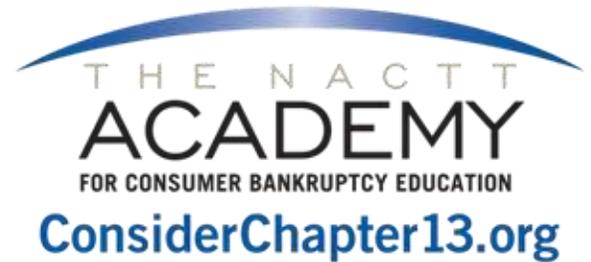


**NACTT 57<sup>th</sup> Annual  
Seminar  
San Francisco, CA  
Educational Materials**



**Thursday 1:00 – 2:00 Breakout Session**

**Claims Secured by Personal Property**

**Moderator: Pamela Simmons-Beasley**, Chapter 13 Standing Trustee  
for the District of South Carolina (Columbus)

**Dennis LeVine**, Brock and Scott PLLC (Tampa, FL)

**Michael J. Watton**, Watton Law Group (Milwaukee, WI)

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# CLAIMS SECURED BY PERSONAL PROPERTY

## OUTLINE

7/7/2022

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Chapter 13 in the Bankruptcy Code (1978 as amended) marks the first time that virtually all secured debts can be somewhat altered in a bankruptcy without getting the specific agreement of security holders. Real benefit is provided to the debtors who have personal property with secured loans due. Concepts including the automatic stay preventing enforcement or perfection of a security holder's rights, turnover of personal property from a secured creditor, and lien avoidance are all basic bankruptcy rights helping Debtors in Chapter 13 that did not exist before in bankruptcy. This outline explains the balance the Code (through Chapter 13) has struck between Debtors, Secured Creditors holding lien rights on personal property and Trustees handling those claims.

In this discussion and outline common areas of practice and concern for practitioners are focused on.

### **I. Foundation in Chapter 13**

Chapter 13 cases deal with a number of issues regarding personal property and claims secured by personal property. Issues of what property is, how different pieces of personal property are secured, how a security interest becomes an Allowed Secured Claim, how values are determined and challenged, how exemptions apply, adequate protection, how liens are released or pass through a case, as well as practical matters given particular secured personal property, and local plan treatment are covered throughout this outline.

#### **A. Personal Property- Black's Law Definition**

**Personal property. 1.** Any movable or intangible thing that is subject to ownership and is not classified as real property... **2.** Property not used for a taxpayer's trade or business or held for income production or collection.

**Real property.** Land or anything growing on, attached to or erected on it, excluding anything that may be severed without injury to the land...

Black Law Dictionary, 7<sup>th</sup> Ed. 2000.

#### **B. Common Issue: Mobile Homes-Real or Personal Property?**

1. Whether a mobile home that is the debtor's principal residence is considered real or personal property is important because it will determine whether the claim it secures can be modified.
2. If the mobile home is considered real property, the claim cannot be modified pursuant to 11 U.S.C. § 1322(b)(2), which prohibits modification of secured claims "secured only by a security interest in real property that is the debtor's principal residence."
3. Whether the mobile home is real or personal property depends on state law. See Appendix 1 for state-by-state treatment.
4. Most states require that both the mobile home and the land on which it sits be titled in the same owner's name before it can be converted to real property.
  1. Several states have an exception to this, if the land to which the mobile home is being affixed is being leased long-term (10 years or more).
5. Most states require that the mobile home be affixed to the land and that the certificate of title be surrendered or cancelled in order to convert the mobile home to real property.
6. Do provisions in the loan documents affect the result?
  - a. *In re Colver*, 13 B.R. 521 (Bankr. D. Nev. 1981)-Court found that mobile home was in the nature of personal property, based in part on the language in the loan documents providing that the mobile home would continue to be personal property "notwithstanding the manner and degree of affixation of the [mobile home] to any real property."
  2. *In re Bell*, 2008 Bankr. LEXIS 1326 (Bankr. D.S.C. Apr. 22, 2008)-Court found that mobile home was personal property under state law. Language in the loan documents including all "improvements" and "fixtures" did not include mobile home because it was not specifically referenced and did not constitute a fixture. Accordingly, the mortgage creditor did not have a security interest in the mobile home, which was the debtor's principal residence, and its claim could be valued.
  - c. *In re Thompson*, 217 B.R. 375 (B.A.P. 2d Cir. 1998)-Court found that mobile home was personal property under both statute and terms of the loan agreement, which stated that regardless of what efforts were made to affix the mobile home to real property, it would remain personal property unless the creditor consented and state law allowed the mobile home to be classified otherwise.

### **C. Common Issue: Lien Retention and Satisfaction**

1. If a debtor proposes to retain property and the holder of a claim secured by the property has **not** accepted the plan (11 U.S.C. § 1325(a)(5)(A)), 11 U.S.C. § 1325(a)(5)(B) states that the plan must provide that the holder of the allowed secured claim retain its lien until the underlying debt is paid under nonbankruptcy law, or until

the debtor receives a discharge, whichever occurs first. Section 1325(a)(5)(B)(II) provides that if the case is **dismissed or converted before the plan is completed**, the lien is retained to the extent recognized by applicable non-bankruptcy law.

2. The national form plan contains language regarding secured creditors' retention of liens. Most districts also have express language in their form plans regarding secured creditors' retention of liens, and some districts have express language requiring secured creditors to satisfy their liens after payment. See Appendix 2 for each district's specific plan language (if any) addressing secured creditors' lien retention and satisfaction.
3. Even if the debtor receives a discharge, the creditor may still be able to recover any amounts remaining pursuant to the contract from a codebtor.
  - a. *In re Coffey*, 2022 Bankr. LEXIS 169 (Bankr. N.D. Ala. Jan. 25, 2022)-The debtor paid the full amount of the 910 claim at 5.25% interest through her plan. After she received a discharge, the creditor made demand upon her husband, the non-filing codebtor, for unpaid interest. The debtor asserted that the creditor violated the discharge injunction. The Court found that the debtor's discharge did not affect the codebtor's liability and therefore the creditor was not prevented from taking action against the non-filing codebtor. FDCPA issues? State issues?
4. Nonstandard language added to a plan may or may not be effective.
  - a. *In re Pagan*, 2022 Bankr. LEXIS 165 (Bankr. E.D. Wis. Jan. 24, 2022)-The form plan contained language stating that the secured creditor retained its lien until the earlier of payment of the debt determined under non-bankruptcy law, or discharge of the debt under section 1328. The debtor included additional nonstandard language in her plan that stated, "Creditors with secured claims shall retain their mortgage, lien or security interest in collateral until the earlier of (a) the payment in full of the secured portion of their proof of claim, or (b) discharge under 11 U.S.C. § 1328." The debtor's plan proposed to pay the creditor's claim secured by a vehicle in full at 6% interest. After the debtor totaled her vehicle and received insurance proceeds, the debtor argued that she should be permitted to keep the portion of the proceeds remaining after payment of the claim in accordance with the plan. The creditor argued it was entitled to all insurance proceeds, based on the contractual interest rate. The Court found that the nonstandard language added to the form plan by the debtor was ambiguous. However, the Court found that if the debtor completes her plan and receives a discharge, the creditor will be required to release its lien on the excess proceeds. Accordingly, the Court required the trustee to hold the proceeds in trust until either the debtor receives a discharge or until her case is dismissed. HOW is that ambiguous? **Editor's note**--- Court found it ambiguous because the model plan language required the opposite to be indicated in the same plan? Does acceptance mean non-objection to confirmation? There was NO unsecured portion of the creditor's claim.
  - b. *Santander Consumer USA, Inc. v. Donnadio (In re Donnadio)*, 608 B.R. 507 (B.A.P. 6th Cir. 2019)-The plan should not have been confirmed because it did

not contain specific language providing that the creditor retained its lien, as required by section 1325(a)(5)(B)(i)(I).

- c. *In re Foley*, 606 B.R. 790 (Bankr. E.D. Wis. 2019)-declining to consider non-standard provision providing for retention of liens until “payment in full of the secured portion of their proof of claim,” but noting that the language was unclear, stating, “the court has significant questions over whether the language used accomplishes the goal expressed by debtor’s counsel at the confirmation hearing.”  
**Editor’s Note**--- Precursor to *Pagan*.
5. Creditors who refuse to release liens after payment in full under the terms of the plan may be subject to sanctions.
    - a. *In re Simmons*, 623 B.R. 288 (Bankr. D.S.C. 2021)-the debtors’ confirmed plan valued a claim secured by a mobile home. The plan contained language stating that secured creditors would retain liens pursuant to 11 U.S.C. § 1325(a)(5)(B) and also stated, “Secured creditors paid the full secured claim provided for by this plan shall timely satisfy and [sic] liens in the manner required by applicable law or order of this Court.” The debtors completed their plan and received a discharge. After the creditor failed to release its lien, the debtors filed a motion for contempt. The creditor did not appear at the hearing on the motion, and the Court entered an order compelling the release of the lien and ordering the secured creditor to pay the debtors’ attorney fees and costs incurred in connection with the motion for contempt. The order imposed future sanctions if the creditor did not timely comply. The creditor did not comply and the Court issued a Rule to Show Cause. The creditor did not appear at the hearing on the Rule to Show Cause. The Court required the creditor to pay the debtor’s attorney fees and costs in connection with the motion for contempt and Rule to Show Cause, per-day sanctions for noncompliance with the Court’s first order, and imposed additional per-day sanctions until the creditor fully complied with the Court’s orders.
  6. A creditor’s failure to object to the debtor’s plan may affect its lien retention rights.
    - a. *In re Myles*, 2020 Bankr. LEXIS 1631 (Bankr. E.D. Mich. 2020)-the debtor was not eligible for a discharge. The plan proposed to pay a claim secured by the debtor’s vehicle in full at 6% instead of the 20% contract rate. After the debtor completed her plan, the creditor refused to release its lien because it claimed it was entitled to interest at the original contract rate. The debtor filed a motion to release lien, which the Court granted. The Court noted that the creditor did not object to, and in fact affirmatively accepted the confirmed plan, and pointed out that the plan did not provide for lien retention after plan completion. Therefore, the Court held that the creditor’s lien was extinguished after the debtor completed her plan.
    - b. *In re Foley*, 606 B.R. 790 (Bankr. E.D. Wis. 2019)-creditors’ failure to object to confirmation of the debtors’ proposed chapter 13 plans constituted acceptance for purposes of section 1325(a)(5)(A).

