

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**Mark T. Brown &
Templeton Mortgage Corporation
Appellants**

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NO. 09-10145

VS.

**Vance Cole Chestnut
Appellee**

**(Appeal from the United States District Court for the Northern District
of Texas, Fort Worth Division, Civil No. 4-08-cv-578-A) (Bankruptcy
Appeal)**

**AMICUS CURIAE BRIEF OF TIM TRUMAN, TRUSTEE
In support of the Debtor, Vance Cole Chestnut (Appellee)**

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW TIM TRUMAN, TRUSTEE, Amicus Curiae, and files
this Brief as follows.

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**NO. 09-10145
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BRIEF OF AMICUS CURIAE TIM TRUMAN, TRUSTEE

**TO THE HONORABLE UNITED FIFTH CIRCUIT COURT OF
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COMES NOW TIM TRUMAN, TRUSTEE, Amicus Curiae, and files
this Brief as follows.

STATEMENT OF APPELLATE JURISDICTION

Jurisdiction is proper in this Court pursuant to 28 U.S.C. §158 (a).

IDENTITY AND INTEREST OF AMICUS CURIAE

Tim Truman (hereafter "Trustee") is the duly appointed Chapter 13
Trustee for the Northern District of Texas, Fort Worth Division. He has
served as Chapter 13 Trustee in the Fort Worth Division for approximately
30 years. He was appointed as Trustee in this Bankruptcy Proceeding on
January 31, 2003. The Trustee has a vital interest in the outcome of this

case. One of the main issues in this Appeal involves how the doctrine of *res judicata* is applied to Confirmation Orders in pending Chapter 13 cases. The outcome of the appeal may affect not only this bankruptcy case, but many other cases as well. The Trustee's interest in this issue is with regard to the finality of Confirmation Orders since he has an obligation to administer cases pursuant to such Orders.

STATEMENT OF THE ISSUE

Whether the doctrine of *res judicata* was applied correctly in holding that the final Confirmation Order was a determination that the Eastland Property was property of the debtor's bankruptcy estate.

STATEMENT OF THE CASE

This is a bankruptcy proceeding filed on April 30, 2003, Bankruptcy Case No. 03-41050-DML-13, by Vance Cole Chestnut ("Debtor" and "Appellee"). This appeal is from the Memorandum Opinion and Order entered in the above-captioned bankruptcy proceeding on July 29, 2008 by D. Michael Lynn, United States Bankruptcy Judge. The Appellant is Mark T. Brown and Templeton Mortgage Corporation ("the Creditor" and "Appellant").

ARGUMENT AND AUTHORITIES

It is well accepted that confirmation represents a turning point in the life of a Chapter 13 case. It is at this point that all of the “important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with reference to the plan.” 3 *Chapter 13 Bankruptcy* §228.1 (Keith Lundin, ed., 3rd ed. Rev. 2006.) The confirmed Chapter 13 plan controls the debtor-creditor relationship unless and until the plan is modified or the creditor is relieved of its effects. It is upon the Order of Confirmation that the Trustee relies in his distribution of funds pursuant to the confirmed plan. This is an area well defined by 11 U.S.C. §1327 and well settled by case law. Section 1327(a) states clearly that:

“The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claims of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.” 11 U.S.C. §1327(a.)

This language is a codification of the judicial doctrine of res judicata and must be given appropriate weight. In fact, courts have described the effect

of confirmation as *res judicata* with respect to all issues that were or could have been adjudicated at or before the confirmation hearing.¹

The Creditor relies on the fact that the ownership characterization of certain real property (the "Property") has not yet been settled to its satisfaction. The ownership of the Property was an issue that could and should have been raised at confirmation of the Plan of Reorganization (the "Plan.") Since the issue of ownership was not raised, the *res judicata* effect of confirmation precludes the creditors from now raising this issue.

