

MAY 10 2005

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

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**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	CC-04-1165-MoPK
)		
ROBERT BRAWDERS and CHERYL)	Bk. No.	SV-00-15661-KL
BRAWDERS,)		
)	Adv. No.	SV-00-01370-KL
Debtors.)		
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COUNTY OF VENTURA TAX)		
COLLECTOR,)		
)		
Appellant,)		
)		
v.)	<u>O P I N I O N</u>	
)		
ROBERT BRAWDERS; CHERYL)		
BRAWDERS,)		
)		
Appellees.)		
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Argued and Submitted on January 20, 2005
at Pasadena, California

Filed - May 10, 2005

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Kathleen T. Lax, Bankruptcy Judge, Presiding.

Before: MONTALI, PERRIS and KLEIN, Bankruptcy Judges.

1 MONTALI, Bankruptcy Judge:

2

3 In rare circumstances, the res judicata effect of a confirmed
4 Chapter 13 plan can effectively avoid a creditor's lien or modify
5 its in rem rights even if there is no valid legal basis for doing
6 so, provided that the plan does so explicitly and due process
7 considerations are met.¹

8 Although the Chapter 13 plan in this case has language that
9 clearly affects some secured creditors' rights, none of that
10 language applies to the specific rights at issue here.
11 Alternatively, even if the plan could be read to affect the
12 secured creditor's rights, applying that strained reading in
13 hindsight is no substitute for clear advance notice to the secured
14 creditor, as required for due process. For each of these
15 independent reasons, we REVERSE and REMAND a judgment awarding
16 damages for violation of the automatic stay based on an erroneous
17 interpretation of the effect of the confirmed plan.

18

I. FACTS

19 Debtors Robert and Cheryl Brawders ("Debtors") have a long
20 standing dispute with the County of Ventura Tax Collector

21

22 ¹ Unless otherwise indicated, all chapter, section and
23 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.
24 We use the term "res judicata" in its generic sense --
encompassing doctrines that have been more precisely called claim
25 preclusion and issue preclusion as well as the codification in
Section 1327 of the effect of confirmation. We use this broad
26 terminology because there is some ambiguity about which doctrine
Debtors rely upon and our reasoning applies to all such doctrines.
27 See generally Paine v. Griffin (In re Paine), 283 B.R. 33, 38-39
(9th Cir. BAP 2002) and The Alary Corp. v. Sims (In re Associated
28 Vintage Group, Inc.), 283 B.R. 549 (9th Cir. BAP 2002) (each
discussing res judicata and collateral estoppel terminology).

1 ("Ventura") over the amount of real property tax assessments on
2 their principal residence (the "House"). Debtors claim that the
3 amount due was reduced to \$9,350.00 in an earlier Chapter 13 case
4 (Case No. ND-95-10521-RR, Bankr. C.D. Cal.) (the "First Case"),
5 filed on February 8, 1995. Now, in their current Chapter 13 case
6 (SV-00-15661-KL) (the "Second Case"), Debtors seek damages for
7 Ventura's attempt to collect a higher amount.

8 Ventura's collection attempt was to issue a "Notice of
9 Impending Tax Collector's Power to Sell" on June 2, 1997,
10 asserting \$30,264.32 in past due taxes (the "Tax Lien Notice").
11 Ventura sent that notice after confirmation of Debtors' Chapter 13
12 plan in the First Case (the "Plan") but before the House had
13 revested in Debtors. Ventura admits that sending the Tax Lien
14 Notice violated the automatic stay, though it disputes whether
15 this resulted in any damage to Debtors and it denies that the
16 First Case had any effect on its lien rights or reduced the amount
17 of its tax assessment.²

18 Ventura sent a copy of the Tax Lien Notice to Debtors'
19 mortgage lender ("Bank"). Bank responded by making a payment to
20 Ventura, without notice to Debtors, and then demanding
21 reimbursement. This and other disputes with Bank precipitated
22 Debtors' filing of this Second Case on June 14, 2000.

23 On June 27, 2000, Debtors filed an adversary proceeding
24

25 ² Under Debtors' Chapter 13 plan in the First Case the
26 Property remained in the bankruptcy estate until Debtors received
27 their discharge, which was not until November 15, 2000. See 11
28 U.S.C. § 1328(a). Section 362(c)(1) provides that, with some
exceptions, "the stay of an act against property of the estate"
continues "until such property is no longer property of the
estate." 11 U.S.C. § 362(c)(1).

1 against Ventura (SV-00-01370-KL). Bank was also named as a
2 defendant but was later dismissed based on a consensual resolution
3 involving refinancing the House and paying Bank. In their second
4 amended complaint Debtors sought damages for issuance of the Tax
5 Lien Notice, among other things.