- i. There are many cases suggesting if a creditor does not object to a plan, the creditor may be deemed to have accepted it. *See, In re Andrews*, 49 F.3d 1404, 1409 (9<sup>th</sup> Cir. 1995); *In re Szostek*, 886 F. 2d 1405 (3d. Cir. 1989); *Bronitsky v. Bea*, 533 B.R. 283 (B.A.P. 9<sup>th</sup> Cir. 2015); *In re Davis*, 411 B.R 225 (Bankr. D. Md. 2008).
- 7. If the debtor is not entitled to a discharge, the debtor may be required to pay the full amount of the debt under nonbankruptcy law.
  - a. *Bank of the Prairie v. Picht (In re Picht)*, 428 B.R. 885 (B.A.P. 10th Cir. 2010)- because the debtor was not eligible for a discharge, section 1325(a)(5)(B)(i) required the plan to provide for the creditor to retain its lien until payment in full or until the lien is extinguished, both under nonbankruptcy law. *See also In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007).
  - b. *But see In re Myles*, 2020 Bankr. LEXIS 1631 (Bankr. E.D. Mich. 2020)- discussed above. Because the creditor accepted the plan that did not expressly provide for lien retention after plan completion, the lien was extinguished upon plan completion.

**D. Common Issue: Exemptions--- Specifically on a Mobile Home—Homestead Exemption or A Particular Personal Property?**

1. Completely State Law Dependent

- a. Colorado — Statutory on exemptions and mobile homes (April 2022)

38-41-205. Of what homestead may consist. (1) The homestead mentioned in this part 2 may consist of: (a) **A DWELLING, AS DEFINED IN SECTION 38-41-201.7**; (b) A house and lot or lots, INCLUDING MANUFACTURED HOMES, MOBILE HOMES, TRAILERS, AND TRAILER COACHES, AS SET FORTH IN SECTION 38-41-201.6; or (c) of A farm consisting of any number of acres.

**38-41-201.7. Definition of "dwelling" - personal property included.** (1) AS USED IN THIS PART 2, UNLESS THE CONTEXT OTHERWISE REQUIRES, "DWELLING" MEANS CONVENTIONAL HOUSING AND PERSONAL PROPERTY THAT IS ACTUALLY USED AS A RESIDENCE, INCLUDING: (a) **A VEHICLE**, AS DEFINED IN SECTION 42-1-102 (112), INCLUDING ANY TRAILER, AS DEFINED IN SECTION 42-1-102 (105); PAGE 5-SENATE BILL 22-086 (b) **A VESSEL**, AS DEFINED IN SECTION 33-13-102 (5); (c) A CAMPER COACH, AS DEFINED IN SECTION 42-1-102 (13); (d) **MOUNTED EQUIPMENT**, AS DEFINED IN SECTION 42-1-102 (60); (e) **A RAILWAY CAR**; (f) **A SHIPPING OR CARGO CONTAINER OR SHED**; (g) **A YURT**; AND (h) **A TINY HOME, WHETHER MOVABLE ON WHEELS OR STATIONARY ON A FOUNDATION.**

- b. Compare, Missouri Statutes and case law

i. MO Stat.

Rs. Stat. Mo. 513-430 lists property exempt from attachment:

(6) Any mobile home used as the principal residence but not attached to real property in which the debtor has a fee interest, not to exceed five thousand dollars in value;

While the Missouri Homestead exemptions states:

Rs. Stat. Mo. 513.475.

The homestead of every person, consisting of a **dwelling house** and appurtenances, **and the land** used in connection therewith, not exceeding the value of fifteen thousand dollars, which is or shall be used by such person as a homestead, shall, together with the rents, issues and products thereof, be exempt from attachment and execution. The exemption allowed under this section shall not be allowed for more than one owner of any homestead if one owner claims the entire amount allowed under this subsection; but, if more than one owner of any homestead claims an exemption under this section, the exemption allowed to each of such owners shall not exceed, in the aggregate, the total exemption allowed under this subsection as to any one homestead.

ii. MO Case Law

Even though one may argue the phrase (and the land) could suggest the “dwelling house” may be sufficient for a mobile home to obtain a homestead exemption, the Missouri courts have long ruled otherwise. See, *In re White*, 287 B.R. 232 (E.D.MO. 2002). Here the Debtor in a Chapter 7 owned a mobile home, but not the land on which it was situated. Debtor claimed a mobile home exemption and a homestead exemption. “In order to convert a mobile home from personal property to real property a debtor must attach the mobile home to a permanent foundation situated on real estate owned by the mobile home owner. [Section 700.111 R.S.Mo.](#)” *Id.* at 235

R.S.Mo. 700.111 allows for the surrender of a certificate regarding mobile homes (for tax purposes) once a mobile home is affixed to a permanent foundation.

2. Could a Mobile Home become exempt as a fixture attached to the real property structure?
3.
  - a. Again, State law controls.
    - i. Example Missouri:

“In a fixture analysis, to determine when an item “become[s] so related to particular real property that an interest in the item arises,” the Missouri Supreme Court outlined three necessary elements: (1) annexation, (2) adaption, and (3) the intent of the annexor. \*54 [Marsh, 537 S.W.2d at 404](#). All three elements are required in some degree for an item to become a fixture. [Wisdom v. Rollins, 664 S.W.2d 37, 39 \(Mo. Ct. App. 1984\)](#) (holding that each element must be present to some degree no matter how slight)...” In re 8760 Service Group, LLC, 586 B.R. 44 (W.D.Mo. 2018).

- ii. Virtually all states a mixed question of fact and law. Annexation, application of use to property and intent. See e.g. In re Casper, 156 B.R. 794 (S.D. IL. 1993).

#### **E. Common Issue: Is A personal property lease (rental furniture/autos) really a lease or a secured transaction?**

1. The curious cases of Rental Centers and the reengineering of rent to own autos.

Rent to own personalty schemes can go a variety of bad ways for the creditor. Creditors seek lease... executory contract status. Debtor seeks to re-characterize such a transaction in Chapter 13 as an installment sales contract secured by the personal property. If Debtor wins, debtor then can try to make the claim unsecured or partially unsecured and cram down claim values.

Comparisons between States, state law dependent

- a. Ohio as an example

In re White, 109 B.R. 768 (S.D. OH. 1989), stove, stereo, refrigerator in issue. Debtor “leases” for \$2000 over-time payments and then files Chapter 13. Debtor seeks in the plan to pay the claim as a RISC (retail installment sales contract) with the collateral goods worth \$850 and seeks to pay \$850 through plan as secured, remainder unsecured. Court looks to Ohio state law. There is a state lease purchase agreement law therefore the lease must be a true lease.

- b. Other states:

“The most significant factor that determines whether a transaction is a lease or a sale and security interest is whether the lessor has retained a meaningful residual interest in the goods at the end of the lease term. [In re Allen, 174 B.R. 293, 295 \(Bankr.D.Or.1994\)](#); [In re Zaleha, 159 B.R. 581, 585 \(Bankr.D.Idaho 1993\)](#); [Kimco Leasing, Inc. v. State Bd. of Tax Commissioners, 656 N.E.2d 1208, 1218 \(Ind.Tax 1995\)](#); [Addison v. Burnett, 41 Cal.App.4th 1288, 49 Cal.Rptr.2d 132, 136–37 \(1996\)](#); [4 James J. White & Robert S. Summers, Uniform Commercial](#)

[Code § 30–3 at 18 \(4th ed.1995\).](#)” In re Macklin, 236 B.R. 403, 406 (E.D.AR. 1999).

- c. The South Carolina Experience - Democracy in action---
  - i. 1992 pro-debtor opinion *In re Barnhill* 189 B.R. 611 (Bankr. D.S.C. 1992), applying a variety of factors test. Most importantly, the fact that nothing was due at lease end suggested lease was a disguised RISC.
  - ii. Overturned by Statute, S.C. Code Ann 36-1-201
  - iii. Now, In re Parker, 363 B.R. 769 (S. SC. 2006) – virtually all leases that look like RISCs can be leases.

#### **F. Common Issue-- Late Filed Secured Claims In A Chapter 13**

1. Issue is how to make sure claims secured by personal property are filed timely and the effects if a claims deadline has passed.

2. Rule dependent issue. Fed. R. Bankr. P. 3002

Fed. R. Bankr. P. 3002 related to the filing of proofs of claim in Chapter 13 cases was amended in 2017. Three things to note:

a. To be “allowed” and receive payment from the Chapter 13 Trustee, secured and unsecured creditors are required to file a proof of claim. Rule 3002(a). “A secured creditor...must file a proof of claim or interest to be allowed, except as provided in Rules.....3003.... “

b. In both chapter 13 and chapter 7 cases, a proof of claim is timely if filed no later than 70 days after the order for relief or the date of conversion. Rule 3002(c).

c. A secured creditor’s lien will not be void if a secured creditor fails to file a proof of claim. Rule 3002(a). “...A lien that secures a claim against the debtor is not void due only to the failure of any entity to file the proof of claim.

3. Limited basis in the Rules to request extension of time

a. A creditor can move to extend the time to file a proof of claim by up to 60 days. An extension may be granted if (a) notice was insufficient to the creditor because the debtor failed to timely file the list of creditors’ names and addresses under Rule 1007(a), or (b) notice was insufficient to the creditor and notice was mailed at a foreign address. Rule 3002(c)(6).

b. A creditor in chapter 13 **cannot** invoke excusable neglect under Rule 9006(b)(1) to allow a tardy proof of claim by a secured creditor

- i. Bankruptcy Rule 9006(b) governs extensions of deadlines established under the Bankruptcy Rules. See Fed. R. Bankr. P. 9006(b); see also Yaquinto v. Ward (In re Ward), 978 F.3d 298, 302 (5th Cir. 2020). “Generally, bankruptcy courts may extend upcoming deadlines ‘for cause shown’ and may excuse noncompliance with past deadlines ‘where the failure to act was the result of excusable neglect.’ ” In re Ward, 978 F.3d at 302 (quoting Fed. R. Bankr. P. 9006(b)(1)). Under Bankruptcy Rule 9006(b)(3), however, this general rule is inapplicable to certain deadlines, including those established by Bankruptcy Rule 3002(c) for filing proofs of claim in chapter 13 cases. See Fed. R. Bankr. P. 9006(b)(3). Instead, bankruptcy courts “may enlarge the time for taking action under Rule[ ] ... 3002(c) ... only to the extent and under the conditions stated in th[at] rule[ ]. ...” Fed. R. Bankr. P. 9006(b)(3).