Participation of the Creditor in the confirmation process is not a determinative factor. "The terms of a confirmed plan are legal obligations of the debtor and all creditors without regard to whether the creditor participated in the confirmation process." 3 *Chapter 13 Bankruptcy* §229.1 (Keith Lundin, ed., 3rd ed. Rev. 2006). The Creditor in this case had every opportunity to participate in the process of confirmation, but apparently chose not to do so. The Creditor was served with notice of the filing of the claim by the Debtor on its behalf and was served with a notice of the filing of the Plan as well as notice of the confirmation date. Although the Creditor chose not to participate in the process they are still bound by the terms of the Confirmation Order once it became final.

¹ See *In re Pardee*, 193 F.3d 1083,1087 (9th Cir. 1999) and *In re Braune*, 385 B.R. 167, 172 (N.D. Tex. 2008)

The Fifth Circuit has held that a bankruptcy court's order confirming a plan barred subsequent actions that were raised or could have been raised in connection with confirmation. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1054 (5th Cir.1987). The seventh circuit in the *Chappell* decision stated that "if the plan was unsatisfactory to the mortgage holder, it should have objected. Instead the failure of the mortgage company to object to confirmation of a chapter 13 plan is deemed acceptance. *In re Chappell*, 984 F.2d 775, 783 (7th Cir. 1993.) This is analogous to the fact situation in the case at bar. If Templeton objected to the payment of its lien through the Debtor's chapter 13 Plan, then it should have filed an objection to Confirmation. Such a course of action would have allowed Templeton to present factual evidence regarding the community or separate nature of the property in question. The propriety of the contents of the plan should have been dealt with at confirmation, and, if necessary, pursued on appeal. Instead, Templeton chose not to bring an objection to confirmation. It is now precluded from doing so. Once the Plan was confirmed, and the Confirmation Order was final, all parties including the Debtor, the Creditor and the Trustee were bound by the terms of the order. It is now too late for the Creditor to request an adjudication of issues settled by the Confirmation process.

The Creditor relies in part on *In re Simmons* and *In re Kliebrink*² with regard to the issue of the questionable characterization of the Property as either community or separate property. In fact, the Creditor questions why the Debtor did not file an objection to the secured claim, or why the Debtor did not bring an adversary proceeding to determine the character of the Property. The Creditor's argument makes no practical sense. The Creditor did not file its own claim. The Debtor filed a claim on behalf of the Creditor in the amount of \$22,000.00. The Debtor did so pursuant to 11.U.S.C. §501(c) which allows a debtor or a trustee to file a proof of claim, if a secured creditor has not done so of its own accord. 11 U.S.C. Section 502(a) further provides that when a claim is filed under Section 501, that claim is deemed allowed, unless a party in interest, including a creditor, objects. When a claim is filed pursuant to Section 501(c), Bankruptcy Rule 3004 instructs the clerk to give notice of the filing to the creditor, the debtor and the trustee. It would not make sense for the Debtor to be required to object to the claim which it filed on behalf of the creditor. Instead, the burden is on the creditor to file its own objection to the treatment of its lien through chapter 13 process. The Creditor did not take advantage of this opportunity

² *In re Simmons*, 765 V.2d 547 (5th Cir. 1985) and *In re Kleibrink*, 346 B.R. 734 (N.D. Tex. 2006.)

to bring the issue of the treatment of its lien before the Bankruptcy Court through the claims objection process, prior to confirmation.

In addition, a review of the Schedule A originally filed, shows that the real property (located in Ranger, Texas) was scheduled by the Debtor with a value of \$15,110.00 and a secured debt of \$22,000.00. This scheduling of the Property reveals that the Debtor clearly considered the property in question to be property of the estate and that it would be treated as such. In addition, the Debtor's action in filing a claim on behalf of the Creditor was another indication that the Debtor believed and intended to treat the real property as property of the estate. Finally, the Debtor clearly provided for the payment of the secured debt in his Final Plan filed on March 3, 2004. All of these actions put the Creditor on notice that the Property was being treated as property of the estate and, accordingly, that that the Trustee would consider the Property to be property of the estate.³ Once the Plan was confirmed, and the Confirmation Order was final, all parties including the Debtor, the Creditor and the Trustee were bound by the terms of the order.

