

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	
	§	
BILLY RAY DELP,	§	Case No. 91-44581-BJH-11
	§	
Debtor.	§	
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	§	
BILLY RAY DELP,	§	
	§	
Plaintiff,	§	
	§	
V.	§	Adversary Proceeding No. 95-4170
	§	
HBF FINANCIAL, LTD.,	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Agreed Pretrial Order entered by the Court on July 5, 2001, the parties agreed to bifurcate the trial of the issues raised in this adversary proceeding (the “Adversary”). Specifically, the parties agreed to litigate the issues surrounding the validity and survival of the lien separately from the claims of civil contempt and intentional infliction of emotional distress. *See* Agreed Pretrial Order at 9. The issues surrounding the validity and survival of the lien were tried on August 15, 2001. After reviewing the Court’s file, the stipulated facts contained in the Agreed Pretrial Order, the evidence admitted at trial, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law, *see* FED. R. CIV. P. 52, made applicable to the Adversary by FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

1. Billy Ray Delp, Jr. (“Delp” or the “Debtor”) and Gertrude Delp are husband and wife (collectively, the “Delps”). *See* Agreed Pretrial Order at 2, Stipulated Fact 1.
2. Delp filed this bankruptcy case (the “Case”) on or about November 4, 1991. *See* Agreed Pretrial Order at 2, Stipulated Fact 2.
3. Delp described his homestead as 8400 Cardinal Lane, North Richland Hills, Texas (the “Property”) on Schedule C - “Property Claimed as Exempt” under Texas Property Code § 42.001 and § 42.002. *See* Agreed Pretrial Order at 2-3, Stipulated Fact 3.
4. The Delps acquired the Property by warranty deed on September 4, 1985. *See* Agreed Pretrial Order at 3, Stipulated Fact 7.
5. The Property consisted of approximately five acres when Delp filed the Case. *See* Agreed Pretrial Order at 3, Stipulated Fact 8.
6. In no document filed with the Bankruptcy Court prior to confirmation did Delp ever disclose that the Property consisted of more than one acre of land. *See* Agreed Pretrial Order at 2-3, Stipulated Fact 3.
7. Troy & Nichols was the only secured creditor scheduled by Delp as holding a lien on the Property. *See* Agreed Pretrial Order at 3, Stipulated Fact 10.
8. The first meeting of creditor’s occurred on December 11, 1991. *See* Agreed Pretrial Order at 3, Stipulated Fact 5.
9. No creditor objected to Delp’s claim of the Property as exempt under Texas state law. *See* Agreed Pretrial Order at 3, Stipulated Fact 4. No creditor objected because no creditor had

notice that Delp was attempting to exempt more acreage than was legally appropriate under Texas state law – Delp had never disclosed that the Property was comprised of approximately five acres instead of the one acre then allowed to be exempted in Texas.

10. HBF Financial, LTD. (“HBF”), the defendant in the Adversary, acquired its claim against Delp by assignment dated May 27, 1992. *See* Agreed Pretrial Order at 4, Stipulated Fact 15. Specifically, HBF acquired, by that assignment, a judgment that Sunbelt Savings had initially taken against Delp and Nu-Way, Inc. on May 24, 1991 in the amount of \$1,050,000.00, plus interest (the “Judgment”). *See* Agreed Pretrial Order at 3, Stipulated Fact 13; *see also* HBF Exhibit 3. Delp listed Sunbelt Savings on Schedule F as a creditor with a contingent, disputed claim in the amount of \$1,050,000.00. *See* Agreed Pretrial Order at 4, Stipulated Fact 14.

11. HBF filed an amended proof of claim in the Case on or about January 15, 1993 in the amount of \$948,419.01 as an unsecured non-priority claim (the “Proof of Claim”). The Proof of Claim reflects that it is based on the amendment of a claim filed by the RTC, as successor to Sunbelt Savings. The Proof of Claim reflects that it is unsecured “except to extent abstract of judgment may attach to any non-exempt property.” *See* Agreed Pretrial Order at 4, Stipulated Fact 16.

12. The Judgment was abstracted in the Deed Records of Tarrant County, Texas and recorded on June 11, 1991. *See* Agreed Pretrial Order at 4, Stipulated Fact 17; *see also* HBF Exhibit 2. The effect of abstracting the Judgment was to create a judgment lien against the Property (the “Judgment Lien”). *See Citicorp Real Estate, Inc. v. Banque Arabe Internationale D’Investement*, 747 S.W.2d 926, 929 (Tex. Civ. App. – Dallas 1988, no writ) (holding that properly abstracted judgment creates statutory lien against property); *McGlothlin v. Coody*, 39 S.W.2d 133, 134 (Tex.

Civ. App.– Eastland 1931), *aff'd*, 59 S.W.2d 819 (Tex. Comm'n App.1933, judgment *aff'd* as recommended) (holding the purpose of an abstract of judgment is to create a lien against the debtor's property and to provide notice to subsequent purchasers of the existence of the judgment and the lien).

13. Pursuant to 11 U.S.C. § 1121(b), Delp had 120 days from the filing of the Case in which he had the exclusive right to file a plan of reorganization. *See* 11 U.S.C. § 1121(b). Since Delp filed the Case on November 4, 1991, his exclusive period within which to file a plan would have expired on March 5, 1992. However, Delp filed a Motion for Extension of Exclusive Time to File Plan on March 4, 1992. *See* Motion for Extension of Exclusive Time to File Plan, docket no. 32.¹ HBF and John Harvison (“Harvison”) opposed this motion and a hearing was set for June 23, 1992. Prior to the hearing, the parties announced that an agreement had been reached with regard to exclusivity and an Agreed Order Regarding Motion for Extension of Debtor's Exclusive Time to File Plan was entered on July 22, 1992. *See* Agreed Order Regarding Motion for Extension of Debtor's Exclusive Time to File Plan, docket no. 77. The agreement provided that HBF and Harvison could file a competing plan of reorganization and disclosure statement after September 1, 1992.

14. Delp filed his proposed plan of reorganization and a disclosure statement attendant to that plan on September 30, 1992. *See* Debtor's Plan of Reorganization and Disclosure Statement, docket nos. 90 and 91. As a result of the termination of exclusivity, HBF and Harvison filed their competing plan of reorganization and a disclosure statement attendant to that competing plan on

¹All references to docket no. ___ are references to the Court's docket in the Case. If reference is made to the Court's docket in the Adversary, that will be indicated as “Adversary docket no. ___.” If reference is made to the Court's docket in the Oakview Adversary, that will be indicated as “Oakview Adversary docket no. ___.”

October 1, 1992. *See* HBF and Harvison's First Amended Plan of Reorganization and First Amended Disclosure Statement, docket nos. 92 and 93.

15. Thereafter, both parties filed various amended plans and disclosure statements. On January 27, 1993, HBF and John Harvison filed their Fourth Amended Plan of Reorganization (the "HBF Plan") and the Disclosure Statement attendant thereto. *See* HBF Exhibit 8 and Plaintiff's Exhibit 3. Delp filed his final Second Amended Plan and Disclosure Statement (the "Delp Plan") on January 29, 1993. *See* final Second Amended Plan of Reorganization and Disclosure Statement, docket no. 165. The HBF Disclosure Statement (and the HBF Plan) and the Delp Disclosure Statement (and the Delp Plan) were approved for solicitation by Order entered on February 2, 1993. *See* Order Approving Disclosure Statements and Fixing Time for Filing Acceptances or Rejections of Alternative Plans of Reorganization, docket no. 169.