#### 4. Practical advice re late filed claims.

a. Late-filed claims can disrupt the orderly administration of cases. The failure to file a timely proof of claim in a chapter 13 case is grounds for disallowance of the claim, and the creditor will not receive distribution from the Trustee. When a Chapter 13 Plan provides to pay a secured claim in the Plan, however, the Debtor or Trustee generally want to pay the claim. Therefore, when the creditor misses the bar date, the following alternatives are available -

- the Debtor or Trustee can file a claim on behalf of the secured creditor
- the creditor can file an untimely proof of claim, and no party in interest objects
- a party files a Motion to allow a late filed claim
- the creditor can file a Motion for stay relief

#### b. Other arguments

- informal proof of claim
- claim not subject to discharge where not listed

#### c. One last back door solution

- i. But perhaps the most likely scenario is that if a creditor on a secured claim, usually a car lender, misses the bar date for filing a proof of claim and fails to get or file within an extension under 3002 and the Debtor does not file within the following 30 days under 3004, there is another possible solution.

- ii. *See, In re Kielman*, 2019 WL 6880082 (Bankr. E.D. WI 2019). Debtor may choose to seek an extension of the deadline to file a claim under Rule 3004, which may be enlarged under Rule 9006(b)(1) for excusable neglect. So even though 9006 (b)(1) is not available to a creditor, it is available to the debtor because the debtor can file a claim for a secured creditor pursuant to Rule 3004 (not 3002). The debtor is incentivized to do so normally on a vehicle loan.

**G. Common Issue- Can a creditor compel surrender of collateral in a Chapter 13 case?**

What is the consequence of a debtor's failure to surrender collateral?

1. If a Debtor indicates surrender of collateral as part of a Chapter 13 plan, creditors' options include moving for relief from stay and the moving for replevin in state court.
2. The 11<sup>th</sup> Circuit Court of Appeals in *Failla v. Citibank, N.A.*, 2016 WL 5750666 (11<sup>th</sup> Cir. 2016) may shed some additional light on the subject. In *Failla*, Chapter 7 statement of intention indicated surrender. Discharge in the Chapter 7 was entered. Debtor continued to fight foreclosure in State court. Bankruptcy Court issued order to compel debtor to stop opposing the foreclosure action. 11<sup>th</sup> Circuit agreed that the statement on intention required debtor to **relinquish all of their rights to the collateral**. Thus, the 11<sup>th</sup> Circuit ruled the bankruptcy court had the authority under the Bankruptcy Code to require the Debtors to "surrender" their house to the mortgage holder – which meant the debtor no longer opposing the mortgage holder's foreclosure action in state court. The 11<sup>th</sup> Circuit also found the bankruptcy court has authority under § 105 to deny the discharge where the debtor fails to complete their selection of surrender in the debtor's statement of intention.
3. Creditors will claim that the case leaved no room for doubt that this is applicable to Chapter 13 cases. Creditor advice:
  - i. Prior to confirmation, the lender can file an objection to confirmation and argue that the Debtor must surrender the vehicle prior to the Court confirming the Plan.
  - ii. Where the Plan has already been confirmed, the creditor can file a Motion to dismiss the case. The argument by the creditor is that the failure to surrender the vehicle is a material default in the confirmed Plan. In either case, prior to filing such a Motion the secured creditor should contact the Debtor's attorney to advise such a Motion will be

filed unless the debtor makes arrangements for surrender of a vehicle to the lender.

4. Compare this to the line of state laws which specifically do not allow repossession of a vehicle unless the vehicle is in default. In many cases that is 90 days delinquency. Thus, in many states the vehicle lender cannot clear title for resale. So what of *Failla* in Chapter 13 for a vehicle or for that matter for Chapter 7 in certain states?

#### **H. Common Issue: The Hanging Paragraph-- 910 claims OR the 1-year period.**

1. The so-called “hanging paragraph” in Section 1325 provides –

For purposes of paragraph (5) [which deals with plan treatment of allowed secured claims], section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

2. Question does the 1 year period ”if the collateral for that debt consists of anything other of value” mean “anything other than”
  - a. a motor vehicle (as defined in section 30102 of title 49) or
  - b. a motor vehicle (as defined in section 30102 of title 49) acquired for personal use of the debtor or
  - c. a PMSI in a motor vehicle (as defined in section 30102 of title 49) acquired for personal use of the debtor.<sup>1</sup>

3. The majority of courts allow a debtor to cram down the value of a vehicle acquired for business purposes within one year of the petition. *See, e.g., In re Parish*, 2006 WL 1679710 (Bankr. M.D. Fla. 2006); *In re Balsinde*, 2007 WL 4247642 (Bankr. S.D. Fla. Nov. 29, 2007); *In re Hickey*, 370 B.R. 219 (Bankr. D.

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<sup>1</sup> See “Hanging Paragraph, Cars for Non-Personal Use, and PMSI” by Gretchen Holland, Chapter 13 Trustee, in The Academy for Consumer Bankruptcy Education, *Consider Chapter 13*, November 3<sup>rd</sup>, 2019.

Neb. 2007); *In re Ellegood*, 362 B.R. 696, 704 (Bankr. E.D. Va. 2007) (not citing *In re Hayes* but nevertheless concluding that the hanging paragraph creates two categories of secured debt, one for motor vehicles and another for non-motor vehicles); *In re Ford*, 2008 WL 1925153, \*5 (Bankr. E.D. Wis. April 29, 2008); *In re Horton*, 398 B.R. 73 (Bankr. S.D. Fla. 2008); *In re Thompson*, 2009 WL 1758757 \*4 (Bankr. N.D. Ohio June 17, 2009); *In re McPhilamy*, 566 B.R. 382 (Bankr. S.D. Texas 2017).

4. A minority of courts, however, have ruled that a motor vehicle financed within one year that does not qualify for protection under the 910 day rule is protected under the second section of the hanging paragraph. *In re Sandifer*, 603 B.R. 648, 649-50 (Bankr. M.D. Ga. 2019); *In re Book*, 18-bk-03993-CPM (Bankr. M.D. Fla. 2019); *In re Littlefield*, 388 B.R. 1 (D. Maine 2008); *In re Tanguay*, 427 B.R. 663 (Bankr. E.D. Tenn. 2010).

## **Appendix 1**

### **Alabama**

Ala. Code § 32-20-20

### **Alaska**

Alaska Stat. § 34.85.010

### **Arizona**

Ariz. Rev. Stat. §§ 33-1501; 42-15201; 42-15202

### **Arkansas**

Ark. Code §§ 14-86-102 (what is deemed real or personal property for tax purposes); 27-14-1603

### **California**

Cal. Health & Safety Code § 18551

### **Colorado**

Colo. Rev. Stat. §§ 38-29-202; 38-29-208

### **Connecticut**

No statute directly addressing mobile homes as real or personal property. However, it appears that Connecticut treats mobile homes as real property. *See* Conn. Gen. Stat. § 21-67a.

### **Delaware**

No statute addressing mobile homes as real or personal property.

### **Florida**

Fla. Stat. § 319.261

### **Georgia**

Ga. Code §§ 8-2-181-183

### **Hawaii**

No statute addressing mobile homes as real or personal property.

### **Idaho**

Idaho Code § 63-304

### **Illinois**

No statute directly addressing mobile homes as real or personal property. However, one Illinois bankruptcy court has stated that three criteria determine whether an article or structure is a fixture under Illinois law: “(1) actual annexation to realty, (2) application to the use or purpose for which the land is appropriate, and (3) intention to make the article a permanent accession to the realty.” *In re Green*, 436 B.R. 91 (Bankr. S. D. Ill. 2010).

### **Indiana**

Ind. Code. § 9-17-6-15.5

### **Iowa**

Iowa Code § 435.26

### **Kansas**

Kan. Stat. § 58-4214

### **Kentucky**

Ky. Rev. Stat. § 186A.297

### **Louisiana**

La. Stat. § 9:1149.4

### **Maine**

No statute directly addressing mobile homes as real or personal property, but Me.Stat. § 652 states that a certificate of title is not required for a mobile home that is permanently affixed to real property owned by the owner of the mobile home within 30 days of the date of sale.

*Atl Home Sols., Inc. v. Quang Pham*, 2022 Me. 6 (Jan. 25, 2022) (providing 3-part test that Maine uses ““for determining whether personalty has become part of the realty on which it rests.””

### **Maryland**

Md. Real Prop. Code §§ 8B-101-104

### **Massachusetts**

No statute directly addressing mobile homes as real or personal property.

*Ellis v. Board of Assessors*, 358 Mass. 473 (1970) held that if a mobile home has the characteristics of a “conventional home,” it should be classified as real estate and taxed accordingly.

### **Michigan**

Mich. Comp. Laws § 125.2330i

### **Minnesota**

Minn. Stat. § 168A.1412

**Mississippi**

Miss. Code §§ 63-21-30; 27-53-15

**Missouri**

Mo. Rev. Stat. § 700.111

*In the Estate of Parker*, 25 S.W.3d 611 (Mo. Ct. App. 2000) held that despite the intent to affix the mobile home to the real property and the efforts taken to do so, the mobile home did not convert to real property because § 700.111 required that the mobile home be situated on real estate owned by the mobile home owner. The deceased husband was the sole owner of the real estate and the mobile home was jointly owned by the husband and the surviving spouse; therefore, the mobile home continued to be personal property of the surviving spouse.

**Montana**

Mont. Code §§ 15-1-116 (for tax purposes); 15-1-119

**Nebraska**

Neb. Rev. Stat § 60-169

**Nevada**

Nev. Rev. Stat. § 362.244

**New Hampshire**

N.H. Rev. Stat. §§ 477.44.

**New Jersey**

N.J. Stat. § 54:4-1.5 (for tax purposes)

**New Mexico**

N.M. Stat § 66-3-1 provides that manufactured homes are “subject to the registration and certificate of title provisions of the Motor Vehicle Code.”

**New York**

No statute directly addressing mobile homes as real or personal property.

**North Carolina**

N.C. Gen. Stat. §§ 105-273; 20-109.2; 47-20.6; 47-20.7

**North Dakota**

N.D. Cent. Code § 47-10-27 (**expressly states, “for purposes of 11 U.S.C. 1322(b)(2), a manufactured home is deemed real property”**).

## **Ohio**

Ohio Rev. Code § 5701.02(A), (B)(2)

*Reinhardt v. Vanderbilt Mortg. & Fin., Inc. (In re Reinhardt)*, 563 F.3d 558 (6th Cir. 2009).

## **Oklahoma**

Okla. Stat. § 47-1117

Okla. Admin. Code § 710:60-3-133.