Property of the Estate is defined in Section 541 of the Bankruptcy Code and is comprised of "all of the property, wherever located and by whomever held...all legal and equitable interests of the debtor in property as

³ In fact, the Trustee disbursed funds to the Creditor which totaled \$26,233.60, including interest, as provided by the Confirmed Plan.

of the commencement of the case.” It further states that this includes “all interests of the debtor and the debtor’s spouse in community property as of the commencement of the case that is under the sole, equal, or joint management and control of the debtor.” 11 U.S.C. §541(a)(1) and 11 U.S.C. §541 (a)(2)(A). Additionally, under the laws of the State of Texas, there is a presumption that all assets of the spouses acquired during the marriage are presumed to be community property, thereby placing the burden of proof on the party asserting separate character to show by clear and convincing evidence that a particular asset is, in fact, separate. TEX. FAM. CODE ANN. §3.003.

This Court’s analysis in its prior opinion in this bankruptcy proceeding, regarding the character of the Property, still applies.

“The Eastland Property was not clearly part of Mr. Chestnut’s bankruptcy estate at the time of the foreclosure, but neither was it clearly *not* part of his estate. Whether an asset is property of the estate is a legal determination which frequently entails complex analyses involving a number of legal elements and a variety of facts. Here, the status of the Eastland property hinged on the application of Texas’s legal presumptions regarding separate and community property as well as an examination of the factual bases underlying the transaction, including the text of the title documents, the source of purchasing funds, and even the possible existence of fraud. These questions concerning the characterization of the Eastland property as separate or community property can only be answered with finality through the judicial process, which was not initiated here until after the foreclosure of the Eastland property. Regardless of whether the Eastland property is

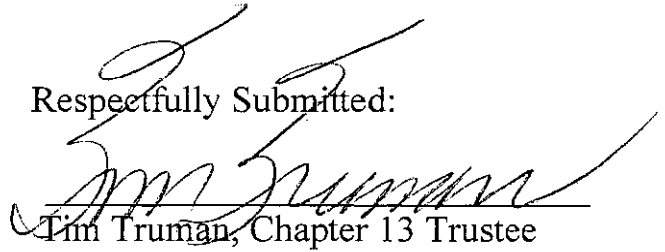
ultimately held to have been Mrs. Chestnut's separate property or the Chestnuts' community property, at the time that [the creditor] foreclosed on the Eastland property, it was uncertain whether it was property of Mr. Chestnut's estate and, therefore, was arguable property." *In re Chestnut*, 422 F.3d 298, 303 (5th Cir. 2005).

The facts of this bankruptcy proceeding have not changed with regard to the Fifth Circuit's analysis of the characterization of the Property. The Creditor made no attempt to bring before the Court any action which would have resulted in a final determination of the character of the Property. Instead, it sat back and said nothing while the Trustee, pursuant to the final confirmation order paid the Creditor \$26,233.60 on the secured claim filed for it by Debtor. In light of that omission, the Creditor is bound by the *res judicata* effect of the Confirmation Order which clearly establishes and makes provision for the payment of the Creditor's lien through Chapter 13 Plan. The Creditor may not now come before the Court seeking adjudication of issues which could have been determined prior to confirmation as required by 11.U.S.C. §1327(a.)

CONCLUSION

WHEREFORE, Tim Truman, Amicus Curiae and Trustee respectfully prays that this Court uphold the ruling of the Bankruptcy Court below, and for all other just and proper relief.

Respectfully Submitted:



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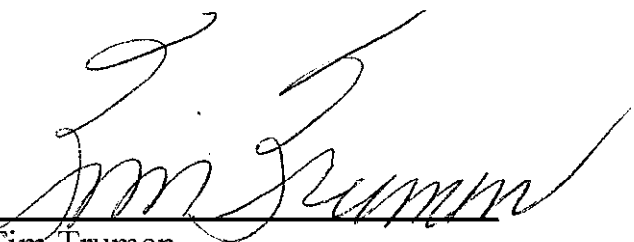
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae has been served by me this 20th day of May, 2009, on the parties listed below by United States First Class Mail, and/or electronically by the Court:

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