon Case. The Chapter 13 Trustee filed this appeal in the Pahs case. No creditor objected to the proposed Chapter 13 plans in either of these cases.

Bank of America is a secured creditor of the Gordons because payment of the Gordons' debt to Bank of America is secured by the lien of a deed of trust on the Gordons' principal residence. In their plan, the Gordons asserted that they did not owe any arrearages to Bank of America. Bank of America did not object to confirmation of the Chapter 13 plan and did not file a claim in the Gordon case.

Bank of America and the Chapter 13 Trustee filed these appeals to challenge the non-standard plan language in the Gordon and Pahs Chapter 13 plans. The Chapter 13 Trustee has standing on all issues related to plan confirmation. 11 U.S.C. §§ 323, 1302. As detailed below, the Code requires a Chapter 13 plan to provide for the cure of an arrearage on

certain secured debts. § 1322(b)(5). In their plan, the Gordons claimed that no arrearage was due to Bank of America. On the current record, it is unclear whether or not Bank of America disputes this contention. However, Bank of America does dispute the holding of the bankruptcy court that confirmation of the Gordons' plan constitutes a binding and conclusive determination that there was no arrearage due to Bank of America.

IV. LEGAL BACKGROUND

This case concerns three major concepts at work in a Chapter 13 case: (a) plan confirmation; (b) claims allowance; and (c) treatment of secured creditors. I summarize each of these concepts.

A. *Plan Confirmation*

Under the Code and the Rules, plan confirmation is on a relatively fast track. A Chapter 13 debtor must file a plan with the petition, or within 14 days after the petition is filed. FED. R. BANKR. P. 3015(b). "The hearing on confirmation of the plan may be held not earlier than 20 days after and not later than 45 days after the date of the meeting of creditors." 11 U.S.C. § 1324(b). Under § 1327, a confirmed plan has a potent binding effect:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

"Upon becoming final, the order confirming a chap-

ter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack." *In re Talbot,* 124 F.3d 1201, 1209 (10th Cir. 1997) (internal quotation and citation omitted).

B. *Claims Process*

The claims allowance process is used in all chapters of the Code. This process gives creditors the right to file a claim against the debtor's estate. § 501. Once a claim is filed, the claim is deemed allowed unless a party in interest objects to the claim. § 502(a). If an objection is filed, the bankruptcy court resolves the objection. § 502(b). Creditors who hold allowed claims are entitled to distributions under a confirmed Chapter 13 plan.

However, the claims process often moves a bit more slowly than the plan confirmation process. For most creditors, the deadline for filing claims is 90 days after the first meeting of creditors. FED. R. BANKR. P. 3002(a). This is 45 days *after* the latest date on which a hearing on plan confirmation may be held. "So, in the typical Chapter 13 case, a plan is proposed, any objections to it are resolved, and the plan is confirmed well *prior to* any deadline for filing proofs of claim." *Order,* p. 4 (emphasis in original). The deadline for filing claims may not be contracted by the bankruptcy court. FED. R. BANKR. P. 9006(c)(2).

C. *Treatment of Secured Creditors*

Generally, a secured creditor is a creditor who holds a lien or other security interest in property of the debtor to secure payment of the debt. Bank of America is a secured creditor of the Gordons. Secured creditors are not required to file a claim. By negative inference, FED. R. BANKR. P. 3002(a) generally is read to exclude any requirement that a secured creditor file a claim.

> Neither the Code nor the Rules mandate that a secured creditor file a proof of claim. Indeed, the Advisory Committee Note to Rule 3002(a) states that, "A secured claim need not be filed or allowed under § 502 or § 506(d) unless a party in interest has requested a determination and allowance or disallowance under § 502."

In re Babbin, 160 B.R. 848 (D. Colo. 1993).[6] However, secured creditors may file a claim and often do file a claim.

The Code has many provisions that address the treatment of secured creditors. One key provision is § 506(d)(2), which provides, in pertinent part:

> To the extent that a lien secures a claim against the debtor that is not an allowed secured claim,

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[6] There are some exceptions to the rule that a secured creditor need not file a claim. *See, e.g., Hoxworth v. Blinder,* 74 F.3d 205, 210 (10th Cir. 1996) (Unless the collateral is in the possession of the court or the trustee, a secured creditor has no obligation to file a proof of claim). These exceptions do not apply here.

such lien is void, unless—

* * * * * *

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

This provision and many cases support the proposition that liens pass through bankruptcy unaffected. In many circumstances, "a secured creditor may ignore the proof of claim process altogether and look solely to its lien for satisfaction of the debt." *Order,* p. 5.

However, liens or security interests are not totally bullet proof in bankruptcy. For example, under § 522(f), a debtor may avoid a lien on personal property to the extent the lien impairs an exemption. If a secured claim is disallowed by the court, the lien securing the claim is void. § 506(d). Certain types of secured claims can be "crammed down" to the value of the collateral under § 506(a).[7]

D. *Debtors' Approach To A Chapter 13 Plan*

The debtors in these cases rely on specific provisions of Chapter 13 as the bases for their efforts to define the claims of their secured creditors in their plans and then to bind those creditors to the plan. The debtors seek to bind creditors to the terms of a confirmed plan before the deadline for filing claims

[7] Generally, a lien or other security interest is only as valuable as the collateral. Assuming a fair valuation of the collateral, a cram down does not actually impair a lien or other security interest.

has expired. Under the debtors' approach, a claim filed by a secured creditor after confirmation of a Chapter 13 plan cannot alter the plan, even if the claim demonstrates that the plan is not in compliance with the requirements of the Code and the Rules.

In the present cases, § 1322(b) and (c) are the key provisions that permit a Chapter 13 debtor to address secured claims in the plan. In pertinent part, § 1322(b)(2) and (5) provide:

> (b) Subject to subsections (a) and (c) of this section, the plan may—
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence....
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any ... secured claim on which the last payment is due after the date on which the final payment under the plan is due.

Concerning plan provisions that propose to cure a default, § 1322(e) also must be noted.

> (e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

Under § 1322(b)(2), the Gordon plan may not modify Bank of America's rights because the Gordons' debt to Bank of America is secured by a lien in the Gordons' principal residence. Relying on § 1322(b)(5), however, the Gordons state in their plan that they are not in default on their debt to Bank of America. If true, the Gordons need not provide in their plan a provision for curing a default within a reasonable time. If the Gordons' confirmed plan is binding on Bank of America, then Bank of America cannot later file a claim asserting that there is a default that must be cured under the terms of the plan.

If a Chapter 13 plan modifies the rights of [a] secured creditor, other than a creditor whose only security is a security interest in real property that is the debtor's principal residence, and the plan is confirmed, then § 1327(b) and (c) can be read to bind that secured creditor to the treatment accorded in the plan.

> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

In this case, the debtors rely on § 1327 to support their argument that a confirmed plan is binding and, therefore, their non-standard plan language is ap-

propriate.

E. ***Standard Local Bankruptcy Forms & Debtors' Non-standard Language***

Paragraph VIII of the standard Chapter 13 plan form adopted in this district includes the following language.

> POST–CONFIRMATION MODIFICATION—The *debtor shall file and serve upon all parties in interest a modified plan* which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of the confirmation. The value of property to satisfy 11 U.S.C. section 1325(a)(4) may be increased or reduced with the modification, if appropriate. The modification will be filed no later than one year after the petition date. Failure of the debtor to file the modification may be grounds for dismissal.

Local Bankruptcy Form 3015–1.1, ¶ VIII (emphasis added).[8] Local Bankruptcy Rule 3015–1(1) requires that the "Chapter 13 Plan form must be used when filing the original plan, as well as with any amendment to the plan."