## **Oregon**

Or. Rev. Stat. § 446.626

## **Pennsylvania**

*In re Lownes*, 437 B.R. 182 (E.D. Pa. 2010) (setting forth criteria for determining whether mobile home has become real property).

75 Pa. Cons. Stat. § 1140

67 Pa. Code § 401.5

## **Rhode Island**

No statute directly addressing mobile homes as real or personal property.

*Irwin v. Shorey*, 2007 RI Super. LEXIS 93 (2007) (finding that trailers without permanent foundations and having “inherent mobility” should be taxed as tangible personal property).

## **South Carolina**

S.C. Code §§ 56-19-500-560

## **South Dakota**

S.D. Codified Laws §§ 32-3-3.1, 3.2

## **Tennessee**

Tenn. Code § 55-3-128

## **Texas**

Tex. Occ. Code § 1201.222

## **Utah**

Utah Code § 70D-2-305

**Vermont**

Vt. Stat. Ann. Tit. 9, §§ 2603-2605

**Virginia**

Va. Code § 46.2-653.1

**Washington**

Wash. Rev. Code §§ 65.20.020-65.20.060; 65.20.910

**West Virginia**

W. Va. Code § 17A-3-12b; § 11-5-12

**Wisconsin**

Wis. Stat. § 101.9203

**Wyoming**

Wyo. Stat. §§ 31-2-501, 502

## Appendix 2

### National Form Plan

Section 3.2 (Request for valuation of security, payment of fully secured claims, and modification of undersecured claims):

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

### Northern District of Alabama

Section 3.2 (Request for valuation of security, claim modification, and hearing on valuation):

The holder of any claim listed below as having value in the column headed *Amount of Secured Claim* will retain the lien until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law; or
- (b) discharge under 11 U.S.C. § 1328(a), at which time the lien will terminate and be released by the creditor.

Section 3.3 (Secured claims excluded from 11 U.S.C. § 506 and fully secured claims):

The holder of any claim listed below will retain the lien until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge under 11 U.S.C. § 1328(a), at which time the lien will terminate and be released by the creditor.

### Middle District of Alabama

Section 16(a) (Other Plan Provisions):

Lien Retention: Allowed secured claim holders shall retain liens until the liens are released or upon completion of all payments under this plan unless specified in paragraph 6.

### Southern District of Alabama

12.5 Lien retention

The holder of any secured claim listed in sections 7.1 or 7.2 will retain the lien on its collateral until the earlier of: (a) payment of the underlying debt determined under nonbankruptcy law or

(b) discharge of the underlying debt under Bankruptcy Code § 1328, at which time the lien will terminate and must be released by the creditor.

### **District of Alaska**

7.2 Retention of Security Interests and Revesting of Property: Secured creditors will retain their liens until the claims as determined under applicable non bankruptcy law have been paid in full or a discharge is entered under 11 U.S.C. § 1328 as provided by 11 U.S.C. § 1325(a)(5)(B). Except as provided in this plan or in the order confirming the plan, upon confirmation of this plan all of the property of the estate vests in the debtor(s) free and clear of any claim or interest of any creditor provided for by this plan under 11 U.S.C. § 1327.

### **District of Arizona**

If confirmed, the Plan will modify the rights and duties of the Debtor and creditors, except secured creditors will retain their liens until the earlier of payment of the underlying debt or Debtor's discharge under Code § 13283. If the case is dismissed or converted to another chapter (for example, Chapter 7) without completion of the Plan, each lien shall be retained to the extent recognized by applicable nonbankruptcy law.

Also in section 5(a):

The holder of a claim will retain the lien until the earlier of payment of the underlying debt determined under nonbankruptcy law or discharge under Code § 1328, at which time the lien will terminate and shall be released by the creditor. Federal tax liens shall continue to attach to property excluded from the bankruptcy estate under Code § 541(c)(2) until the Internal Revenue Service is required to release the liens in accordance with nonbankruptcy law.

Section 5(b):

If a creditor fails to file a secured claim or files a wholly unsecured claim, the debtor may delete the proposed payment of a secured claim in the order confirming plan. The holder of a timely filed secured claim will retain its lien until the earlier of payment of the underlying debt determined under nonbankruptcy law or discharge under Code § 1328, at which time the lien will terminate and shall be released by the creditor.

### **Eastern and Western District of Arkansas**

Section 3.3 (secured claims excluded from § 506) states that creditors will retain their liens.

Section 3.4 (§ 506 valuation):

The holder of any claim listed below as having value in the column headed Value of collateral will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of: (a)

payment of the underlying debt determined under nonbankruptcy law, or (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

### **Northern District of California**

Section 3.07 (long term secured debts) states that creditors shall retain liens.

Section 3.08 (modified secured claims, or claims that mature before completion of the plan):

(d) Lien retention. Each Class 2 creditor shall retain its existing lien on the property interest of the Debtor or the Estate until the earlier of: (a) payment of the underlying debt determined under nonbankruptcy law, or (b) completion of the plan and, unless not required by the bankruptcy court, entry of Debtor's discharge under 11 U.S.C. § 1328.

### **Central District of California**

Language contained in Attachment B to Chapter 13 Plan/Plan Confirmation Order:

6. Retention of lien until avoidance: The Creditor Lienholder will retain the Subject Lien for the full amount due under the corresponding note and deed of trust, mortgage or lien if the Debtor's Chapter 13 case is dismissed or converted to any other chapter under the Bankruptcy Code, or if the collateral is sold or refinanced, prior to the Lien Avoidance Effective Date.

7. Retention of rights upon foreclosure of other lien: In the event that the Creditor holder of any other lien on the Collateral forecloses on its interest and extinguishes the Creditor Lienholder's lien rights prior to the Lien Avoidance Effective Date, the Creditor Lienholder's lien will attach to any proceeds greater than necessary to pay the senior lien(s) from the foreclosure sale.

"Debtor's Request to Modify Creditor's Secured Claim and Lien" chart in section IV of the plan:

11 U.S.C. § 506(a) and (d)—Debtor seeks avoidance of your lien(s) on the above described collateral that will be effective upon the earliest to occur of either payment of the underlying debt determined under nonbankruptcy law or one of the following:

*(check all that apply and see LBR Form F 4003-2.4.ORDER.AFTERDISCH):*

- (1) discharge under 11 U.S.C. § 1328, or
- (2) Upon completion of all Plan payments.

### **Southern District of California**

Section 3.2:

The holder of any claim listed below as having value in the column headed Amount of secured claim will retain the lien until the earlier of the following events as applicable to the particular secured creditor: 1) payment of the underlying debt determined under nonbankruptcy law; 2) discharge under 11 U.S.C. § 1328, or 3) completion of payments under the plan if the debtors(s) are not entitled to a discharge. After the date applicable to termination of the lien, it will be released by the creditor unless the claim is a nondischargeable claim owed to a governmental entity. See Local Bankruptcy Rule 3015-8.

### **District of Colorado**

Section 7.3 (Secured claims subject to 11 U.S.C. § 506 (Real Property)):

The creditors listed in Part 1.3 and below shall retain the liens securing their claims until discharge under 11 U.S.C. § 1328, or, if the debtor is not eligible for a discharge, upon the debtor's successful completion of all plan payments and the closing of the case.

Section 7.4 (Secured claims subject to 11 U.S.C. § 506):

The creditors shall retain the liens securing their claims until discharge under 11 U.S.C. § 1328 or payment in full under nonbankruptcy law.

### **District of Connecticut**

Section 3.2 (Secured claims subject to valuation):

The holder of any claim listed below will retain the lien on the Collateral of the Debtor or the estate(s) until the earlier of: (a) payment of the underlying debt determined under nonbankruptcy law, or (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate.

### **District of Delaware**

No provision in the plan.

### **Northern District of Florida**

Section 7.2:

Except as provided above, allowed secured claim holders shall retain liens until liens are released or upon completion of all payments under this Plan.

### **Middle District of Florida**

Section D, General Plan Provisions:

Secured creditors, whether or not provided for under the Plan, shall retain liens securing such claims.

### **Southern District of Florida**

Treatment of secured claims section has a statement “Retain Liens pursuant to 11 U.S.C. § 1325(a)(5)” at the top of the section.

### **Northern District of Georgia**

Section 3.2 (Request for valuation of security and modification of certain undersecured claims):

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) payment of the amount of the secured claim, with interest at the rate set forth below, and discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Section 3.3 (secured claims to be paid in full):

The holder of any claim listed below will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) payment of the amount of the secured claim, with interest at the rate set forth below, and discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Section 3.6 (Other allowed secured claims):

The holder of the claim will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) payment of the amount of the secured claim, with interest at the rate set forth above, and discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

### **Middle District of Georgia**

No provision in the plan.

### **Southern District of Georgia**

**10. Retention of Liens.** Holders of allowed secured claims shall retain the liens securing said claims to the full extent provided by 11 U.S.C § 1325(a)(5).

### **District of Hawaii**

Section 4.3 Class 1: Secured claims where (a) the debtor was in default on the petition date and (b) the claimant's rights are not modified by the plan, except for the curing of the default.

### **District of Idaho**

Section 3.2 (Request for valuation of security, payment of fully secured claims, and modification of undersecured claims):

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (c) payment of the underlying debt determined under nonbankruptcy law, or
- (d) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Section 3.3 (Secured claims excluded from 11 U.S.C. § 506):

The holder of any claim listed below will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

### **Northern District of Illinois**

Uses National Form Plan.

### **Central District of Illinois**

Miscellaneous section at end of plan:

B. All secured creditors shall retain the liens securing their claims until the earlier of the payment of the underlying debt as determined under non-bankruptcy law or discharge under 11 U.S.C. § 1328.

### **Southern District of Illinois**

E) Residential Real Estate Secured Claims to which 11 U.S.C. § 506 Valuation is Applicable (“Lien Stripping”):

That pursuant to 11 U.S.C. § 1325(a)(5)(B) the creditor will continue to retain the lien on the residential real estate until the Debtors receive a discharge pursuant to Section 1328 of the Bankruptcy Code. Upon the entry of the order of discharge the lien is voided.

### 12. LIEN RETENTION

With respect to each allowed secured claim to be paid in full through the Plan, other than mortgage or long-term debts, the holder of such claim shall retain the lien securing its claim until the earlier of (i) the payment of the underlying debt determined under non-bankruptcy law; or (ii) entry of the discharge order under 11 U.S.C. § 1328.

