Nos. 16-1346, 16-1347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re DERRICK ALLEN and TERESA STEVENS HARLING; In re JEFFREY JEREL RHODES
Debtors

LVNV FUNDING, LLC,
Creditor-Appellant

-v.-

DERRICK ALLEN and TERESA STEVENS HARLING; JEFFREY JEREL RHODES
Debtors- Appellees

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF THE *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTORS-APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

LVNV Funding, LLC, et al v. Harling, No. 16-1346
LVNV Funding, LLC, v. Rhodes, No. 16-1347

Pursuant to FRAP 26.1 and Fourth Circuit Local Rule 26.1(b), Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**.

If yes, identify any trustee and the members of any creditors' committee.
Pamela Simmons-Beasley. There is no creditors' committee.

This 22nd day of August, 2016.

/s/ Tara Twomey

Tara Twomey, Esq.

Attorney for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization of approximately 3,000 consumer bankruptcy attorneys practicing throughout the country. NACBA is dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors, and to those ends it provides assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. In particular, NACBA submits amicus curiae briefs when in its view resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case. NACBA also strives to influence the national conversation on bankruptcy laws and debtors' rights by increasing public awareness of and media attention to the important issues involved in bankruptcy proceedings.

The result in the cases at bar will affect the administration of every chapter 13 case and chapter 11 in the Fourth Circuit. The position advanced by appellant, LVNV Funding, LLC ("LVNV"), would make every reorganization case more burdensome and expensive to debtors without advancing any valid public policy or principle.

CONSENT

Each of the parties has consented to the filing of this amicus brief by the National Association of Consumer Bankruptcy Attorneys.

STATEMENT UNDER FED. R. APP. P. 29(c)(5)

No party's counsel authored this Amicus Curiae Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Under principles of res judicata, confirmation of a chapter 13 plan bars relitigation of any issue "actually litigated by the parties" and any issue "necessarily determined by the confirmation order." Confirmation of the Harlings' and Rhodes' plans did not expressly or impliedly determine the allowability of LVNV's facially invalid proof of claim. LVNV's assertions to the contrary are barred by clauses in the plan providing for distributions only to holders of allowed claims and reserving to the post-confirmation period parties' right to object to

claims – clauses whose binding effect is established by the very principles of preclusion law on which LVNV relies.

ARGUMENT

As LVNV states (Brief, p.1), the facts in these chapter 13 cases are uncontested, and they are simple. To take the *Harling* case as an example, Derek and Theresa Harling filed a joint chapter 13 petition on June 26, 2015. They filed their chapter 13 plan on July 9, 2015 (within 14 days of the petition, as required by Bankruptcy Rule 3015). The plan was amended on August 10, 2015, to resolve an issue with a secured creditor. In substance the plan, like many chapter 13 plans, provided that the debtors' income and assets for the succeeding five years would be dedicated to making specified payments to creditors – first to the secured and administrative creditors and then a small payment (approximately 1%) to unsecured creditors (which LVNV purports to be).

Under Bankruptcy Rule 3002(c) the deadline for filing claims in the *Harling* case was 90 days after the first meeting of creditors, or October 26, 2015.[1] The confirmed plan contained the following provisions: In a paragraph entitled "NOTICE TO AFFECTED CREDITORS AND PARTIES IN INTEREST" the plan stated, "Failure to object may constitute an implied acceptance of and consent

[1] Governmental creditors had 180 days after the order for relief (ordinarily the date of the filing of the petition) to file claims. Fed. R. Bankr. P. 3002(c) and (c)(1).

to the relief requested in this document [the plan]." Plan, § I. In a paragraph entitled "PLAN DISTRIBUTION TO CREDITORS," it was stated, "Confirmation of this plan does not bar a party in interest from objecting to a claim." Plan, § IV. In a paragraph entitled "General Unsecured Creditors" it was stated, "General unsecured creditors shall be paid allowed claims pro rata by the trustee to the extent that funds are available after payment of all other allowed claims. The debtor does not propose to pay 100% of general unsecured claims." Plan, § 4.[2] These provisions are part of the form chapter 13 plan required by local bankruptcy rule or practice in South Carolina. *See* Ex. A to South Carolina Local Bankruptcy Rule 3015-1.