16. The HBF Plan was modified by Order dated March 3, 1993. The modification subordinated payment of Class 9 claims to payment in full of Class 8 claims. HBF was a Class 8 claimant under the HBF Plan. *See* Agreed Pretrial Order at 4, Stipulated Fact 18.

17. After contested confirmation hearings with respect to the competing plans (the Delp Plan and the HBF Plan), the Court denied confirmation of the Delp Plan by Order entered on April 1, 1993, *see* Order Denying Second Amended Plan of Reorganization of Debtor, docket no. 288, and confirmed the HBF Plan, as modified, by Order entered on April 6, 1993. *See* Plaintiff's Exhibit 4.

18. Under the HBF Plan, a plan trustee (the "Plan Trustee") was appointed to liquidate Delp's non-exempt assets and make distributions to creditors in accordance with the terms of the HBF Plan. *See* HBF Exhibit 8 at ¶ 5.03.

19. Counsel for the Plan Trustee testified that he learned that the Property was comprised of approximately five acres within about six months of confirmation of the HBF Plan. Counsel for the Plan Trustee further testified, however, that after researching the legal issues surrounding the designation of excess acreage as exempt property without timely objection by any creditor, he concluded that while Delp's claim of exemption of the entire Property was improper, nothing could be done by the Plan Trustee to recover the excess acreage for the benefit of the estate. Finally, counsel for the Plan Trustee testified that he then advised certain creditors or their counsel, including HBF, of the fact that an improper exemption had been claimed by Delp and his conclusion that nothing could be done to recover the excess acreage.

20. On November 18, 1994, the State of Texas instituted condemnation proceedings with respect to a portion of the Property, and named Sunbelt Savings and HDS as parties along with Delp. *See* Plaintiff's Exhibit 23. Sunbelt Savings and HDS² were named as parties because each such entity had abstracted its prepetition judgment against Delp and thus, were shown in the deed records as parties with liens against the Property. *See id.* at p. 4. As lien claimants, Sunbelt Savings and HDS were entitled to notice and an opportunity to participate in the condemnation proceedings. *See* TEX. TRANSP. CODE ANN. § 314.022 (Vernon 1999).

21. HBF's representative testified that in late 1994 or early 1995, HBF learned of the condemnation suit and its lien rights (as assignee of Sunbelt Savings) with respect to the Property.

22. Upon the conclusion of the condemnation proceedings, the State of Texas acquired

²Like Sunbelt, HDS also held a prepetition judgment against Delp that had been abstracted in the deed records in Tarrant County, Texas, resulting in a judgment lien against the Property in favor of HDS. *See* fn. 5, *infra*.

approximately 1.3 acres of the Property, *see* Agreed Pretrial Order at 3, Stipulated Fact 11, leaving approximately 3.7 acres currently owned by the Delps. Proceeds from the condemnation proceedings were used to pay off the mortgage on the Property. After payment of the mortgage, approximately \$43,015.00 remained in the registry of the state court pending the outcome of litigation to determine who was entitled to the remaining proceeds.³

23. The Plan Trustee filed a Motion for Order Approving Partial Distribution of Trust Assets on April 20, 1995. *See* Agreed Pretrial Order at 4, Stipulated Fact 20; *see also* Plaintiff's Exhibit 5. The Order Approving Partial Distribution of Trust Assets was entered on May 15, 1995, *see* Plaintiff's Exhibit 6, and provided for a payment to HBF of \$199,772.69. *See* Agreed Pretrial Order at 4, Stipulated Fact 20.

24. On July 21, 1995, HBF caused a writ of execution to be issued against Delp and the Property. *See* Plaintiff's Exhibit 10, Exhibit 2; *see also* Agreed Pretrial Order at 5, Stipulated Fact 22. On August 9, 1995, HBF filed a notice in state court seeking to require Delp to designate which one acre of the Property he wished to exempt under Texas state law as his homestead. *See* Plaintiff's Exhibit 10, Exhibit 1; *see also* Agreed Pretrial Order at 5, Stipulated Fact 23.

25. Subsequent to the above demand to designate one acre of homestead, a hearing was held before the state court at which time HBF sought to compel Delp to designate one acre of the Property as his homestead. *See* Agreed Pretrial Order at 5, Stipulated Fact 24.

26. On September 26, 1995, Delp filed the Adversary seeking, *inter alia*, a determination

³As of August 15, 2001, these proceeds were held in the registry of the state court. The Court is unaware of whether Oakview has now been permitted to take those funds in light of its final judgment in the Oakview Adversary (as defined hereinafter).

that (i) HBF's post-confirmation collection activities violated the discharge provisions of the HBF Plan and/or the Bankruptcy Code, (ii) HBF's lien was avoided by the Bankruptcy Code and confirmation of the HBF Plan, and/or (iii) HBF was estopped to assert its lien against the Property. *See* Plaintiff's Exhibit 10 at pp. 7-12; *see also* Agreed Pretrial Order at 5, Stipulated Fact 25.

27. On October 6, 1995, the Plan Trustee filed his second motion for order approving partial distribution of trust assets. *See* Plaintiff's Exhibit 6A. The Order approving this partial distribution was entered on November 30, 1995. *See* Plaintiff's Exhibit 6B. HBF received a distribution of approximately \$24,500.00. *See id.*

28. On November 29, 1995, HBF filed its motion for summary judgment in the Adversary, seeking a summary judgment that its lien against the Property was valid and unaffected by confirmation of the HBF Plan. *See* Defendant and Counter-Claimant's Motion and Brief for Summary Judgment, Adversary docket no. 7; *see also* Agreed Pretrial Order at 5, Stipulated Fact 26. Delp responded to HBF's motion for summary judgment and opposed entry of such a judgment. *See* Plaintiff's Exhibit 11.

29. On February 8, 1996, Delp conveyed the Property to his wife, Gertrude. *See* Plaintiff's Exhibit 22; *see also* Agreed Pretrial Order at 5, Stipulated Fact 30.

30. On February 22, 1996, the Court⁴ denied HBF's motion for summary judgment and, *sua sponte*, held that HBF's lien was invalid as HBF had failed to object to Delp's designation of the homestead as exempt within thirty days of the creditor's meeting and that this failure to object caused all five acres to vest in Delp "outside of [HBF's] reach." *See* Plaintiff's Exhibits 13 and 14; *see also*

⁴The Honorable Massie Tillman presiding. The Adversary was reassigned to the undersigned judge on April 9, 2001.

Agreed Pretrial Order at 5, Stipulated Fact 27.