6 On Ventura's motion for summary judgment the bankruptcy court
7 entered an order stating that Ventura had violated the automatic
8 stay and leaving for trial an accounting and the amount of
9 attorneys' fees and other damages to be awarded.³ The bankruptcy
10 court simultaneously entered a "Memorandum on Legal Issue: The
11 Effect of the Provision for the County's Claim and Lien Interest
12 in the Plan Confirmed in Case No. ND 95-10521 RR" (the "Res
13 Judicata Decision") which determined that Debtors' House had
14 revested in them "free of any lien interest held by [Ventura] on

16 ³ As noted in the text, the bankruptcy court's order was
17 actually entered on Ventura's motion for summary judgment. The
18 excerpts of record and the bankruptcy court's docket do not
19 reflect any cross-motion for summary judgment by Debtors, but the
20 bankruptcy court's order states "Fourth Cause of Action-
21 (Violation of the Automatic Stay against County) [¶] Grant in
22 favor of the Plaintiffs [i.e. Debtors]." (Emphasis added.)
23 Debtors appear to assume that the bankruptcy court intended not
24 merely to deny Ventura's motion for summary judgment but to grant
25 affirmative relief to Debtors. They argue on this appeal that
26 Ventura was bound to appeal this alleged ruling within ten days.
27 See Fed. R. Bankr. P. 8002(a).

28 We reject Debtors' argument. Even if we were to assume that
the bankruptcy court intended to grant affirmative relief to
Debtors (and without suggesting that the bankruptcy court intended
to do so or properly could do so), such a ruling would not be
final because an accounting and a determination of damages
remained for trial. See generally Jensen Elec. Co. v. Moore,
Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1329 (9th Cir.
1989) (order awarding attorney's fees which does not fully dispose
of amount of fees is not a final, appealable order). See also
Lindblade v. Knupfer (In re Dyer), 322 F.3d 1178, 1186 n. 10 (9th
Cir. 2003) (citing with approval authority that order establishing
liability under § 362(h) but not quantifying damages is not
final).

1 account of its pre-petition claims” and that those claims had been
2 reduced by the Plan to \$9,350.00. There is no dispute that if
3 Ventura’s tax assessments are reduced to that amount then it was
4 overpaid by Bank and Debtors, and Ventura will owe Debtors a
5 refund of \$12,905.00.

6 By a subsequent motion Debtors also sought to recover their
7 expenses associated with refinancing their House to reimburse Bank
8 for what it had paid to Ventura, the alleged cost of a higher
9 interest rate for their refinance when the new lenders learned
10 that the loan was in default, over \$40,000.00 in attorneys’ fees
11 and costs, and pre-judgment interest. On June 19, 2003, the
12 bankruptcy court issued a “Memorandum on Trial and Motion for
13 Attorneys Fees and Costs” (the “Damages Decision”) awarding
14 \$39,668.21 to Debtors, including the \$12,905.00 for tax
15 overpayments. The bankruptcy court entered a judgment, Debtor
16 appealed,⁴ and Ventura cross-appealed. Before us is the cross-
17 appeal.

18 II. JURISDICTION

19 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
20 and 157. We have jurisdiction over this final judgment that
21 determines the amount of damages for Ventura’s violation of the
22 automatic stay. 28 U.S.C. § 158(a) and (b). See Dyer, 322 F.3d
23 at 1186 and n.10.⁵

24
25 ⁴ We dismissed debtors’ appeal for lack of prosecution.

26 ⁵ Ventura argued before the bankruptcy court that there is
27 no jurisdiction under Section 362(h) to award damages in this
28 Second Case for a stay violation in the First Case. Ventura has
not raised that argument on this appeal, and although we have an
(continued...)

1 **III. ISSUE**

2 Did the bankruptcy court err in awarding damages, based on
3 its conclusion that res judicata reduced the enforceable amount of
4 Ventura's lien to the amount stated in Debtors' Plan?⁶

5 _____
6 ⁵(...continued)

7 independent obligation to determine if we lack jurisdiction we are
8 satisfied that the bankruptcy court did have jurisdiction to award
9 such damages and therefore we have jurisdiction to review that
10 award on appeal. This is not a case in which there are concurrent
11 bankruptcy proceedings involving different debtors, where the
12 actions of one bankruptcy court might impinge on the jurisdiction
13 of the other, or violate principles of comity. See, e.g., Snavely
14 v. Miller (In re Miller), 397 F.3d 726 (9th Cir. 2005) (citing
15 inter alia In re Shared Technologies Cellular, Inc., 293 B.R. 89
16 (D. Conn. 2003)). Rather, there is only one pending bankruptcy
17 case involving the Debtors, who have asked the bankruptcy court to
18 determine the res judicata effect of an order in a different case.
19 Courts do this all the time. See Valley Nat. Bank of Arizona v.
20 A.E. Rouse & Co., 121 F.3d 1332, 1335-36 (9th Cir. 1997) (proper
21 remedy if second court erred in not giving res judicata effect to
22 first court's judgment is to appeal second court's determination,
23 not collateral attack in third court). Moreover, these Debtors
24 returned to the very same bankruptcy court (although a different
25 bankruptcy judge). We have no difficulty in concluding that the
26 bankruptcy court in the Second Case had jurisdiction to determine
27 the res judicata issues and decide whether to award damages under
28 Section 362(h). See Williams v. Levi (In re Williams), ___ B.R.
___, 2005 WL 857439 (9th Cir. BAP 2005) (ancillary jurisdiction
in third bankruptcy case to annul stay in second bankruptcy case);
28 U.S.C. § 1367 (codification of supplemental jurisdiction).