In the *Harling* case, LVNV was not scheduled as a creditor. It filed a proof of claim as an unsecured creditor on July 8, 2015, the day before the plan was filed and well before the deadline for filing objections to confirmation. Its brief does not dispute that the obligation on which its purported claim is based is unenforceable on its face, barred by the statute of limitations. LVNV also does not dispute that it failed to file an objection to confirmation of the plan. Indeed, there were no objections to confirmation, and the plan was confirmed by order of the

[2] This is all the plan said about the treatment of general unsecured claims. The form merely gives the debtor the opportunity to state whether unsecured creditors "do" or "do not" receive 100% of their claims. This is generally done for the purpose of determining whether the projected disposable income test of section 1325(b) applies. 11 U.S.C. § 1325(b)(1).

bankruptcy court on August 20, 2015. Ten days after the confirmation order was entered, debtors' counsel filed an objection to the facially invalid LVNV claim.

LVNV's response, that an objection to its claim was precluded by confirmation of the Harlings' chapter 13 plan, was rejected by the bankruptcy court in a well-reasoned and thoughtful opinion. *In re Harling*, 541 B.R. 330 (Bankr. D. S.C. 2015). The Bankruptcy Court relied primarily on a reservation of rights clause in the Harlings' plan.

The bankruptcy court below was wholly correct in finding that the clause, providing that "Confirmation of this plan does not bar a party in interest from objecting to a claim," is valid and binding as written under the very principles of res judicata on which LVNV relies. Furthermore, beyond any reservation of rights, confirmation of a chapter 13 plan does not have preclusive effect on a party's right to object to a proof of claim filed by an unsecured creditor.

I. PRINCIPLES OF RES JUDICATA ON WHICH LVNV RELIES PRECLUDE ITS CHALLENGE TO THE HARLING PLAN.

Bankruptcy plans are binding and their provisions are entitled to res judicata effect. As the Supreme Court held just last year:

> When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. 11 U.S.C. §1327(a). Confirmation has preclusive effect, foreclosing relitigation of "any issue actually litigated by the parties and any issue necessarily determined by the confirmation order." 8 Collier [on Bankruptcy, 15th ed.] ¶1327.02[1][c], at 1327–6; see also *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 275, 130 S.Ct. 1367, 176 L.Ed. 2d 158 (2010)(finding a confirmation order "enforceable and binding" on a creditor where the creditor had notice of the error and failed to object or timely appeal.).

Bullard v. Blue Hills Bank, 135 S.Ct. 1686, 1692, 191 L.Ed.2d 621 (2015).

LVNV, however, stands preclusion law on its head when it argues that confirmation of the Harlings' chapter 13 plan barred a subsequent objection to the LVNV proof of claim. First, the plan provided that distributions would be made only to unsecured creditors holding allowed claims. This direction accords with Bankruptcy Rule 3021, which authorizes distributions only to "creditors whose claims have been allowed." Generally, an "allowed" claim is one that has not been objected to. 11 U.S.C. § 502(a). As further discussed below, no unsecured claims had been allowed or disallowed at the time of confirmation, as the time for creditors to file claims – as well as the time for filing objections -- had not run. The plan, therefore, rationally advised creditors that the allowance of claims would

be reserved to the post-confirmation period and that "Confirmation of this plan does not bar a party in interest from objecting to a claim."

Moreover, allowance of general unsecured claims was not an issue "actually litigated by the parties" or "necessarily determined by the confirmation order," to use the Supreme Court's formulation in *Bullard v. Blue Hills Bank, supra,* 135 S. Ct. at 1692. As further discussed below, in chapter 13 cases, like the Harlings', the allowance of unsecured claims is not "actually litigated" by the parties in connection with confirmation, and is not "necessarily determined by the confirmation order." The reservation of rights clause in the plan confirmed this: "Confirmation of this plan does not bar a party in interest from objecting to a claim."

