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JUDGE: M. A. Mahoney

PARTIES: Benjamin M. Blomgren, Regions Bank

CHAPTER: 13

ATTORNEYS: M. J. McCormich, R. P. Reynolds

DATE: 6/12/00

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

IN RE

BENJAMIN M. BLOMGREN

Case No. 99-12163-MAM-13

Debtor.

**ORDER DISALLOWING LATE FILED CLAIM AND SETTING  
ADEQUATE PROTECTION PAYMENTS AT \$125 PER MONTH**

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Attorneys for the Debtor

Robert P. Reynolds, Tuscaloosa, Alabama, Attorney for Regions Bank

This matter is before the Court on the motion of Regions Bank to allow late filed claim and Benjamin M. Blomgren's objection to the motion. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the claim of Regions Bank is disallowed and the continued use of the 1996 Ford Ranger by Benjamin M. Blomgren is approved based on Regions Bank receiving adequate protection payments of \$125 per month.

**FACTS**

Benjamin M. Blomgren filed for relief pursuant to chapter 13 of the Bankruptcy Code on June 21, 1999. Blomgren had financed the purchase of a 1996 Ford Ranger through Regions Bank prior to the filing of this case. Blomgren granted Regions a security interest in the vehicle as part of the financing agreement. The interest rate under the parties' agreement was 13% per annum.

On June 22, 1999, this Court mailed the creditors listed by Blomgren the standard notice of commencement of the case. The notice set July 29, 1999, as the date for the meeting of

creditors and hearing on confirmation, July 28, 1999, at 12:00 p.m. as the deadline to file an objection to confirmation, and October 27, 1999, as the deadline for creditors, excluding governmental units, to file a proof of claim. This notice was sent to Regions Bank, P.O. Box 10205, Birmingham, Alabama 35202.

Blomgren's chapter 13 plan was confirmed on August 17, 1999. Regions was provided monthly preference payments equaling its total secured claim (including present value interest) of \$8,647.31. Unsecured claimants were to receive distributions equal to 100% of their allowed claims. Regions did not object to confirmation.

On March 16, 2000, Regions Bank filed a proof of claim in the amount of \$11,680.03 and this motion to allow late filed claim. The address provided by Regions was the same as the address to which the Court's notice was sent. Regions alleges that the value of the vehicle (including a warranty valued at \$425) is \$8,925. Regions attributes its failure to timely object to confirmation or timely file a proof of claim to its "reorganization."

The Court took judicial notice of the following values established by the N.A.D.A. Official Used Car Guide for the 1996 Ford Ranger:<sup>1</sup>

	TRADE-IN	LOAN	RETAIL
June 2000	5,800	5,225	7,625
May 2000	5,950	5,375	7,800
April 2000	5,975	5,400	7,825
March 2000	6,150	5,550	8,025

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<sup>1</sup>The debtor offered into evidence a depreciation schedule for the vehicle based upon the N.A.D.A. values. Regions objected based upon its inability to examine the exhibit prior to the hearing. The Court finds the exhibit to be inadmissible and will draw its own conclusions based upon the N.A.D.A. values.

	TRADE-IN	LOAN	RETAIL
February 2000	6,200	5,600	8,075
January 2000	6,200	5,600	8,075
December 1999	6,250	5,625	8,150
November 1999	6,350	5,725	8,250
October 1999	6,425	5,800	8,325
September 1999	6,525	5,875	8,450
August 1999	6,575	5,925	8,500
July 1999	6,675	6,025	8,600
June 1999	6,875	6,200	8,825
<b>Average Depreciation/Month</b>	89.58	81.25	100.00

## LAW

### A.

A secured creditor is not required to file a claim. The creditor's security interest will survive or pass through the bankruptcy. *See, Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992) (chapter 7 case). However, the automatic stay precludes enforcement actions during the bankruptcy case. Moreover, the creditor foregoes distributions under the chapter 13 plan if it fails to file a proof of claim. *In re Stewart*, 247 B.R. 515 (Bankr. M.D. Fla. 2000); NORTON BANKRUPTCY LAW AND PRACTICE 2D § 43:5 (West 2000). As the following analysis of the Bankruptcy Code and Rules indicates, a creditor of a chapter 13 debtor must not only file a claim to receive distributions, but must timely file the claim.

Distributions in chapter 13 are made by the standing trustee pursuant to the terms of the debtor's confirmed plan to creditors whose claims have been allowed. 11 U.S.C. § 1326; Fed. R.