20 ⁶ Debtors argue that this appeal is moot and frivolous
21 because Ventura stipulated to what it owes Debtors in tax
22 assessment overpayments (the "Tax Stipulation"). Debtors did not
23 provide us with a copy of the Tax Stipulation until their motion
24 to augment the record filed one week prior to oral argument before
25 us, but the excerpts of record do include an order approving the
26 Tax Stipulation and the Judgment does incorporate approximately
27 the amount stipulated (\$12,905.00, whereas the Tax Stipulation
28 amount is \$12,905.86). Nevertheless, having reviewed the Tax
Stipulation we agree with Ventura that it resolves only the
"accounting" and not the in rem tax "liability" issues.
Therefore, this appeal is neither moot nor frivolous.

Debtors also allege that this appeal is untimely. As Ventura
points out, the Res Judicata Order and the order approving the Tax
Stipulation were both interlocutory. See generally Jensen Elec.
Co., 873 F.2d at 1329; Dyer, 322 F.3d at 1186 n.10. Debtors'
notice of appeal from the Judgment extended the time for Ventura
(continued...)

1 **IV. STANDARDS OF REVIEW**

2 We review de novo the res judicata effect of a Chapter 13
3 plan and interpretation of the Bankruptcy Code and Rules, because
4 these matters are legal issues or mixed questions of law and fact
5 in which legal issues predominate. George v. Morro Bay (In re
6 George), 318 B.R. 729, 732-33 (9th Cir. BAP 2004); Wells Fargo
7 Bank v. Yett (In re Yett), 306 B.R. 287, 290 (9th Cir. BAP 2004).
8 Interpretation of the contractual terms of a Chapter 13 plan is
9 generally a factual issue which we review for clear error (Yett,
10 306 B.R. at 290) but such factual issues can become mixed with
11 legal issues. Whether a contract is ambiguous is a matter of law,
12 which we review de novo. Miller v. United States (In re Miller),
13 253 B.R. 455, 458 (Bankr. N.D. Cal. 2000) ("Miller I") (citing
14 cases), aff'd, 284 B.R. 121 (N.D. Cal. 2002) ("Miller II").

15 In this case we need not decide which standard applies to
16 interpretation of the Plan because we would reach the same result
17 whether we reviewed the bankruptcy court's interpretation for
18 clear error or de novo. Whether adequate notice has been given
19 for purposes of due process in a particular instance is a mixed
20 question of law and fact that we review de novo. Educ. Credit
21 Mgmt. Corp. v. Repp (In re Repp), 307 B.R. 144, 148 (9th Cir. BAP
22 2004).

23 **V. DISCUSSION**

24 There is no question that Ventura violated the automatic stay
25 by sending the Tax Lien Notice. The question is what damages are
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27 ⁶(...continued)
28 to file its notice of cross-appeal, and that notice was timely.
See Fed. R. Bankr. P. 8002(a).

1 appropriate, if any.

2 The bankruptcy court held Ventura partly responsible for
3 Debtors' legal fees and the costs associated with resolving their
4 disputes with Bank, including some of the costs of refinancing
5 their House to repay Bank what it had paid Ventura. The
6 bankruptcy court also awarded Debtors \$12,905.00 based on its view
7 that Ventura's lien had been reduced to \$9,350.00 by the res
8 judicata effect of the Plan and by Section 1327, which states in
9 full:

10 § 1327. Effect of confirmation

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

16 (b) Except as otherwise provided in the plan
17 or the order confirming the plan, the confirmation
18 of a plan vests all of the property of the estate
19 in the debtor.

20 (c) Except as otherwise provided in the plan
21 or in the order confirming the plan, the property
22 vesting in the debtor under subsection (b) of this
23 section is free and clear of any claim or interest
24 of any creditor provided for by the plan.

25 11 U.S.C. § 1327.