If res judicata and the binding effect of a chapter 13 plan have any true application to the issues in this case, they bar LVNV from challenging these provisions. LVNV does not contend that it failed to receive notice of the plan in time to object. LVNV instead argues that the reservation of rights was invalid as not sufficiently "specific." If so, it should have filed an objection to the plan, as the bankruptcy court correctly observed. *Harling*, 541 B.R. at 337. Nor does LVNV explain why it should be rewarded for lying in wait until after plan confirmation before contending, as it does, that provisions limiting distributions to

"allowed claims" and reserving claim objections to the post-confirmation period are invalid or ineffective.

In any event, even if the provisions were invalid or ineffective – and they are not, as discussed below – their inclusion in a confirmed chapter 13 plan precludes a subsequent challenge by a creditor who received notice of the plan in time to object. In *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 176 L.Ed. 2d 158 (2010), the Supreme Court held that the treatment of a creditor's claim in a confirmed chapter 13 plan was entitled to preclusive effect, even if the plan treatment were invalid both as a matter of substance (failure to prove that a student loan imposed an undue hardship on the debtor or the debtor's dependents) and procedure (failure to do so by commencing an adversary proceeding). Analyzing the issues under principles of res judicata, a unanimous Supreme Court said that if the creditor had wished to dispute the plan provision, the creditor should have raised the issue by a timely objection to confirmation. LVNV's contention that the plan provisions in these cases are invalid or ineffective is precluded by the very principles of res judicata on which it relies. *See Harling*, 541 B.R. at 337 (recognizing that LVNV's position is inconsistent with *Espinosa*); *see also In re Russo-Chestnut,* 522 B.R. 148 (Bankr. D. S.C. 2014) ("By failing to object to the Reservation Language, no matter how general or specific, before confirmation, a

creditor would itself be barred by *res judicata* from disputing its effectiveness.");

In re Hearn, 337 B.R. 603 (Bankr. E.D. Mich. 2006).

II. EVEN IN THE ABSENCE OF A RESERVATION OF RIGHTS, CONFIRMATION OF A CHAPTER 13 PLAN SHOULD NOT PRECLUDE OBJECTIONS TO UNSECURED CLAIMS, AS CONFIRMATION DOES NOT ENTAIL THEIR ALLOWANCE OR DISALLOWANCE

Even if LVNV's challenge in the bankruptcy court and on this appeal were not barred by the principles of res judicata on which it relies, there is no merit to LVNV's contention that provisions like those in the *Harling* plan are invalid or ineffective because not sufficiently "specific." To quote again the words of the Supreme Court's recent opinion, plan confirmation is preclusive of matters "actually litigated by the parties" or "necessarily determined by the confirmation order." *Bullard,* 135 S.Ct. at 1692. Applying these principles to the facts of the *Harling* case, the parties did not "actually litigate" a claims objection and nothing in the Harlings' chapter 13 plan expressly or impliedly "determined" any issue relating to the allowance of disallowance of unsecured claims.

In the bankruptcy court, LVNV relied strongly on this Court's decision in *Covert v. LVNV Funding, LLC,* 779 F.3d 242 (4th Cir. 2015), which held that confirmation of a chapter 13 plan precluded former chapter 13 debtors from pursuing post-confirmation claims against a creditor under the Fair Debt Collection Practices Act ("FDCPA") and related state laws. The *Harling* Bankruptcy Court

determined, 541 B.R. at 334, that there was no clause in the *Covert* chapter 13 plan reserving the right the object to claims post-confirmation, and it distinguished *Covert* principally on that basis. We submit, in addition, that *Covert* is inapposite because the claims that the *Covert* debtors proposed to challenge in their FDCPA lawsuit "were allowed" in their chapter 13 plans and, in the words of this Court, "each Plaintiff made payments on these claims."