### **Northern District of Indiana**

Uses National Form Plan

### **Southern District of Indiana**

### 13. Lien Retention

With respect to each allowed secured claim provided for by the plan, the holder of such claim shall retain its lien securing such claim until the earlier of a) the payment of the underlying debt determined under non-bankruptcy law or b) entry of a discharge order under 11 U.S.C. § 1328.

### **Northern District of Iowa**

Uses National Form Plan

### **Southern District of Iowa**

Uses National Form Plan

### **District of Kansas**

10.1 Retention and release. Any secured creditor whose debt is secured by real property will retain its lien pursuant to § 1325(a)(5) and shall be required to release the lien at the time

designated by § 1325(a)(5); provided, however, that entry of the discharge shall not release a lien that secures a claim being treated under § 1322(b)(5).

#### 11.1 Lien retention and release

Any secured creditor whose debt is secured by personal property will retain its lien pursuant to § 1325(a)(5) and shall be required to release the lien at the time designated by § 1325(a)(5), including “910 car” loan creditors and “one-year loan” creditors, as defined by the paragraph following § 1325(a)(9).

### **Eastern District of Kentucky**

Part 3:

Each holder of an allowed secured claim, which is paid in full during the life of the plan and for which the collateral is not surrendered, shall retain the lien securing the claim until the earlier of: (1) payment of the underlying debt as determined under non-bankruptcy law; or (2) discharge. Should this case be dismissed or converted before the plan is completed, the lien securing an allowed secured claim shall be retained by the holder to the extent recognized by non-bankruptcy law.

### **Western District of Kentucky**

Uses National Form Plan

### **Eastern District of Louisiana**

7.3. Allowed Secured Claims. Allowed Secured Claims shall be paid after satisfaction of payments under sections 7.1-7.2. Payments to secured claimants shall be as follows:

Allowed Secured Creditors shall retain their mortgage, lien or security interest in collateral until completion of all payments due under the Plan to any party. To the extent the Plan provides for the cure of prepetition defaults on a secured claim but provides that the unmatured prepetition amounts owed shall be payable beyond the term of the Plan, on Completion of the Plan, the prepetition default shall be deemed cured, the debt will be current through the Completion Date of the Plan, and all claims to cure shall be released both in personam and in rem. Except as provided by the Plan, the Allowed Secured Claim shall be reduced to the unmatured portion of the debt that extends beyond the Completion Date and the claimant’s lien shall be retained to secure only that obligation unless otherwise modified by court order or Federal Rule of Bankruptcy Procedure 3002.1.

For an Allowed Secured Claim payment of which does not extend beyond the Plan Completion Date (payable entirely through the Plan), upon payment of the Allowed Secured Claim, the

security interest over Debtor's property shall be cancelled upon order of the Court or upon discharge, whichever occurs first.

...

Claimants holding claims payable under this section shall release and cancel from the public records any lien, writ, notice of seizure or encumbrance over property of Debtor or his estate which was created by virtue of an action to collect the Allowed Secured Claim or that has been satisfied in accordance with the Plan.

Section 7.3.b. (Request for valuation of security, payment of fully secured claims, and modification of undersecured claims):

The holder of any Allowed Secured Claim listed below will retain its lien on the property interests of Debtor or the estate to secure repayment of its Allowed Secured Claim until the earlier of:

- a. Payment of the Allowed Secured Claim determined under non-bankruptcy law, or
- b. Completion of the Plan, at which time the lien will terminate and be released by the creditor.

### **Middle District of Louisiana**

5E Secured claims determined under 11 U.S.C. § 506:

Each holder of a secured claim shall retain the lien securing the claim until the secured value, as determined by the court, or the amount of the claim, whichever is less, is paid in full.

### **Western District of Louisiana**

The following terms apply to all secured claims listed in Section 3.2 of this plan:

...

Lien Retention. The holder of any claim listed in this Section 3.2 as having value in the column headed *Amount of secured claim* will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of: (a) payment of the underlying debt determined under nonbankruptcy law, or (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

[Same language is contained in Section 3.3]

### **District of Maine**

Section 3.7 Lien Retention

The holder of any allowed secured claim provided for by the plan in § 3.2 will retain the holder's lien(s) on all property interest(s) of the debtor(s) or the estate(s) until the earlier of:

- (a) payment in full of the underlying debt determined under non-bankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

In addition, if this chapter 13 case is dismissed or converted without the completion of the plan, all such liens will be retained by the holders of such liens to the extent recognized by applicable nonbankruptcy law.

### **District of Maryland**

Section 4.6 Secured Claims.

The holder of an allowed secured claim retains its lien under 11 U.S.C. § 1325(a)(5)(B)(i).

### 5. THE AMOUNT AND VALUATION OF CLAIMS.

Secured creditors holding claims treated under Section 5 retain their liens until the earlier of: the payment of the underlying debt determined under nonbankruptcy law; or discharge under 11 U.S.C. § 1328; or, if the Debtor cannot receive a discharge as provided in 11 U.S.C. § 1328(f), the notice of Plan completion. If the case is dismissed or converted without completion of the Plan, liens shall also be retained by the holders to the extent recognized under applicable nonbankruptcy law.

### **District of Massachusetts**

Section 3.B.1. (Request for valuation of security, payment of fully secured claims, and modification of undersecured claims under 11 U.S.C. § 506):

The creditor will retain its lien to the extent of the value of the lien securing the creditor's allowed secured claim.

### **Eastern District of Michigan**

G. SECURED CLAIMS TO BE STRIPPED OR AVOIDED FROM THE COLLATERAL AND TREATED AS UNSECURED: Claims for which the creditor holds a lien that is listed as "Stripped" in Class 3.1 or "Avoided" in Class 3.2 are avoided and will be paid as a General Unsecured Creditor as provided in Class 9 of the Plan. Upon completion of the Plan, the creditor will record a Satisfaction of the Lien in the applicable Public Records to discharge and release the lien. If the creditor fails to do so, the debtor may file a motion for an order declaring that the

lien has been satisfied by completion of the confirmed Plan, which the debtor may then have certified and recorded in the applicable Public Records.

**Western District of Michigan**

C.1.h. Wholly Unsecured Claims:

Upon completion of the Plan, the lien shall be discharged and removed from the property. The Debtor(s) may move under Fed. R. Bankr. P. 7070, on notice to the holder of such a claim who refuses to release the lien, for an order declaring the lien released and for related relief.

N. LIEN RETENTION. With respect to each allowed secured claim provided for by the Plan, the holder of such claims shall retain the lien securing such claim until the earlier of (i) the underlying debt determined under applicable non-bankruptcy law is paid in full, or (ii) entry of the discharge; provided, however, that entry of the discharge shall not release a lien that secures a claim subject to treatment under 11 U.S.C. § 1322(b)(5). Upon the occurrence of (i) or (ii) above, the holder shall release its lien and provide written evidence of the same to the Debtor(s) within 30 days after (i) or (ii) above. Notwithstanding the foregoing, if this case of the Debtor(s) under Chapter 13 is dismissed or converted without completion of the Plan, the holder of such claim shall retain its lien to the extent recognized by applicable non-bankruptcy law.

**District of Minnesota**

Part 6 (Home Mortgages in Default) and Part 7 (Claims in Default): The creditors will retain liens.

Part 8 (Secured Claims Subject to Modification (“Cramdown”) Pursuant to § 506 (§ 1325(a)(5))) and Part 9 (Secured Claims Excluded from § 506 and Not Subject to Modification (“Cramdown”) (§ 1325(a)) (910 vehicles and other things of value):

Unless otherwise specified in Part 16, the creditors listed in this Part retain the liens securing their allowed secured claims to the extent provided under 11 U.S.C. § 1325(a)(5)(B)(i).

**Northern District of Mississippi**

No provision in the plan

**Southern District of Mississippi**

No provision in the plan

**Eastern District of Missouri**

4.7 All secured creditors shall retain the liens securing their claims until the earlier of the payment of the underlying debt determined under non-bankruptcy law or discharge under § 1328. However, Debtor will request avoidance of non-purchase money liens secured by consumer goods as well as judicial liens which impair exemptions and said creditors will not retain their liens if the court enters an order granting Debtor's request to avoid the liens.

### **Western District of Missouri**

Plan Provisions (end of plan):

#### **E. LIEN RETENTION**

The holder of a secured claim shall retain its lien until the earlier of the payment of the underlying debt determined under non-bankruptcy law or the discharge under 11 U.S.C. §1328. If the case is dismissed or converted without completion of the plan, the lien also shall be retained by such holder to the extent recognized by applicable non-bankruptcy law pursuant to 11 U.S.C. §1325(a)(5)(B).

### **District of Montana**

2(b) (Impaired Secured Claims):

Secured creditors shall retain their liens as provided by 11 U.S.C. § 1325(a)(5)(B).

### **District of Nebraska**

Part 6 A.1 Home Mortgage Claims (including claims secured by real property the Debtor(s) intend to retain):

The mortgage creditor will retain any lien securing its claim.

Part 10 Additional Provisions:

4. Unless otherwise provided in this plan or ordered by the court, the holder of each allowed secured claim provided under this plan will retain the lien securing its claim under 11 U.S.C. § 1325(a)(5)(B).

### **District of Nevada**

8.2 Creditor Duties:

a. Release of Lien-The holder of an allowed secured claim, provided for in § 4.3 or § 4.4, shall retain its lien until the earlier of the payment of the underlying debt as determined under non-

bankruptcy law or discharge under § 1328. After either one of the foregoing events, the creditor shall release its lien and provide evidence and/or documentation of such release to Debtor within 30 days. In the event the creditor fails to timely release the lien, the debtor may request entry of an order declaring that the secured claim has been satisfied and the lien has been released.

### **District of New Hampshire**

General Plan Provisions:

D. Retention of Lien: All secured creditors shall retain the liens securing their claims unless otherwise stated.

### **District of New Jersey**

Part 4 (Secured Claims), d(2):

Where the Debtor retains collateral and completes the Plan, payment of the full amount of the allowed secured claim shall discharge the corresponding lien.

### **District of New Mexico**

Section 4.2 (Claims Secured by Real Property-Lien Stripping, Lien Avoidance, and Valuation), Part A:

Creditors will retain their mortgage liens until discharge under § 1328 or payment in full under nonbankruptcy law, at which time the liens will be avoided.

Part B:

Creditors will retain their liens until discharge under § 1328 or payment in full under nonbankruptcy law, at which time the liens will be avoided.

Section 4.2 (Claims Secured by Personal Property), Part B:

Creditors will retain their liens until discharge under § 1328 or payment in full under nonbankruptcy law, at which time the liens will be avoided.