The requirements of this standard plan provision address the potential conflict that arises when a plan is confirmed before the deadline for filing claims has passed. Under this language, a debtor with a confirmed plan is required to file a modified plan to pro-

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[8] Hereafter, I will refer to this standard language as "¶ VIII."

vide, for example, for allowed secured claims that were not filed at the time of confirmation. Failure to do so "may be grounds for dismissal." ¶ VIII. According to the appellants, this language permits prompt confirmation of a plan with a continuing ability to ensure compliance with the Code after post-confirmation claims are filed. Under § 1329(a), a plan may be modified at any time before payments under the plan are completed. The effect of § 1329(a) is discussed further below.

In the Chapter 13 plans at issue in this case, the debtors marked the language of ¶ VIII, quoted above, as not applicable. In place of that language, the debtors inserted the following non-standard language:

> 1. Fed. R. Bankr. P. 3002, 3004, and 3021 shall apply to distributions made by the trustee pursuant to this plan. A proof of claim for an unsecured or priority creditor must be filed within the time set forth by these rules in order to be allowed and for the creditor to receive the distribution set forth in the plan. Tardily filed unsecured or priority claimants will receive nothing, except by separate motion and order. This plan does not constitute an informal or informal proof of claim. Secured creditors set forth in the plan need not file a proof of claim in order to receive distribution; however, if a creditor files a proof of claim which does not assert a security interest, it will be deemed to be unsecured and will share, pro rata, as a Class four claim. *An objection [to] confirmation of this plan must be filed in order to dispute*

> *the status or claim amount of any creditor as specifically set forth herein.* Pursuant to 11 U.S.C. sections 1326 and 1327, this plan shall bind the parties, and the trustee shall distribute in accordance with the plan.
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> * * * * * *
>
> 3. Note to any creditor holding a deed of trust secured by the Debtor(s)'s real property: the proposed plan provides for the Debtor(s)'s best estimate of the mortgage arrears owed to your company (if applicable), as set forth in Class II(a). *If you disagree with the amount provided, it is your obligation to file an objection to the plan. In the absence of an objection, the amount set forth in the plan is controlling, and will have a res judicata effect subsequent to the entry of the order of confirmation.*

Order, pp. 1–2 (emphasis in original). The Gordon and Pahs plans were confirmed with this non-standard language.

V. ANALYSIS

In effect, the non-standard language quoted above permits the plan to define the claim amount and treatment of any secured creditor, including the amount of any arrearage due to a creditor whose claim is subject to the limitations imposed by § 1322(b)(5). Under that subsection, a default on a secured claim must be cured under the plan within a reasonable time. The bankruptcy court held that once such a plan is confirmed, the plan is binding on creditors whose claims have been defined by the

plan.[9] In the view of the bankruptcy court, the plan is binding even if the deadline for creditors to file claims has not expired when the plain is confirmed.

Under this view, if the debtor states in the confirmed plan that he or she is not in default on a debt subject to the restrictions of § 1322(b)(5), that assertion becomes binding on confirmation of the plan. If, after confirmation, a secured creditor files a timely claim asserting that the debtor is in default on such a loan, the creditor cannot pursue the issue to require (1) a determination of whether there is a default or not; and (2) if there is a default, a determination of reasonable plan provisions to cure the default.

After detailed analysis of the effect of the non-standard language, the bankruptcy court reached three key conclusions:

> 1) The post-confirmation plan modification requirement stated in ¶ VIII of this district's standard chapter 13 plan form is invalid because that requirement conflicts with § 1329(a), which defines who may initiate a post-confirmation modification. *Order,* p. 7.
>
> 2) If procedural requirements are met, an order confirming a plan that specifically addresses a secured creditor's claim has a *res judicata* effect.

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[9] Importantly, the bankruptcy court emphasized that a plan that impacts the security interest rights of a creditor must be served properly on that creditor. Absent proper service and notice, the plan is not binding on a creditor. *Order,* pp. 14–15.

> As a result, "(i)f a proposed plan unambiguously informs a creditor that its claim will be affected, disallowed or valued in a certain way, the creditor may not ignore the confirmation process just because the claims bar date has not expired." *Order,* pp. 11, 15.
>
> 3) The chapter 13 plan confirmation process and the Code's claims process are two alternate processes which may be used to determine a secured claim. If procedural requirements are met, either plan confirmation or the claims process provide sufficient due process to creditors whose rights are affected by a proposed plan or a claim proceeding. *Order,* pp. 11, 13–15.

These three conclusions are the bases on which the bankruptcy court approved the debtors' proposed non-standard language. I respectfully disagree with each of these conclusions.

A. § 1329(a) & Post–Confirmation Plan Modification Requirement

Paragraph VIII of the standard Chapter 13 plan form adopted in this district includes a requirement that after confirmation of a plan, the debtor shall file a modified plan under certain circumstances.

> The debtor shall file and serve upon all parties in interest a modified plan which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of the confirmation.

Local Bankruptcy Form 3015–1.1, ¶ VIII. The appel-

lees argue that this requirement is inconsistent with § 1329(a), which provides in relevant part:

> At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim....

Section 1329(a) then provides a wide variety of permitted modifications.

A local rule that is inconsistent with the Code or attempts to limit a practice allowed by the Federal Rules of Bankruptcy Procedure is invalid. *In re Wilkinson,* 923 F.2d 154, 155 (10th Cir. 1991). The appellees note that § 1329(a) limits the power to request modification of a plan to the debtor, the trustee, or the holder of an allowed unsecured claim. According to the appellees, ¶ VIII improperly adds the bankruptcy court to the group that is permitted to request a modification under § 1329(a). The bankruptcy court agreed. "To the extent the Modification Rule amounts to a bankruptcy court order to modify a confirmed Chapter 13 Plan, it is inconsistent with the Code and invalid." *Order,* p. 7.

I respectfully disagree with this conclusion. "[T]he Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements" of the Code. *United Student Aid Funds, Inc. v. Espinosa,* 130 S. Ct. 1367, 1381 (2010) (citing §§ 523(a), 1325, 1328(a)(2)). Section 1324(a) "*requires* bankruptcy courts to address and correct a defect in a

debtor's proposed plan even if no creditor raises the issue." *Id.* at 1381 n. 14.

Another division of the bankruptcy court addressed this issue in *In re: Butcher,* 459 B.R. 115 (Bankr. D. Colo. 2011). The *Butcher* court noted § 105(a) of the Code:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Butcher, 459 B.R. at 122–123. As the Butcher court observed, the powers granted by § 105(a) may be used only in a manner consistent with the Code. *Id.* Addressing a court's duty to ensure compliance with the Code, the Supreme Court also cited § 105(a) in *Espinosa.* 130 S. Ct. at 1381.

Given the overarching duty of the bankruptcy court to require compliance with the Code, I cannot conclude that § 1329(a) prevents the bankruptcy court from requiring a Chapter 13 plan to comply with the Code via a modification of the plan after a plan has been confirmed. Considering all of the applicable law, section 1329(a) does not impose such a restriction on the court's authority. Therefore, I conclude that the requirement that Chapter 13 debtors include in their plans ¶ VIII of Local Bankruptcy

Form 3015–1.1 is not in conflict with the Code. On this issue, I adopt the reasoning of the *Butcher* court as stated in Section II.D. of its opinion. *Butcher,* 459 B.R. at 121–126.

B. Res Judicata Effect of a Plan Confirmation Order

No doubt, there is plenty of authority for the proposition that an order confirming a Chapter 13 plan has a *res judicata* effect. To review, under § 1327, a confirmed plan has a potent binding effect:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

"Upon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is res judicata and its terms are not subject to collateral attack." *In re Talbot,* 124 F.3d 1201, 1209 (10th Cir. 1997) (internal quotation and citation omitted). To this point in the analysis, there is no real dispute.