The differences from the situation at bar are material. Here, general unsecured claims had not been allowed or disallowed at the time of plan confirmation in *Harling*. They could not have been, because the period for their filing had not yet run. The debtors in *Covert*, unlike the debtors here, were not objecting to claims within the framework provided by the Code. Instead the *Covert* debtors were pursuing affirmative collateral claims (state law and FDCPA) long after LVNV's claims had been allowed. The *Covert* debtors did not seek reconsideration of LVNV's allowed claims as permitted by section 502(j) of the Bankruptcy Code.[3] Moreover, the Harlings' objection to LVNV's proof of claim would not benefit them personally, because they will distribute the same amount to creditors over the plan period whether or not LVNV is in the pool. Without

[3] Section 502(j) specifically permits the allowance or disallowance of claims to be reconsidered for cause. 11 U.S.C. 502(j). This section contains no time limit for seeking reconsideration, and the text of the statute indicates that such requests may be made after confirmation (i.e., after distributions to creditors).

LVNV's claim, there are simply fewer creditors with allowed unsecured claims to share in the distribution.

LVNV asserts that the insufficiency of a "general reservation of rights" has been "endorsed by the majority of courts outside the Fourth Circuit." (Br. p. 18) In support, in its Summary of Argument (LVNV Br. at 6) and its Argument (Br. at 18-24), LVNV cites several chapter 11 decisions that it contends support its argument. A short description of each of the cases demonstrates how little relevance these cases have to the facts at bar: [4]

- *D&K Properties v. Mutual of New York,* 112 F.3d 257 (7th Cir. 1997). This was a chapter 11 case where the claim at issue had been specifically allowed during the bankruptcy proceedings, and the debtor's assets liquidated and distributed. The circuit court affirmed the lower courts' finding that a general reservation of rights clause was ineffective to allow the debtor to challenge an allowed claim that had been "actually litigated."[5] Here, LVNV's claim was neither allowed nor "actually litigated."

[4] We assume, *arguendo,* that these cases have survived the Supreme Court's decision in *Espinosa.* As discussed above, under *Espinosa,* LVNV had an obligation to object to a general reservation of rights as insufficiently "specific."
[5] Subsequent Seventh Circuit authority recognizes that "plan provisions identifying causes of action by type or category are not mere blanket reservations." *See, e.g., Kmart Corp. v. Intercraft Co. (In re Kmart Corp.),* 310 B.R. 107, 124 (Bankr. N.D. Ill. 2004), construing *P.A. Bergner & Co. v. Bank One (In re PA Bergner & Co.),* 140 F.2d 1111, 1117 (7th Cir. 1998).

- *In re United Operating LLC,* 540 F.3d 251 (5th Cir. 2008), was also a chapter 11 case. The debtor, post-confirmation, sought to assert claims of mismanagement that it contended took place during the chapter 11 proceedings. This is an example of many cases that have barred a former debtor from post-confirmation assertions of mismanagement during its bankruptcy case as "necessarily determined by the confirmation order," even in the face of a general reservation of rights clause. As discussed below, and particularly in districts that confirm chapter 13 plans before the claims bar date, plan confirmation does not "necessarily determine" the allowance of a claim.
- *Browning v. Levy,* 283 F.3d 761 (6th Cir. 2002), was another chapter 11 case in which a debtor, post-confirmation, attempted to pursue legal malpractice and related claims against its representatives in the bankruptcy proceedings. Like *Covert*, *Browning* involves a collateral proceeding raising claims that the court held should have been raised in the bankruptcy case. *Browning* is therefore inapplicable to the cases at bar, which involve claim objections in the bankruptcy court, not collateral lawsuits.
- *Harstad v. First American Bank,* 39 F.3d 898 (8th Cir. 1994), also a chapter 11 case, involved post-confirmation avoidance claims that the debtor sought to assert for his own personal benefit post-confirmation. The court concluded that the debtor lacked standing to bring a preference suit more than two and a half

years after confirmation of his plan. Additionally, the court found that such an action would provide no benefit to the estate. As in many similar cases, including *Covert,* the Court expressed concern that the debtor's failure to identify or assert the claims pre-confirmation would permit him to benefit from them, to the detriment of his creditors who had never been informed of their existence and had agreed to a plan that did not deal with them. By contrast, the primary beneficiaries of the debtors' objection to LVNV's claim in this case are those unsecured creditors with valid claims.[6]