31. HBF appealed this decision to the District Court. On December 14, 1998, the District Court reversed and remanded the Adversary to this Court for further proceedings consistent with its decision. *See* Agreed Pretrial Order at 5, Stipulated Fact 28. Specifically, the District Court concluded that

Just because property is exempt from the bankruptcy estate under § 522(1) does not mean, however, that any liens on the property are automatically avoided. Section 522(f) of the bankruptcy code governs the avoidance of liens, providing that a debtor can avoid a judicial lien “to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of [section 522]” 11 U.S.C.A. § 522(f)(1) (West Supp. 1998); *see Owen v. Owen*, 500 U.S. 305, 310-11 (1991) (to determine whether a judicial lien is valid under § 522(f), a court asks “whether [the lien] impairs an exemption to which [the debtor] would have been entitled but for the lien itself.”). Subsection (b)(2)(A) of section 522 exempts, *inter alia*, any property that is exempt under state law. As previously mentioned, under Texas state law, Delp was entitled to a homestead exemption of no more than one acre. *See* TEX. PROP. CODE ANN. 41.002(a) (Vernon’s Supp. 1999). Because only one of the five acres is exempt under Texas state law and thus under § 522(b), the lien only impairs Delp’s exemption as to that one acre. As a result, under § 522(f), the lien survives as to the other four acres, despite the fact that the entirety of the acreage was exempt from the bankruptcy estate by default under § 522(1). *See Morgan v. FDIC*, 149 B.R. 147, 150-52 (B.A.P. 9th Cir. 1993); *In re Streeper*, 158 B.R. 783, 786-87 (Bankr. N.D. Iowa 1993); *In re Mohring*, 142 B.R. 389, 393-94 (Bankr. E.D. Cal. 1992); *In re Smith*, 119 B.R. 757, 760 (Bankr. E.D. Cal. 1990); *In re Frazier*, 104 B.R. 255, 257-59 (Bankr. N.D. Cal. 1989); *In re Montgomery*, 80 B.R. 385, 387-90 (Bankr. W.D. Tex. 1987). . . .

For the foregoing reasons, the Court concludes that the bankruptcy court erred in determining that HBF’s lien on Delp’s five acres at 8400 Cardinal Lane was invalid and should be avoided in its entirety due to HBF’s failure to object to Delp’s claim of the entire five acre tract as exempt under § 522(1). Because the bankruptcy court did not base its ruling on any of the other arguments raised in Delp’s brief, this Court shall

not consider them. The bankruptcy court's decision is therefore REVERSED, and this matter is REMANDED to the bankruptcy court for any further proceedings necessary in light of this opinion.

See Plaintiff's Exhibit 15 at pp. 3-4.

32. Delp appealed the District Court's decision to the Fifth Circuit Court of Appeals, which ultimately dismissed the appeal for lack of jurisdiction on December 20, 1999. *See* Plaintiff's Exhibit 20; *see also* Agreed Pretrial Order, Stipulated Fact 29.

33. On December 29, 1999, Oakview, LTD.⁵ ("Oakview") filed suit against Gertrude Delp in Texas state court seeking to require her to designate which one acre of the Property she wished to exempt under Texas state law as her homestead. Like HBF, Oakview asserted that it continued to hold a valid judgment lien against the Property (arising from an abstract of judgment filed in the deed records prepetition) notwithstanding confirmation of the HBF Plan.

34. Oakview's state court petition against Gertrude Delp was removed to this Court on January 10, 2000 and was assigned adversary proceeding number 00-4007 (the "Oakview Adversary"). *See* Notice of Removal, Oakview Adversary docket no. 1.

35. On January 25, 2000, HBF moved for entry of judgment in the Adversary (now remanded after the Fifth Circuit dismissed Delp's appeal). *See* Plaintiff's Exhibit 17.

36. On February 1, 2000, Delp responded to HBF's motion for entry of judgment in the Adversary, opposing the entry of any judgment in HBF's favor due to the issues that the District Court

⁵Oakview's lien claim arises from an assignment of a judgment and judgment lien originally held by H.D.S. Enterprises, Inc. ("HDS") against Delp and the Property. *See* HBF Exhibit 6, Findings of Fact 2 and 3.

had concluded remained to be decided upon remand – *i.e.*, Delp’s other claims and equitable defenses of waiver, estoppel, etc. *See* Plaintiff’s Exhibit 18.

37. On that same date, Gertrude Delp filed her Motion to Consolidate in the Oakview Adversary, seeking to consolidate the Adversary and the Oakview Adversary for trial. *See* HBF Exhibit 9. In the Motion to Consolidate, Gertrude Delp stated “[b]ecause the claims in this proceeding [the Oakview Adversary] are the same issues to be decided in adversary proceeding no. 495-4170, Billy Ray Delp, Jr. v. HBF Financial, Ltd., this Court should consolidate these two adversary proceedings for trial.” *See id.* at 3, ¶ 8.

38. By Order entered on April 6, 2000, the Court denied the Motion to Consolidate, simply stating its preference for separate trials of the two adversaries. *See* Order Denying Motion to Consolidate, Oakview Adversary docket no. 6.

39. By Order entered on April 13, 2000, the Court denied HBF’s motion for judgment, concluding that issues remained for trial. *See* Order Denying Motion for Entry of Judgment, Adversary docket no. 38.

40. The Oakview Adversary was set for trial docket call on July 26, 2000. Shortly after that trial docket call, the parties were advised that the Oakview Adversary would be tried on August 28, 2000.

41. On August 8, 2000, HBF filed its “Release of Judgment Lien” in the deed records of Tarrant County, Texas. *See* HBF Exhibit 5; *see also* Agreed Pretrial Order at 6, Stipulated Fact 32. HBF elected to release its judgment lien because the Oakview Adversary was set for trial and

Oakview's lien claim, if upheld at trial, would exhaust the value of the non-exempt portion of the Property.

42. The Oakview Adversary was tried on August 28, 2000. On February 28, 2001, the Court entered its Findings of Fact and Conclusions of Law, *see* HBF Exhibit 6, and Judgment, *see* HBF Exhibit 7, in the Oakview Adversary, concluding, *inter alia*, that Oakview had a valid, subsisting judgment lien on the Property, subject to the right of the Delps to designate one acre of the Property as their homestead pursuant to the provisions of the Texas Property Code. *See id.*

43. On February 16, 2001, the Plan Trustee filed his final motion to distribute trust assets. *See* Plaintiff's Exhibit 7. On March 7, 2001, the Court entered an order approving this motion to distribute and authorized payment of \$34,504.00 to HBF on its unsecured claim. *See* Plaintiff's Exhibit 8.

44. HBF did not recover any money or property as a result of the Judgment Lien against the Property. *See* Agreed Pretrial Order at 4, Stipulated Fact 21.

45. Any Finding of Fact may also be construed as a Conclusion of Law.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding. *See* 28 U.S.C. §157 (b)(2)(A).

A. **Did HBF Have a Valid Judgment Lien Against the Property, and the Condemnation Proceeds, Notwithstanding Confirmation of the HBF Plan, Until it Released that Lien Voluntarily?**

2. The Court concludes that until it was voluntarily released on August 8, 2000, the Judgment Lien was a valid judgment lien against the Property, subject to the Delps' right to designate

one acre as exempt under Texas state law. The Court comes to this conclusion for at least the three reasons discussed below.⁶

(i) **The District Court’s prior decision in the Adversary is the law of the case.**

3. In connection with the prior appeal, the District Court concluded that (i) Delp was entitled to a homestead exemption of no more than one acre, (ii) only one of the five acres that comprise the Property is exempt under Texas state law, (iii) the Judgment Lien only impaired Delp’s exemption as to that one acre of land, and (iv) the Judgment Lien survived as to the other four acres, “despite the fact that the entirety of the acreage was exempt from the bankruptcy estate by default under § 522(l) [of the Bankruptcy Code].” *See* Plaintiff’s Exhibits 15 and 16.