The appellees argue, in effect, that a court imposed requirement that a confirmed plan be amended later is in conflict with the well established law that an order confirming a Chapter 13 plan has a *res judicata* effect. On this basis, the appellees argue, it is improper for the bankruptcy court to require debtors to include in their plans ¶ VIII of the standard

Chapter 13 plan form adopted in this district. According to this argument, requiring modification of a plan after confirmation of the plan prevents *res judicata.*

What does a plan confirmation order with a binding effect mean when a plan's non-compliance with the Code is revealed only after the plan has been confirmed? That question is answered by looking to the content of the plan and the order confirming the plan.

> (I)t is the *contents of a confirmed plan* that is binding on the Debtors and their creditors under § 1327. Where the plan commits the Debtors to reconcile their plan with the actual allowed claims following the lapse of the claim filing deadlines, that obligation is made binding by the confirmation order.

Butcher, 459 B.R. at 126 (emphasis in original). With ¶ VIII as part of a confirmed plan, the debtor's obligation to amend the plan to maintain compliance with the Code becomes a binding commitment because it is part of the confirmed plan. In this circumstance, the requirement that a debtor maintain continuing compliance with the law is res judicata. Requiring continued compliance with the Code in a plan and in the order of confirmation does not conflict with the res judicata effect of a confirmation order.

C. Plan Confirmation & Claims Processing Are Alternative Procedures

To summarize, I do not agree that the language

of ¶ VIII, which requires a debtor to amend a confirmed plan to maintain compliance with the Code, is in conflict with the Code. I do not agree that the *res judicata* effect of an order confirming a plan, which includes the required ¶ VIII, precludes a creditor's use of the claims process. Rather, if a creditor uses the claims process and a claim indicates that the confirmed plan does not comply with the Code, *res judicata* does not preclude a properly filed claim from triggering a required modification of a confirmed plan. With that foreshadowing, my conclusion on this final question likely is obvious. Still, I will explain briefly.

The relatively short time frame for holding a confirmation hearing in a Chapter 13 case was added to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Essentially, the debtors contend that this time frame and the other provisions of Chapter 13 discussed in this order combine to permit a Chapter 13 debtor to use plan confirmation as an exclusive means to establish conclusively the value and treatment of secured claims, independent of and to the exclusion of the bankruptcy claims process. This reading of Chapter 13 is not proper.

To the extent reasonably possible, the court is obligated to interpret a statutory scheme to give effect to each individual provision and to permit the statutes to function as parts of an integrated whole. This is so even when part of the whole has been amended. "(T)he normal assumption is that where Congress amends only one section of a law, leaving another

untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible." *Markham v. Cabell,* 326 U.S. 404, 411 (1945).

The provisions of the Code at issue here can be read to function as parts of an integrated whole. As detailed earlier, § 1324(b) provides a rather short time line within which a hearing on the confirmation of a chapter 13 plan must be held. Meanwhile, the deadline for creditors to file claims proceeds at a somewhat slower pace. "So, in the typical Chapter 13 case, a plan is proposed, any objections to it are resolved, and the plan is confirmed well *prior to* any deadline for filing proofs of claim." *Order,* p. 4. Claims filed after confirmation may show that the confirmed plan is not in compliance with the Code. What to do? Require the debtor to invoke § 1329 and amend the plan to maintain compliance with the Code. With this approach all of the relevant provisions of the Code remain effective, and Chapter 13 is not permitted to abrogate the claims provisions of the Code and Rules. Like the *Butcher* court, I conclude that the approach proposed by the debtors here effectively abrogates the claims provisions of the Code and the Rules. Such an abrogation is not proper. *Butcher,* 459 B.R. at 130–132 (discussing improper abrogation of Rule 3002(c), which concerns time for filing claims, and related issues).

D. Conclusion

Ultimately, the non-standard plan language proposed by the debtors and approved by the bankruptcy court in these cases conflicts with the claims pro-

cessing procedures and other requirements of the Code and the Rules. Most important, the non-standard language improperly eliminates the requirement that a Chapter 13 plan remain in compliance with the Code even after the plan has been confirmed. On the other hand, the standard language of ¶ VIII, as contained in the standard Chapter 13 plan form adopted in this district, permits the court, the debtor, and the creditors to maintain compliance with all of the requirements of the Code, both before and after confirmation of a Chapter 13 plan. Because the non-standard language approved by the bankruptcy court is not in compliance with the requirements of the Code, I must reverse the orders of the bankruptcy court approving the non-standard language and confirming the plans of the debtors containing that non-standard language.

VI. CONCLUSION AND ORDERS

THEREFORE, IT SO ORDERED as follows:

1. That in Civil Action No. 11–cv–00960–AP, *In re: Gordon,* the ruling of the United States Bankruptcy Court for the District of Colorado in the Order Approving Plan Language [docket # 33 in the bankruptcy court, filed March 25, 2011] and the ruling of the United States Bankruptcy Court for the District of Colorado in the Order Confirming Chapter 13 Plan [docket # 38 in the bankruptcy court, filed March 25, 2011] and any concomitant judgment are REVERSED;

2. That in Civil Action No. 11–cv–01340–AP, *In re: Pahs,* the ruling of the United States Bankruptcy

Court for the District of Colorado in the Order Confirming Chapter 13 Plan [docket # 39 in the bankruptcy court, filed May 5, 2011] and which is based on the Order Approving Plan Language cited in paragraph one (1), above, and any concomitant judgment, are REVERSED;

3. That these cases are REMANDED to the United States Bankruptcy Court for the District of Colorado for the entry of plan confirmation orders and any related orders consistent with this opinion.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

BANKRUPTCY CASE NO. 10-13885 EEB
CHAPTER 13

IN RE EDWARD LEON GORDON, DORIS JEAN GORDON,
DEBTORS.

ORDER APPROVING PLAN LANGUAGE

This matter comes before the Court *sua sponte* on the Debtors' proposed Chapter 13 plan. The Debtors have added language to their plan, essentially warning secured creditors that, if they do not object to the plan's proposed treatment of their liens and/or the amount of arrearages stated, then the plan will have a *res judicata* effect as to both their lien and claim amount (the "Non-Standard Language"). The debtors' bar in this district has begun to add this language in many plans. Thus, the Court felt the need to question whether the Non-Standard Language is permissible under the Bankruptcy Code, despite the fact that no one had objected to it. Both the Debtors and the Chapter 13 Trustee have done an excellent job framing the issues in their briefs and oral argu-

ments.[1] For the reasons set forth below, the Court concludes that the Debtors' Non- Standard Language does not violate the Code.

I. APPLICABLE PLAN LANGUAGE

Debtors' proposed plan is contained on the standard plan form required in this district, found at Local Bankruptcy Form 3015-1.1. Debtors have added extensive additional language under section V.G, "Other." Of concern to the Court is the following Non-Standard Language:

> 1. Fed. R. Bankr. P. 3002, 3004, and 3021 shall apply to distributions made by the trustee pursuant to this plan. A proof of claim for an unsecured or priority creditor must be filed within the time set forth by these rules in order to be allowed and for the creditor to receive the distribution set forth in the plan.
>
> Tardily filed unsecured or priority claimants will receive nothing, except by separate motion and order. This plan does not constitute a formal or informal proof of claim. Secured creditors set

[1] The identical Non-Standard Language is also at issue in plans submitted by Debtors' counsel in three other pending Chapter 13 cases before this Court: (1) *In re Pahs*, Case Number 10-15557 EEB; (2) *In re Osterman*, Case Number 10-11492 EEB; and (3) *In re Renner*, Case Number 10-17975 EEB. The Court originally ordered oral arguments and briefs in the *In re Pahs* case. Because the Court finds the facts in this case best suited to highlight the legal issues presented, the Court is deeming the briefs filed by Debtors' counsel and the Chapter 13 Trustee in the *Pahs* case as filed in this case. Separate orders in accordance with this Order will enter in each of the other three cases.

