

Cal. Civil Code § 580(b)  
Cal. Civil Code § 726  
Usury  
Cal Const. Art. XV, § 1(2)  
15 U.S.C. § 1640(a)(1)  
11 U.S.C. § 506(b)  
Attorneys Fees  
TILA

Smith v. Gold Country Lenders

BAP # OR-99-1542-RyKM

# OR-99-1543-RyKM

In Re Smith

Bankruptcy # 697-62183-aer13

8/4/00 BAP (affirming Radcliffe in part, reversing and remanding in part) (underlying bankruptcy court decision was a letter opinion)

Unpublished

In 1993, Debtor's predecessor in interest in certain California property, executed a note and trust deed for \$15,000 secured by the California property in favor of a third party. At some point the third party was paid off by another third party, and Debtor's predecessor gave another note (for \$15,000) to the paying party.

In 1994, Debtor borrowed \$28,000.00 from Creditor, and along with her predecessor, executed a note and trust deed on the California property in Creditor's favor. At the same time, Debtor executed alone a "Cross Collateral" Installment Note to Creditor for \$43,000 at 12% interest and a "Cross Collateral" Trust Deed on property in Oregon to secure the \$43,000 note. The 12% interest was to be paid pursuant to the terms of the original \$15,000 and \$28,000.00 notes. The \$43,000 note recited that it was given only as additional security for the two prior notes and trust deeds and was not to be considered an "additional loan." It further stated that when the \$28,000.00 and \$15,000.00 notes and trust deeds were paid in full, the \$43,000 note and trust deed would be reconveyed.

The \$28,000 note went into default and a senior lienholder foreclosed. Creditor did not bid at the sale, and obtained no proceeds therefrom.

Debtor filed Chapter 13 in 1997. Creditor filed a claim to which Debtor objected, asserting various defenses, some of which were based on alleged Truth In Lending Act (TILA) violations.

The bankruptcy court held Debtor liable on \$43,000 principal, with interest thereon, and awarded costs and fees under § 506(b). The court offset the claim by \$1000 plus \$32.80 in costs as statutory damages under TILA for certain disclosure

violations. The court did not award any "actual" TILA damages. Debtor appealed.

Held: Affirmed in part; reversed and remanded in part.

Re: Secured Claim: California Civil Procedure Code (CCP) §580(b) (the antideficiency statute) does not prevent a secured lender from realizing on additional security. Neither does CCP §726 which requires recourse to security before attempts to collect personal liability. In any case, CCP § 726 does not apply to a "sold out" junior lienholder, as was the case at bar.

Re: Interest Rates: The interest rate charged was not usurious. California law applied because the loan documents were executed there, (even though the security was in Oregon), and there was no showing of an attempt to evade Oregon's usury laws. Under California law, loans by licensed real estate brokers, such as Creditor, secured by real property are exempted from the California Constitution's restriction on the interest rate. See CAL CONST., Art. XV, § 1(2);

Re: TILA: Only statutory damages were appropriate. Debtor failed to prove any actual damages, that is, she failed to prove the she would have gotten credit on more favorable terms absent the violation.

Claim Principal: Creditor did not prove it was entitled to a claim based on either the \$15,000 note or the note that replaced it. The \$43,000 note referenced the \$15,000 note. However the \$15,000 had been paid off at the time the \$43,000 note was executed. Further, there was no evidence Debtor agreed to assume the note that replaced the \$15,000 note.

§ 506(b): As an oversecured creditor, Creditor was entitled to its reasonable postpetition costs and attorney fees under 11 U.S.C. § 506(b), and the test set out in In Re Kord Enterprises II, 139 F.3d 684, 687 (9<sup>th</sup> Cir. 1998). The attorney fee clauses in the \$43,000 note and trust deed were sufficiently broad to cover bankruptcy fees incurred, irrespective of whether the \$43,000 note's balloon payment was, or was not, due.

The BAP remanded for recalculation of the claim, minus \$15,000 principal (and the interest, costs and fees thereon). The bankruptcy court was instructed to revisit the reasonableness of the fees previously awarded in light of the \$15,000 reduction in principal.

1 **NOT FOR PUBLICATION**

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

5	In re	)	BAP Nos. OR-99-1542-RyKM
		)	OR-99-1543-RyKM
6	GERALDINE KAY SMITH,	)	
		)	Bk. No. 697-62183-aer13
7	Debtor.	)	
8	_____	)	
	GERALDINE KAY SMITH,	)	
9	Appellant\Cross-Appellee,	)	
10	v.	)	<u>MEMORANDUM</u> <sup>1</sup>
11	GOLD COUNTRY LENDERS,	)	<b>FILED</b>
12	Appellee\Cross-Appellant.	)	AUG 4 2000
13	_____	)	NANCY B. DICKERSON, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

14 Argued and Submitted after Telephone Conference on July 17, 2000  
15 Seattle, Washington

16 Filed - August 4, 2000

17 Appeal from the United States Bankruptcy Court  
18 for the District of Oregon

19 Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding.

20  
21 Before: RYAN, KLEIN, and MACDONALD,<sup>2</sup> Bankruptcy Judges.  
22  
23  
24

25 <sup>1</sup>This disposition is not appropriate for publication and may not  
26 be cited except when relevant under the doctrines of law of the case,  
27 res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1  
and 9th Cir. Rule 36-3.