Bankr. P. 3021. In chapter 13, a claim shall be allowed “except to the extent that . . . proof of such claim is not timely filed, except to the extent tardily filed as permitted . . . under the Federal Rules of Bankruptcy Procedure.” 11 U.S.C. § 502(9).

The Federal Rules of Bankruptcy Procedure provide that a proof of claim in a chapter 13 case is timely filed if “filed not later than 90 days after the first date set for the meeting of creditors.” Fed. R. Bankr. P. 3002(c). This time limit cannot be enlarged based on the excusable neglect standard of Rule 9006(b)(1). *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 389 n.4, 13 S. Ct. 1989, 123 L. Ed. 2d 74 (1993). The enlargement of the Rule 3002(c) time limit is permissible only to the extent stated in Rule 3002(c). Fed. R. Bankr. P. 9006(b)(3). None of the Rule 3002(c) exceptions apply to this case. Thus, the Court does not have the discretion or power to allow the claim of Regions unless it was timely filed.

Regions was notified of the deadline to file proofs of claim. Clearly its claim was not timely filed and must therefore be disallowed.

Since Regions does not hold an allowed claim, it cannot receive distributions in accordance with terms of Blomgren’s chapter 13 plan. It has no claim to be paid. Fed. R. Bankr. P. 3021; *In re Baldridge*, 232 B.R. 394 (Bankr. N.D. Ind. 1999); *cf. In re Stewart*, 247 B.R. 515 (late filed claim disallowed, but secured creditor to receive chapter 13 plan distributions pursuant to proof of claim filed by debtor on behalf of creditor); *but see, In re Dennis*, 230 B.R. 244 (Bankr. D.N.J. 1999) (notwithstanding failure of secured creditor to timely file claim and debtor not filing a claim on behalf of creditor, court found creditor was to receive distributions pursuant to the confirmed chapter 13 plan). Additionally, the stay precludes Regions from foreclosing on its collateral without obtaining relief.

B.

Although its claim is disallowed, the lien of Regions on the 1996 Ford remains intact and survives Blomgren's chapter 13 case. Blomgren desires to use the vehicle during the pendency of his chapter 13 case. Thus, the next logical step is to ensure that Regions is adequately protected.

No formal adequate protection or relief from stay motion was filed, but both parties addressed this issue during the hearing on this matter. The Court therefore finds that neither party is prejudiced by its determining in this posture the amount necessary to adequately protect Regions Bank and they have consented to the Court's consideration of the issue.

Blomgren offered monthly payments of \$125 through his chapter 13 plan as adequate protection. Regions contends that Blomgren must provide payments equaling the entire value of its collateral (\$7,500), plus interest. According to Regions, this amounts to monthly payments of \$167, the amount Blomgren proposed to pay Regions under his plan.

An oversecured creditor is entitled to postpetition interest upon completion of reorganization or confirmation. 11 U.S.C. § 506(b); *Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.)*, 54 F.3d 722, 730 (11th Cir. 1995). However, a creditor, whether over or undersecured, is not entitled to "interest on its collateral during the stay to assure adequate protection." *Delta Resources*, 54 F.3d at 729 (quoting *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 382, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988)). Therefore, notwithstanding the terms of the parties' financing agreement, Blomgren does not have to make interest payments to adequately protect Regions.

Blomgren also does not have to provide payments totaling the present value of Regions' collateral. If Regions had participated in the plan confirmation process, it may have been entitled to such payments pursuant to § 1325(a)(5)(B)(ii) of the Bankruptcy Code, but adequate

protection does not require this. *See, Timbers*, 484 U.S. 377-78 (unlike § 1129(b)(2)(A)(i)(II), chapter 11's version of § 1325(a)(5)(B)(ii), adequate protection entitlement does not guarantee secured creditor the present value of its collateral). Adequate protection requires that secured creditors are protected against the decline in value of their collateral, not the perpetuation of the ratio of collateral to debt. *Delta Resources*, 54 F.3d at 730; *Aegean Fare, Inc. v. Commonwealth of Massachusetts (In re Aegean Fare, Inc.)*, 34 B.R. 965, 968 (Bankr. D. Mass. 1983) (adequate protection does not entitle secured creditor to cash payments equal to the value of its collateral, rather is intended to assure maintenance of the lien value); Gerald F. Munitz, *Adequate Protection, the Automatic Stay, and the Use, Sale or Lease of Property*, 780 PLI/COMM 265, 270 (1998) (entitled to protection of value of lien). Thus, payments equal to the amount the vehicle depreciates serves as adequate protection to Regions.