> forth in the plan need not file a proof of claim in order to receive distribution; however, if a creditor files a proof of claim which does not assert a security interest, it will be deemed to be unsecured and will share, *pro rata*, as a Class four claim. **An objection confirmation of this plan must be filed in order to dispute the status or claim amount of any creditor as specifically set forth herein.** Pursuant to 11 U.S.C. sections 1326 and 1327, this plan shall bind the parties, and the trustee shall distribute in accordance with the plan.
>
> . . .
>
> 3. Note to any creditor holding a deed of trust secured by the Debtor(s)'s real property: the proposed plan provides for the Debtor(s)'s best estimate of the mortgage arrears owed to your company (if applicable), as set forth in Class II(a). **If you disagree with the amount provided, it is your obligation to file an objection to the plan. In the absence of an objection, the amount set forth in the plan is controlling, and will have a *res judicata* effect subsequent to the entry of the order of confirmation**.

Debtors' Proposed Plan, ¶ V.G (emphasis added).

If enforceable, this Non-Standard Language will directly impact the claims of two secured creditors in this case, Bank of America and Americredit. Bank of America holds the first mortgage on the Debtors' home, and has not filed a proof of claim nor objected to the plan. The plan asserts that the Debtors owe

Bank of America no arrearages. Americredit holds a lien on the Debtors' car. It has filed a proof of claim, asserting that the car is worth $12,825 and, therefore, it holds a secured claim in this amount, with a deficiency claim for the balance of $1,791. The plan, however, values the car at only $5,000 and the Debtors propose to treat Americredit's claim as a secured claim only to the extent of $5,000. If the Non-Standard Language is allowed in this plan and is given *res judicata* effect, then these two secured creditors will be bound by the plan's assertions, despite the fact that Americredit has filed a contrary proof of claim and Bank of America is under no obligation as a secured creditor to file a proof of claim.

II. DISCUSSION

A. The Court's Duty to Police Plan Provisions

No creditor has objected to the Debtors' proposed plan or to its inclusion of the Non-Standard Language. Nevertheless, § 1325(a),[2] which governs plan confirmation, instructs a bankruptcy court to confirm a plan only if the plan complies with the "applicable provisions" of the Code. Similarly, § 1322(b) delineates what provisions are appropriate for inclusion in a plan, and the eleventh subparagraph of that section states a plan may "include any other appropriate provision *not inconsistent* with this title." 11 U.S.C. 1322(b)(11) (emphasis added). The Supreme Court recently made clear that these sec-

[2] Unless otherwise noted, all references to "§" or "section" are to 11 U.S.C. and "Code" refers to the Bankruptcy Code.

tions put an obligation on bankruptcy courts to ensure that a debtor has conformed his plan to the requirements of the Bankruptcy Code, regardless of whether any one has filed a plan objection. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1381 & n.14 (2010) ("Section 1325(a) . . . *requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.") (emphasis original). A court's failure to perform this duty may have significant consequences. If notice is adequate and no one appeals the confirmation order, the plan will become final, regardless of whether its provisions violate the Code. *See id.* at 1380 (concluding plan enforceable and binding even though bankruptcy court's confirmation of it was legal error).

B. Competing Concepts of Claims Allowance, Plan Confirmation, and Lien Ride-Through

This case implicates three major concepts at work in a Chapter 13 case: claims allowance, plan confirmation and protection of lien rights. Unfortunately, these concepts do not always work in harmony. First, the claims allowance process is a well-established process used in all chapters of the Code for establishing allowed claims. It gives creditors the right to file a claim against a debtor's estate. 11 U.S.C. § 501(a) ("A creditor . . . may file a proof of claim."). Once a creditor files a proof of claim under § 501, the claim is deemed allowed, unless a party in interest objects. 11 U.S.C. § 502(a). If an objection is filed, the court will resolve it after a hearing. *See* 11 U.S.C. § 502(b); Fed. R. Bankr. P. 3007(a). Hold-

ers of allowed claims are then entitled to distributions under a confirmed Chapter 13 plan.

While the claims allowance process seems straightforward, it becomes less so in the Chapter 13 context due to the overlapping requirements of plan confirmation. According to a new provision added to the Code by BAPCPA,[3] a hearing on confirmation of the plan must be held not later than forty-five days after the first meeting of creditors. 11 U.S.C. § 1324(b). The deadline for filing proofs of claim for unsecured claims is ninety days after the first meeting of creditors. Fed. R. Bankr. P. 3002(c). Taxing authorities have until 180 days after the order for relief or sixty days from the Chapter 13 debtor's filing of a tax return. Secured creditors have no deadline and are not required to file a proof of claim. Fed. R. Bankr. P. 3002(a) (by negative inference); *In re Babbin*, 160 B.R. 848, 849 (D. Colo. 1993). So, in the typical Chapter 13 case, a plan is proposed, any objections to it are resolved, and the plan is confirmed well *prior to* any deadline for filing proofs of claim.

To complicate matters further, the Code gives a Chapter 13 debtor the power to propose a plan for repayment of his creditors, with certain rights to modify allowed claims. The Code sets forth what a Chapter 13 plan must do and also what a plan may do. 11 U.S.C. §§ 1322, 1325. It prescribes three options for the treatment of secured claims: "(1) the secured creditor accepts the plan; (2) the plan provides

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[3] Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

that the secured creditor retain its lien and be paid the full amount of the allowed claim; or (3) the debtor surrenders the property securing the claim to the creditor." *Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 829 (11th Cir. 2003) (citing 11 U.S.C. § 1325(a)(5)). The Code also allows a debtor to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ." 11 U.S.C. § 1322(b)(2). A Chapter 13 plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending . . . ." 11 U.S.C. § 1322(b)(5). The power to cure an arrearage on a home mortgage is important to many Chapter 13 debtors because it is often the inability to get current on a home mortgage that forces the debtor into bankruptcy in the first place. Of course, to cure a default, the debtor must be able to ascertain the amount of the arrearage. This often proves difficult because, in many cases, the mortgage holder has not yet filed a proof of claim at the time of confirmation and fails to adequately communicate with the debtor.[4]

If the plan is confirmed, the plan is binding on the debtor and all creditors, whether or not the plan provides for a creditor and whether or not a creditor has accepted or objected to the plan. 11 U.S.C. § 1327(a). Section 1327(a) is often referred to as giv-

[4] For a discussion of the problems facing many Chapter 13 debtors with home mortgages, see Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008).

ing *res judicata* effect to a confirmed plan. As stated by the Tenth Circuit, "[u]pon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack." *In re Talbot*, 124 F.3d 1201, 1209 (10th Cir. 1997) (citing 8 *Collier on Bankruptcy* ¶ 1327.02[1] (Lawrence P. King ed., 15th ed. 1996)). Further, § 1327(b) provides that, except as otherwise provided in the plan, confirmation vests all property of the estate in the debtor. 11 U.S.C. § 1327(b). The vesting of property, except as otherwise provided for in the plan, is "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. § 1327(c). Some courts interpret this last subsection of § 1327, combined with the power to alter the rights of secured creditors found in § 1322(b)(2), as giving a Chapter 13 debtor the power to modify or extinguish liens on estate property via a confirmed plan. *In re Ramey*, 301 B.R. 534, 544-45 (Bankr. E.D. Ark. 2003); *In re Stewart*, 2010 WL 4259940, at *6-8 (Bankr. E.D. La. 2010).

A debtor's ability to modify a secured creditor's lien in his plan raises the third concept at work in the Chapter 13 case–protection of secured creditor lien rights. There is a long-standing and oft-cited principle, dating back to the last century, that liens pass through bankruptcy unaffected. *See Long v. Bullard*, 117 U.S. 617, 620-21 (1886). Although the principle pre-dates passage of the Code, it has been recently reaffirmed by the Supreme Court. *See*

Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (recognizing the continued relevancy of the "pre-Code rule that liens pass through bankruptcy unaffected"); *see also In re Haberman*, 516 F.3d 1207, 1209 (10th Cir. 2008) (citing principle). The principle is interpreted to mean that a secured creditor is not required to file a proof of claim or otherwise participate in the bankruptcy in order to protect its lien. *See Dewsnup*, 502 U.S. at 417-18. Rather, a secured creditor may ignore the proof of claim process altogether and look solely to its lien for satisfaction of the debt. *In re Tarnow*, 749 F.2d 464, 465 (7th Cir. 1984). The Code now specifically provides that a secured creditor's failure to file a proof of claim does not invalidate or extinguish a lien. 11 U.S.C. § 506(d)(2).