- LVNV cites a Tenth Circuit chapter 11 case, *In re Mako,* 985 F.2d 1052 (10th Cir. 1993), at pp. 22-23 of its brief but not in the Summary of Argument. In *Mako*, the question revolved around whether a third party—the purchaser of the debtor's assets—could enforce a reservation of claims clause in the chapter 11 plan. The court affirmed the district court's determination that the third party did not have standing to pursue the avoidance action.[7] *Mako* is simply inapposite to the case at bar.

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[6] Debtors may also benefit from the disallowance of invalid claims depending on the structure of the chapter 13 plan and the amount of the allowed claims filed by unsecured creditors.

[7] Subsequent decisions from within the Tenth Circuit have recognized that general reservation language is sufficient to preserve claims. *See Connolly v. City of Houston (In re Western Integrated Networks LLC),* 322 B.R. 156 (Bankr. D. Colo. 2005).

There is in fact a split in the circuits as to the effectiveness of a general reservation of rights clause in a chapter 11 case. LVNV identifies the First Circuit's holding that a general reservation of rights provision adequately preserves post-confirmation claims. *See In re Bankvest Capital Corp.,* 375 F.3d 51 (1st Cir. 2004). Practice in the Second, Third, Ninth, and Eleventh Circuits tends to be supportive of a debtor's retention of claims through a general plan provision. *See, e.g., Katz v. I.A. Alliance Corp. (In re I. Appel Corp.),* 300 B.R. 564, 570 (S.D. N.Y. 2003), *aff'd* 104 Fed. Appx. 199 (2d Cir. 2004); *E. Minerals & Chem. Co. v. Mahan,* 225 F.3d 330, 337 (3d Cir. 2000); *Idearc Media LLC v. Glassman,* 2011 U.S. Dist. LEXIS 14865 (E.D. Pa. 2011); *Diamond Z Trailer Inc. v. JZ LLC (In re JZ LLC),* 371 B.R. 412 (B.A.P. 9th Cir. 2007). *In re Associated Vintage Group, Inc.,* is especially interesting because it limited a prior decision on which LVNV relies, stating that "*Kelley* must be construed as consistent with our decision ... in which we pointed out that it is entirely possible that a general reservation of rights might be sufficient in another case." 283 B.R. 549, 554, 564 (B.A.P. 9th Cir. 2002), limiting *In re Kelley,* 199 B.R. 698 (B.A.P. 9th Cir. 1996); *see* LVNV Br. at 24, 26, 29. The *Associated Vintage Group* Court also recognized that a "plan confirmed early in the case does not ordinarily definitively resolve claims," 160 B.R. at 560, adopted a flexible, case-by-case approach, and said, "We need to be

more precise about our analysis of when and why plan confirmation renders particular disputes uncontestable." Id. at 554.

But these chapter 11 cases are all distinguishable, because they involve the preservation of causes of action that the debtor or former debtor purports to assert against creditors after plan confirmation. The cases do not hold that a mere objection to a proof of claim in a chapter 11 case could be barred by plan confirmation or failure to specifically identify each objectionable claim and the nature of the objection. Such a rule would play havoc with the administration of chapter 11 cases, where there may be thousands of claims filed in the case and where the investigation and decision to pursue objections may take years. *See Matter of Hovis*, 356 F.3d 820 (7th Cir. 2004) ("It would greatly and needlessly disrupt ordinary, efficient means of reorganization to adopt a rule that all claims must be filed and litigated to conclusion before a plan of reorganization is confirmed"). For example, in *Katz v. I.A. Alliance Corp.,* 300 B.R. at 570, the district court observed that, "mandating a specific description of every claim the debtor intends to pursue could entail months or years of investigation and corresponding delay in the confirmation of the plan of reorganization."