26 It is well established that principles of res judicata and
27 finality, as partly codified in Section 1327, can make even
28 "illegal" provisions of a Chapter 13 plan binding. See Great
Lakes Higher Educ. Corp. v. Pardee (In re Pardee), 193 F.3d 1083
(9th Cir. 1999) (student loan debt discharged by confirmation of
Chapter 13 plan so providing, even though debt may have been
nondischargeable); Multnomah County v. Ivory (In re Ivory), 70
F.3d 73 (9th Cir. 1995) (res judicata precluded collateral attack

1 on confirmation order, despite possible jurisdictional error).⁷

2 This general proposition is subject to some major
3 limitations. The starting point is that a debtor asserting res
4 judicata "has the burden of proof on all elements and bears the
5 risk of non-persuasion." Repp, 307 B.R. at 148 n.3 (citations
6 omitted).

7 Next, a plan should clearly state its intended effect on a
8 given issue. Where it fails to do so it may have no res judicata
9 effect for a variety of reasons: any ambiguity is interpreted
10 against the debtor, any ambiguity may also reflect that the court
11 that originally confirmed the plan did not make any final
12 determination of the matter at issue, and claim preclusion
13 generally does not apply to a "claim" that was not within the
14 parties' expectations of what was being litigated, nor where it
15 would be plainly inconsistent with the fair and equitable
16 implementation of a statutory or constitutional scheme. See
17 Miller I, 253 B.R. at 456-59, aff'd, Miller II, 284 B.R. at 124;
18 Repp, 307 B.R. at 148 n.3; Associated Vintage Group, 283 B.R. at
19 554-65.

20 Another major limitation is that due process requires
21 adequate notice and procedures. See, e.g., Repp, 307 B.R. at 149-
22 54 (notice requirements); Enewally v. Wash. Mutual Bank (In re
23 Enewally), 368 F.3d 1165, 1173 (9th Cir.), cert. denied, 125 S.Ct.
24 669 (2004) (confirmation has no preclusive effect on matters
25 requiring adversary proceeding, or where plan does not give
26 adequate notice of proposed treatment).

27
28 ⁷ These concepts are more fully explicated in Associated
Vintage Group, 283 B.R. 549, 554-65.

1 The foregoing limitations on res judicata principles are
2 particularly apropos when secured claims are involved. Absent
3 some action by the representative of the bankruptcy estate, liens
4 ordinarily pass through bankruptcy unaffected, regardless whether
5 the creditor holding that lien ignores the bankruptcy case, or
6 files an unsecured claim when it meant to file a secured claim, or
7 files an untimely claim after the bar date has passed. See Bisch
8 v. United States (In re Bisch), 159 B.R. 546, 550 (9th Cir. BAP
9 1993) ("there is no duty on the part of the secured party to
10 object to the confirmation of the [Chapter 13] plan, and failure
11 to do so does not somehow constitute a waiver of the party's
12 secured claim"); Work v. County of Douglas (In re Work), 58 B.R.
13 868, 869 (Bankr. D. Or. 1986). See also Enewally, 368 F.3d at
14 1168-72 and n.2 (noting implications of "Fifth Amendment's
15 prohibition against taking private property without compensation")
16 (citation and quotations marks omitted). There is no dispute that
17 Ventura's assessments are secured by a lien because California law
18 provided as of the filing date of the Second Case that "[e]very
19 tax on real property is a lien against the property assessed."
20 Cal. Rev. & Tax. Code § 2187 (West 1998).

21 Applying the above principles to this case, Debtors have not
22 met their burden to establish that their Plan had any res judicata
23 effect on Ventura's lien rights or the amount of its assessments.

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1 a. The Plan only purports to affect Ventura's claim
2 against the estate, not the amount of the
3 underlying assessment debt or Ventura's in rem
4 rights

5 The Plan is a stationer's form with blanks filled in by
6 Debtors. Debtors rely on form language stating that the present
7 value of distributions under the Plan on account of secured claims
8 "is equal to the allowed amount of such claim." Debtors take this
9 language out of context. The full provision states:

10 III. CLASSIFICATION AND TREATMENT OF CLAIMS

11 * * *

12 2. CLASS TWO -- Claims secured by Real Property that is
13 the debtor's PRINCIPAL RESIDENCE. The value as of the
14 effective date of the Plan, of the series of payments to
15 be distributed under the Plan on account of each secured
16 claim provided for by the Plan, is equal to the allowed
17 amount of such claim. Defaults shall be cured using a
discount rate of 7 % per annum. Any obligation
maturing by its terms before termination of this Plan
shall be paid on or before its due date. Each creditor
shall retain its lien. [Emphasis added.]