On the other hand, the Code provides a debtor with several methods to modify or invalidate a lien. For example, certain types of secured claims can be "crammed down" to the value of the collateral pursuant to § 506(a). Debtors in this case propose to do this to their auto loan and second home mortgage. In addition, if a secured claim is disallowed by the court pursuant to § 502, the lien securing the disallowed claim will be void. 11 U.S.C. § 506(d); *Dewsnup*, 502 U.S. at 416. A debtor may initiate an adversary proceeding "to determine the validity, priority or extent of a lien." Fed. R. Bankr. P. 7001(2). Section 522(f) allows avoidance of liens on personal property impairing an exemption. As discussed below, some courts conclude that a debtor cannot affect a lien without invoking one of these specific methods. Other courts believe plan confirmation is an ad-

ditional method, specifically permitted by § 1327(c), of modifying a lien.

It is not difficult to imagine that the interaction of the three concepts–claims allowance, plan confirmation, and protection of lien rights–often creates problems. For example, if a Chapter 13 plan purports to do something that is at odds with a filed proof of claim or a secured creditor's lien rights, which concept wins out? Must a creditor file both a proof of claim and a plan objection to protect its rights? Does a confirmed plan always control since it has *res judicata* effect? Or does an allowed claim take precedence, even if it was filed after plan confirmation? Do the lien rights of a secured creditor always ride through bankruptcy unaffected, even in the face of a contrary plan provision? Does the Code give a debtor the power to alter secured creditor's rights and to vest property free and clear of claims and interests through the plan process? If a debtor is prevented from altering a home mortgage holder's lien rights, how does the debtor ensure that he or she has cured the arrearage? Unfortunately, there are no simple answers to these questions.

C. The "Modification Rule"

One potential solution to the lack of symmetry between the claims allowance process and the plan confirmation process is found in local forms used in this district. The Local Rules require debtors to use a Chapter 13 plan form containing the following provision:

> The debtor must file and serve upon all parties in interest a modified plan which will provide for al-

> lowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation . . . . The modification will be filed no later than one year after the petition date. Failure of the debtor to file the modification may be grounds for dismissal.

Local Bankr. Form 3015-1.1, ¶ VIII (the "Modification Rule"). The Modification Rule presents a practical solution to a potentially thorny issue. The Rule allows both the plan confirmation process and claims allowance process to function. At the same time, it allows for later resolution of any inconsistency between a confirmed plan and subsequently filed proofs of claim. It only works, however, to the extent that a secured claimant files a proof of claim, which it is not required to do.

Despite these practical benefits, Debtors' proposed plan marks the Modification Rule as "N/A," and Debtors argue this local rule is inconsistent with the Code and, therefore, unenforceable. The power to set local rules is provided for in Rule 9029.[5] Under that Rule, a local bankruptcy rule must be consistent with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Local bankruptcy rules "may prescribe practice or procedure but may not enlarge, abridge or modify any substantive right." *In re Rivermeadows Assocs., Ltd.*, 205 B.R. 264, 269 (10th Cir. BAP 1997). A local rule which is inconsistent with the Code or attempts to limit a practice allowed by the Federal Rules of Bankruptcy

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[5] All references to "Rule" shall refer to the Federal Rules of Bankruptcy Procedure, unless otherwise noted.

Procedure is invalid. *In re Wilkinson*, 923 F.2d 154, 155 (10th Cir. 1991); *In re Rivermeadows*, 205 B.R. at 269.

Debtors contend that the Modification Rule is inconsistent with § 1329, which governs plan modifications. In relevant part, that section provides that a plan may be modified "upon the request of the debtor, the trustee, or the holder of an allowed unsecured claim." 11 U.S.C. § 1329(a). Nothing in the text of § 1329 specifically grants a bankruptcy court the power to order a post-confirmation plan modification *sua sponte*. Nevertheless, the Modification Rule essentially *orders* a debtor to file a plan modification, upon pain of dismissal, even if no modification is requested by the debtor, trustee or an unsecured creditor. Although the case law construing § 1329(a) is sparse, the cases that do exist appear to support Debtors' argument. As noted by one court, § 1329(a) "expressly limits the universe of persons who may propose or request modification of a confirmed Chapter 13 plan" and "[t]he bankruptcy court is statutorily excluded from that universe of persons." *In re Muessel*, 292 B.R. 712, 716 (1st Cir. BAP 2003); *see also In re Haddox*, 2003 WL 22681412, at *3 (10th Cir. BAP Nov. 12, 2003) ("By statute, at least, it does not appear that a bankruptcy court may *sua sponte* modify a confirmed plan."). By way of contrast, other provisions of the Code specifically provide for *sua sponte* action by a court where Congress intended bankruptcy courts to have that power. *See, e.g.*, 11 U.S.C. § 707(b)(1) (providing that the court may dismiss a Chapter 7 case "on its own motion"). Thus, the Court agrees with Debtors that, to the extent the

Modification Rule amounts to a bankruptcy court order to modify a confirmed Chapter 13 plan, it is inconsistent with the Code and invalid.

D. Case Law Approaches

Taking the Modification Rule out of play returns us to the question of how to balance the competing concerns outlined above. Courts are split on the proper balance. The case law can be broadly categorized into three approaches, each discussed below.

1. Emphasis on the Claims Allowance Process and Secured Creditor Rights

The first category of cases, sometimes called the majority position, actually encompasses several different approaches to the issues presented.[6] A common thread among them all, however, is that Chapter 13 plan confirmation is not, by itself, sufficient to alter a secured creditor's lien rights. *E.g., Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 827-33 (11th Cir. 2003); *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 92-93 (4th Cir. 1995); *Simmons v. Savell (In re Simmons)*, 765 F.2d 547, 555-56 (5th Cir. 1985). Rather, these cases emphasize the principle that liens pass through bankruptcy unaffected, thus permitting a secured creditor to elect not to participate in the bankruptcy and instead to rely on its lien rights. *E.g., In re Bateman*, 331 F.3d at 827; *Cen-Pen Corp*., 58 F.3d at 92. These cases hold that,

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[6] *See* Eric Richards, *Due Process Limitations of the Modification of Liens Through Bankruptcy Reorganization*, 71 Am. Bankr. L.J. 43, 79-90 (1997) (discussing case law and describing this line of cases as the "majority view").

in order to alter lien rights, a debtor must invoke some process other than plan confirmation, such as the claims allowance process or a separate adversary proceeding. *E.g., Cen-Pen Corp.*, 58 F.3d at 92 ("For a debtor to extinguish or modify a lien during the bankruptcy process, some affirmative step must be taken toward that end."). Only by invoking a separate process, these courts reason, will a creditor be afforded adequate notice and opportunity to respond. *E.g. Bateman*, 331 F.3d at 831-32 (citing *In re Hobdy*, 130 B.R. 318, 322 (9th Cir. BAP 1991)) (concluding the plan confirmation process should not be used to reduce a valid claim without affording a creditor the requisite notice and opportunity to be heard.); *In re Simmons*, 765 F.2d at 552 (noting that purpose of a claim objection is to place the parties on notice that litigation is required to resolve an actual dispute); *In re Vincente*, 257 B.R. 168, 179-80 (Bankr. E.D. Pa. 2001) (listing cases) ("[A] creditor's lien rights may not be affected unless it has notice and opportunity to defend against the debtor's attempt to do so.").