Section 4.4 (Secured Tax Claims):

Creditors will retain their liens until discharge under § 1328 or payment in full under nonbankruptcy law, at which time the liens will be avoided.

Part 13 (Other Standard Provisions):

**13.3 Lien Retention.** Unless provided otherwise in the Plan, secured creditors will retain their liens until full payment of their claims secured by collateral as determined under applicable non-bankruptcy law.

**Northern District of New York**

Section 3.2 (Request for valuation of security, payment of fully secured claims and modification of undersecured claims):

The holder of any claim listed below as having value in the column headed *Amount of secured claim (net value)* will retain the lien on the property interest of the Debtor or the estate until the earlier of:

- (c) payment of the underlying debt determined under nonbankruptcy law, or
- (d) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

**Eastern District of New York**

Section 3.4 (Request for valuation of security, payment of fully secured claims, and modification of under-secured claims):

This paragraph shall not modify liens underlying any secured claims under non-bankruptcy law absent an order determining such motion, and until either completion of payments under the plan or entry of discharge of the debtor(s), as determined by the Court.

**Western District of New York**

Uses National Form Plan

**Southern District of New York**

Section 3.3 (Avoidance of wholly unsecured liens and valuation of security/bifurcation of liens):

This paragraph shall not modify liens underlying any secured claims under non-bankruptcy law absent an order determining such motion, and either completion of payments under the plan or entry of discharge of the Debtor(s), as determined by the Court.

**Eastern District of North Carolina**

Part 3 (Treatment of Secured Claims):

**3.1 Lien Retention.**

The holder of each allowed secured claim provided for below will

retain the lien on the property interest of the Debtor(s) or the estate until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the Debtor(s) under 11 U.S.C. § 1328.

### **Middle District of North Carolina**

The holder of any claim listed in Section 4 as having value in the column headed Amount of Secured Claim will retain the lien on the property interest of the Debtor or the estate until the earlier of:

- (a) payment of the underlying debt determined under non-bankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

### **Western District of North Carolina**

Section 3.2 (Request for valuation of security, payment of fully secured claims, and modification of undersecured claims), Section 3.3 (Secured claims excluded from 11 U.S.C. § 506), and Section 3.4 (Lien avoidance):

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien on the property interest of the Debtor or the estate until the earlier of:

- (a) Payment of the underlying debt determined under nonbankruptcy law, or
- (b) Discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

### **District of North Dakota**

Part 7 (Home Mortgages in Default) and Part 8 (Claims in Default):

The creditors will retain liens.

Part 9 (Secured Claims-Amount in Plan Controls (§ 1325(a)(5) Cramdown) and Part 10 (Secured Claims Excluded from § 506 (§1325 Hanging Paragraph):

Unless otherwise specified in Part 16, the creditors listed in this Part retain the liens securing their allowed secured claims to the extent provided under 11 U.S.C. § 1325(a)(5).

### **Northern District of Ohio**

Uses National Form Plan

## **Southern District of Ohio**

Part 4 (Secured Claims: Treatment, Timing and Service Requirements):

4.4 Retention of Lien. The holder of any claim listed in Paragraphs 5.1.2(A) or (B), 5.1.3, 5.1.4(A) or (B), and 5.4.1 will retain its lien on the property interest of the Debtor or the Debtor's estate until the earlier of – (a) payment of the underlying debt determined under nonbankruptcy law, (b) discharge of the underlying debt under § 1328, or (c) completion of the Plan—at which time the lien will terminate and be released by the creditor.

## **Northern District of Oklahoma**

Section 3.2.1 Payment of fully secured claims:

The holder of any claim listed below will retain the lien on the property securing such claim until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Section 3.2.2 Requests for valuation of collateral and modification of undersecured claims:

The holder of any claim listed below as having value in the column headed “Amount of Secured Claim” will retain the lien on the property securing such claim until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

## **Eastern District of Oklahoma**

Section 3.2.1 Payment of fully secured claims:

The holder of any claim listed below will retain the lien on the property securing such claim until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Section 3.2.2 Requests for valuation of collateral and modification of undersecured claims:

The holder of any claim listed below as having value in the column headed “Amount of Secured Claim” will retain the lien on the property securing such claim until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

**Western District of Oklahoma**

No provision in plan

**District of Oregon**

Section 4(b) (Treatment of Secured Claims):

Secured creditors' liens shall be treated in accordance with § 1325(a)(5)(B)(i) and must be released when retention ends under that section.

**Eastern District of Pennsylvania**

Section 4(c) (Allowed secured claims to be paid in full: based on proof of claim or pre-confirmation determination of the amount, extent or validity of the claim):

- (1) Allowed secured claims listed below shall be paid in full and their liens retained until completion of payments under the plan.
- (5) Upon completion of the Plan, payments made under this section satisfy the allowed secured claim and release the corresponding lien.

Section 4(d) Allowed secured claims to be paid in full that are excluded from 11 U.S.C. § 506:

- (1) The allowed secured claims listed below shall be paid in full and their liens retained until completion of payments under the plan.

**Middle District of Pennsylvania**

Part 2D (Other secured claims (conduit payments and claims for which a § 506 valuation is not applicable, etc.):

- 1. The allowed secured claims listed below shall be paid in full and their liens retained until the earlier of the payment of the underlying debt determined under nonbankruptcy law or discharge under §1328 of the Code.

Part 2E (Secured claims for which a § 506 valuation is applicable):

These claims will be paid in the plan according to modified terms, and liens retained until the earlier of the payment of the underlying debt determined under nonbankruptcy law or discharge under §1328 of the Code.

### **Western District of Pennsylvania**

#### Section 8.8:

Any creditor whose secured claim is not modified by this plan and subsequent order of court shall retain its lien.

#### Section 8.9:

Any creditor whose secured claim is modified or whose lien is reduced by the plan shall retain its lien until the underlying debt is discharged under 11 U.S.C. § 1328 or until it has been paid the full amount to which it is entitled under applicable nonbankruptcy law, whichever occurs earlier. Upon payment in accordance with these terms and entry of a discharge order, the modified lien will terminate and be released. The creditor shall promptly cause all mortgages, liens, and security interests encumbering the collateral to be satisfied, discharged, and released.

### **District of Rhode Island**

#### (1) REQUEST FOR VALUATION OF SECURITY, PAYMENT OF FULLY SECURED CLAIMS, AND MODIFICATION OF UNDERSECURED CLAIMS UNDER 11 U.S.C. § 506:

For each listed claim, the value of the secured claim will be paid in full with interest at the rate stated below, and the creditor will retain its lien to the value of the secured claim.

### **District of South Carolina**

#### Section 3.2 (Request for valuation of security and modification of undersecured claims):

Unless 11 U.S.C. § 1325(a)(5)(A) or (C) applies, holders of secured claims shall retain liens to the extent provided by section 1325(a)(5)(B)(i). Unless there is a non-filing co-debtor who continues to owe an obligation secured by the lien, any secured creditor paid the allowed secured claim provided for by this plan shall release its liens at the earliest of the time required by applicable state law, order of this Court, or thirty (30) days from the entry of the discharge.

#### Section 3.3 (Other secured claims excluded from 11 U.S.C. § 506 and not otherwise addressed herein):

Unless there is a non-filing co-debtor who continues to owe an obligation secured by the lien, any

secured creditor paid the allowed secured claim provided for by this plan shall satisfy its liens at the earliest of the time required by applicable state law, order of this Court, or upon completion of the payment of its allowed secured claim in this case.

### **District of South Dakota**

Section 5.1 (Claims secured only by Debtor's principal residence) and section 5.2 (claims fully secured by real or personal property, excluding claims in Parts 5.1 and 5.4):

A creditor listed below will retain its lien or other encumbrance on the collateral stated until the creditor's claim is paid in full pursuant to the written agreement between Debtor and the creditor, at which time the lien or other encumbrance will terminate and shall be promptly released by the creditor.

Section 5.3 (Claims partially secured by real or personal property as provided by 11 U.S.C. § 506(a)):

A creditor listed below as having a secured claim will retain its lien or other encumbrance on the collateral stated until the secured claim is paid in full, at which time the lien or other encumbrance will terminate and shall be promptly released by the creditor.

Section 5.4 (Secured claims excluded from 11 U.S.C. § 506):

A creditor listed below will retain its lien or other encumbrance on the collateral stated until the claim is paid in full, at which time the lien or other encumbrance will terminate and shall be promptly released by the creditor.

### **Eastern District of Tennessee**

Section 3.2 (Request for Valuation of Security, Payment of Fully Secured Claims, and Modification of Undersecured Claims) and Section 3.3 (Secured Claim Excluded from 11 U.S.C. § 506):

Each creditor listed below will retain its lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328,

at which time the lien will terminate and be released by the creditor.

### **Middle District of Tennessee**

Section 3.2 (Request for valuation of security and claim modification):

The holder of any claim listed below as secured by any value will retain the lien until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

### **Western District of Tennessee**

Section 7, Chart for secured Claims, contains a statement: “[Retain lien 11 U.S.C. § 1325(a)(5)]”

### **Northern District of Texas**

Section II, General Provisions, D.(3) (Post-Petition Mortgage Arrearage): Mortgage Lenders shall retain their liens.

E.(1) (Secured Claims to be paid by trustee):

Such creditors shall retain their liens on the Collateral described in Section I, Part E.(1) as set out in 11 U.S.C. § 1325(a)(5)(B)(I)

E.(2) (Secured 1325(a)(9) Claims to be paid by the trustee-no cram down):

Such creditors shall retain their liens on the Collateral described in Section I, Part E.(2) until the earlier of the payment of the underlying debt determined under non-bankruptcy law or a discharge under § 1328 and shall receive interest at the rate indicated from the date of confirmation.

### **Eastern District of Texas**

#### 3.7 Lien Retention.

The holder of a lien securing payment of a claim addressed in §§3.1 or 3.2 of this Plan shall retain its lien until the indebtedness secured by such lien is totally satisfied as determined under applicable non-bankruptcy law. The holder of a lien securing payment of any other allowed secured claim that is governed by this Plan shall retain its lien until the earlier of:(1) the total satisfaction of the indebtedness secured by the lien as determined under applicable non-bankruptcy law; or (2) the entry of a discharge order in favor of the Debtor under § 1328(a). In each instance, the provisions of this subsection may be superseded by a subsequent order of the Court.

### **Western District of Texas**

Section 7.5 (Creditors to be Paid Directly by Debtor (Other Than Mortgage Creditors), by a Third Party, or by a Co-Debtor):

Creditors within this class shall retain their liens on the collateral that is security for the claim until the claim has been paid in full as determined by the note and/or applicable nonbankruptcy law.

