

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

IN RE: )  
 )  
TODD VAUGHN and )  
PAMELA VAUGHN, )  
 )  
 ) MEMORANDUM DECISION RE:  
 ) MOTIONS TO MODIFY  
Debtors. ) CHAPTER 13 PLAN

The matters before the Court are Debtors Todd W. and Pamela J. Vaughn's Motion to Modify Chapter 13 Plan and Second Motion to Modify Chapter 13 Plan and the objections thereto filed by the Chapter 13 Trustee and the Internal Revenue Service. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Debtors Todd W. and Pamela J. Vaughn's Chapter 13 debt adjustment plan was confirmed by Order entered July 12, 1988. The confirmed plan provided for payments to the Chapter 13 Trustee of \$100.00 for twelve months, followed by \$361.47 for the next twelve months, followed by \$271.49 for the next thirty-six months. The Internal Revenue Service (IRS) was scheduled to receive full payment on its \$9,098.44 tax claim<sup>1</sup> with 9% interest.

On August 23, 1990, Debtors filed a Motion to Modify Chapter 13 Plan. IRS and Rick A. Yarnall, Chapter 13 Trustee (Trustee), objected to the Motion. A hearing on this Motion was held September 11, 1990. Debtors informed the Court that they would file an amended motion to modify.

Debtors filed a Second Motion to Modify Chapter 13 Plan on September 19, 1990. Debtors proposed to pay the Trustee \$250.00 per month for 12 months followed by payments of \$400.00 per month for 22 months. The modified distribution would include payments to Debtors' counsel and Norwest Bank with an unspecified "remaining sum" payment to IRS without interest on Debtors' current

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<sup>1</sup> On June 10, 1988, IRS filed proof of an unsecured, priority claim of \$8,258.07. This included taxes due of \$7,449.00 plus interest to the petition date of \$809.07. IRS also claimed a penalty of \$809.07 for a total claim of \$9,098.44. While Debtors' confirmed plan provided for repayment of \$9,098.44 plus 9% interest to IRS, it did not identify the claim as one of priority under 11 U.S.C. § 1322(a)(2).

obligation of \$9,680.79.

IRS objected to the Second Motion on the grounds that the modified repayment term exceeds the five year limitation imposed by 11 U.S.C. § 1329(c) and, contrary to 11 U.S.C. § 1329(a), it eliminated the 9% interest payment that the original plan provided. IRS argued that Debtors could not eliminate interest payments because that issue was "res judicata."

A hearing was held October 30, 1990 and the Second Motion was taken under advisement.

## II.

Confirmation of a Chapter 13 plan binds the debtor and each creditor, whether or not the creditor accepts the treatment provided. 11 U.S.C. § 1327(a). A confirmed plan, however, may be modified to

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments[.]

11 U.S.C. § 1329(a) (in pertinent part). The modified plan must meet the same general requirements for confirmation as the original plan. 11 U.S.C. §§ 1329(b)(1), 1322(a), 1322(b), 1323(c), and 1325(a). The term of repayment for the modified plan may not exceed five years. 11 U.S.C. § 1329(c).

All Chapter 13 plans, including any modifications, must provide for

the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim[.]

11 U.S.C. § 1322(a)(2) (in pertinent part) (emphasis added). Claims entitled to priority under § 507 include unsecured tax claims. 11 U.S.C. § 507(a)(7).

## III.

Two questions must be answered. First, must Debtors continue paying IRS interest on its claim under any modified plan? Second, may Debtors' modified plan include a repayment term that exceeds five years from the date payments under the original plan began?

### A.

For three reasons, the Court concludes that Debtors may modify their plan by eliminating the interest payment to IRS on its priority claim.

First, elimination of the interest payment constitutes one of the recognized ways in which a plan may be modified, as set forth in § 1329(a), since Debtors still propose to pay IRS its full claim of \$9,098.44. As this Court discussed in In re Oletzke, Bankr. No. 186-00254-INH, slip op. at 6 (Bankr. D.S.D. December 11, 1990), a modification under § 1229(a) -- a statute identical with § 1329(a) -- may alter the payments on a claim or the term of repayment, but **not** the **claim** itself. Debtors do not propose to alter IRS' claim; rather, Debtors want to eliminate interest payments that are in excess of the claim.

Second, the elimination of the interest payment does not affect any **right** IRS may have under § 1322(a)(2) or the confirmed plan. Full payment "in deferred cash payments" of priority claims under § 1322(a)(2) does not contemplate the payment of interest on, or a present value repayment of, a priority claim. In re Hageman, 108 B.R. 1016, 1018-19 (Bankr. N.D. Iowa 1989). Most courts faced with this issue agree. Hageman, 108 B.R. at 1019 (see cases cited therein). In Hageman, the court noted that present value language in the Code is specific. Id. at 1018. For example, § 1129(a)(9)(A) provides that certain priority claim holders "will receive on account of such claim deferred cash payments ... of a value, **as of the effective date of the plan**, equal to the allowed amount of the claim." Section 1322(a)(2) does not contain the necessary "as of the effective date of the plan" language. See also 11 U.S.C. § 1222(a)(2); In re Herr, 80 B.R. 135, 137 (Bankr. S.D. Iowa 1987). Therefore, Debtors are not obligated under the § 1322(a)(2) to pay IRS interest on their claim.