Courts adopting this line of reasoning generally acknowledge the *res judicata* effect given a confirmed plan by § 1327, but offer various reasons why § 1327 does not allow a plan to alter lien rights. For example, in *Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821 (11th Cir. 2003), the Eleventh Circuit cites fairness concerns that it would give the debtor a "windfall" if he were allowed to unencumber assets "through the simple expedient of passing his property through the estate." *Id.* at 831 (quoting *In re Simmons*, 765 F.2d at 555-56). In addition, the *Bateman* court reasoned that it is the

claims allowance process–not the plan confirmation process–which governs the amount of a secured creditor's claim. Thus, while § 1327 binds the parties to the distribution amount under the plan, the *Bateman* court concluded that the amount of the claim is determined by § 502(a), even if the amount listed in the debtor's plan differs. *Id.* at 832. The *Bateman* court reasoned that the claims allowance process is the more specific procedure for determining claim amounts and therefore controls over the more general policy considerations in § 1327(a). *Id.* at 832 (citing *In re Hobdy*, 130 B.R. 318, 322 (9th Cir. BAP 1991)). Stated another way, courts adopting this line of reasoning hold that § 1327(a) makes the plan binding as to the amount to be distributed under the plan, but hold that it is not binding as to the amount of the claim. *See Fleet Real Estate Funding Corp. v. Fewell (In re Fewell)*, 164 B.R. 153, 155-56 (Bankr. D. Colo. 1993) (citing *In re Hobdy*, 130 B.R. at 322). If a portion of a creditor's allowed claim, as determined by § 502, remains unpaid after a debtor has made all plan payments, the lien survives and is enforceable against the debtor. *See id.* at 156-57; *In re Bateman*, 331 F.3d at 832.

Cases in this category also downplay the import § 1327(c), which provides that, except as otherwise provided in a plan, confirmation vests property of the estate with debtor "free and clear of any claim or interest of any creditor provided for by the plan." Responding to a debtor's argument that this language gave him the power to strip a lien, the Seventh Circuit interpreted the terms "claim or interest" narrowly to *not* include a lien. *In re Simmons*, 765

F.2d at 555. The *Simmons* court cited as authority an earlier bankruptcy court opinion which reasoned that both "claim" and "lien" are separately defined by the Code, but the term "interest" is not. *Id.* (citing *In re Honaker*, 4 B.R. 415, 416-17 (Bankr. E.D. Mich. 1980)); *see also* 11 U.S.C. §§ 101(5), 101(37). Had Congress intended to allow lien stripping in § 1327(c), it would have used the defined term "lien" rather than the undefined "interest." *Id.* Other courts have focused on the term "provided for" in § 1327(c). These courts conclude that a plan only "provides for" a lien held by a secured creditor when it provides for payment to the creditor in an amount equal to its security. *Cen-Pen Corp.*, 58 F.3d at 94. Thus, absent full payment owed to the secured creditor, a lien is not "provided for" and survives Chapter 13 confirmation. *Id.*; *Southtrust Bank of Alabama v. Thomas (In re Thomas)*, 883 F.2d 991, 998 (11th Cir. 1989) (plan that made zero payments to secured creditor did not "provide for" lien).

Some of the cases in this category involve home mortgage liens. In those instances, § 1322(b)(2) is offered as another basis for not permitting a plan to alter a home mortgage lien or an associated arrearage claim. *See Bateman*, 331 F.3d at 831, n.9. In *Bateman*, the secured creditor held a lien against the debtor's home and filed a timely proof of claim for an arrearage on that mortgage. The debtor then proposed a plan that would pay less than half of the mortgage arrearage listed in the proof of claim. The creditor did not object to the plan and it was confirmed. The *Bateman* court held that the creditor's lien, as well as the associated arrearage claim, sur-

vived the debtor's contrary plan provision. *Id.* at 831 ("[I]f a lien on a mortgage survives the § 1327 *res judicata* effect of a confirmed plan, then so must any corresponding arrearage claim . . . ."). The Eleventh Circuit acknowledged that § 1322(b)(5) permits a debtor to cure a home mortgage arrearage in a plan, but held that the provision "does not compromise the amount of the aggregate secured claim or the rights of the secured creditor to recover the arrearage." *Id.* at 827, n.5 (citing *Nobelman v. Am. Savs. Bank*, 508 U.S. 324, 331-32 (1993)). Thus, despite "three years of diligent execution of the Plan," the debtor's home was still encumbered by a lien for the full arrearage amount at the conclusion of the case. *Id.* at 833.

2. Emphasis on the *Res Judicata* Effect of a Confirmed Plan

A second line of cases puts emphasis on the *res judicata* effect of a confirmed plan under § 1327 and allows a Chapter 13 debtor to modify a secured creditors' rights through a plan. Similar to the Debtors' arguments in this case, these courts generally hold that a secured creditor's failure to object to a plan can result in modification of a claim and a lien. Courts adopting this line of reasoning acknowledge the principle that liens pass through bankruptcy as valid, but hold that the principle cannot provide absolute protection to a lien in a reorganization case.

Indeed, as noted by one court, the Supreme Court's latest decision discussing the principle, *Dewsnup v. Timm*, was a Chapter 7 liquidation case in which the reorganization powers of a debtor were not at issue. *In re Ramey*, 301 B.R. 534, 544 (Bankr. E.D. Ark. 2003) (citing *Dewsnup v. Timm,* 502 U.S.

410 (1992)); *see also In re Stewart*, 2010 WL 4259940, at *6 (Bankr. E.D. La. 2010). Even the *Dewsnup* opinion itself appears to acknowledge that reorganization cases are of a different character. *See Dewsnup,* 502 U.S. at 418-19 (stating that "[a]part from reorganization proceedings" the pre-Code bankruptcy statute did not permit involuntary reduction of a lien for any reason other than payment on the debt). Thus, cases in this category conclude that the principle cannot be taken "to the extreme" because it stands only for "the proposition, now codified in 11 U.S.C. § 506(d), that *unless action is taken* to avoid a lien, it passes through a bankruptcy proceeding." *Matter of Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990) (emphasis added).

Confirmation of a plan is one such action that can avoid a lien. *Id.* at 1110; *In re Ramey*, 301 B.R. at 544. The Code gives specific statutory authority for that action in §§ 1322 and 1327(c). *In re Ramey*, 301 B.R. at 544 ("A Chapter 13 plan has specific statutory authority to cure a default on a secured loan, modify the due date and amount of payments, and even eliminate a secured claim."). As such, a secured creditor who elects not to participate in a bankruptcy case or file a plan objection, does so at its own risk, because a plan can and may modify the creditor's lien. *E.g., In re Stewart*, 2010 WL 4259940, at *6-8 (Bankr. E.D. La. 2010).

Some cases in this category draw authority from Chapter 11 reorganization cases. As with Chapter 13, the Code gives Chapter 11 debtors the right to propose a plan that modifies the rights of secured creditors. *See* 11 U.S.C. § 1123(b)(5). Chapter 11

also contains § 1141(c), a provision that is very similar to § 1327(c), which provides with immaterial exceptions that "except as provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." Courts have interpreted § 1141(c) to permit a Chapter 11 debtor to extinguish any lien that is not specifically preserved in the confirmed Chapter 11 plan. *See In re Penrod*, 50 F.3d 459, 462-63 (7th Cir. 1995); *In re Be-Mac Transp. Co., Inc.*, 83 F.3d 1020, 1025-26 (8th Cir. 1996).