	<u>Amount in</u> <u>Default</u>	Monthly Payment	Number of Months	Total Payment
National Mortgage Co.	<u>\$4,244</u>	\$84.04	#60	\$5,042.62

20 * * *

[Ventura] [Emphasis added.]	<u>\$9,350</u>	\$185.15	#60	\$11,109.21
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23 The above provision is geared toward typical debtors who may
24 have fallen behind in mortgage payments on their principal
25 residence. Debtors' treatment of National Mortgage Co.
26 ("National") illustrates how this provision works.

27 At oral argument we confirmed that National is the holder of
28 a consensual mortgage or deed of trust debt against Debtors' House

1 and that the \$4,244.00 listed is the arrearage amount, not the
2 total amount of the debt. Under the Plan, Debtors' \$4,244.00 of
3 arrearages were to be repaid to National over the term of the Plan
4 but, as Debtors' attorney confirmed, the Plan does not purport to
5 reduce the underlying mortgage debt owed to National, nor does the
6 Plan affect National's rights to enforce its lien in that total
7 amount upon any default. Therefore, when the Plan states that its
8 distributions to class two (the distributions on the "amount in
9 default") will be equal in value to the allowed amount of the
10 creditor's "claim," it is using common Chapter 13 parlance to
11 refer to the arrearage not the total amount of the debt.

12 Debtors read the word "claim" as referring to the underlying
13 debt, and they read the Plan as reducing that debt to the "amount
14 in default" listed in class two; but if that were so then
15 Debtors' entire mortgage debt (perhaps several hundred thousand
16 dollars) would be reduced to the amount in default (\$4,244.00).
17 Not only is that a very strained reading but it would be
18 prohibited by the Bankruptcy Code, which generally bars any
19 modification of the rights of creditors holding claims "secured
20 only by a security interest in real property that is the debtor's
21 principal residence" (except to cure defaults over a reasonable
22 time). See 11 U.S.C. § 1322(b)(2), (b)(5), and (c). It would be
23 inconsistent to read the Plan's boilerplate language to modify
24 precisely the types of claims that cannot be modified.

25 At oral argument Debtors' attorney argued that the outcome
26 should be different for Ventura because it is not a consensual
27 lender. We are not persuaded. It is true that the
28 antimodification provisions of Section 1322(b)(2) apply only to

1 consensual liens (see 11 U.S.C. §§ 101(51) and 1322(b)(2)), but
2 the meaning of the Plan does not change based on the character of
3 the debt. Debtors cannot read the same language in class two one
4 way for National and another way for Ventura.

5 Debtors' attorney also argued that tax debts typically are
6 equal to the entire amount of the underlying tax, implying that
7 Ventura should have known that what was being modified was the
8 underlying debt, not just what it was to receive out of Chapter 13
9 Plan payments. The fact that the underlying debt to Ventura may
10 equal or approximate any arrearage has nothing to do with whether
11 the Plan purports to affect the underlying debt or the lien
12 securing that debt.⁸ All that the Plan did was to limit what
13 Ventura would be paid from the bankruptcy estate. It did not
14 purport to affect the underlying assessment debt to Ventura or its
15 in rem rights.

16 Debtors' reading is also out of context with the rest of the
17 Plan. Included in the Plan is a motion to avoid creditors' liens
18 that impair exemptions. See 11 U.S.C. § 522(f). It clearly warns
19 that Debtors intend "to treat such creditors as unsecured
20 creditors only" and that any objection must be filed "within 20
21 days from the date this motion and plan is served on you."

22 [Emphasis in original.] There is no similar notice, or any notice
23 at all, to warn creditors in class two of Debtors' interpretation
24 of the Plan as effectively stripping liens down to the amount of
25 arrearages.

27 ⁸ In fact, the total amount of property tax debt may be
28 different from the "amount in default" that is placed in class two
of the Plan. Taxes can be assessed but not yet "in default."

1 Another provision of the Plan actually does propose to strip
2 liens to the alleged value of the collateral, but it gives clear
3 notice that this is what is intended. See 11 U.S.C. § 506(a). It
4 specifies the precise dollar amounts for the "total amount of
5 debt," the "secured claim," and the "unsecured amount." In
6 contrast, the Plan's provision concerning class two does not
7 mention the total amount of debt, it refers only to the "[a]mount
8 in default," and it provides that "[e]ach creditor shall retain
9 its lien."

10 These differences illustrate once again that the class two
11 portion of the Plan concerns arrearages, not the total amount of
12 the underlying debt or the lien securing that debt. Debtors have
13 not met their burden to establish that the Plan purported to have
14 any effect on the amount of Ventura's tax assessment or its lien
15 rights. See generally Miller I, 253 B.R. 455, aff'd Miller II,
16 284 B.R. 121 (refusing to apply ambiguous plan provision against
17 creditor under res judicata principles).