28 <sup>2</sup>Hon. Donald MacDonald IV, Chief Bankruptcy Judge for the  
District of Alaska, sitting by designation.

E00-15(21)

1 Prior to filing her chapter 13<sup>3</sup> bankruptcy petition, Geraldine  
2 Smith ("Debtor") entered into a series of secured loan transactions  
3 with Gold Country Lenders ("GCL"). GCL filed a proof of claim in  
4 Debtor's bankruptcy case, and Debtor filed an objection. After a  
5 series of hearings, the bankruptcy court entered a final order (the  
6 "Order") that allowed GCL a secured claim, but made reductions to  
7 the amount of the claim. Debtor timely filed a notice of appeal,  
8 and GCL timely filed a notice of cross appeal.

9 We AFFIRM IN PART and REVERSE and REMAND IN PART.

10  
11 I. FACTS

12 In the early 1990s, Nanci Hirsch owned a home in Borrego  
13 Springs, California (the "California Property"), and United  
14 Airlines held the first lien. In January 1993, Hirsch borrowed  
15 \$15,000 through GCL, a licensed California corporation that acts as  
16 a real estate financing broker.<sup>4</sup> The note (the "\$15,000 Note") and  
17 the trust deed (the "\$15,000 Trust Deed") were in favor of an  
18 entity known as S.P.S. At some point, Hirsch approached GCL about  
19 extending the terms of the \$15,000 Note. Because S.P.S. only  
20 wanted to provide short-term financing, investors Tory and Doreen  
21 Teixeira paid off the \$15,000 Note, and Hirsch executed a new  
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23 <sup>3</sup>Unless otherwise indicated, all chapter and section references  
24 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. All rule  
25 references are to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9036.

26 <sup>4</sup>Apparently, GCL finds investors to fund loans to third parties.  
27 The loans are secured by real property and GCL takes a fee for  
28 performing this service. GCL does not use its own money to fund the  
loans. The note and trust deed are initially made out in GCL's name,  
and the beneficial interests are subsequently assigned to the third  
party investor.

1 \$15,000 note (the "Texeira Note") in favor of the Teixeiras and  
2 secured by the California Property.<sup>5</sup>

3 Prior to June 1994, United Airlines initiated foreclosure  
4 proceedings against the California Property. Debtor, who worked  
5 with Hirsch, approached GCL to arrange a loan that was partially  
6 intended to purchase an interest in the California Property and to  
7 rescue it from foreclosure. On June 1, 1994, Debtor borrowed  
8 \$28,000 through GCL,<sup>6</sup> and she and Hirsch executed a \$28,000 note  
9 (the "\$28,000 Note") and trust deed on the California Property. On  
10 the same day, Debtor executed a cross-collateral installment note  
11 with GCL for \$43,000 at 12% interest (the "Note"). Debtor also  
12 executed a cross-collateral trust deed (the "Trust Deed") that was  
13 recorded against a parcel of property Debtor owned in Oregon (the  
14 "Property"). The \$43,000 balloon payment was due on June 25, 1995.  
15 The interest on the Note was to be paid in accordance with the  
16 terms of the \$15,000 Note and the \$28,000 Note. The Note stated  
17 that it was "given only as additional security for the above  
18 referenced Notes and Deeds of Trust and is not to be considered an  
19 additional loan." Cross-Collateral Installment Note (June 1,  
20 1994). It further provided that once the \$15,000 Note and the  
21 \$28,000 Note were paid in full, the Note and Trust Deed would be  
22 reconveyed to Debtor. Both the Note and Trust Deed were executed  
23 in favor of GCL.

24 In February 1996 after obtaining relief from the automatic  
25 stay in Debtor's bankruptcy case, United Airlines held a

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27 <sup>5</sup>The bankruptcy court noted that it was unclear from the evidence  
what happened to the \$15,000 Note.

28 <sup>6</sup>B.H. Nix was the party who actually funded the loan.

1 nonjudicial foreclosure sale of the California Property and sold it  
2 for \$131,000. GCL did not bid at the sale.

3 Debtor continued to make interest payments on the Note through  
4 June 25, 1996 but did not make the balloon payment that was due in  
5 June 1995. In 1995, GCL sent a notice that the balloon payment was  
6 due, but Debtor called GCL and determined that they would not yet  
7 call the loan due. In November 1996, GCL sent a second balloon  
8 payment notice, but it was returned undeliverable. On April 27,  
9 1997, GCL filed a notice of default and election to sell pursuant  
10 to the Note and Trust Deed. The sale was noticed for August 24,  
11 1997 and indicated that the default was based on Debtor's failure  
12 to timely make the balloon payment.

13 On April 16, 1997, Debtor filed her chapter 13 bankruptcy  
14 petition, and on May 19, 1998, Debtor's third amended chapter 13  
15 plan was confirmed.<sup>7</sup>

16 On June 10, 1997, GCL filed a \$49,174.82 proof of claim with  
17 the bankruptcy court to which Debtor objected.<sup>8</sup> On January 5,  
18 1998, GCL filed its first amended proof of claim. Because of a  
19 typographical error, it was quickly replaced with a second amended  
20 proof of claim that was filed on January 9, 1998 and that asserted

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21 <sup>7</sup>The Plan proposed to pay GCL \$46,520 at 6% interest. The res  
22 judicata effect, if any, of the plan was not raised as an issue before  
23 the bankruptcy court and is not raised as an issue on appeal.