In *Penrod,* the Seventh Circuit acknowledged the "old saw" that liens pass through bankruptcy unaffected. *Id.* at 461. It reasoned, however, that "when lienholders participate in a bankruptcy proceeding, and especially in a reorganization, they know that their liens are likely to be affected, and indeed altered." *Id.* at 462. The court held that liens are "interests" covered by § 1141(c) and that "unless the plan of reorganization, or the order confirming the plan says that a lien is preserved, it is extinguished by the confirmation . . . provided, we emphasize, that the holder of the lien participated in the reorganization." *Id.* at 463. "Our suggested interpretation reconciles the language of section 1141(c) with the principle, which we have pointed out cannot be maintained without careful qualification, that liens pass through bankruptcy unaffected. They do-unless they are brought into the bankruptcy proceeding and dealt with there." *Id.*

In this second category, § 506(d)(2), and the principle it embodies, is not seen as being in conflict with § 1327(c) because those sections are viewed as dealing with completely different aspects of the bankruptcy process. Section 506(d)(2) prevents "voiding" of a creditor's lien based *solely* on the failure to file proof of the underlying claim. Section 1327(c), on the other hand, "may operate to affect the lien of a creditor that has failed to file a proof of claim, but only when the additional statutory requirements of § 1327(c) are present: when confirmation has occurred, the creditor's claim is 'provided for' by the plan and the creditor's lien is not preserved by the plan or order of confirmation." 7 Norton Bankr. L. & Prac. 3d § 151:25 (2009). The "free and clear" effect of § 1327(c) is not dependent on whether a secured creditor has filed a proof of claim.[7] *See In re Dendy*,

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[7] *See also* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 234.1 (4th ed. 2004). Mr. Lundin explains that the former Bankruptcy Act did not empower Chapter 13 debtors to affect the rights of secured claim holders that declined to participate in plans. With the passage of the Bankruptcy Reform Act of 1978, Congress sought to change this shortcoming and allowed secured claims to be provided for and bound by a Chapter 13 plan. "The option of a secured claim holder to not participate in the Chapter XIII plan was purposefully and completely eliminated by the Bankruptcy Reform Act of 1978." *Id.* If a secured creditor can avoid the *res judicata* effect of § 1327 by simply not filing a proof of claim, "then Chapter 13 reverts to practice under the former Act, and secured claim holders once again have a veto of their treatment under plans." *Id.* Mr. Lundin concludes, "[t]he Code provisions for the treatment of secured claims in Chapter 13 cases were precisely designed to prevent this outcome." *Id.*

396 B.R. 171, 177 n.7 (Bankr. D.S.C. 2008) (confirmed plan stripped down wholly unsecured second mortgage even though mortgage holder did not file proof of claim).

Cases in this category acknowledge the claims allowance process, but characterize it as an "alternate" process to determine a secured claim, and stress that secured creditors cannot rely on this alternative and ignore the confirmation process, without risking modification of their rights. *In re Ramey*, 301 B.R. at 542-45 (citing Keith M. Lundin, *Chapter 13 Bankruptcy* § 233.1 (3d ed. 2000 & Supp. 2002)); *In re Wolf*, 162 B.R. 98, 107-08 (Bankr. D.N.J. 1993); *In re Fili*, 257 B.R. 370, 374 (1st Cir. BAP 2001). Thus, "except in cases where the notice to the creditor of the plan treatment of the lien is so insufficient that it violates due process of law," a plan will have *res judicata* effect. *In re Ramey*, 301 B.R. at 545. Indeed, some courts hold that confirmation of a plan that addresses allowance of a particular claim and that provides proper notice, will *bar* a creditor's later-filed claim under the principles of *res judicata*. *In re Fili*, 257 B.R. at 374. The creditor cannot rely solely on a proof of claim, but must also file an objection to the plan to disagree with the characterization or treatment of its claim. *Id.* at 374.

Courts emphasizing the *res judicata* effect of a plan also find it binding on the amount necessary to cure a home mortgage arrearage pursuant to § 1322(b)(5). Notwithstanding the general exception set forth in § 1322(b)(2), which prevents the modification of a lender's rights secured by a debtor's primary residence, § 1322(b)(5) explicitly "authorizes

debtors to cure any defaults on a long-term debt, such as a mortgage, and to maintain payments on the debt during the life of the plan." *See Rake v. Wade*, 508 U.S. 464, 469 (1993). The effect of the provision is to "essentially split each of [the creditor]'s secured claims into two separate claims-the underlying debt and the arrearages." *Id.* at 473. If the debtor is successful in curing the default, the debt is reinstated to its pre-default position, thereby "return [ing] the debtor and creditor to their respective positions before the default." *In re Litton*, 330 F.3d 636, 644 (4th Cir. 2003). Where a plan provides for a particular arrearage amount and that plan is confirmed and performed, courts have held that the arrearage amount listed in the plan is binding on the home mortgage creditor, even if the arrearage amount listed in the plan is incorrect. *See Padilla v. GMAC Mortgage Corp. (In re Padilla)*, 389 B.R. 409, 422 (Bankr. E.D. Pa. 2008); *In re Pitts*, 354 B.R. 58, 65-66 (Bankr. E.D. Pa. 2006); *In re Miller*, 2007 WL 81052, at *6 (Bankr. W.D. Pa. Jan. 9, 2007).

3. Emphasis on Due Process

The final category of cases has been called the "middle of the road" approach. *In re Basham*, 167 B.R. 903, 907 (Bankr. W.D. Mo. 1997). Courts adopting this view hold that a lien may be modified through the confirmation process, but only if the creditor received adequate notice that its lien would be adversely affected by the proposed plan. *See Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 162 (4th Cir. 1993). Whether notice is adequate depends on the particular circumstances of the case. For example, in *Linkous*, the debtor's plan

proposed to treat a creditor as partially secured pursuant to § 506(a). *Id.* at 161. The plan summary sent to the creditor listed the number and amount of payments debtor proposed to pay the creditor, but did not otherwise specifically mention that the secured creditor's claim was to be treated as partially secured. *Id.* The plan was confirmed without objection and no appeal was filed. Later, the secured creditor sought to revoke the confirmation on due process grounds. The Fourth Circuit agreed, concluding that a confirmation order is not entitled to *res judicata* effect under § 1327(a), "if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution." *Id.* at 162. The Court determined that Rule 3012 required a debtor to give specific notice that a § 506 valuation hearing would be conducted. *Id.* at 163. Because the notice sent to the secured creditor did not make reference to an intent to value the secured claim pursuant to § 506(a), it was not "reasonably calculated" to apprise interested parties and thus failed the fundamental requirements of due process. *Id.*

This approach has some appeal but, arguably, the *Linkous* case and other cases following it have been limited by the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). In *Espinosa*, the Chapter 13 debtor proposed a plan which provided that he would repay only the principal of his student loans. *Id.* at 1374. The debtor did not initiate an adversary proceeding to determine the dischargeability of his student loans. The debtor sent the plan to all creditors and no cred-

itor objected. The plan was confirmed and no appeal was taken. After the debtor completed the plan and received a discharge of his student loan interest, the student loan creditor challenged the confirmed plan under Fed. R. Civ. P. 60(b)(4), on the basis that the confirmation order was void because the creditor did not receive due process. Specifically, the creditor argued that the Code requires a bankruptcy court to make a finding of undue hardship in an adversary proceeding before discharging student loan debt. *Id.* at 1374-75. The creditor asserted that, because there was no summons and complaint in connection with an adversary proceeding, its due process rights were violated.

The Supreme Court agreed that the creditor had been deprived of its right to an adversary proceeding to determine dischargeability and could have timely objected to the debtor's plan on that basis and appealed an adverse ruling on its objection. *Id.* at 1378. Nevertheless, the Supreme Court held that the lack of an adversary proceeding and its related summons and notice, "did not amount to a violation of [the creditor's] constitutional right to due process." *Id.* In reaching this conclusion, the Supreme Court found that the due process right to notice does not require actual notice, but merely notice "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (citing *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)). Because the creditor received actual notice of the filing and contents of the debtor's plan, the creditor's due process rights were

"more than satisfied." *Id.* Debtor's failure to file a summons and complaint was not grounds to void the confirmation order. *Id.* The creditor had "forfeited its arguments regarding the validity of service or the adequacy of the Bankruptcy Court's procedures by failing to raise a timely objection in that court." *Id.* at 1380.