18 b. Alternatively, applying any reading of the Plan that
19 would affect the underlying debt to Ventura or its lien
20 rights would violate due process

21 Even if the Plan could be read as Debtors suggest, that
22 meaning is hardly clear enough to have given Ventura adequate
23 notice in the First Case to satisfy due process. Debtors did not
24 combine confirmation of their Plan with an adversary proceeding
25 seeking a declaratory judgment or partial lien avoidance limiting
26 Ventura's in rem rights, nor did the Plan give notice that Debtors
27 had any such intent. See Fed. R. Bankr. P. 3007 (claims
28 objections) and 7001(1), (2), and (9) (adversary proceeding

1 required for avoidance of lien, or determination of its "validity,
2 priority, or extent," or declaratory judgment of same).

3 As the Ninth Circuit stated in Enewally:

4 Although confirmed plans are res judicata to issues
5 therein, the confirmed plan has no preclusive effect
6 on issues that must be brought by an adversary
7 proceeding, or were not sufficiently evidenced in a
8 plan to provide adequate notice to the creditor.

9 * * *

10 "[I]f an issue must be raised through an adversary
11 proceeding it is not part of the confirmation process
12 and, unless it is actually litigated, confirmation
13 will not have a preclusive effect." Cen-Pen Corp. v.
14 Hanson, 58 F.3d 89, 93 (4th Cir. 1995) (quoting In re
15 Beard, 112 B.R. 951, 956 (Bankr. N.D. Ind. 1990)).

16 Enewally, 368 F.3d at 1173 (emphasis added). See also Shook v.
17 CBIC (In re Shook), 278 B.R. 815, 824 (9th Cir. BAP 2002) (plan
18 can effectively determine value and/or avoid a lien only if
19 creditor receives "clear notice" that the plan will do so).

20 Debtors argue that the order confirming the Plan states, "The
21 court finds that the plan meets the requirements of 11 U.S.C.
22 § 1325," implying that such requirements were "actually
23 litigated." Section 1325 provides that, unless collateral is
24 surrendered or the holders of allowed secured claims agree
25 otherwise, they must retain their liens and the value of
26 distributions under the Chapter 13 plan must be "not less than the
27 allowed amount of such claim." 11 U.S.C. § 1325(a)(5).

28 If this is Debtors' argument it misreads Enewally. Nothing
in the excerpts of record suggests that as part of their Plan
confirmation process Debtors submitted evidence for what amounts
to a declaratory judgment that the tax assessments were only
\$9,350.00. Nor is there any evidence that Ventura had adequate

1 notice that this was at issue and that Debtors would treat
2 confirmation as the equivalent of an adversary proceeding. See
3 Repp, 307 B.R. at 152-53 (creditor entitled to expect that
4 adversary proceeding rules will be applied when required).

5 An adversary proceeding is commenced by the filing of a
6 complaint and service of a summons and the complaint on the
7 defendant. Fed. R. Bankr. P. 7003 and 7004. Thus, the creditor
8 is specifically put on notice that the validity of its lien is at
9 issue and that it must respond in order to preserve its rights.

10 If the process contemplated by the applicable rules is not
11 followed, a creditor's rights can be affected only if the
12 requirements of due process are otherwise met. See GMAC Mortgage
13 Corp. v. Salisbury (In re Loloe), 241 B.R. 655, 662 (9th Cir. BAP
14 1999) (the greater the deviation from the process set out in the
15 rules, "the greater the quality and amount of notice needed in
16 order to comply with due process").

17 As we have held in an analogous Chapter 11 case involving
18 claim objections under Rule 3007:

19 Neither the statute nor the rules say, "oh, by the
20 way, we [plan proponents] can also sandbag you by
21 sneaking an objection into a reorganization plan and
22 hoping you do not realize that we can use this device
23 to circumvent the claim objection procedure mandated
24 by the rules." That is not the law, and if it were
25 the law, it would be a material disservice to public
26 confidence in the integrity of the bankruptcy system.

27 While we do not hold that a plan can never be used
28 to object to a claim of a creditor who does not
actually consent to such an objection, by holding
that the essence of Rule 3007 must be complied with,
we are holding that considerations of due process
mandate great caution and require that the creditor
receive specific notice (not buried in a disclosure
statement or plan provision) of at least the quality
of specificity, and be afforded the same opportunity
to litigate one-on-one, as would be provided with a

1 straightforward claim objection under Rule 3007.
2 Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.), 293
3 B.R. 489, 497 (9th Cir. BAP 2003) (emphasis added). See also In
4 re Millspaugh, 302 B.R. 90, 100 at nn.20-21 (Bankr. D. Idaho 2003)
5 (applying Dynamic Brokers in Chapter 13 context).

