**UNITED STATES COURT OF APPEALS**
**for the Fifth Circuit**

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**No. 93-7459**
**Summary Calendar**

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**IN THE MATTER OF: JOHNNY MACK COOK,**

**Debtor.**

**BOYLE MORTGAGE COMPANY, through its servicing agent BancPlus Mortgage Co.,**

**Appellant,**

**VERSUS**

**JOHNNY MACK COOK,**

**Appellee.**

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Appeal from the United States District Court
for the Northern District of Mississippi
(CA-2:92-003-D)

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(June 2, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

Appellant Boyle Mortgage Corporation through its servicing agent, BancPlus Mortgage Co., asks this Court to require a hearing on the merits of its claim secured by a mortgage on the Debtor's residence notwithstanding confirmation of a Chapter 13 plan affecting the secured claim. We agree that the bankruptcy and district courts erred in rejecting Boyle's request and so reverse and remand.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The plan set forth $6,270 of arrearage due BancPlus, to be repaid in 36 monthly installments of $174.16.[1] Creditors had until August 6, 1990, to object to plan confirmation, but no objections were filed. The plan was confirmed on August 17. On August 30, Boyle filed its proof of claim showing $12,409.40 as the arrearage due. Debtor objected to the claim, and the bankruptcy court and district court sustained Debtor's objection on the basis of the res judicata effect of the plan confirmation. See 11 U.S.C.A. § 1327(a) (West 1993) (providing that the provisions of a confirmed plan "bind . . . each creditor whether or not the claim 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").

Boyle asks us to apply Sun Finance Co. v. Howard (In re Howard), 972 F.2d 639 (5th Cir. 1992), to protect the full amount of the arrearage claimed, despite the plan provision for less than the full claim.[2] Cook, however, also relies on Howard. Howard involved a creditor who had never received a copy of the plan or notice of any proposed reduction in its claim; before confirmation the creditor had been lulled into complacency, because it had filed a proof of claim to which the debtors did not object. Id. at 640. This court held that the general rule as to the binding effect of

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[1] Boyle did not designate the plan as part of the record on appeal but agrees that the plan proposes this treatment of its claim.

[2] To the extent that Boyle's argument involves interpretation of the plan rather than the Code sections, we note that Boyle has not included the plan or confirmation order in the record on appeal. We therefore cannot review any alleged error in the interpretation of the confirmed plan.

the combined plan "must give way . . . to the interest of the secured creditor . . . in being confident that its lien is secure unless a party in interest objects to it." 972 F.2d at 641.

Cook contends that Howard supports his position because Boyle received a copy of the plan and knew of the proposed reduction of its claim in time to object to plan confirmation. Thus, Cook asserts that Boyle's claim was not compromised or reduced "without notice." Cf. Howard, 972 F.2d at 641. Boyle allowed the plan to be confirmed without objection despite knowledge that the plan was reducing its claim. Accordingly, Boyle is like "[a] secured creditor *with notice* that the debtor is objecting to its claim [who] must participate in the bankruptcy proceedings to protect its rights." Id. at 642 (emphasis added).

Cook's argument misperceives Howard. Howard turns not on the mere fact of notice to the secured creditor that the debtor seeks to modify its claim in a plan, but on a re-affirmance of In re Simmons, 765 F.2d 547 (5th Cir. 1985), which held that the debtor must affirmatively object to a secured claim, pursuant to 11 U.S.C. § 506(a), and the associated Bankruptcy Rules 3007 and 9014, in order to modify or avoid the creditor's lien in bankruptcy. Simmons points out the difference between plan confirmation procedure, which is not ordinarily intended to be the arena for resolving individual claims, and the adversary process by which claims are disputed. By collapsing the secured creditor's ability to object to the plan into his right to preserve his lien intact absent an objection to his claim, the bankruptcy court effectively

rendered the claims objection process meaningless.

There are two related objections to requiring a debtor to challenge the secured creditor's claim in a specific adversary proceeding. One is that the creditor will get two shots at attacking the possibility of reorganization, both in the plan confirmation hearing and when its claim is objected to. The second criticism is that separating the effect of plan confirmation from claims objection dilutes the binding impact of a confirmation order prescribed by section 1327(a) of the Code. These objections do not withstand analysis because they flatly contradict Simmons.

In a thorough analysis of the Chapter 13 process, on which we focus here, Simmons demonstrated that "a proof of secured claim must be acted upon -- that is, allowed or disallowed -- before confirmation of the plan or the claim must be deemed allowed for purposes of the plan." Simmons, 765 F.2d at 553, citing 11 U.S.C. §§ 502(a), 506(a), 1325(a)(5). When this procedure is followed, the § 506 valuation hearing will be binding on plan confirmation, and the two-shot objection evaporates.

It may be argued that because the bankruptcy rules permit a creditor to file its proof of claim after the Chapter 13 confirmation hearing, compare Bankruptcy Rule 3002(c) with Rules 3015(b) and 2002(b), it will be impractical to schedule confirmation promptly while still complying with Simmons. See, e.g., Burks, Drafting Chapter 13 Plans with a Binding Effect: The Interaction between the Proof of Claim and Confirmation Processes, Norton Bankruptcy Law Advisor 1993-No. 2 (Feb. 1993). Bankruptcy

courts have devised several ways to master this timing problem that do not require cutting off a secured creditor's right to a contested claim objection or valuation hearing. One of those means is to schedule a confirmation hearing at which a plan is tentatively confirmed so that distributions commence subject to re-evaluation after the claim filing deadline. Another means, implied in Simmons and Howard, would be to join the confirmation hearing with a section 506 valuation proceeding concerning the secured creditor's claim. In this way, the secured creditor would receive an adversary proceeding timed to coincide with the hearing on the plan. Ingenious courts, we are sure, have utilized other methods to reconcile the demand of efficiency in Chapter 13 with the requisites of Simmons.

Simmons also rejects the contention that section 1327(a), which binds all parties to the provisions of a confirmed plan, may alone effectively reduce a creditor's secured claim when the secured creditor did not appear to contest the plan. To permit such a reduction would grant the debtor an unjustified windfall that is utterly at odds with the longstanding rule that a secured creditor may "ignore the bankruptcy proceeding and look to the lien for satisfaction of the debt." Simmons, 765 F.2d at 556, quoting In re Tarnow, 749 F.2d 464, 465 (7th Cir. 1984).[3] This is not to say that secured claims may never be reduced by a Chapter 13 plan,

[3] In so holding, Simmons does not diminish the force of cases such as Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987), which have applied the res judicata effect of confirmed plans against later-raised unsecured claims. See discussion in In re Howard, 972 F.2d at 641.

see section 1322(b)(2), but only that the procedures followed must conform to the requirements of Chapter 13, section 506, section 502, and Simmons.

For these reasons, the confirmation of Cook's Chapter 13 plan does not foreclose Boyle from filing and obtaining distribution based upon a timely proof of claim, to the extent it survives the debtor's objection. The judgments of the bankruptcy and district courts are **REVERSED** and the case is **REMANDED** to the bankruptcy court for a hearing on the debtor's objection to Boyle's proof of claim.