4. These conclusions by the District Court are the law of the case and are binding on this Court on remand. *See Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061-62 (5th Cir. 1991) (holding that the “law of the case” doctrine is a restriction self-imposed by the courts in the interests of judicial efficiency; and generally operates to preclude a reexamination of issues decided on appeal, either by the district court on remand or by the appellate court itself upon a subsequent appeal); *Marine Overseas Servs., Inc. v. Crossocean Shipping Co., Inc.*, 791 F.2d 1227, 1232 (5th Cir. 1986) (citing with approval to *Chapman v. Nat’l Aeronautics and Space Admin.*, 736 F.2d 238, 241 (5th Cir. 1984) (holding that the “law of the case” doctrine operates to preclude a reexamination of issues of law actually decided on appeal)); *Lehrman v. Gulf Oil Corp.*, 500 F.2d

⁶Certain of these reasons would be sufficient, standing alone, to support the ultimate conclusion reached by the Court. However, because the Court anticipates an appeal by Delp, the Court has stated all of the reasons for its ultimate conclusions throughout this decision to facilitate appellate review.

659, 663 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975) (holding that “[a]s a general rule if the issues were decided, either expressly or by necessary implication, those determinations of law will be binding on remand and on a subsequent appeal.”).

5. The Court adopts the conclusions of the District Court in connection with the prior appeal as its conclusions in accordance with the law of the case doctrine.

(ii) This Court’s decision in the Oakview Adversary is entitled to collateral estoppel effect against Delp.

6. This Court concluded in the Oakview Adversary that Oakview’s judgment lien against the Property was, and continued to be, a valid lien against the Property, and specifically rejected all of Delp’s claims and defenses to the continuing validity of that lien, finding “no basis in law or in fact” for Delp’s affirmative defenses.⁷ *See* HBF Exhibits 6 and 7. In the Motion to Consolidate, the Delps admitted that the issues raised in the Oakview Adversary were “the same” as the issues raised in the Adversary. *See* Plaintiff’s Exhibit 9 at 3, ¶ 8.

7. The doctrine of collateral estoppel prohibits a party from relitigating issues of fact or law that were necessary to a prior judgment and that were actually determined in a prior action. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case”); *Aktiengesellschaft v. Smoked Foods*

⁷When given collateral estoppel effect, this prior decision in the Oakview Adversary disposes of all of the issues raised in the Adversary unless two arguably material facts give rise to a different result. The factual differences of possible significance are the fact that HBF was a plan proponent and received distributions as an unsecured creditor under the HBF Plan. For the reasons explained hereinafter, these factual differences are of no consequence.

Products Co., Inc., 776 F.2d 1270, 1275 (5th Cir. 1985) (stating that collateral estoppel bars a party from litigating for a second time issues previously decided). Mutuality of parties is no longer necessary for the application of collateral estoppel. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (holding that mutuality of parties is not necessary for the doctrine of collateral estoppel to apply).

8. The doctrine of collateral estoppel bars Delp's attempt to relitigate the legal issue of the validity of an abstract of judgment lien against the Property after confirmation of the HBF Plan (here, the Judgment Lien) because this Court previously held in the Oakview Adversary that Oakview's judgment lien against the Property (the "same issue" that is presented here) remained valid after confirmation of that plan. Since the issue of whether Oakview's lien remained valid after confirmation of the HBF Plan was necessary to this Court's judgment in the Oakview Adversary, and the same issue is presented here, collateral estoppel is properly applied against Delp to preclude relitigation of this issue.

(iii) Independently, the Court again comes to the same conclusion.

(a) The Property was not dealt with in the HBF Plan; and thus, confirmation of the HBF Plan had no effect on the Judgment Lien.

9. The Property was not dealt with in the HBF Plan. The HBF Plan merely recited the result flowing from the failure of any creditor to object to Delp's claim of exemption of the entire Property – *i.e.*, the Property was no longer property of the estate and revested in the Delps. Specifically, the HBF Plan recited that "[t]he Debtor and the Debtor's spouse shall be entitled to retain their homestead, subject to all valid liens, and their personal property scheduled as exempt under Schedule C of the Debtor's Schedules of Assets and Liabilities." *See* HBF Exhibit 8 at ¶ 4.10.

10. The Supreme Court held in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) that Federal Rule of Bankruptcy Procedure 4003(b) establishes a thirty day time period for objecting to exemptions and a failure to object within that time period bars a later objection regardless of whether or not the debtor had a colorable basis for the exemption claimed. *See id.* at 642. The Supreme Court relied on 11 U.S.C. § 522(l) for its holding, which provides that “[u]nless a party in interest objects, the property claimed as exempt . . . is exempt.” *See id.* at 643. As exempt property, the property is no longer property of the bankruptcy estate (despite being improperly exempted). *See id.* at 643-44; *see also In re H.B. Halbert, Jr.*, 146 B.R. 185, 188 (Bankr. W.D. Tex. 1992) (holding that “[o]nce the property is exempted, it is no longer any part of the property of the estate and it ‘revests’ in the debtor”); *In re Robertson*, 105 B.R. 440, 446 (Bankr. N.D. Ill. 1989) (“the effect of the automatic allowance of a claim of exemption due to the expiration of the 30-day period is, under well-settled case law, to ‘revest’ the property in the Debtor and end its status as ‘property of the estate,’” *citing In re Grossman*, 80 B.R. 311, 314 (Bankr. E.D. Penn.1987)); *In re Hahn*, 60 B.R. 69, 73 (Bankr. D. Minn. 1986) (“once a debtor’s claim of exemption to property has been allowed by the running of the period for objection to the claim of exemptions under Bankruptcy Rule 4003(b), the property revests in the debtor and is no longer property of the estate.”); *In re Kretzer*, 48 B.R. 585, 587 (Bankr. D. Nev. 1985) (“Unless a party in interest timely objects, property claimed as exempt is exempted from the bankruptcy estate. . . . [P]roperty exempted from the estate revests in the debtor.”)

11. Thus, under the applicable case law, the Property, once exempted without a timely objection, was no longer property of the estate and revested in Delp. The HBF Plan simply recognizes and recites that legal result. Therefore, notwithstanding confirmation of the HBF Plan, the Judgment

Lien remained valid against the Property because the Property was not dealt with substantively in the HBF Plan.

(b) Alternatively, if the Property was dealt with in the HBF Plan, the HBF Plan itself preserved the Judgment Lien.

12. Alternatively, even if the HBF Plan dealt with the Property, the Judgment Lien was preserved by the terms of the HBF Plan. The HBF Plan specifically provided that “[t]he Debtor and the Debtor’s spouse shall be entitled to retain their homestead, *subject to all valid liens*, and their personal property scheduled as exempt under Schedule C of the Debtor’s Schedules of Assets and Liabilities.” *See* HBF Exhibit 8 at ¶ 4.10 (emphasis added). Because the Judgment Lien was expressly preserved in the HBF Plan, the Judgment Lien survived confirmation of the HBF Plan.