24 <sup>8</sup>The basis for the objection was as follows: (1) GCL did not  
25 attach a note signed by Debtor; (2) the unsigned note that was  
26 attached did not specify the interest to be paid; (3) there was no  
27 evidence of a security interest or evidence of its perfection; (4)  
28 there was no evidence that \$283.80 in late charges were authorized;  
(5) there was no evidence that \$1,162.02 in attorney's fees and costs  
were authorized; (6) GCL did not comply with California Civil Code §  
2954.5 and therefore could not collect late charges; (7) no notice of  
default was filed and therefore, the notice of sale was invalid; and  
(8) the attorney's fees and costs sought were not reasonable.

1 a \$48,636 secured claim.<sup>9</sup> Debtor filed an amended objection,  
2 seeking disallowance of the claim.<sup>10</sup> On June 15, 1998, GCL filed  
3 its third amended proof of claim, asserting a \$61,182.59 secured  
4 claim that included attorney's fees and costs (the "Claim").  
5 Debtor objected to the Claim (the "Objection").<sup>11</sup> The bankruptcy  
6 court set the matter for trial, but reserved the issue of GCL's  
7 entitlement to attorney's fees and costs for a later date. After  
8 trial, the bankruptcy court took the matter under advisement.

9 On August 27, 1998, the bankruptcy court issued a letter  
10 ruling that allowed GCL a secured claim in the amount of \$43,000  
11 plus \$9,796.60 in interest,<sup>12</sup> less \$1,000 in statutory damages for a  
12 Truth in Lending Act ("TILA") violation, for a total of \$51,796.60.  
13 The court held that any of Debtor's subsequently allowed costs for  
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15 <sup>9</sup>The breakdown of the claim was as follows: \$43,000 principal  
16 balance due; (2) \$4,370 in interest accrued to the petition date; (3)  
17 \$550 in attorney's fees; (4) \$45 in record fees; (5) \$291 for a title  
search; and (6) \$20 for service on Debtor.

18 <sup>10</sup>The basis for Debtor's objection to the second amended proof of  
19 claim was as follows: (1) she did not sign the purchase money note for  
20 \$15,000, and to the extent she was liable for it, GCL had not provided  
21 any evidence specifying the interest payment; (2) the interest rate  
22 charged on the \$15,000 Note was usurious under Oregon law; (3) the  
23 interest rate charged on the \$28,000 Note was usurious under Oregon  
24 law; (4) GCL was prohibited from making loans in Oregon because it was  
25 not registered in Oregon and, under Oregon law, Debtor was therefore  
only liable for the principal amount of the loan; (5) Debtor was  
entitled to rescind the \$28,000 Note for Truth in Lending Act  
violations; (6) GCL had waived its right to the balloon payment by  
accepting interest payments after the balloon payment due date and  
failing to give Debtor an opportunity to cure the default prior to  
filing the notice of default; and (7) GCL abandoned the primary  
collateral, the California Property, and they therefore were not  
entitled to proceed against the Property.

26 <sup>11</sup>In April 1998, Debtor filed an amended objection to claim that  
27 the bankruptcy court opted to treat as a trial brief.

28 <sup>12</sup>The interest was calculated from June 25, 1996 through the plan  
confirmation date.

1 bringing the TILA damages claim would be deducted and that the  
2 amount of GCL's postpetition attorney's fees and costs allowed  
3 under § 506(b) would be added. Because it had not resolved the  
4 amount of attorney's fees and costs, the court indicated that a  
5 final order on the allowed claim would be entered after issues  
6 regarding fees and costs were resolved.<sup>13</sup>

7 On January 27 and 28, 1999, the court held a hearing on the  
8 applications of GCL and Debtor for attorney's fees and costs. The  
9 court held that Debtor was entitled to recover costs of \$32.80 for  
10 prevailing on her TILA claim, with the amount to be deducted from  
11 the amount of GCL's allowed claim. The court awarded GCL  
12 attorney's fees and costs of \$16,098.20.<sup>14</sup> Additionally, the court  
13 gave GCL the opportunity to seek additional fees, and GCL filed an  
14 application seeking an additional \$7,697.60 in attorney's fees and  
15 costs. In a July 22, 1999 letter ruling, the bankruptcy court  
16 allowed GCL supplemental fees of \$6,745.10 and then stated that  
17 "[b]ased upon this letter and the previous order entered herein  
18 February 25, 1999, an appropriate order shall be entered allowing  
19 GCL's claim." Letter Ruling (July 22, 1999), at 2. On July 22,  
20 1999, the Order was entered, allowing the Claim in the amount of  
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25 <sup>13</sup>On September 8, 1998, Debtor filed a "Motion for Additional and  
26 Different Findings and Conclusions, Rule 7052(b), Re Debtor's  
27 Objections to Claim of Gold Country Lenders." On September 17, 1998,  
the court issued an order partially granting the motion with respect  
to the award of postpetition, preconfirmation interest, but otherwise  
denying the motion.

28 <sup>14</sup>GCL had requested \$17,475.79 in fees and costs.

1 \$68,980.91.<sup>15</sup>

2 On August 2, 1999, Debtor timely filed a notice of appeal, and  
3 GCL filed a notice of cross appeal. In its opening brief in  
4 Debtor's appeal, GCL indicated that it was abandoning all issues  
5 raised in its cross appeal.

6  
7 II. ISSUES

- 8 A. Whether the court erred in allowing GCL a secured claim.  
9 B. Whether the court erred in concluding that the interest rate  
10 charged was not usurious under California law.  
11 C. Whether the court erred in determining that Debtor had not  
12 provided any evidence of actual damages caused by GCL's TILA  
13 violations.  
14 D. Whether the court erred in determining the principal amount of  
15 the Claim.  
16 E. Whether the court abused its discretion in awarding attorney's  
17 fees and costs under § 506(b).

18  
19 III. STANDARD OF REVIEW

20 The bankruptcy court's determination that (1) GCL was entitled  
21 under California law to proceed against the Property and (2)  
22 California usury laws applied are conclusions of law that are  
23 reviewed de novo. See Duckor Spradling & Metzger v. Baum Trust (In  
24 re P.R.T.C., Inc.), 177 F.3d 774, 782 (9th Cir. 1999).

25  
26  
27 <sup>15</sup>The breakdown was as follows: (1) \$43,000 principal balance  
28 owed; (2) \$4,170.41 interest to the petition date; (3) \$22,843.30 in  
attorney's fees and costs; (4) less \$1,032.80 in TILA damages and  
costs.

1 The bankruptcy court's determination that Debtor did not  
2 suffer actual damages as a result of GCL's TILA violations is a  
3 question of fact reviewed for clear error. See Koirala v. Thai  
4 Airways Int'l, Ltd., 126 F.3d 1205, 1213 (9th Cir. 1997).  
5 Similarly, the bankruptcy court's calculation of the principal  
6 amount of an allowed claim is a finding of fact reviewed for clear  
7 error. See Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 68-69 (9th  
8 Cir. BAP 1995).

9 The bankruptcy court's award of attorney's fees is reviewed  
10 for an abuse of discretion. See Ford v. Baroff (In re Baroff), 105  
11 F.3d 439, 441 (9th Cir. 1997).

#### 12 IV. DISCUSSION

##### 13 A. The Bankruptcy Court Did Not Err in Allowing GCL a Secured 14 Claim.

15  
16 In her trial brief, Debtor argued that GCL's loan was a  
17 purchase money loan for which there was no recourse other than the  
18 property that the loan was used to purchase, citing California  
19 Civil Procedure Code ("CCP") § 580b. Debtor contended that GCL  
20 illegally extended their security for the Note beyond the  
21 California Property and that this rendered the Note and Trust Deed  
22 unenforceable, leaving GCL without a valid claim. Additionally,  
23 Debtor argued that GCL was barred by CCP § 726(a) from pursuing the  
24 Property because it did not comply with the notice provision in CCP  
25 § 726(a) and because of CCP § 726's limitation on the amount of any  
26 deficiency judgment.

27 The court disagreed, holding that California's antideficiency  
28 legislation was not implicated because GCL was not seeking a

1 deficiency judgment by recovering against the Property. The court  
2 further noted that even if the antideficiency statutes were  
3 implicated, they did not bar GCL, a sold-out junior lienholder,  
4 from enforcing the underlying debt and obtaining a personal  
5 judgment. On appeal, Debtor contends that the court erred in  
6 making these determinations. We disagree.

7 CCP § 580b prevents the holder of a purchase money mortgage  
8 note from obtaining a deficiency judgment against the debtor.  
9 See CAL. CIV. PRO. CODE § 580b (West 1999). A deficiency judgment is  
10 an action to secure a money judgment for the balance due on an  
11 obligation. See Hatch v. Security-First Nat'l Bank of Los Angeles,  
12 19 Cal. 2d 254, 261 (1942) (en banc). Assuming that the Note and  
13 Trust Deed constituted a purchase money mortgage, CCP § 580b  
14 "prohibits only a deficiency judgment in the strict sense, i.e., a  
15 personal judgment against the debtor. It does not prevent the  
16 creditor from realizing on additional security." Hodges v. Mark,  
17 49 Cal. App. 4th 651, 656 (1996) (citation and internal quotation  
18 marks omitted).

19 Debtor contends that Brown v. Jensen, 41 Cal. 2d 193 (1953) (en  
20 banc) dictates a different result. In Brown, an owner sold  
21 property to a buyer who placed both a first trust deed in favor of  
22 a lender and a second trust deed in favor of the owner on the  
23 parcel of property that was purchased. Both trust deeds were  
24 purchase money trust deeds. After the first trust deed holder  
25 foreclosed on the property and the second trust deed holder made no  
26 effort to rescue the property, the court held that the second trust  
27 deed holder could not obtain a deficiency judgment against the  
28

1 buyer.<sup>16</sup> Id. at 195-98. Contrary to Debtor's assertion, Brown does  
2 not control the result here because in Brown, both trust deeds were  
3 against the same parcel of property and the second trust deed did  
4 not have additional security. This distinction is critical  
5 because, as indicated above, CCP § 580b does not prevent the  
6 creditor from realizing on additional security. We therefore agree  
7 with the bankruptcy court that CCP § 580b was not implicated.

8       Additionally, Debtor's reliance on CCP § 726 is unavailing.  
9 In contrast to CCP § 580b, which destroys rights that would  
10 otherwise exist by requiring satisfaction of a debt to come from  
11 the security, CCP § 726<sup>17</sup> is intended as a procedural device that  
12 requires "recourse to the security before the lender may proceed on  
13 the borrower's personal liability." Kish v. Bay Counties Title

14 \_\_\_\_\_  
15       <sup>16</sup>Specifically, the court held that under CCP § 580b, "the  
16 character of the transaction must necessarily be determined at the  
17 time the trust deed is executed. Its nature is then fixed for all  
18 time and as so fixed no deficiency judgment may be obtained regardless  
19 of whether the security later becomes valueless." Brown, 41 Cal. 2d  
20 at 197.

21       <sup>17</sup>Among other provisions, CCP § 726 provides that if a deficiency  
22 judgment is not prohibited by CCP § 580b,

23       then upon application of the plaintiff filed at  
24 any time within three months of the date of the  
25 foreclosure sale and after a hearing thereon at  
26 which the court shall take evidence . . . as to  
27 the fair value of the real property . . . therein  
28 sold as of the date of the sale, the court shall  
render a money judgment against the defendant .  
. . for the amount by which the amount of the  
action exceeds the fair value of the real  
property . . . . In no event shall the amount of  
the judgment . . . exceed the difference between  
the amount for which the real property . . . was  
sold and the entire amount of the indebtedness  
secured by the mortgage or deed of trust.

CAL. CIV. PRO. CODE § 726 (West 1999).

1 Guar. Co., 254 Cal. App. 2d 725, 733 (1967). Because GCL was  
2 proceeding against additional security and not attempting to obtain  
3 a personal judgment against Debtor, this statute is inapplicable.  
4 Moreover, even if it were applicable, CCP § 726 does not apply to a  
5 nonforeclosing junior creditor whose security is destroyed when the  
6 senior lienholder forecloses; instead, it only prevents the  
7 foreclosing senior lienholder from obtaining a deficiency judgment.  
8 See Bank of America Nat'l Trust & Savs. Ass'n v. Graves, 51 Cal.  
9 App. 4th 607, 612-13 (1996).

10 Accordingly, the court did not err in determining that neither  
11 CCP § 580b nor CCP § 726 prevented GCL from proceeding against the  
12 Property and asserting a claim in Debtor's case.<sup>18</sup>

13 B. The Court Did Not Err in Determining That GCL's Interest Rates  
14 Were Not Usurious Under California Law.

15 In her trial brief, Debtor contended that the interest rate  
16 that GCL charged was usurious and that GCL was not entitled to  
17 collect interest on the principal amount of the loan. The court  
18 disagreed, finding that the issue was governed by California law,  
19 which exempted loans made by licensed real estate brokers from the  
20 usury provisions.

21 \_\_\_\_\_  
22 <sup>18</sup>It is unclear whether Debtor is also arguing that GCL's failure  
23 to be licensed in Oregon prevented it from taking a security interest  
24 in a property located outside California. Debtor cites no authority  
25 for this proposition. Under Oregon law, a mortgage broker who is not  
26 licensed under Oregon law is liable to a "person suffering  
27 ascertainable loss" for "damages in an amount equal to the  
28 ascertainable loss." OR. REV. STAT. § 59.925(3) (1999). Thus, the  
statute does not preclude a mortgage broker from another state from  
taking a security interest in property located in Oregon. Similarly,  
our research has not revealed (and Debtor had not cited) any  
California law that would prevent a California mortgage broker from  
taking a security interest in property located in another state.  
Thus, this argument is unavailing.

1 On appeal, Debtor argues that GCL charged an excessive rate of  
2 interest under Oregon law and that it therefore is not entitled to  
3 collect interest on the Note. We disagree.

4 "The weight of authority supports the rule that, in the  
5 absence of any attempt to evade the usury limitations, the law of a  
6 state where a contract was consummated governs the enforcement of  
7 its terms." Casner v. Hoskins, 130 P. 55, 57 (Or. 1913). Because  
8 Debtor did not contend and there is no evidence to establish that  
9 GCL's failure to be licensed in Oregon was intended to evade  
10 Oregon's usury laws, California law applies because California is  
11 where the pertinent documents were executed. In California,  
12 interest on real property loans is limited to the greater of ten  
13 percent, or five percent above the federal discount rate. See CAL.  
14 CONST., art. XV, § 1(2) (1999). However, this constitutional  
15 restriction does not apply to a loan that is made by a licensed  
16 real estate broker and that is secured in whole or in part by a  
17 lien on real property. Id. The bankruptcy court held that GCL's  
18 transactions with Debtor satisfied this provision, and Debtor does  
19 not raise any specific arguments on appeal challenging this  
20 conclusion. Therefore, the court did not err in including interest  
21 in the amount of the Claim.<sup>19</sup>

22 C. The Court Did Not Err in Determining That Debtor Had Not  
23 Provided Any Evidence of Actual Damages Caused by GCL's TILA  
24 Violations.

25 In her trial brief, Debtor contended that GCL had violated the  
26 TILA by (1) failing to disclose that loan fees and points were  
27 finance charges, and (2) not delivering to Debtor a notice of right

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28 <sup>19</sup>Debtor does not raise any issues with respect to the amount of  
interest awarded.

1 of rescission as required by 12 C.F.R. § 226.23.<sup>20</sup> The court held  
2 that GCL had failed to disclose certain fees as finance charges and  
3 that it therefore violated TILA. However, it held that Debtor had  
4 not established any actual damages caused by the violation, and it  
5 therefore awarded statutory damages of \$1,000 and costs.

6 On appeal, Debtor contends that in addition to awarding her  
7 statutory damages, the court should have awarded her actual damages  
8 because "she had to pay more interest than GCL advised her she  
9 would be paying." Appellant's Opening Br., at 24. We disagree.

10 When a creditor fails to comply with one of TILA's provisions,  
11 in addition to statutory damages, the creditor may be liable for  
12 "any actual damage." 15 U.S.C. § 1640(a)(1). The vast majority of  
13 courts that have considered the issue have concluded that in order  
14 to recover actual damages, the debtor must establish that he or she  
15 would have gotten credit on more favorable terms absent the  
16 violation. See, e.g., Cirone-Shadow v. Union Nissan of Waukegan,  
17 955 F. Supp. 938, 943 (N.D. Ill. 1997) (citing cases and adopting a  
18 narrow interpretation and limiting actual damages to situations in  
19 which a debtor can establish that he would have gotten credit on  
20 more favorable terms); McCoy v. Salem Mortgage Co., 74 F.R.D. 8, 12  
21 (E.D. Mich. 1976) (same). These courts have adopted a stringent  
22 requirement because

23 [t]he legislative history of the Act indicates  
24 that Congress was aware of the difficulty of  
25 establishing that causal link between the  
financing institution's noncompliance with the  
Act and the Plaintiff's purported damages. . .

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26  
27 <sup>20</sup>12 C.F.R. § 226.23 requires that "[i]n a transaction subject to  
28 rescission, a creditor shall deliver two copies of the notice of the  
right to rescind to each consumer entitled to rescind." 12 C.F.R. §  
226.23 (2000).

1 . As one court has succinctly noted, "if  
2 actual damages could be computed by a simple  
3 formula, no statutory damage provision would  
4 have been necessary."

4 Wiley v. Earl's Pawn & Jewelry, Inc., 950 F. Supp. 1108, 1114 (S.D.  
5 Ala. 1997) (citations omitted). In addition, this definition is  
6 consistent with the usual definition of actual damages, which  
7 requires actual loss or injury. Id. If a debtor cannot establish  
8 that he or she would have either gotten a better interest rate or  
9 foregone the loan completely, then no actual loss is suffered.  
10 Therefore, because Debtor did not introduce any evidence to  
11 establish that she suffered actual damages, the court did not err  
12 in declining to award them.

13 D. The Bankruptcy Court Erred in Determining the Principal Amount  
14 of the Claim.

15 In the Objection, Debtor argued that because GCL had not  
16 presented any document in which she had agreed to assume the  
17 \$15,000 Note, GCL could not include that amount in the Claim.  
18 Additionally, she argued that only the holder of the note could  
19 collect on it, and because the \$15,000 Note was executed in favor  
20 of S.P.S., GCL could not collect on the \$15,000 Note.

21 In its August 27, 1998 letter ruling, the court found that  
22 prior to Debtor's alleged assumption of the \$15,000 Note, the  
23 \$15,000 Note had been paid off and replaced by the Teixeira Note,  
24 which Hirsch had executed in favor of the Teixeiras. In determining  
25 that the principal amount of the Claim should include \$15,000 based  
26 on the Teixeira Note, the court did not address Debtor's argument  
27 that GCL was not a beneficiary of the Teixeira Note .

28 In response to the court's ruling, Debtor timely filed a

1 motion to amend the court's findings, contending that she had only  
2 agreed to assume the \$15,000 Note, not the Texeira Note, and that  
3 the first time she became aware of the existence of the Texeira  
4 Note was shortly before trial.<sup>21</sup> She pointed out that the Note  
5 required her to make interest payments consistent with the \$15,000  
6 Note, not the Texeira Note. Debtor also argued that Debtor's  
7 failure to assume either of the notes in writing rendered them void  
8 under the statute of frauds. The bankruptcy court denied this  
9 portion of the motion without making any findings.

10 On appeal, Debtor again contends that GCL cannot assert a  
11 claim based on either the \$15,000 Note or the Texeira Note because  
12 GCL was not listed as a beneficiary on either note. She also  
13 argues that the Texeira Note was not part of her transaction with  
14 GCL and that she did not agree to assume that obligation and that  
15 her failure to assume either the \$15,000 Note or the Texeira Note  
16 renders them void under the statute of frauds. Therefore, she  
17 asserts that the court erred in including in the amount of the  
18 Claim that portion of the Note that represented the Texeira Note.<sup>22</sup>  
19 We agree.

20 Rule 3001(f) provides that a proof of claim that is executed  
21 and filed in accordance with the bankruptcy rules constitutes prima  
22 facie evidence of the validity of the amount of the claim. See  
23 FED. R. BANKR. P. 3001(f). "After an objection is raised, the

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25 <sup>21</sup>It is unclear from the record whether Debtor raised this issue during the trial.

26 <sup>22</sup>GCL did not address these arguments in either its trial brief  
27 or its opening brief on appeal. At oral argument, it contended that  
28 what the court meant when it said that the \$15,000 Note had been paid off was that only the beneficiary had changed. This contention is not supported by the record or the court's findings.

1 objector bears the burden of going forward to produce evidence  
2 sufficient to negate the prima facie validity of the filed claim."  
3 Spencer v. Pugh (In re Pugh), 157 B.R. 898, 901 (9th Cir. BAP  
4 1993) (citations omitted). If the objecting party produces  
5 sufficient evidence to "negate the validity of the claim, the  
6 ultimate burden of persuasion remains on the claimant to  
7 demonstrate by a preponderance of the evidence that the claim  
8 deserves to share in the distribution of the debtor's assets." Id.  
9 (citations omitted).

10 Here, the bankruptcy court found that the \$15,000 Note had  
11 been paid off by the Texeiras and that Hirsch had executed the  
12 Texeira Note in their favor. Although the \$15,000 Note had been  
13 paid off, the Note required Debtor to pay interest in accordance  
14 with the terms of both the \$15,000 Note and the \$28,000 Note. It  
15 also provided that the Note and Trust Deed would be reconveyed once  
16 the \$15,000 Note and the \$28,000 Note were paid in full. Further,  
17 the mortgage loan disclosure statement for the \$28,000 Note  
18 indicated that as of June 3, 1994, United Airlines was the first  
19 lienholder and S.P.S. was the second lienholder. None of these  
20 documents referred to the Texeira Note or deed of trust. There is  
21 no evidence that Debtor otherwise agreed to assume the Texeira  
22 Note. Because the \$15,000 Note was paid off, the terms of the Note  
23 and Trust Deed do not permit inclusion in the Claim of any sum,  
24 including interest and attorney's fees, based on either the \$15,000  
25 Note or the Texeira Note.<sup>23</sup> Because GCL did not establish by a  
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27 <sup>23</sup>Moreover, GCL did not proffer any evidence that it had any  
28 liability for either the \$15,000 Note or the Texeira Note, both of  
(continued...)

1 preponderance of the evidence that it was entitled to a claim based  
2 on either of these notes, the bankruptcy court committed reversible  
3 error, and we therefore vacate the Order. On remand, the  
4 bankruptcy court is to calculate and disallow that portion of the  
5 Claim that represents interest and attorney's fees and costs that  
6 are based on either of these notes.

7 E. The Court Did Not Err in Permitting Attorney's Fees and Costs  
8 To Be Included in the Amount of the Claim, but We Remand the  
9 Issue of the Reasonableness of the Award.

10 Section 506(b) provides that

11 [t]o the extent that an allowed secured claim  
12 is secured by property the value of which after  
13 any recovery under subsection (c) of this  
14 section, is greater than the amount of such  
15 claim, there shall be allowed to the holder of  
16 such claim, interest on such claim, and any  
17 reasonable fees, costs, or charges provided for  
18 under the agreement under which such claim  
19 arose.

20 11 U.S.C. § 506(b). Thus, a secured creditor is entitled to  
21 attorney's fees if: "(1) the claim is an allowed secured claim;  
22 (2) the creditor is oversecured; (3) the fees are reasonable; and  
23 (4) the fees are provided for under the agreement." Kord Enters.  
24 II v. California Commerce Bank (In re Kord Enters. II), 139 F.3d  
25 684, 687 (9th Cir. 1998).

26 After considering Debtor's objections to GCL's request to  
27 include attorney's fees and costs in the Claim, the court overruled  
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29 <sup>23</sup>(...continued)

30 which were secured by the California Property that was lost to the  
31 senior lienholder in a foreclosure. For either note, the remedy of  
32 S.P.S. and the Teixeiras was limited to obtaining a deficiency judgment  
33 against Hirsch (or Debtor, to the extent that she legally assumed  
34 liability) under California law. There is no evidence that GCL had  
35 any liability. In the absence of any liability for either of these  
36 notes, GCL is not entitled to recover this amount from Debtor or her  
37 estate.

1 most of Debtor's objections and awarded fees and costs, with  
2 certain reductions. Debtor contends on appeal that the court  
3 abused its discretion in awarding GCL attorney's fees because the  
4 fees were not provided for in the agreements, and the fees were not  
5 reasonable.<sup>24</sup> We examine these contentions in turn.

6 1. Attorney's Fees and Costs Were Provided For in the Trust  
7 Deed and Note.

8 Debtor argued below that GCL's failure to provide her with the  
9 legally required balloon payment notice<sup>25</sup> and its continued  
10 acceptance of interest payments after the balloon payment's due  
11 date constituted a waiver of the balloon payment's due date which,  
12 in turn, meant that the Note was not in default. Although it did  
13 not make any specific finding, the court indicated that it had  
14 considered all of Debtor's objections to the inclusion of  
15 attorney's fees and overruled those objections. On appeal, Debtor  
16 contends that because there was no default, there was "NO TRIGGER"  
17 for the attorney's fees and costs in any of the relevant  
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19 <sup>24</sup>With respect to the first prong, as indicated above, GCL held  
20 an allowed secured claim. With respect to the second prong, Debtor  
has not disputed on appeal that GCL was not oversecured.