Moving from chapter 11 to chapter 13, the chapter before this Court, analysis of the case law cited by LVNV demonstrates that no court has accepted its absolutist argument that objections to unsecured proofs of claim are barred merely

by confirmation of a chapter 13 plan. In addition to rejection by the courts below, LVNV apparently made the same argument in *In re Clark,* 2016 WL 3548815 (N.D. Okla. June 21, 2016), where it was soundly rejected even though there was no express reservation of rights clause in the chapter 13 plan. The court in *In re Morton,* 298 B.R. 301, 309 (B.A.P. 10th Cir. 2003), noted a split in authority as to whether a secured claim is deemed allowed through the confirmation process. However, even as to secured claims, the court held that neither the Bankruptcy Code nor Bankruptcy Rules provide a deadline for filing objection to claims in a chapter 13.

In any event, the argument that a secured creditor's claim may be deemed allowed by confirmation of a chapter 13 plan rests on the proposition that the plan depends on the allowance of the secured claim and establishes the treatment of the secured creditors. LVNV conflates the treatment of secured and unsecured claims. Even assuming the confirmation process bars later claim objections to secured claims, these arguments have no application to the treatment of unsecured claims. *See In re Shank,* 315 B.R. 799, 804 (Bankr. N.D. Ga. 2004) (concluding that confirmation of a chapter 13 plan cannot bar objections to unsecured proofs of claim). The *Shank* court observed that "Objections to claims cannot be filed before the filing of the claim itself, and considerations of economy and convenience typically lead a debtor to file all objections at the same time." 315 B.R. at 802.

The court also noted, "In almost all cases it is not necessary to resolve the amount of claims prior to confirmation." *Id*. at 803.[8]

LVNV also conflates claims brought against a creditor or third party and objections to a proof of claim, asserting that, "An objection to a proof of claim and a cause of action asserted after plan confirmation similarly undermine the determination of claim validity made by plan confirmation." (Br. p. 24) This is simply not correct. In chapter 13 as well as chapter 11 cases, there is no "determination of claim validity made by plan confirmation." There are cases (e.g., *Covert)* where the treatment of a claim in a chapter 13 plan has been held to be preclusive of later efforts by the debtor to sue the creditor. However, as a general rule and unless the plan provides otherwise, confirmation of a chapter 11 or chapter 13 plan does not itself allow unsecured claims.

A rule requiring every chapter 13 plan to specify each unsecured claim that might be objected to (and presumably the grounds for objection) would not only be impractical but impossible in chapter 13 cases like those at bar. It would be impossible to carry out unless confirmation of all chapter 13 plans were delayed until after the general bar date (90 days from the first meeting of creditors) or perhaps the governmental bar date – fully six months after the filing. As the

[8] *Shank* distinguishes *dicta* in *Universal American Mortgage Co. v. Bateman (In re Bateman),* 331 F.2d 821 (11th Cir. 2003), regarding objections to claims.

decision below recognizes, confirmation before the bar date is the rule in South Carolina, so that distributions to creditors can start promptly and not be delayed. 541 B.R. at 336.[9]

Later filing claimants are not prejudiced by plans like the Harlings' because the initial distribution is almost always made to secured creditors, and the distribution to unsecured creditors is often not made for several years. As Judge Lundin stated in *Hildebrand v. Hays Imports, Inc. (In re Johnson),* 279 B.R. 218, 221, 222 (Bankr. M.D. Tenn. 2002):

> The possibility (inevitability) that some claims will be allowed and others will be disallowed after confirmation is fully accounted for in the confirmed plan…Because allowed claims *cannot* be known at confirmation in this district, the plan provides that only "allowed" claims will be paid from the base amount….When a claim is disallowed after confirmation, the money that would have been paid to that creditor under the confirmed plan is simply redistributed

[9] It would also make no sense to bifurcate the deadline for claims objections in chapter 13 cases, for example, by requiring objections to claims filed before the confirmation date and objections to post-confirmation claims by a later date. Unsecured claims in chapter 13 cases often receive a very small distribution. Because of the expense of filing a claim objection, objections to unsecured claims are commonly made in a single filing. See *Shank,* 315 B.R. at 802. To require multiple filings would simply impose an additional burden on chapter 13 trustees and debtors. Such a rule would also be very difficult to administer and lead to game playing: surely a claim filed a minute before the confirmation hearing should not be protected from objections; so courts would then have to draw lines, found nowhere in the Code or rules, about when a claim was filed early enough to be deemed protected by res judicata.