13. In *In re Smith and Kourian v. Mortgage Funding Corp.*, 216 B.R. 686 (B.A.P. 1st Cir. 1997), the court considered whether an otherwise valid mortgage lien survived confirmation of the debtor’s plan. There, the plan provided that the debtor “shall retain his interest in the Sarasota, Florida property and the Kennebunkport property (subject to any mortgage liens).” *Id.* at 688. The court held that this language was sufficient to preserve the pre-existing liens, stating that “the plan was not silent about the mortgage’s treatment. It *expressly* stated that Smith would retain the Kennebunkport property ‘*subject to any mortgage liens.*’” *Id.* at 689 (emphasis in original).

14. Delp relies heavily on the Seventh Circuit’s decision in *Matter of Penrod*, 50 F.3d 459 (7th Cir. 1995), to support his view that confirmation of the HBF Plan cut off the Judgment Lien. However, in *Penrod*, neither the plan of reorganization nor the order confirming the plan made mention of the lien at issue. *See id.* at 462. The Seventh Circuit stated that “[t]he question we must decide in

this case is whether preexisting liens survive a reorganization when the plan (or order confirming it) does not mention the liens. What in other words is the default rule when the plan is silent?” *See id.* After stating the issue, the Circuit held that because the plan did not mention whether the secured creditor’s lien was preserved, the lien was extinguished. *See id.*; *see also FDIC v. Be-Mac Transport Co., Inc., (In re Be-Mac Transport Co., Inc.)*, 83 F.3d 1020, 1025 (8th Cir. 1996) (citing *Penrod* with favor for the proposition that a secured creditor who participates in the reorganization may lose its lien by confirmation of a reorganized plan which does not expressly preserve the lien).

15. Here, the HBF Plan expressly preserved the Judgment Lien when it provided that “[t]he Debtor and the Debtor’s spouse shall be entitled to retain their homestead, subject to all valid liens. . . .” *See* HBF Exhibit 8 at ¶ 4.10. Unlike the situation in *Penrod*, the HBF Plan specifically stated that the Delps’ retention of the Property was “subject to all valid liens.” The facts here are analogous to the facts in *Smith and Kourian* and, as the court in that case concluded, the language of the HBF Plan itself preserved the Judgement Lien.

B. Did HBF’s Conduct Violate the Discharge Injunction?

16. The Court concludes that HBF’s conduct did not violate the discharge injunction for the two alternate reasons discussed below.

(i) The Judgment Lien survived confirmation of the HBF Plan because the Property (and the Judgment Lien) was not dealt with in the HBF Plan.

17. In order for HBF’s conduct to have violated the discharge injunction, the Property and the Judgment Lien must have been dealt with by the HBF Plan. As noted previously, the Court concluded that the Property was not dealt with in the HBF Plan at all because the Property fell out of

the estate when no party filed a timely objection to Delp's claim of the Property as exempt. *See* pp. 15-16, *supra*. The effect of this failure to object was to revest the Property in Delp subject to any valid lien against the Property. *See* p. 13, *supra* (as noted, this conclusion of the District Court is the law of the case) and at pp. 15-16, *supra* (this Court's alternative, independent conclusion).

18. Because the Property was revested in Delp (subject to valid liens) when no party objected to Delp's claimed exemption, and because the Property was not dealt with in the HBF Plan, HBF's conduct in attempting to enforce the Judgment Lien did not violate the discharge injunction.

(ii) Alternatively, if the Property was dealt with in the HBF Plan, HBF's conduct did not violate the discharge injunction because its lien rights were expressly preserved in the HBF Plan.

19. Alternatively, the Court concludes that HBF's conduct did not violate the discharge injunction due to the plain language of section 1141 of the Bankruptcy Code itself. Looking first to section 1141(b), the Code provides that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the *property of the estate* in the debtor." 11 U.S.C. § 1141(b) (emphasis added).⁸ Moreover, section 1141(c) of the Code provides that "[e]xcept as otherwise provided . . . in the plan or the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors" 11 U.S.C. § 1141(c) (emphasis added). Finally, section 1141(d)(1) of the Code provides that "[e]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan,

⁸As noted previously, the Property was no longer property of the estate thirty days after the creditor's meeting. *See* pp. 13, 15-16, *supra*.

the confirmation of a plan – (A) discharges the debtor from any debt that arose before the date of such confirmation” 11 U.S.C. § 1141(d)(1)(A) (emphasis added).

20. Since the Judgment Lien was preserved in the HBF Plan,⁹ HBF’s conduct in attempting to enforce that lien did not violate the discharge injunction provided by either the HBF Plan or Section 1141 of the Bankruptcy Code.

C. Is HBF Estopped From Asserting the Judgment Lien by Filing the Proof of Claim?

21. The Court concludes that HBF is not estopped by the filing of the Proof of Claim from asserting the validity of the Judgment Lien for at least two independent reasons discussed below.

(i) Delp has unclean hands and cannot rely upon an estoppel defense.

22. Delp’s failure to claim only one acre of the Property as his exempt homestead (as that is all that was lawfully allowed under Texas state law) and/or Delp’s failure to disclose that the Property was comprised of approximately five acres (so that his creditors had the information they would need to object timely to Delp’s improper claim of a homestead exemption) are the starting points of this controversy. Had Delp made a homestead claim that was consistent with applicable state law and the Bankruptcy Code, this controversy could have been avoided.

23. There is no question that Delp was only entitled to claim one acre of the Property as his exempt homestead. The Property is clearly urban in nature (because it is located within the city of North Richland Hills). As an urban homestead, Delp was entitled to a one acre exemption. *See* TEX.

⁹As noted previously, the HBF Plan stated that “[t]he Debtor and the Debtor’s spouse shall be entitled to retain their homestead, *subject to all valid liens*, and their personal property scheduled as exempt under Schedule C of the Debtor’s Schedules of Assets and Liabilities.” *See* HBF Exhibit 8 at ¶ 4.10 (emphasis added).

PROP. CODE ANN. § 41.002(a) (Vernon Supp. 1992); *see also Falor v. Falor*, 840 S.W.2d 683, 686 (Tex. Civ. App.— San Antonio 1992) (stating that an urban homestead consists of only one acre of land).¹⁰ Had Delp made a proper urban homestead exemption claim of one acre, the excess acreage (approximately four acres) would have been property of the estate, and that excess acreage and any liens against that excess acreage would have been dealt with in any plan of reorganization confirmed in the Case.

24. Moreover, even if Delp wanted to attempt to claim the entire Property as exempt, if he had disclosed that the Property was comprised of approximately five acres, there is little question that some party in interest (HBF, Oakview, or some other party) would have objected to this excessive homestead exemption being claimed by Delp on the basis that the claim was improper under applicable law. Such an objection would have resulted in either an amended claim of exemption by Delp or a determination by the Court that the excess acreage was not exempt and was, in fact, property of the estate. Again, under that scenario, the Court is satisfied that this controversy could have been avoided because the excess acreage could have been dealt with in the Case and the effect of the Judgment Lien against the excess acreage and on HBF's unsecured claim could have been addressed at that time. Dealing with the Judgment Lien during the Case would have resulted in a credit of the value of the lien against any unsecured claim otherwise asserted by HBF in accordance with 11 U.S.C. § 506(a) or a decision to release that lien during the Case with its corresponding effect on HBF's allowable unsecured claim.

¹⁰While the urban homestead exemption expanded to ten acres effective January 1, 2000, *see* TEX. PROP. CODE ANN. § 41.002(a) (Vernon 2000), when Delp filed the Case and designated his exempt property, the statute provided for the exemption of only one acre.