Section 7.8 (Secured Claims: Treatment of Claim and Motion to Value Collateral Pursuant to § 506; and 910 Day Claims/1 Year Claims):

Creditors within this class shall retain their liens on the collateral that is security for their claims until the earlier of: (1) the date the underlying debt, as determined by non-bankruptcy law, has been paid in full; or (2) the date discharge is entered under § 1328. If the case is dismissed or converted without completion of all Plan payments, the liens shall be retained by the creditors pursuant to applicable non-bankruptcy law.

Section 7.9 (Wholly Unsecured Claims):

Upon entry of a Discharge Order, the holder of the lien is required to execute and record a full and unequivocal release of its liens, encumbrances and security interests secured by the real property and to provide a copy of the release to the Trustee, Debtor, and Debtor's counsel.

...

If the case is dismissed or converted without completion of all Plan payments, the liens shall be retained by the creditors pursuant to applicable non-bankruptcy law.

Section 7.10 (Motions to Avoid Lien Pursuant to § 522(f)):

If the case is dismissed or converted without completion of all Plan payments, the liens shall be retained by the creditors pursuant to applicable non-bankruptcy law.

### **Southern District of Texas**

8.C.ii (Secured Claim for Claim Secured Only by a Security Interest in Real Property that is the Debtor(s)' Principal Residence (Property to be Retained)):

- (i) Upon the Debtor(s)' completion of all payments set forth in this Plan, the holder of the lien is required to execute and record a full and unequivocal release of its liens, encumbrances and security interests secured by the principal residence and to provide a copy of the release to the Debtor(s) and their counsel.

12. (Modification of Stay and Lien Retention):

The holder of an Allowed Secured Claim that is proposed to be paid under this Plan shall retain its lien until the earlier of (i) the payment of the underlying debt as determined under non-bankruptcy law; or (ii) the entry of a discharge under 11 U.S.C. § 1328. The holder of a claim secured by a valid lien may enforce its lien only if the stay is modified under 11 U.S.C. § 362 to allow such enforcement.

**District of Utah**

Uses National Form Plan

**District of Vermont**

Uses National Form Plan

**Eastern District of Virginia**

No provision in plan

**Western District of Virginia**

Uses National Form Plan

**Eastern District of Washington**

Section 3.1.7:

Each creditor shall retain its lien or other interest in property vesting in the debtor until payment in full of the underlying debt or discharge under 11 U.S.C. § 1328.

**Western District of Washington**

IV.C. (Secured Claims):

Secured creditors shall retain their liens until the earlier of payment of the underlying debt, determined under nonbankruptcy law, or discharge under 11 U.S.C. § 1328.

**Northern District of West Virginia**

Part 3 (Treatment of Secured Claims):

Secured Claims. Each holder of an allowed secured claim, which is paid in full during the life of the plan and for which the collateral is not surrendered, shall retain the lien securing the claim until the earlier of: (1) payment of the underlying debt as determined under non-bankruptcy law; or (2) discharge. Should this case be dismissed or converted before the plan is completed, the lien securing an allowed secured claim shall be retained by the holder to the extent recognized by non-bankruptcy law.

### **Southern District of West Virginia**

#### Part 3 (Treatment of Secured Claims):

Secured Claims. Each holder of an allowed secured claim, which is paid in full during the life of the plan and for which the collateral is not surrendered, shall retain the lien securing the claim until the earlier of: (1) payment of the underlying debt as determined under non-bankruptcy law; or (2) discharge. Should this case be dismissed or converted before the plan is completed, the lien securing an allowed secured claim shall be retained by the holder to the extent recognized by non-bankruptcy law.

### **Eastern District of Wisconsin**

Section 3.2 (Request for valuation of security and modification of undersecured claims held by non-governmental entities) and Section 3.3 (Secured claims excluded from 11 U.S.C. § 506 and payment of fully secured claims):

The holder of any allowed secured claim having a value greater than \$0, as listed below in the *Amount of secured claim* column, will retain the lien on the property interest of the debtor or the estate until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien on the debtor's and the estate's interest in the property that secures the claim (*Collateral*) is terminated and deemed released by the creditor.

### **Western District of Wisconsin**

Section III.A. (Secured Claims) contains the following language: [Retain Liens pursuant to 11 U.S.C. § 1325(a)(5)]

### **District of Wyoming**

Uses National Form Plan

### **District of Columbia**

Section 4.6 (Secured claims that are to be paid outside of the Plan):

The holder of the claim shall retain its lien (or right of setoff) after completion of the Plan and entry of any discharge.

Part 5: Valuation of Security Interests and Treatment of Liens, section 5.1 (General Provisions):

With respect to each allowed secured claim provided for in the Plan, the holder of such secured claim will retain the listed lien on the indicated property interest until the earliest of the following:

- a) Payment of the underlying debt determined under nonbankruptcy law, or
- b) Discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor, or
- c) If the Debtor(s) cannot receive a discharge as provided in 11 U.S.C. § 1328(f), the notice of Plan Completion.

If the case is dismissed or converted without completion of the Plan, liens shall also be retained by the holders to the extent recognized under applicable nonbankruptcy law.

**NACTT PRESENTATION**

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# CLAIMS SECURED BY PERSONAL PROPERTY

July 7, 2022

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**Points of Focus in this Presentation**

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Late Filed Claims	Mobile Homes
Personal property leases	Hanging paragraph
Lien retention	Compelling surrender

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**PANELISTS**

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Michael Watton

Pamela Simmons-Beasley

Dennis LeVine



| Brock & Scott

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**Late Filed Claims – is there a remedy in Chapter 13?**

**Calendar the Claims Bar Date – and Do Not Miss it!**

- To be “allowed” and receive payment from the Chapter 13 Trustee, secured and unsecured creditors are required to file a proof of claim. Rule 3002(a)
- In both chapter 13 and chapter 7 cases, a proof of claim is timely if filed no later than 70 days after the order for relief or the date of conversion. Rule 3002(c)
  - amended in 2017
  - 180 days for Govt. claims
- Remember to redact “Personal Identifying Information” in all Court Filings

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**Late Filed Claims – is there a remedy in Chapter 13?**

**Filing a claim in Chapter 13 cases as soon as possible has several benefits –**

- More prompt distribution of adequate protection payments
- Allows creditor to amend claim to unsecured where the Debtor later surrenders collateral

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**Late Filed Claims – is there a remedy in Chapter 13?**

**In very limited circumstances creditors may request up to a 60-day extension**

- A creditor can move to extend the time to file a proof of claim by up to 60 days. An extension may be granted if (a) notice was insufficient to the creditor because the debtor failed to timely file the list of creditors’ names and addresses under Rule 1007(a), or (b) notice was insufficient to the creditor and notice was mailed at a foreign address. Rule 3002(c)(6)
- Creditor cannot involve excusable neglect under Rule 9006 (b)(1).

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**Late Filed Claims – is there a remedy in Chapter 13?**

**Does a Secured Creditor have to File a Proof of Claim?**

- YES, secured creditors now must file a Claim in Chapter 13 cases
  - Failure to file a claim does not impact the Secured Creditor's lien

**What if we miss the POC filing deadline in Chapter 13?**

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**Late Filed Claims – is there a remedy in Chapter 13?**

Late-filed claims can disrupt the orderly administration of cases. The failure to file a timely proof of claim in a chapter 13 case is grounds for disallowance of the claim, and the creditor will not receive distribution from the Trustee.

BUT, when a Chapter 13 Plan provides to pay a secured claim in the Plan, however, the Debtor or Trustee generally want to pay the claim. Therefore, when the creditor misses the claims bar date some of the following alternatives are available -

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**Late Filed Claims – is there a remedy in Chapter 13?**

- Creditor can file an untimely proof of claim, and no party in interest objects
  - NOTE - a creditor in chapter 13 cannot invoke excusable neglect under Rule 9006(b)(1) to allow a tardy proof of claim because it is governed by Rule 3003
- A party files a Motion to allow a late filed claim

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**Late Filed Claims – is there a remedy in Chapter 13?**

- If a creditor does not file a timely proof of claim, the debtor or trustee may file a proof of claim within 30 days after the bar date. Rule 3004
  - Debtor may choose to seek an extension of the deadline to file a claim under Rule 3004, which may be enlarged under Rule 9006(b)(1) for excusable neglect
    - Only available to the Debtor
  - So even though Rule 9006(b)(1) is not available to a creditor, it is available to the debtor because the debtor can file a claim for a secured creditor pursuant to Rule 3004 (not 3002). The debtor may be incentivized to do so on a vehicle loan

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**Late Filed Claims – is there a remedy in Chapter 13?**

Other creditor arguments or strategies –

- Late filed claim is an informal proof of claim
- Claim not subject to discharge if claim not listed in Schedules
- Filing a Motion for stay relief

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**Mobile Homes – Personal or real Property?**

- Why Important
  - Exemption Plan For Debtor, and Modification Rights on secured claim
- Exemptions
  - State Law Dependent
    - Contrast Colorado v. Missouri Law (examples)
      - Affixed to real estate key in most states
  - Modification Under 1322(b)(2)
    - "...secured only by a security interest in real property that is debtor's principal residence..."
  - State Law Dependent
    - Appendix TOOL – state by state
    - Usually "affixed" standard to R/e and surrender of certificate of title

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### The Hanging Paragraph – Financing within One Year

The so-called “hanging paragraph” in Section 1325 provides –

For purposes of paragraph (5) [which deals with plan treatment of allowed secured claims], section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, *the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.*

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### The Hanging Paragraph – Financing within One Year

When is the protection of the “hanging paragraph” NOT available to a motor vehicle creditor -

- Loan made more than 910 days prior to BK filing
- Not for Personal Use
- Refinanced not PMSI
- Wrap in negative equity
- Loan includes gap insurance

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### The Hanging Paragraph – Financing within One Year

Courts are split on whether a vehicle **intended for non-personal (i.e. business) use or subject to a non- PMSI loan**, and acquired within one year of the bankruptcy filing, is protected from bifurcation by this section.

- if the first provision of the hanging paragraph generally applies to all motor vehicles (and prohibits modification only when the collateral was purchased within 910-days of the petition date *and* when the collateral was acquired for the personal use of the debtor), the second provision applies to “any other thing” (i.e. all collateral other than motor vehicles), or
- if the first provision of the hanging paragraph narrowly applies to motor vehicles acquired for the debtor’s personal use, the second provision must apply to “any other thing”, including motor vehicles not acquired for the debtor’s personal use.