6 At oral argument both counsel suggested that the bankruptcy
7 court in this Second Case was concerned about Ventura being
8 permitted to ignore the First Case and still pursue its in rem
9 remedies at some later date. That concern reverses the parties'
10 burdens. It was Debtors' burden to bring an action for
11 declaratory relief as to the amount of taxes owed, or to avoid
12 Ventura's lien or otherwise limit its in rem rights. We have
13 already held that the Plan did not even purport to do this; but
14 assuming for the sake of argument that the Plan could be read as
15 Debtors suggest, that reading is too obscure to satisfy Ventura's
16 due process rights. Therefore the Plan has no res judicata effect
17 on the amount or enforceability of Ventura's lien against Debtors'
18 real property.

19 This does not mean that Ventura was entitled to receive
20 payments from the bankruptcy estate greater than what was provided
21 in the Plan. Ventura did not file a timely proof of claim in the
22 First Case and it withdrew its untimely claim, so the only
23 Chapter 13 payments to which Ventura was entitled were those that
24 Debtors provided in the Plan -- \$9,350.00 over time, with
25 interest. In addition, though, Ventura retained its in rem rights
26 against Debtors' House, and those rights and the amount of the
27 underlying debt owed to Ventura have not been affected by
28 confirmation of Debtors' Plan in the First Case. Ventura was also

1 entitled to accept payments from Bank (which undoubtedly paid
2 Ventura to protect its security interest from being eroded by the
3 penalties and interest that might accrue if Ventura continued to
4 remain unpaid).

5 Our conclusions are consistent with the authority cited by
6 the bankruptcy court and by Debtors. The bankruptcy court cited
7 Andrews v. Loheit (In re Andrews), 49 F.3d 1404 (9th Cir. 1995),
8 and Work, 58 B.R. 868, for the proposition that the "treatment
9 provided in the Plan was consistent with 11 U.S.C.
10 § 1325(a)(5)(B)." As noted above, that section of the Bankruptcy
11 Code generally requires that secured creditors receive the present
12 value of their allowed claim over time. See 11 U.S.C.
13 § 1325(a)(5)(A) and (B).

14 It is true that Ventura waived any rights under Section
15 1325(a)(5) by not asserting a claim or objecting to the Plan. Out
16 of the Plan payments Ventura was entitled to no more than what the
17 Plan provided. See Andrews, 49 F.3d at 1409. That does not,
18 however, eviscerate Ventura's lien rights or reduce the total
19 amount of assessments secured by its lien. Section 1325(a)(5) is
20 irrelevant to our analysis.

21 The reasoning in Work supports our analysis. Section
22 1327(c), on which Debtors' rely, says that confirmation of a
23 Chapter 13 plan vests property of the estate in the debtor "free
24 and clear of any claim or interest" of a creditor provided for in
25 the plan. As Work observed, claims and interests are not the same
26 thing. "Claim" is defined in § 101(5), and includes a "right to
27 payment" or "right to an equitable remedy." 11 U.S.C. § 101(5).
28 "Interest" is not defined in the Bankruptcy Code, but must mean

1 something different from "claim."

2 If, for the purposes of § 1327(c), the term "claim"
3 was meant not only to include claims against the
4 debtor but also claims against property of the
5 debtor, then use of the term "interest" would be
6 superfluous. By use of the term "interest" it
7 appears that the term "claim" was to have a more
8 limited meaning than that used in § 102(2).⁹ It is
9 appropriate that the Court determine in factual
10 circumstances such as in the present case, that the
11 term "claim" include those debts upon which the
12 debtor has personal liability and the term "interest"
13 cover claims against property of the debtor. The
14 term "claim" would refer to debts which would be
15 discharged under § 1328 and the term "interest" would
16 refer to liens or interests in property which would
17 be unaffected by a discharge under § 1328.

10

11 Work, 58 B.R. at 871.

12 Under this reasoning, a plan that provides for a claim but
13 does not provide for an interest in property securing that claim
14 does not affect the interest of the creditor in the property. The
15 property vests free of the claim, but not free of the interest,
16 which in this case is the lien of Ventura.

17 On this appeal Debtors also cite Lawrence Tractor Co. v.
18 Gregory (In re Gregory), 705 F.2d 1118 (9th Cir. 1983), and Ivory,
19 70 F.3d 73. Neither case is contrary to our analysis.

20 In Gregory the Ninth Circuit held that the holder of "a
21 large, unsecured claim" receives adequate notice for purposes of
22 due process when it receives "any notice from the bankruptcy court
23 that its debtor has initiated bankruptcy proceedings" because "it
24 is under constructive or inquiry notice that its claim may be

25

26 ⁹ Section 102(2) provides that "'claim against the debtor'
27 includes claim against property of the debtor[.]" 11 U.S.C.
28 § 102(2). Therefore, although Ventura's ad valorem taxes are not
Debtors' personal liability they are still a claim against the
bankruptcy estate.