> through the base or pot and paid to other creditors holding allowed claims.[10]

It should be noted that the debtors in the cases below received no monetary benefit from the objection to LVNV's claim. The benefit went to other unsecured creditors, whose distribution was not decreased by a competing, invalid claim. The objection to the claim thus prevented the rights of legitimate creditors from being impaired by LVNV's invalid claim.

LVNV also asserts that permitting post-confirmation objections undermines the finality of plan confirmation in three ways.[11] First, according to LVNV, it would motivate debtors to refrain from pursuing causes of action the proceeds of which could be distributed to creditors. But this possibility is dealt with by the many cases that preclude chapter 11 and chapter 13 debtors from pursuing or benefiting from causes of action, that should have been disclosed and/or distributed

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[10] Judge Lundin was referring to his district, Tennessee, where the practice of confirming chapter 13 plans before the bar date for filing claims is the same as in South Carolina. Bankruptcy Rule 3007 provides that an objection to a claim should be in writing and made on 30 days' notice, but it does not set a specific deadline for filing an objection.

[11] LVNV also overstates the "finality" of a chapter 13 plan. In a chapter 13 case the debtor does not receive a discharge until after completion of payments required by the plan (usually after three to five years). During this lengthy period, the plan can be modified "upon request of the debtor, the trustee, or the holder of an allowed unsecured claim." 11 U.S.C. § 1329(a). There is ample time after confirmation to deal with unsecured claims.

to creditors in their plans.[12] It has little or no application in most chapter 13 cases where the objection is to an invalid unsecured claim, and it has absolutely no application in the instant case where the filing of an objection to a proof of claim, if sustained, would benefit other unsecured creditors.

LVNV's second alleged policy benefit of an absolute bar to a claim objection not previously specified is that it motivates debtors to object to claims promptly. LVNV, however, does not explain how a rule requiring early or premature objections will motivate parties to file them. It would seem more likely that chapter 13 parties would be motivated either not to bother filing objections – making it more likely that patently invalid claims will receive a distribution – or, just as bad from a policy perspective, result in a policy of over-objection to claims so that rights will not be lost. In any event, a deadline for filing objections to proofs of claim has not been set in the statute or in the Bankruptcy Rules, and bad law should not be written to fill a perceived gap.

Finally, LVNV asserts that its proposed rule is beneficial because otherwise parties might have to repay amounts received from the chapter 13 trustee. First, there is some irony in LVNV's assertion that it may file a knowingly invalid claim, and then be permitted to keep any money received on that invalid claim under all

[12] A debtor may, of course, exempt an affirmative claim against a creditor or other party if such an exemption is permitted by applicable exemption law, just as other property interests may be exempted.

circumstances. Second, this is a highly unlikely possibility, as unsecured creditors in chapter 13 cases do not ordinarily receive distributions until secured debt is paid, in many cases years after distributions begin. Third, the idea that the estate may recover excess or improper payments to creditors is not foreign to the Bankruptcy Code. Section 502(j) provides just such a remedy when the allowance or disallowance of a claim is reconsidered.

Contrary to LVNV's assertion, a plan provision reserving the deadline for filing objections to claims does not tilt the process in favor of debtors or give them an unfair advantage over creditors. On the other hand, requiring every claim to be specified as objectionable prior to confirmation would delay distributions to creditors, increase the likelihood that payments on invalid claims would prejudice legitimate creditors, and unfairly burden the administration of chapter 13 and chapter 11 cases.

CONCLUSION

The judgment of the Bankruptcy Court should be affirmed.

Respectfully submitted,

/s/ Tara Twomey

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,107 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on August 22, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
Tara Twomey, Esq.
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