After *Espinosa*, it seems clear that service of a plan can satisfy due process, even if the plan proposes to do something that would normally require an adversary or motion process. Certainly the failure to follow procedural requirements set forth in the Code (such as filing of an adversary proceeding or contested matter) would be grounds to object to confirmation of a plan. However, failure to meet the additional procedural requirements will not be grounds to avoid the *res judicata* effect of a confirmation order, if the creditor received proper notice and service of the plan.

E. Analysis of Debtors' Non-Standard Language Under the Case Law

Against this backdrop, the Court must evaluate the Non-Standard Language in the Debtors' plan. In many cases, where creditors have not yet filed their proofs of claim prior to confirmation, the impact of this language is unknown. That is the case here in terms of the Debtors' first mortgage, held by Bank of America. The Debtors are proposing to allow Bank of America to retain its lien, to make regular payments under the existing terms of the note, and Debtors assert that they owe no arrearages on the debt. Bank of America has neither objected to the plan, nor filed a proof of claim. Should this passivity

on the Bank's part be construed as their agreement that there are no arrearages and the plan be given *res judicata* effect on this factual assertion?

The issue is drawn into sharper focus in the case of the Debtors' auto loan, held by Americredit. Americredit has already filed a proof of claim, asserting that it holds a claim secured against the Debtors' car, which it values at $12,825, and the balance of its claim is an unsecured deficiency claim in the amount of $1,791. The Debtors' plan values the car at $5,000 and proposes to cram down Americredit's secured claim to $5,000, leaving a much larger deficiency claim. Under § 502(a), Americredit's proof of claim is deemed allowed because the Debtors have not objected to it. Absent Americredit's consent, § 1325(a)(5) would require the Debtors to pay Americredit $12,825 in the plan on account of its secured claim or they must surrender the vehicle. Since Americredit did not object to the plan, has it given its consent to the plan's $5,000 cram down treatment? Should the Court ignore the inconsistency because Americredit did not participate in the confirmation process?

To answer these questions, this Court begins with a recognition that the confirmation process and the claims adjudication process serve as alternative methods for resolving disputed claims. *See In re Ayre*, 360 B.R. 880, 886 (C.D. Ill. 2007). If procedural requirements are satisfied, both processes will afford a creditor with due process that its rights are being affected. In regard to claims, several rules ensure that the creditor is given due process. An objection to a proof of claim initiates a contested matter,

and the objection and notice of the hearing must be served on the creditor, debtor and trustee. *See* Fed. R. Bankr. P. 3007, Local Bankr. R. 3007-1. Likewise, either party may separately initiate a contested matter to seek valuation of a secured claim. Fed. R. Bankr. P. 3012. In the case of valuing a lien on real property, Local Rule 3012-1 requires a debtor to file a separate motion asking for a valuation and determination of secured status under § 506 and to reference the request in any plan.

The plan confirmation process itself also requires service of process on any secured creditor whose rights will be affected by the plan. *See* Fed. R. Bankr. P. 9014; Local Bankr. R. 3015-1(b)(3). This first assumes that the plan contains a clear description of how the debtor proposes to allow and treat a particular creditor's claim.[8] It also requires compliance with the notice and service requirements of Rules 2002(b) and 7004. If followed, the creditor will be deemed apprised that its rights will be affected by confirmation and will have been afforded an ade-

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[8] The Court is aware that many plans in this district contain a more generic version of the Non-Standard Language that purports to void any liens on personal property, other than a car, if the creditor's lien is not specifically referenced in the plan. In other words, without even naming the creditor, the plan's provision attempts to wipe out the lien, absent an objection by the creditor. Presumably debtors' counsel are trying to avoid the expense of a lien search to find out if the debtor's computer or washing machine is subject to a security interest. This Court has previously ruled that this generic version does not afford a creditor sufficient due process that its lien rights are affected. *In re Jackson,* 2009 WL 5943245, at *3 (Bankr. D. Colo. Aug. 31, 2009).

quate opportunity to object. *See United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010).

One point of clarification is in order before proceeding further in this analysis. There is a common misperception in this district that "notice" and "service" are synonymous. Under local rules, when a debtor files his plan with his bankruptcy petition, the court will mail notice of the plan to all creditors listed on the debtor's mailing matrix. Since most mailing matrices list the creditors at post office boxes with no named representatives of the creditors, the court mailing may only satisfy the "notice" requirements of Rule 2002(b). Generally, it will not satisfy the additional "service" requirements of Rule 7004. While Rule 7004 allows for service to be effected by a first class mailing anywhere within the United States, it sets forth specific requirements *as to whom the mailing must be addressed*. For example, service on a corporation requires mailing to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . ." Fed. R. Bankr. P. 7004(b)(3). Rule 7004(b)(4)-(7) contains special rules for service on a governmental agency. Unless the debtor's matrix includes addresses that meet these requirements, the court's mailing will not satisfy the service requirements. In addition, if the affected party is an "insured depository institution," with certain exceptions, the service must be by *certified* mail addressed to a named officer of the institution. Fed. R. Bankr. P. 7004(h). The court's mailing will never suffice when certified mail is required.

This is not to suggest that every creditor must be "served" with the plan. All creditors must receive "notice." But "service" is only required as to those creditors whose rights will be specifically impacted by the plan, such as a secured creditor whose lien rights and/or arrearage amount is intended to be affected, or a tax claim that a debtor seeks to determine its amount and treatment. It could also involve the rights of a lessor or a party to an executory contract. In most cases, it will involve secured and priority creditors that are specifically mentioned in the plan. Because the court cannot utilize its limited resources to police a debtor's compliance with the service requirements in the absence of an objection, the standard form of confirmation order in this district includes a caveat: "This order binds those creditors and parties in interest that have been served in accordance with applicable rules." This language is intended to remind debtors' counsel that the plan will only be binding to the extent that they have satisfied both notice and service requirements.

To the extent that a debtor has complied with these rules, this Court will give *res judicata* effect to any final order specifically addressing the creditor's claim, whether that is an order on a claim objection or a confirmation order. The confirmation order, if entered first, will be controlling as to those claims specifically addressed in the plan. In essence, the Court adopts the second line of cases giving emphasis to the *res judicata* effect of a properly served plan. If a proposed plan unambiguously informs a creditor that its claim will be affected, disallowed or valued in a certain way, the creditor may not ignore

the confirmation process just because the claims bar date has not expired. *In re Thaxton*, 335 B.R. 372, 374 (Bankr. N.D. Ohio 2005). The confirmed plan is akin to a new contract between the debtor and its creditors, which defines the creditors' rights. *See In re Talbot*, 124 F.3d 1201, 1209 (10th Cir. 1997). The Court agrees with the cases discussed above that acknowledge the principle that liens ride through bankruptcy unaffected, but also recognizes the principle's limited application in a reorganization case. *See In re Penrod*, 50 F.3d 459, 462-63 (7th Cir. 1995). The Debtors' Non-Standard language is an expression of this obligation placed on a creditor to object to plan confirmation if it disagrees with how a debtor proposes to treat its claim. This language merely restates the *res judicata* effect that a confirmed plan may have on the rights of a creditor, including modification of a lien.

III. Conclusion

For the reasons stated above, the Court concludes the Non-Standard Language in the Debtors' proposed plan is permissible and not inconsistent with the Code. A separate standard confirmation order will enter, together with a separate judgment to this effect.

DATED this 25th day of March, 2011

BY THE COURT:

/s/ Elizabeth E. Brown

Elizabeth E. Brown
United States Bankruptcy Judge

STATUTORY PROVISIONS INVOLVED

1. Section 158 of Title 28 of the United States Code provides in pertinent part:

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

* * * * *

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy

appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel--

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

2. Section 1291 of Title 28 of the United States Code provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the Unit-

ed States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.