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**The Hanging Paragraph – Financing within One Year**

The majority of courts allow a debtor to cram down value of a vehicle acquired for business purposes within one year of the petition

*In re Parish*, 2006 WL 1679710 (Bankr. M.D. Fla. 2006)  
*In re Balsinde*, 2007 WL 4247642 (Bankr. S.D. Fla. Nov. 29, 2007)  
*In re Hickey*, 370 B.R. 219 (Bankr. D. Neb. 2007)  
*In re Ellegood*, 362 B.R. 696, 704 (Bankr. E.D. Va. 2007)  
*In re Ford*, 2008 WL 1925153, \*5 (Bankr. E.D. Wis. April 29, 2008)  
*In re Horton*, 398 B.R. 73 (Bankr. S.D. Fla. 2008)  
*In re Thompson*, 2009 WL 1758757 \*4 (Bankr. N.D. Ohio June 17, 2009)  
*In re McPhlamy*, 566 B.R. 382 (Bankr. S.D. Texas 2017)

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**The Hanging Paragraph – Financing within One Year**

A minority of courts, however, have ruled that a vehicle financed within one year that does not qualify for protection under the 910-day rule is protected under the second section of the hanging paragraph

*In re Sandifer*, 603 B.R. 648, 649-50 (Bankr. M.D. Ga. 2019)  
*In re Book*, 18-bk-03993-CPM (Bankr. M.D. Fla. 2019)  
*In re Littlefield*, 388 B.R. 1 (D. Maine 2008)  
*In re Tanguay*, 427 B.R. 663 (Bankr. E.D. Tenn. 2010)

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**Leases vs. Secured Transactions – Rent to Own**

The curious cases of Rental Centers and the reengineering of rent to own

- Autos
- Other personal property

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### Leases vs. Secured Transactions – Rent to Own

#### Look at State law

- Rent to own personalty schemes can go a variety of bad ways for the creditor.
- Creditors seek lease... executory contract status.
- Debtor seeks to re-characterize as an installment sales contract secured by the personal property.
  - If Debtor wins, debtor then can try to make the claim unsecured (e.g. old Sears type cases). See, *Hanack v. Renshaw*, 421 B.R. 738 (Bankr. W.D. Okla. 2000) (term "all merchandise" in a credit card application was too vague to sufficiently describe collateral and therefore did not create a security interest)

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### Lien Retention and Satisfaction

11 U.S.C. § 1325(a)(5)(B) provide that if a debtor proposes to retain property and the holder of a claim secured by the property has **not** accepted the plan, the plan must provide that the holder of the allowed secured claim retain its lien until the underlying debt is paid under non-bankruptcy law, or until the debtor receives a discharge, whichever occurs first.

Section 1325(a)(5)(B)(i)(II) provides that if the case is **dismissed or converted before the plan is completed**, the lien is retained to the extent recognized by applicable non-bankruptcy law.

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### Lien Retention and Satisfaction

The national form plan contains language regarding secured creditors' retention of liens. Most districts also have express language in their form plans regarding secured creditors' retention of liens

Some districts have express language requiring secured creditors to satisfy their liens after payment.

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Lien Retention and Satisfaction

Santander Consumer USA, Inc. v. Donnadio (In re Donnadio), 608 B.R. 507 (B.A.P. 6th Cir. 2019)(plan should not have been confirmed because it did not contain specific language providing that the creditor retained its lien, as required by section 1325(a)(5)(B)(i)(I))

In re Foley, 606 B.R. 790 (Bankr. E.D. Wis. 2019) (precursor to Pagan) (declining to consider non-standard provision providing for retention of liens until "payment in full of the secured portion of their proof of claim," but noting that the language was unclear, stating, "the court has significant questions over whether the language used accomplishes the goal expressed by debtor's counsel at the confirmation hearing")

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Lien Retention and Satisfaction

Creditors who refuse to release liens after payment in full under the terms of the plan may be subject to sanctions

In re Simmons, 623 B.R. 288 (Bankr. D.S.C. 2021) (the debtors' confirmed plan valued a claim secured by a mobile home. The plan contained language stating that secured creditors would retain liens pursuant to 11 U.S.C. § 1325(a)(5)(B) and also stated, "Secured creditors paid the full secured claim provided for by this plan shall timely satisfy and [sic] liens in the manner required by applicable law or order of this Court." The debtors completed their plan and received a discharge. After the creditor failed to release its lien, the debtors filed a motion for contempt. The creditor did not appear at the hearing on the motion, and the Court entered an order compelling the release of the lien and ordering the secured creditor to pay the debtors' attorney fees and costs incurred in connection with the motion for contempt. The order imposed future sanctions if the creditor did not timely comply. The creditor did not comply and the Court issued a Rule to Show Cause. The creditor did not appear at the hearing on the Rule to Show Cause. The Court required the creditor to pay the debtor's attorney fees and costs in connection with the motion for contempt and Rule to Show Cause, per-day sanctions for noncompliance with the Court's first order, and imposed additional per-day sanctions until the creditor fully complied with the Court's orders)

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Lien Retention and Satisfaction

Where debtor not entitled to a discharge, the debtor may be required to pay the full amount of the debt under non-bankruptcy law

Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885 (B.A.P. 10th Cir. 2010) (because the debtor was not eligible for a discharge, section 1325(a)(5)(B)(i) required the plan to provide for the creditor to retain its lien until payment in full or until the lien is extinguished, both under nonbankruptcy law); see also In re Lilly, 378 B.R. 232 (Bankr. C.D. Ill. 2007)

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**Compelling Surrender of Personal Property in Chapter 13**

*Failla v. Citibank, N.A.*, 2016 WL 5750666 (11<sup>th</sup> Cir. 2016)

Debtor stated he would surrender his home, but after entry of the bankruptcy discharge he continued to fight the foreclosure in state court. The creditor moved in bankruptcy court to compel the debtor to stop opposing the foreclosure action, arguing the debtor's action was contrary to the "surrender" of the property.

Bankruptcy court granted the creditor's motion and indicated that if the debtor did not comply with its order to stop defending the foreclosure and surrender the property, it might vacate their discharge.

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**Compelling Surrender of Personal Property in Chapter 13**

The Eleventh Circuit in *Failla* affirmed, holding

- The word "surrender" as used in the Statement of Intention and § 521 required the Chapter 7 debtor to relinquish all rights to the collateral
- the Bankruptcy Code gave the Court authority to require the Debtors to "surrender" their house to the mortgage holder – which meant the debtor could no longer opposing the mortgage holder's foreclosure action in state court
- the bankruptcy court has authority under § 105 to deny the discharge where the debtor fails to complete their selection of surrender in the debtor's statement of intention

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**Compelling Surrender of Personal Property in Chapter 13**

*In re Failla* (11<sup>th</sup> Cir. 2016)

The Eleventh Circuit rejected several of the Debtors' arguments –

- only the Trustee can compel surrender of property
- the remedy of stay relief in Sections 521 and 362 is the creditor's sole remedy for the Debtors' failure to surrender property
- Bankruptcy Courts do not have authority to compel surrender

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### Compelling Surrender of Personal Property in Chapter 13

Where the Chapter 13 Plan provides for surrender of a vehicle, a lender can do the following-

- Prior to confirmation, the creditor can file an objection to confirmation and argue that the Debtor must surrender the vehicle as a condition to the Court confirming the Plan
- Where the Plan already has been confirmed, the creditor can file a Motion to dismiss the case and argue that the failure to surrender the vehicle is a material default in the confirmed Plan

In either case, prior to filing such a Motion the secured creditor should contact the Debtor's attorney to advise such a Motion will be filed unless the debtor makes arrangements for surrender of a vehicle to the lender.

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### SPEAKER CONTACT INFORMATION

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## **Speaker Biographies**



**Pamela Simmons-Beasley** received her BA from Emory University in Atlanta, Georgia and her law degree from the University of South Carolina. Before accepting appointment as a Standing Chapter 13 Bankruptcy Trustee in January 2016 for the District of South Carolina, she practiced primarily in the field of consumer bankruptcy law for 21 years. She is a member of the SC Bar, SC Bankruptcy Law Association (SCBLA), and the J. Bratton Davis Inn of Court. She is a past president of the SCBLA and recipient of the William E. S. Robinson Public Service Award of the SCBLA. This award was given in recognition of her volunteerism with the CARE Program, which is a national initiative of the U.S. Bankruptcy Court designed to provide education to high school and college students on the consequences of consumer credit abuse through on-site presentations. Since joining NACTT, she has served on the ACH/EFT Committee and co-chaired the Auto Creditors' Committee. She currently serves as co-chair of the Inclusion and Acceptance Committee.



**Dennis LeVine**, a native of Tampa, is a Managing Partner in the firm. He focuses his statewide practice on bankruptcy litigation and creditors' rights. Dennis is one of only seven attorneys in Florida to be Board Certified in both consumer bankruptcy law and business bankruptcy law by the American Board of Certification (ABC). He is also rated AV Preeminent by Martindale-Hubbell, the highest rating a lawyer can receive, which indicates a demonstration of the highest professional and ethical standards. Prior to joining the firm, Dennis managed and operated his own firm for 19 years, representing creditors in all Bankruptcy Courts as well as creditors in commercial and consumer collections actions throughout the State of Florida. Dennis received his undergraduate degree from Tulane University where he graduated cum laude. He then went on to earn his Juris Doctor from George Washington University's National Law Center. Dennis is licensed to practice in the federal courts in the Northern, Middle and Southern Districts of Florida.



**Michael J. Watton**, Esq. is the senior partner at Watton Law Group, S.C. He is admitted to practice in Wisconsin, Missouri, Colorado, Utah, Florida, Ohio, New York, Virginia, Arkansas, Kansas, and Arizona. Watton Law Group has six (6) offices in the United States and focuses on helping and protecting consumer debtors in bankruptcy. Mr. Watton received his undergraduate degree in finance from the University of Florida (1987) and his earned his law degree at the Duke University School of Law (1990). He is AV rated by Martindale Hubbell. He is admitted to practice in federal courts in the Eastern and Western Districts of Wisconsin, Eastern and Western Districts of Missouri, the District of Kansas, the Southern District Illinois, the District of Colorado, the District of Utah, the District of Arizona, the Eastern and Western Districts of Arkansas, the Eastern District of Virginia and the United States 7<sup>th</sup>, 8<sup>th</sup>, and 10<sup>th</sup> Circuit Courts of Appeals. Mr. Watton has been married for over 30 years and has three driven, successful children.