1 affected, and it ignores the proceedings to which the notice
2 refers at its peril.” Gregory, 705 F.2d at 1123 (emphasis added).
3 The Ninth Circuit’s specific reference to an unsecured claim is
4 important. Unsecured claims invariably are affected by
5 bankruptcy. In contrast, as we have noted, in rem rights
6 generally pass through bankruptcy unaffected. Therefore, unlike
7 unsecured creditors, secured creditors may ignore the bankruptcy
8 proceedings and look to the lien for satisfaction of the debt.
9 Work, 58 B.R. at 869.

10 In Ivory, the Ninth Circuit held that even if the bankruptcy
11 court had been in error by permitting the debtor to redeem
12 property after the redemption period had expired, res judicata
13 precluded the creditor from bringing what amounted to a collateral
14 challenge to the confirmation order. Ivory, 70 F.3d at 74-75.
15 This was so, the court held, even if the bankruptcy court’s error
16 was jurisdictional. Id. at 75.

17 Ivory is inapposite because the issue determined by res
18 judicata was the redemption period, not a purported reduction of a
19 secured claim that would otherwise pass through bankruptcy
20 unaffected. There is no discussion in Ivory of due process, and
21 the decision says nothing about what notice the county in that
22 case received or how that Chapter 13 plan was worded. Most
23 tellingly, the plan in Ivory purported to affect the creditor’s
24 rights whereas here the Plan does not purport to affect Ventura’s
25 lien or determine the proper amount of Ventura’s assessments under
26 applicable law.

27 As stated by the Ninth Circuit in a Chapter 11 case:

28 If [the debtor] intended [the amount of the

1 creditor's claim stated in a Chapter 11 plan] as a
2 means of challenging the amount of [the creditor's]
3 claim, he picked a peculiar way of going about it,
4 hardly consistent with his fiduciary obligations to a
5 creditor of the estate. While the debtor may
6 challenge any claim he believes in good faith should
7 not be allowed, he must do so by raising the issue
8 squarely with the court and giving the affected
9 creditor an opportunity to respond.

6 Everett v. Perez (In re Perez), 30 F.3d 1209, 1215 (9th Cir. 1994)
7 (citation and footnote omitted).

8 In this case, if Debtors intended the Plan to reduce the
9 amount of Ventura's tax assessments or affect its rights to
10 enforce the full amount of its lien, they needed to raise these
11 issues squarely with the court and Ventura. The need for clear
12 notice is especially high in cases like this because a plan can be
13 confirmed very quickly in a Chapter 13 case -- as little as 30
14 days in local practice, according to Ventura. See Fed. R. Bankr.
15 P. 3015(b) (Chapter 13 plan may be filed with petition) and
16 2002(b) (25 days' notice by mail of time fixed for filing
17 objections and hearing to consider confirmation of Chapter 13
18 plan). No strained reading of the Plan can amount to the clear
19 notice and procedural protections to which Ventura would have been
20 entitled if Debtors had properly sought relief under the
21 Bankruptcy Code and Rules.

22 For the foregoing reasons, we disagree with Debtors' reading
23 of the Plan and its alleged res judicata effect. Confirmation of
24 the Plan did not reduce the amount of Ventura's tax assessments or
25 affect its lien rights.

26 Ventura claims that all of the damages flow from the res
27 judicata issue. We agree with Ventura that the underlying debt
28 was not reduced to \$9,350.00 by any res judicata effect, so

1 Ventura does not owe Debtors a refund of \$12,905.00, but it is
2 less clear how Debtors' other damage claims might be affected. On
3 remand the bankruptcy court can determine whether in view of our
4 reversal on the res judicata issue Debtors are entitled to any
5 portion of the damages previously awarded.

6 **VI. CONCLUSION**

7 Debtors argue that the res judicata effect of their confirmed
8 Plan reduced the amount of Ventura's tax assessments to \$9,350.00
9 and revested their House in them free and clear of Ventura's lien
10 in any greater amount. Nothing in the Plan, however, purports to
11 affect Ventura's lien rights or act as a declaratory judgment on
12 the proper amount of tax assessments.

13 Alternatively, even if the Plan could be read as Debtors now
14 propose, Ventura did not receive the clear notice and procedural
15 protections that due process requires. If Debtors wanted what
16 amounts to a declaratory judgment as to the proper amount of tax
17 assessments, or a partial avoidance of Ventura's lien, they should
18 have filed an adversary proceeding.

19 For each of these alternative reasons, the res judicata
20 effect of the Plan did nothing to reduce the amount of Ventura's
21 underlying tax assessments or affect Ventura's lien rights. Any
22 award of damages for violation of the automatic stay must be
23 reconsidered in light of these conclusions.

24 Accordingly, we REVERSE and REMAND.
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27
28