The Court finds that \$125 per month, the amount offered by Blomgren, adequately protects Regions. This amount is greater than the average amount the vehicle has depreciated each month over the past twelve months according to the N.A.D.A. guide. The values set forth in the guide were the only evidence provided regarding the vehicle's decline in value.<sup>2</sup>

C.

Regions contends that notice of a hearing on confirmation of a chapter 13 plan that proposes to value its collateral must be served pursuant to the Rules governing contested matters. Fed. R. Bankr. P. 9014, 7004(h) (service on an insured depository institution by certified mail). In essence, Regions seeks to modify, vacate or set aside the order confirming Blomgren's

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<sup>2</sup>In the brief filed in support of his objection, the debtor consented to making adequate protection payments "through his chapter 13 plan." Adequate protection payments usually are made outside the plan for several reasons. The Court will leave it to the parties to decide whether the \$125 per month adequate protection payments are made through debtor's chapter 13 plan or outside the plan directly to Regions.

chapter 13 plan because notice of the confirmation hearing was served improperly, i.e., by regular mail, as opposed to certified mail.

Section 1329 of the Bankruptcy Code permits plan modifications in some instances, “upon request of the debtor, the trustee, or the holder of an allowed unsecured claim.” Regions is not the holder of an *allowed* unsecured claim and it therefore cannot request a plan modification pursuant to § 1329.

Regions’ request to vacate or set aside the confirmation order is governed by § 1330(a) of the Bankruptcy Code and possibly Fed. R. Bankr. P. 9024.<sup>3</sup> The pertinent portions of these provisions read as follows:

On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of [title 11], and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

11 U.S.C. § 1330(a).

Rule 60 F.R.Civ.P. [governing relief from an order for mistake, inadvertence, surprise, excusable neglect, new evidence, fraud, etc.] applies in cases under the

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<sup>3</sup>The Court is careful to couch the applicability of Rule 9024 as possible, rather than definite, because some courts have determined that § 1330(a) is the exclusive provision pursuant to which a confirmation order may be vacated, notwithstanding the grounds for relief from an order set forth in Fed. R. Civ. P. 60(b) (applicable in bankruptcy cases pursuant to Fed. R. Bankr. P. 9024). *See, e.g., Branchburg Plaza Associates, L.P. v. Fesq (In re Fesq)*, 153 F.3d 113 (3rd Cir. 1998) (Shadur, J.), *cert. denied*, 526 U.S. 1018, 119 S. Ct. 1253, 143 L. Ed.2d 350 (1999); *In re Lee*, 89 B.R. 250 (N. D. Ga. 1987), *aff’d*, *In re Hackman*, 853 F.2d 1547 (11th Cir. 1988); *but see, Fesq*, 153 F.3d at 120-124 (Stapleton, J., dissenting) (Rule 9024 does not limit the applicability of Fed. R. Civ. P. 60(b) to confirmation orders, but rather, incorporates the Rule 60(b) grounds as bases to vacate confirmation orders and simply adopts the Bankruptcy Code time limits applicable to motions or complaints to vacate confirmation orders); *In re Cook*, 205 B.R. 617, 625 (Bankr. N.D. Ala. 1996) (“[A] party may challenge a confirmation order only by filing a motion under Rules 9023 or 9024 or by filing a notice of appeal pursuant to Rule 8001.”). This Court does not have to determine which conclusion is correct because under both, motions to vacate or set aside confirmation orders are subject to the 180 day time limit set forth in § 1330.



Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

Fed. R. Bankr. P. 9024. Rule 9024 causes a motion to revoke or set aside a confirmation order pursuant to Fed. R. Civ. P. 60(b) (assuming Rule 60(b) is at all applicable to confirmation orders) to be subject to the 180-day time limit set forth in § 1330. Thus, whether the motion of Regions is governed solely by § 1330(a), or by both Rule 9024 and § 1330(a), it must have been filed within 180 days after the date of entry of the order of confirmation. This motion was filed by Regions on March 16, 2000, two-hundred and twelve (212) days after August 17, 1999, the date of the order of confirmation in this case. Thus, this motion was not filed within the 180-day time limit and must therefore be denied.

THEREFORE IT IS ORDERED:

1. The motion of Regions Bank to allow late claim is DENIED and the claim is DISALLOWED.
2. The objection of Benjamin M. Blomgren to the late filed claim is GRANTED.
3. The use of the 1996 Ford Ranger by Benjamin M. Blomgren is approved conditioned on Blomgren making adequate protection payments of \$125 per month in the manner agreed upon by the parties.

Dated: June 12, 2000

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE