

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE FOR THE
WESTERN DIVISION**

In re

RICHARD W. LEVATINO,

Case No. 94-28522-K

Debtor.

Chapter 13

**MEMORANDUM AND ORDER RE CREDITOR'S MOTION SEEKING
TO MODIFY DEBTOR'S CONFIRMED PLAN**

This bifurcated action arises out of a motion filed by an unsecured creditor, Gates, Duncan & Van Camp ("Gates"), seeking a postconfirmation modification of the above-named debtor's chapter 13 plan pursuant to 11 U.S.C. § 1329(a) and FED. R. BANKR. P. 3015(g).

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L), and (O). The court has jurisdiction of this contested matter by virtue of 28 U.S.C. §§ 1334(a) - (b) and 157(a) and Miscellaneous Order No. 84-30 of the United States District Court for this Judicial District. The following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

I. Findings of Fact

The relevant background facts may be briefly summarized as follows. On August 25, 1994, Richard W. Levatino, the above-named debtor ("Debtor"), filed a chapter 13 petition and accompanying repayment plan. The first meeting of creditors was held on September 22, 1994, in accordance with a prior notice that was mailed by the Bankruptcy Clerk to all creditors including Gates. The Clerk's mailing of the notice of the commencement of this case also

contained a full copy of the debtor's proposed repayment plan which included a provision for the treatment of Gates' claim along with other similarly situated business creditors. The debtor's proposed plan provided for, inter alia, two classes of unsecured, nonpriority creditors: that is, the debtor's personal creditors are to receive 100% (actually 97%) of their claims and the debtor's disputed business creditors are to receive 5% of their allowed claims. Gates' claim is part of the latter class. Without opposition from Gates or any other party in interest including the chapter 13 trustee, the debtor's repayment plan was confirmed on November 1, 1994.

It is noted that on October 21, 1994, a consent order was entered herein regarding the liquidation of Gates' claim against the debtor. This order in essence allowed Gates to proceed with a pending prepetition state court lawsuit against the debtor for damages regarding alleged violations of a partnership agreement involving the debtor and Gates. A judgment was entered by the Shelby County, Tennessee, Chancery Court on November 6, 1995, in favor of Gates against the debtor for \$148,268.89. The debtor's counterclaim against Gates was denied by the Chancery Court. After complex litigation concerning the timeliness of Gates' proof of claim, the bankruptcy court subsequently allowed Gates' "amended" proof of claim as a nonpriority, unsecured claim in the amount of \$148,268.89. The state court lawsuit is currently on appeal to the Tennessee Civil Court of Appeals.

On February 22, 1996, Gates filed the instant "Motion to Modify Debtor's Plan." The debtor strongly opposes Gates' section 1329 motion.

II. Conclusions of Law

Modification of a confirmed chapter 13 plan is governed by 11 U.S.C. § 1329.

Specifically, section 1329(a) of the Bankruptcy Code provides:

At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to --

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan

Gates, at this time, is the holder of an allowed unsecured, nonpriority claim and, therefore, has standing under section 1329 to file a motion seeking a postconfirmation modification of the plan.

This section unfortunately provides little or no guidance regarding the standards to be applied by the bankruptcy court in determining whether or not a debtor's confirmed chapter 13 plan should be modified. What constitutes sufficient cause to warrant a postconfirmation modification of a chapter 13 plan is subject to judicial discretion on a case-by-case basis. The legislative history underlying section 1329 suggests, *inter alia*, that a postconfirmation modification is appropriate upon a showing of substantially changed circumstances:

The purpose of this amendment is to permit the debtor or the holder of an allowed unsecured claim to request modification of a confirmed chapter 13 plan in response to changes in circumstances of the debtor substantially affecting (favorably or unfavorably) the ability of the debtor to make payments under the plan

Oversight Hearings on Personal Bankruptcy Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 97th Cong., 1st Sess. 181, 221 (1981-82).

The threshold question here is not so much Gates' standing to file a section 1329 motion, but whether the debtor's confirmed plan should be modified notwithstanding the relevant contentions of Gates. Case law holds that the doctrine of *res judicata* and 11 U.S.C. § 1327 ("Effect of Confirmation") limits the scope of postconfirmation modifications of chapter 13 plans. See, for example, *In re Fitak*, 92 B.R. 243 (Bankr. S.D. Ohio 1988); *In re Moseley*, 74 B.R. 791 (Bankr. C.D. Cal. 1987); *In re Arnold*, 869 F.2d 240 (4th Cir. 1989); *Anaheim Savings*

& Loan Assoc. v. Evans (In re Evans), 30 B.R. 530 (9th Cir. 1983). The Ninth Circuit in *In re Evans* stated that “an order confirming a chapter 13 plan [under section 1327] is res judicata as to all justiciable issues which were or could have been decided at the confirmation hearing.” *In re Evans*, 30 B.R. at 531. In addition, a leading treatise has noted that res judicata limits the application of postconfirmation modifications:

In view of the congressional purpose, the right of the trustee of the holder of an unsecured claim should be limited to situations in which there has been a substantial change in the debtor’s income or expenses that was not anticipated at the time of the confirmation hearing. As to other matters, the confirmation order should be considered res judicata insofar as the matters do not relate to a change in the debtors’s ability to pay

8 COLLIER’S ON BANKRUPTCY ¶ 1329.03 at 1329-6 (15th ed. Rev. 1996) (footnotes omitted).

If, for example, the chapter 13 trustee or an unsecured creditor can show a substantial and unanticipated increase in the debtor’s income and/or decrease in expenses, the court may allow a postconfirmation modification and apply the ability-to-pay test. *Id.*

Ordinarily, in determining whether or not a change in a chapter 13 debtor’s financial circumstances is substantial and unanticipated, the court generally applies an objective, as opposed to a subjective, test and considers, for example, whether the debtor’s changed financial condition is substantial under the circumstances and could have been reasonably anticipated at the time of confirmation by the parties seeking modification. See *In re Fitak*, 92 B.R. at p. 249-250; *In re Arnold*, 869 F.2d at 243.

In *In re Fitak*, 92 B.R. at 250, the court stated:

...As to other matters, the confirmation order should be considered *res judicata* insofar as they do not relate to a change in the debtor’s ability to pay, subject only to the limited right to revocation of the order of confirmation and, of course, the debtor’s right to voluntarily request modification.

When a request for modification is made by the trustee or the holder of an unsecured

claim, *the party requesting modification must bear the burden of showing a substantial change in the debtor's ability to pay since the confirmation hearing and that the prospect of the change had not already been taken into account at the time of confirmation.* A trustee or unsecured claim holder may not raise as grounds for modification under this section facts which were known and could have been raised in the original confirmation proceedings, since the order of confirmation must be considered *res judicata* as to that set of circumstances.

Assuming that a trustee or holder of an unsecured claim can show a substantial and *unanticipated* increase in the debtor's income or decrease in the debtor's expenses, then the ability-to-pay test should be applied to the modification proceeding in the same manner as in the original confirmation proceeding.

5 COLLIER ON BANKRUPTCY ¶1329.01(b) at 1329-4 to 1329-5 (15th ed. 1988) (emphasis added)(footnotes omitted).

As the discussion above indicates, the doctrine of *res judicata* operates as a limitation on the ability of parties to obtain a post-confirmation modification under § 1329(a) based upon unanticipated changed circumstances. In determining whether the debtors' changed circumstances were unanticipated, the court is inclined to apply an objective, as opposed to a subjective, test. Stated differently, evidence regarding what the trustee and the unsecured creditors actually anticipated with respect to a debtor's present or prospective circumstances does not control the court's modification analysis; instead, the court must determine whether a debtor's altered financial circumstances could have been *reasonably anticipated* at the time of confirmation by the parties seeking modification. With the foregoing principles in mind, the court will turn to the facts of the instant case.

Since the nonsalaried debtor here is an insurance salesman who relies solely on sales commissions, his monthly income naturally varies. As the debtor explained in the Schedule I herein, his monthly income of \$5,568.00 was an average income over the seven months prior to the commencement of the chapter 13 case. Gates and other parties in interest had actual knowledge of the debtor's fluctuating commission income. Gates' Memorandum in support of

the instant motion states that the debtor's income went from \$76,327.00 in 1994 to \$88,897.63 in 1995.

It is asserted that under the exact facts and circumstances the increase in the debtor's income is not "substantial" as contemplated under section 1329 and the debtor's changed financial condition could have been reasonably anticipated at the time of original confirmation. Contrast *In re Arnold*, 869 F.2d 240 (4th Cir. 1989) (an increase in the debtor's income from \$80,000 to \$200,000 was substantial and unanticipated); *In re Euerle*, 70 B.R. 72 (Bankr. D.N.H. 1987) (plan was modified after the debtor was left with an interest worth \$300,000 in an estate); *In re Koonce*, 54 B.R. 643 (Bankr. D.S.C. 1985) (payments increased after the debtor won \$1.3 million in a lottery). Thus, it may be said that Gates could have reasonably anticipated the debtor's changed financial condition at the confirmation hearing. That is, Gates, as a party in interest, could have objected to confirmation of the debtor's original plan. 11 U.S.C. § 1324.

Gates additionally argues, postconfirmation, that the debtor is not submitting all his current disposable income under the plan as contemplated in 11 U.S.C. § 1325(b). The disposable income requirement of confirmation of a chapter 13 plan generally does not, ipso facto, apply to postconfirmation motions seeking to modify confirmed chapter 13 plans. See, for example, *In re Anderson*, 153 B.R. 527 (Bankr. M.D. Tenn. 1993); see also *In re Anderson*, 21 F.3d 355 (9th Cir. 1994).

Gates also argues, postconfirmation, that the debtor's confirmed plan provided for an extremely unfair distribution since Gates will receive only a 5% distribution, while the debtor's personal creditors will receive 97%, assuming the plan successfully completes. 11 U.S.C. § 1327(a). Since this percentage plan distribution was known and anticipated at the original

confirmation hearing and was unrelated to a subsequent change in the debtors's ability to pay, the confirmation order herein is res judicata on this particular issue. Gates was on sufficient notice of the plan's classification and treatment of claims and did not object to confirmation. As noted earlier, no party in interest including the chapter 13 trustee objected to the confirmation of the debtor's plan. Simply put, the classification of claims issue was a justifiable issue which could have been decided at the confirmation hearing.

Gates further argues that the debtor's actual expenses are inconsistent with the proposed expenses listed in the debtor's schedules. Considering a totality of the particular facts and circumstances and assuming arguendo the correctness of numerous contentions of Gates, the court finds no substantial or unanticipated change in the debtor's expenses to warrant the unraveling of this confirmed plan. For example, it is understandably anticipated that the debtor's expenses for medical purposes, emergencies, litigation, and education costs may reasonably fluctuate, especially with a family of four.

The court additionally finds that the real property transfers made by the debtor several years prior to the bankruptcy are not sufficient to revoke the section 1325 order of confirmation. See 11 U.S.C. § 1330(a). The debtor properly answered the relevant question in his statement of financial affairs regarding prepetition transfers of real estate. Even if the debtor inadvertently or even intentionally failed to disclose such a transfer, the debtor's present financial condition would not change.

Paragraph 10 of the debtor's statement of financial affairs asks a question concerning transfers not in the ordinary course of the debtor's business "within one year immediately preceding the commencement of this case." The debtor's answer to ¶ 10 is: "wife quitclaimed

undivided interest in home [7101 Eastern Avenue - the principle residence] to Debtor, Husband.”

The debtor’s deposition taken in connection with this action and the exhibits to Gates’ memorandum in support of the instant motion also refer to the transfers of 6594 Elkgate (foreclosed upon) and 5665 Fernway Drive (sold for nominal net proceeds) - both transfers occurred prior to the one year period mentioned in ¶ 10 of the statement of financial affairs.

Assuming many of the contentions made by Gates, nonetheless the court finds that Gates has failed to show a substantial and unanticipated change in the debtor’s financial condition that would warrant an unraveling of the debtor’s confirmed plan. This case is not sufficiently comparable to *In re Arnold*, *In re Euerle*, and *In re Koonce* to allow in essence a late objection to confirmation, notwithstanding a high income debtor.

It should be emphasized that once confirmed, the chapter 13 plan generally is binding on the debtor and on each creditor, secured or unsecured, whether or not the creditor has accepted, rejected, or objected to the plan. (The chapter 13 debtor, however, is not discharged under 11 U.S.C. § 1328(a) until after the plan is fully executed.) Except in extraordinary circumstances, once a chapter 13 plan is confirmed, it is final, and the order of confirmation may be challenged only as having been procured by fraud. See, for example, *In re Wolf*, 162 B.R. 98 (Bankr. D. N.J. 1993); *In re Collier*, 198 B.R. 816 (Bankr. N.D. Ala. 1996).

Considering a totality of the particular facts and circumstances and applicable law, the court concludes that Gates has not carried its required burden of showing that a modification of the debtor’s plan is sufficiently warranted, though Gates can present some evidence of an improvement in the debtor’s financial circumstances. See, for example, *In re Edwards*, 190 B.R. 91 (Bankr. M.D. Tenn. 1995).

The section 1325(a) confirmation order entered on November 1, 1994, under these circumstances, must be considered res judicata under 11 U.S.C. § 1327 and should not be unraveled. Gates' "Motion to Modify Debtor's Plan" is, therefore, denied. Accordingly, there is no necessity for a future evidentiary hearing arising out of this matter.

Based on the foregoing and the case and proceeding records as a whole,

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that the "Motion to Modify Debtor's Plan" filed by Gates, Duncan & Van Camp, an unsecured creditor, seeking a postconfirmation modification of the debtor's plan is hereby denied consistent with the foregoing.

BY THE COURT

David S. Kennedy
Chief United States Bankruptcy Judge

Dated: May 21, 1997

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