25. Of course, none of these potential outcomes was attractive to Delp who wanted to keep the entire homestead acreage free from the claims of his creditors. So, notwithstanding his voluntary decision to file the Case and state law which clearly provided for only one acre of exempt homestead property, Delp claimed the entire Property as exempt and failed to disclose that the Property was comprised of more than one acre.

26. For these reasons, the Court concludes that the issues in dispute in the Adversary are directly traced to Delp's initial decision to, stated most kindly, be less than candid with the Court and his creditors about the size of the Property that he was claiming as his exempt homestead.¹¹

27. The doctrine of unclean hands is an equitable doctrine which allows a court to deny equitable relief to a party guilty of fraud, deceit, unconscionability, or bad faith relative to an issue present in the pending lawsuit. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6th Cir.1995) (explaining the doctrine of unclean hands); *Regional Properties, Inc. v. Finance & Real Estate Consulting Co.*, 752 F.2d 178, 183 (5th Cir. 1985) (explaining equitable doctrine of unclean hands under Texas state law and stating that “[a]n equitable defense cannot be used to reward inequities nor to defeat justice.”) (citations omitted). Application of the doctrine is discretionary. *See Compaq Computer Corp. v. Procom Tech. Inc.*, 908 F. Supp. 1409, 1428 (S.D.

¹¹In the Oakview Adversary, the Court found that “[a]t the time of the institution of the bankruptcy proceeding, Billy Ray Delp, Jr. was aware that he was entitled to exempt under Texas law as his urban homestead only one (1) acre of land.” *See* HBF Exhibit 6, Finding 15. For the reasons stated previously, that factual finding is entitled to collateral estoppel effect against Delp here. *See* pp. 14-15, *supra*. That finding supports the conclusion that Delp intended to defraud his creditors (or at least was acting in bad faith) when he made his excessive homestead exemption claim, either of which would support the application of the unclean hands doctrine. Alternatively, even if this Court's prior finding in the Oakview Adversary is not entitled to collateral estoppel effect here, Delp's less than candid disclosures cause the unclean hands doctrine to be applicable in the exercise of this Court's discretion.

Tex. 1995) (stating that the application of the doctrine of unclean hands is discretionary). As the Third Circuit explained in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3^d Cir. 1989), “the equitable doctrine of unclean hands is not ‘a matter of defense to the defendant.’ Rather, in applying it ‘courts are concerned primarily with their own integrity,’ and with avoiding becoming ‘the abettor of iniquity.’ Thus, the doctrine is to be applied ‘only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.” *Id.* at 1354 (citations omitted).

28. By failing to disclose that the Property consisted of five acres, Delp was, at a minimum, deceitful. By applying collateral estoppel to the findings in the Oakview Adversary, Delp committed a fraud on his creditors (or at least acted in bad faith) when he claimed the entire Property as exempt with knowledge that only one acre of land was properly exempted. *See* HBF Exhibit 6, Finding 15.

29. Delp asserts several equitable defenses (such as collateral estoppel and waiver) to HBF's contention that the Judgment Lien was valid and enforceable against the non-exempt portion of the Property (the excess acreage) until it was voluntarily released. If applied here, the doctrine of unclean hands would allow the Court to deny Delp the benefit of his equitable defenses to the validity of the Judgment Lien. Due to Delp's conduct in making an improper homestead exemption claim and/or in failing to disclose that the Property was comprised of more than one acre of land, the Court concludes that the doctrine of unclean hands is properly applied here, thereby depriving Delp of all equitable defenses he attempts to assert against HBF.

(ii) The Proof of Claim itself preserves the lien.

30. As noted previously, the Proof of Claim stated that HBF's claim was "[u]nsecured except to extent abstract of judgment may attach to any nonexempt property." *See* p. 3, *supra*. The plain language of the Proof of Claim itself preserved HBF's lien as there was nonexempt property (*i.e.*, the excess acreage) to which the Judgment Lien could attach.

D. Is HBF Estopped from Asserting the Judgment Lien by Confirmation of the HBF Plan?

31. The Court concludes that HBF is not estopped from asserting the Judgment Lien by confirmation of the HBF Plan for at least four independent reasons discussed below.

(i) The Oakview Adversary findings and conclusions, and judgment, are entitled to collateral estoppel effect.

32. As previously stated, the doctrine of collateral estoppel prohibits a party from relitigating issues of fact or law that were necessary to a prior judgment and that were actually determined in a prior action. *See* p.14, *supra*. In the Oakview Adversary, this Court held that "the confirmed plan of reorganization, to the extent it deals with the property and the proceeds thereof at all, preserves the judgment lien of Oakview, Ltd." and found Delp's estoppel defense to be without "basis in law or in fact." *See* HBF Exhibits 6 and 7. Because the legal issue of the continued validity of Oakview's abstract of judgment lien in light of confirmation of the HBF Plan, and the issues surrounding Delp's estoppel defense, were actually determined in the Oakview Adversary, were determined adversely to Delp, and those adverse determinations were necessary to the Judgment entered in the Oakview Adversary, Delp is barred by the doctrine of collateral estoppel from relitigating the same issues here.

(ii) Delp has unclean hands and cannot rely upon an estoppel defense.

33. As noted, Delp contends that HBF is estopped from asserting any continuing claim or lien against the Property after confirmation of the HBF Plan. *See* Agreed Pretrial Order at 6. For the reasons stated previously, the Court will exercise its discretion and apply the doctrine of unclean hands against Delp to bar his assertion of an estoppel defense to the continuing validity of the Judgment Lien. *See* pp. 20-23, *supra*.

(iii) The HBF Plan itself preserves the lien.

34. The Judgment Lien was expressly preserved under the terms of the HBF Plan. The HBF Plan specifically provided that “[t]he Debtor and the Debtor’s spouse shall be entitled to retain their homestead, *subject to all valid liens*, and their personal property scheduled as exempt under Schedule C of the Debtor’s Schedules of Assets and Liabilities.” *See* HBF Exhibit 8 at ¶ 4.10 (emphasis added). The Judgment Lien, as a valid lien, was preserved by the terms of the HBF Plan.

(iv) The elements of estoppel are not satisfied here.

35. The party seeking to apply estoppel bears the burden of proof and must establish all of the required elements by a preponderance of the evidence. *See Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992) (holding burden of proof is on party asserting estoppel); *In re Larson*, 862 F.2d 112, 115 (7th Cir. 1988) (holding same); *Crain v. State of Maryland (In re Crain)*, 158 B.R. 608, 612 (Bankr. W.D. Pa. 1993) (holding same); *Royal Bank of Canada v. Hunt (In re Hunt)*, 124 B.R. 200, 206-07 (Bankr. N.D. Tex. 1991) (holding same). The elements of estoppel are: (i) a material misrepresentation or concealment, (ii) made with actual or constructive knowledge of the true facts, (iii) made with the intent that the misrepresentation or concealment be acted upon, (iv) by a party

without knowledge or means of knowledge of the true facts, (v) who detrimentally relies or acts on the misrepresentation or concealment. *See Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 520 (5th Cir. 1994) (citing to *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 371 n.4 (5th Cir. 1990), for elements of estoppel).

36. Delp contends that HBF is estopped from asserting the continued validity of the Judgment Lien due to confirmation of the HBF Plan. Essentially, Delp's contention is that HBF cannot benefit from the Judgment Lien after obtaining confirmation of the HBF Plan. The Court disagrees because Delp failed to carry his burden of proof to establish the elements of estoppel.

37. First, Delp did not prove that HBF made a material misrepresentation of fact in the HBF Plan or Disclosure Statement, or concealed material facts in connection with confirmation of that plan. The evidence is undisputed that when the HBF Plan was confirmed, HBF was not aware that there was any non-exempt real property to which the Judgment Lien remained attached. Thus, when the HBF Plan and Disclosure Statement provided that HBF would be treated as an unsecured creditor, that characterization and treatment was consistent with the only information HBF had available to it. Moreover, the Disclosure Statement attendant to the HBF Plan expressly stated that HBF was relying on, *inter alia*, information contained in Delp's schedules and monthly operating reports to prepare the HBF Plan and Disclosure Statement.¹² *See* Plaintiff's Exhibit 3 at pp. 3-4. Of course, Delp failed to disclose in his schedules that the Property was comprised of more than one acre of land.

¹²In the Oakview Adversary, the Court found that HBF "relied upon the representations contained in [Delp's] schedules in preparing the confirmed plan and in preparing their disclosure statement." *See* HBF Exhibit 6, Finding 14. For the reasons stated previously, that factual finding is entitled to collateral estoppel effect against Delp here. *See* p. 14, *supra*.

38. Second, Delp offered no evidence that would establish that HBF knew, prior to confirmation of the HBF Plan, that the Property was comprised of more than one acre to which the Judgment Lien could continue to be attached.

39. Third, Delp did not prove that HBF made a material misrepresentation of fact in the HBF Plan or Disclosure Statement, or concealed material facts in connection with confirmation, with the intent that they be relied upon by Delp. In fact, when the HBF Plan was confirmed, Delp was the only party who knew the true facts – that the Property was comprised of more than one acre and that he had made an improper homestead exemption claim.

40. Finally, Delp failed to prove that he relied on any alleged misrepresentations (or concealments) of facts made by HBF. Rather, what happened here is that Delp attempted to take advantage of his creditors by making an improper homestead exemption claim, and now he wants to shift the responsibility for the confusion that his own deception caused to one of his creditors, HBF.

41. Because Delp failed to establish the elements of estoppel by a preponderance of the credible evidence, his estoppel defense fails.

E. Is HBF Estopped From Asserting the Judgment Lien by Receiving Payments on its Allowed Unsecured Claim?

42. The Court concludes that HBF is not estopped from asserting the validity of the Judgment Lien because it received payments on its allowed unsecured claim for at least three independent reasons discussed below.

(i) Delp has unclean hands and cannot assert an estoppel defense.

43. As noted previously, estoppel is an equitable defense and a party with unclean hands is barred from asserting such a defense. *See* pp. 22-23, *supra*. For the reasons stated previously, the Court will exercise its discretion and apply the doctrine of unclean hands against Delp to bar his assertion of an estoppel defense to the validity of the Judgment Lien. *See* pp. 20-23, *supra*.

(ii) Delp does not have standing to assert an estoppel defense.

44. As the Supreme Court held in *United States v. Hays*, 515 U.S. 737 (1995), “[t]he question of standing is not subject to waiver. . . . ‘The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.’” *Id.* at 742 (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990)). *See also* *Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548, 1554 (11th Cir. 1989) (noting that “[s]tanding is a jurisdictional prerequisite to suit in a federal court”) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475-75 (1982)). Thus, the Court must consider Delp’s standing to assert an estoppel defense flowing from HBF’s participation in the Case as an unsecured creditor.

45. Initially, the Court concludes that Delp is not adversely affected by HBF’s receipt of distributions from the Plan Trustee as an unsecured creditor under the HBF Plan. As noted previously, Delp’s non-exempt assets were liquidated for the benefit of creditors by the Plan Trustee. HBF had an allowed unsecured claim treated in Class 8 under the HBF Plan. If HBF had been aware that there was non-exempt real property against which the Judgment Lien remained attached, HBF’s allowed unsecured claim would have been reduced by the value of the collateral securing the Judgment Lien in

accordance with section 506(a) of the Bankruptcy Code. Thus, HBF's distributions as an unsecured creditor would have been reduced because it would have participated in the pro rata distributions being made by the Plan Trustee to Class 8 creditors on the basis of a smaller claim. Moreover, if HBF had ever received any distribution on account of the Judgment Lien prior to its voluntary release, HBF's unsecured claim would have been reduced, resulting in reduced distributions from the Plan Trustee. The beneficiaries of a reduced HBF unsecured claim and reduced distributions would have been the other unsecured (Class 8) creditors. Thus, while other unsecured creditors may have had a right to complain about HBF's participation in the first and second distributions made to Class 8 creditors by the Plan Trustee while HBF independently asserted lien rights against the Property (*i.e.*, Class 8 creditors may have had standing), those parties made no objection.

46. While the Court has not found any case directly on point, the Court analogizes this situation to the circumstance where a creditor raises an objection to confirmation of a plan of reorganization that does not adversely affect the creditor or its interest. Courts have repeatedly held that "parties have standing only to challenge those parts of a reorganization plan that affect their direct interest." *See EFL Ltd. v. Miramar Resources, Inc., (In re Tascosa Petroleum Corp.)*, 196 B.R. 856, 862 (D. Kan. 1996) (holding creditor only has standing to challenge those parts of the plan that affects their direct interests); *In re Evans Products Co.*, 65 B.R. 870, 874 (S.D. Fla. 1986) (holding debtor corporations and noninsider shareholders of debtor corporations had standing to challenge only those parts of reorganization plan that affected their direct interests on appeal from confirmation of reorganization plan); *Mutual Life Ins. Co. of New York v. Patrician St. Joseph Partners Ltd. Partnership (In re Patrician St. Joseph Partners Ltd.)*, 169 B.R. 669, 680 (Bankr. D. Ariz. 1994)

(secured creditor who received full payment not allowed to contest plan); *In re Orlando Investors, L.P.*, 103 B.R. 593, 597 (Bankr. E.D. Pa. 1989) (holding that limited partners did not have standing to object to confirmation of plan where retaining limited partnership interests in full); *In re Wonder Corp. of America*, 70 B.R. 1018, 1023 (Bankr. D. Conn. 1987) (holding that a creditor whose rights are unimpaired under the plan has no right to object to confirmation); *Matter of Johns-Manville Corp.*, 68 B.R. 618, 623 (Bankr. S.D.N.Y. 1986), *aff'd in relevant part*, 78 B.R. 407 (S.D.N.Y. 1987) (holding that “no party may successfully prevent the confirmation of a plan by raising the rights of third parties who do not object to confirmation.”). A leading bankruptcy treatise agrees that “[a] party may not . . . object to the treatment or classification of another class of claims or interests in [sic] that treatment does not affect the objector.” 7 Collier on Bankruptcy ¶ 1129.02[3] (15th ed. 2001).

47. Here, it is the other Class 8 creditors (or perhaps the Plan Trustee on behalf of those creditors¹³) that would have had standing to object to HBF receiving payments as a fully unsecured creditor while independently seeking to recover on the Judgment Lien against the Property. No party with standing initiated any such action. Of course, at this point such a complaint is moot because the Judgment Lien has been released and HBF did not receive any distribution on account of the Judgment Lien.

48. For these reasons, the Court concludes that Delp lacks standing to assert an equitable defense arising from HBF's receipt of payments under the HBF Plan as an unsecured creditor.

¹³As noted hereinafter, the Plan Trustee recognized that HBF could not continue to receive distributions as an unsecured creditor and assert the Judgment Lien. Counsel for the Plan Trustee testified that HBF was advised that if it ever received a distribution on account of the Judgment Lien, it would be obligated to return monies to the Plan Trustee which would then be distributed to other Class 8 creditors, pro-rata.

(iii) The elements of estoppel are not satisfied here.

49. As noted previously, to establish an estoppel defense, five elements must be proven by a preponderance of the credible evidence. *See* pp. 25-26, *supra*. Delp contends that HBF is estopped from asserting the continued validity of the Judgment Lien because it received payments on its allowed unsecured claim under the confirmed HBF Plan. In short, Delp contends that HBF cannot benefit from the Judgment Lien after receiving distributions as an unsecured creditor. The Court disagrees because Delp failed to carry his burden of proof in establishing the required elements of estoppel.¹⁴

50. Delp presented no evidence that HBF, with actual or constructive knowledge of the true facts, materially misrepresented or concealed the existence of what it believed was a valid Judgment Lien, with the intent that the misrepresentation or concealment be acted upon by a third party (here Delp and/or perhaps the Plan Trustee), which third party was without knowledge or the means to obtain knowledge of the true facts, and which third party detrimentally relied or acted on the misrepresentation or concealment.

51. As applied to Delp as the alleged innocent third party, Delp knew of his improper claim of homestead exemption from the start. The record is undisputed that HBF did not learn of the fact that there was non-exempt property against which the Judgment Lien remained attached until late 1994 or

¹⁴In addition, the Court notes its prior finding that HBF never received any distribution as a result of the Judgment Lien prior to its decision to release that lien on August 8, 2000. *See* Finding no. 44 at p. 12, *supra*. Moreover, for a significant period of time during which HBF was receiving distributions from the Plan Trustee as an unsecured creditor, this Court had held that HBF did not have a valid judgment lien against the Property and, after reversal by the District Court, Delp continued to appeal and contest the validity of the Judgment Lien.

early 1995, well after confirmation of the HBF Plan. Delp simply failed to prove that HBF made any misrepresentation to him or concealed any fact from him. Alternatively, even if HBF materially misrepresented or concealed its lien rights by electing to continue to receive distributions on its allowed unsecured claim, Delp presented no evidence of HBF's *intent* to deceive.¹⁵ As intent is one of the required elements for the doctrine of estoppel to apply, Delp's estoppel argument fails.

52. While Delp has no standing to assert estoppel based on alleged material misrepresentations of facts (or concealments of facts) to the Plan Trustee, *see* pp. 28-31, *supra*, even if he could make such a claim on behalf of the Plan Trustee, for the reasons set forth below, such an estoppel claim also fails.

53. First, the record is clear that the first person who recognized that Delp had made an excessive homestead exemption claim was the Plan Trustee. The Plan Trustee made this discovery within six months of confirmation of the HBF Plan. It was the Plan Trustee who disclosed this fact to HBF. The record is undisputed that HBF had not independently learned of the improper claim of exemption.

54. Second, counsel for the Plan Trustee testified that the Plan Trustee had been aware of the litigation pending between HBF and Delp – first in state court and then in this Court – with respect to HBF's efforts to enforce the Judgment Lien against the Property. Counsel for the Plan Trustee further testified that he and counsel for HBF had various discussions about the fact that HBF could not continue to receive distributions from the Plan Trustee as an unsecured creditor and continue to attempt

¹⁵Counsel for the Plan Trustee testified that HBF's counsel was informed that if HBF ever actually recovered on the Judgment Lien, HBF would be required to return monies to the Plan Trustee which would then be redistributed to other Class 8 creditors under the HBF Plan.

to collect on the Judgment Lien against the Property. In part as a result of these conversations, HBF decided to release the Judgment Lien.

55. The record is clear that (i) the Plan Trustee was fully informed – perhaps better informed (at least initially) than HBF; (ii) the Plan Trustee has made no assertion that HBF misrepresented any material facts to him or concealed any material facts from him; and/or (iii) the Plan Trustee did not rely on any alleged misrepresentations of facts (or concealment of facts) made to him by HBF in continuing to make distributions to HBF as an unsecured creditor.

56. Again, Delp has simply failed to establish the required elements of estoppel by a preponderance of the credible evidence.

F. Is Delp Entitled to Recover his Attorney Fees?

57. Delp seeks to recover the attorney's fees he has incurred in connection with the Adversary from HBF. Although Delp asserts a right to recover his reasonable attorney's fees, the legal basis for such an award is not specifically plead.

58. Under the "American Rule," in cases brought under federal law, attorney's fees are not ordinarily recoverable absent specific statutory authority, a contractual right, or aggravated conduct. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *Dennison v. Hammond (In re Hammond)*, 236 B.R. 751, 769 (Bankr. D. Utah 1998). With respect to Delp's request for fees, there is no general right to recover attorney's fees under the Bankruptcy Code. *See Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000). Moreover, Delp did not prevail in his legal contentions.

59. As no specific statutory authority or contractual right exists for awarding Delp the attorney's fees he has incurred in connection with his dispute over the continuing validity of the Judgment Lien, and Delp failed to prevail on any of his claims or defenses against HBF, Delp's request for costs and attorney's fees must be denied.

G. Is HBF Entitled to Recover its Attorney Fees?

60. HFB seeks to recover the attorney's fees it incurred in connection with the Adversary. HFB made this request under 28 U.S.C. § 2202 in its First Amended Original Answer and First Amended Counterclaim. See HBF's First Amended Original Answer and First Amended Counterclaim, Adversary docket no. 85 at ¶ 13.

61. The Fifth Circuit has specifically held that in a declaratory action suit, 28 U.S.C. § 2202 does not alter the "American Rule" and thus, absent some other statutory right to attorney's fees or bad faith, attorney's fees are not recoverable. See *Utica Lloyd's of Texas v. Mitchell*, 138 F.2d 208, 210 (5th Cir. 1998)(citing the holding in *Mercantile Nat'l Bank at Dallas v. Bradford Trust Co.*, 850 F.2d 215, 218-19 (5th Cir. 1988) that 28 U.S.C. § 2202 "does not by itself provide statutory authority to award attorneys fees . . ."); *Self-Insurance Institute of America, Inc. v. Koriath*, 53 F.3d 694, 697 (5th Cir. 1995)(holding 28 U.S.C. § 2202 "which authorizes federal courts to grant declaratory relief, plainly does not grant a right to fees.").

62. Under the "American Rule," in cases brought under federal law, attorney's fees are not ordinarily recoverable absent specific statutory authority, a contractual right or aggravated conduct. See p. 33, *supra*.

63. As no specific statutory authority or contractual right exists for awarding HBF the

attorney's fees it has incurred in connection with this dispute, HFB's request for attorney's fees must be denied.

64. Any Conclusion of Law may also be construed as a Finding of Fact.

A Judgment consistent with these Findings of Fact and Conclusions of Law will be entered separately.

Signed: September 27, 2001.

Barbara J. Houser
United States Bankruptcy Judge