21 <sup>25</sup>California Civil Code § 2924i provides that if a balloon  
22 payment loan is secured by a deed of trust on real property and the  
loan is for a period in excess of one year, "[a]t least 90 days but  
23 . . . the holder of the loan shall deliver or mail by first-class mail  
. . . to the trustor . . . at the last known address of that person,  
24 a written notice." CAL. CIV. CODE § 2924i(c) (West 1999). That notice  
25 must contain (1) the name and address of the person to whom the final  
payment is to be made, (2) the date by which the final payment must  
26 be made, (3) the amount of the final payment or a good faith estimate  
of that amount, and (4) if the borrower has a contractual right to  
27 refinance, a statement to that effect. Id. If the creditor does not  
timely provide this notice, it does not extinguish the debtor's  
28 obligation, although the due date of the balloon payment may be  
affected. See CAL. CIV. CODE § 2924i(e) (West 1999).

1 agreements. Without this "trigger," Debtor contends that GCL  
2 cannot collect attorney's fees and costs under § 506(b). We  
3 disagree.

4 Both the Note and the Trust Deed contained attorney's fee  
5 provisions. Specifically, the Note provided that

6 [i]f this note is placed in the hands of an  
7 attorney for collection, I/we promise and agree  
8 to pay holder's reasonable attorney's fees and  
9 collection costs, even though no suit or action  
10 is filed hereon; however, if a suit or an  
11 action is filed, the amount of such reasonable  
12 attorney's fees shall be fixed by the court, or  
13 courts in which the suit or action, including  
14 any appeal therein, is tried, heard, or  
15 decided.

12 Cross-Collateral Installment Note (June 1, 1994), at 1.

13 Additionally, the Trust Deed obligated Debtor "[t]o pay all costs,  
14 fees and expenses of this trust including the cost of title search  
15 as well as the other costs and expenses of the trustee incurred in  
16 connection with or in enforcing this obligation and trustee's and  
17 attorney's fees actually incurred." Cross-Collateral Trust Deed  
18 (June 1, 1994), ¶ 6. Thus, irrespective of whether the balloon  
19 payment was or was not yet due, Debtor's filing for bankruptcy and  
20 subsequent objection to the Claim caused GCL to incur attorney's  
21 fees and costs in enforcing the Trust Deed and Note. Therefore,  
22 the agreements contained the requisite attorney's fee provisions,  
23 and the fourth prong of the test is satisfied.

24 2. We Must Remand the Issue of the Reasonableness of GCL's  
25 Attorney's Fees and Costs in Light of Our Holding That  
26 the Court Erred in Calculating the Principal Amount of  
the Claim.

27 In determining the reasonableness of fees requested under  
28 § 506(b),

1 the key determinant is whether the creditor  
2 incurred expenses and fees that fall within the  
3 scope of the fees provision in the agreement,  
4 and took the kinds of actions that similarly  
5 situated creditors might reasonably conclude  
6 should be taken, or whether such actions and  
7 fees were so clearly outside the range as to be  
8 deemed unreasonable. The bankruptcy court  
9 should inquire whether, considering all  
10 relevant factors including duplication, the  
11 creditor reasonably believed that the services  
12 employed were necessary to protect his  
13 interests in the debtor's property.

8 Pasatiempo Properties v. Le Marquis Assocs. (In re Le Marquis  
9 Assocs.), 81 B.R. 576, 578 (9th Cir. BAP 1987).

10 Here, our holding that the bankruptcy court erred in  
11 determining the principal amount of the Claim may affect the  
12 bankruptcy court's determination regarding the reasonableness of  
13 GCL's attorney's fees and costs. On remand, the court is directed  
14 to revisit this issue in light of our determination that GCL is not  
15 entitled to assert a claim based on either the \$15,000 Note or the  
16 Texeira Note.<sup>26</sup>

#### 18 V. CONCLUSION

19 In sum, the bankruptcy court did not err in allowing GCL a  
20 claim and permitting it to include attorney's fees and interest.

21 Additionally, in order to recover actual damages for a TILA  
22 violation, a debtor must establish detrimental reliance. Because  
23 Debtor did not proffer any such evidence, the court did not err in  
24 declining to award actual damages.

25 However, because the \$15,000 Note was paid off and neither the

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26  
27 <sup>26</sup>Because we are remanding this issue on appeal, we do not  
28 consider any of Debtor's specific objections to the amount of  
attorney's fees and costs incurred, because these amounts are subject  
to change.

1 Note nor the Trust Deed referred to the Teixeira Note, the court  
2 erred in determining that the principal amount of the Claim should  
3 include sums based on either of these notes. Therefore, we vacate  
4 the Order. On remand, the court is to recalculate the amount of  
5 the allowed claim to deduct any sums, including interest and  
6 attorney's fees and costs, that are based on either of these notes.  
7 The court should also revisit the issue of the reasonableness of  
8 GCL's remaining attorney's fees and costs in light of our holding  
9 that it erred in calculating the principal amount of the Claim.

10 AFFIRMED IN PART and REVERSED and REMANDED IN PART.

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U.S. Bankruptcy Appellate Panel  
of the Ninth Circuit  
125 South Grand Avenue, Pasadena, California 91105  
Appeals from Central California (626) 229-7220  
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-99-1542-RyKM

RE: GERALDINE KAY SMITH

A separate Judgment was entered in this case on 8/4/00.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.  
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$105 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

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The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Edwina Clay

Deputy Clerk: August 4, 2000