Further, confirmation of Debtors' plan did not create an unalterable right to interest as IRS argues. Generally, a confirmed plan binds the parties to its provisions. 11 U.S.C. § 1327(a). Those issues that were or could have been litigated at confirmation are res judicata and a debtor or creditor cannot assert

rights inconsistent with provisions of the confirmed plan.<sup>2</sup> In re Glow, 111 B.R. 209, 224 (Bankr. N.D. Ind. 1990); In re Frost, 96 B.R. 804, 808 (Bankr. S.D. Ohio 1989); In re Fitak, 92 B.R. 243, 249 (Bankr. S.D. Ohio 1988); Anaheim Savings and Loan Association v. Evans (In re Evans), 30 B.R. 530, 531 (Bankr. 9th Cir. 1983). The provisions of a confirmed plan, however, are not unalterable. Section 1327(a) is not a limit on permitted modification of a confirmed Chapter 13 plan; rather, it is a statutory description of the effect of a confirmed plan or of a confirmed modified plan. A confirmed Chapter 13 plan binds the debtor (and all creditors), 11 U.S.C.S. § 1327(a), but a confirmed plan "may be modified ... at any time after confirmation

of the plan but before the completion of payments under the plan...." 11 U.S.C.S. § 1329(a). The confirmed plan binds the debtor unless and until it is modified, and then the modified plan "becomes the plan," 11 U.S.C.S. § 1329(b)(2), and the modified plan has the effects described in § 1327. Sections 1322(a), (b), 1323(c) and 1325(a) are the appropriate sources of the limits on modification under § 1329.

In re Jock, 95 B.R. 75, 77 (Bankr. M.D. Tenn. 1989); see also In re Jourdan, 108 B.R. 1020, 1023 (Bankr. N.D. Iowa 1989). As the court in Frost reasoned, "[T]he policy supporting post-confirmation modification of a plan permits a plan to accommodate changed circumstances so long as the modified plan would have been appropriate had the present circumstances existed originally." Frost, 96 B.R. at 808. To construe more narrowly §§ 1327 and 1329(a) would render § 1329 meaningless and "encourage a debtor to propose originally only the least favorable treatment for a claim since he could not alter that treatment if he could not complete his plan as originally proposed." Id. Since payment of IRS' claim in full without interest would have been permissible under § 1322(a) in the original plan, this Court is obligated not to frustrate a modification under § 1329 by requiring the interest payments to continue.

Third and finally, there is no evidence that Debtors' proposal to eliminate the interest payment on IRS' claim is not made in good faith. In re LeMaire, 898

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<sup>2</sup> There has been no claim that an intervening decision or change in the law has altered the repayment provision of unsecured, priority tax claims under § 1322(a)(2) or § 507(a) so as to bar the defense of res judicata. In re Jourdan, 108 B.R. 1020, 1022 (Bankr. N.D. Iowa 1989) (citing State Farm Mutual Automobile Insurance Co., 324 U.S. 154, 162, reh'g denied, 324 U.S. 887 (1945)).

F.2d 1346, 1348-49 (8th Cir. 1990). The plan does not indicate that the interest provision was a bargained-for exchange between Debtors and IRS. Further, when the several factors that courts in this Circuit must consider in making a determination of good faith are reviewed, this Court can only conclude that Debtors' proposed modification does not unfairly manipulate the Code. Id.

B.

Any modification of Debtors' plan may not extend beyond five years from the date of the first payment under the original plan. 11 U.S.C. § 1329(c). The mandate of § 1329(c) is clear. By the Court's calculations based on the requirements of § 1326(a)(1), at least twenty-seven months have elapsed since the first payment should have been made under Debtors' plan through the date of the hearing on Debtors' motion on October 30, 1990<sup>3</sup>. Therefore, from the date of this decision, Debtors have no more than thirty-three months remaining in which to complete plan payments. Their second motion to modify proposes payments over an additional thirty-four months -- at least one month longer than is allowable -- and must be denied on that basis.

An order denying Debtors' Motion to Modify Chapter 13 Plan and Second Motion to Modify Chapter 13 Plan will be entered. Debtors may file and serve within thirty days, an amended motion to modify that meets the five-year repayment term limitation imposed by § 1329(c).

Dated this 6th day of March, 1991.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:  
PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

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<sup>3</sup> The three months necessary for the Court to consider the issues presented on this modification motion should **not** be included in the computation of the time in which Debtors must complete plan payments under §§ 1329(c).

UNITED STATES BANKRUPTCY COURT  
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WESTERN DIVISION

IN RE: )  
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TODD VAUGHN and )  
PAMELA VAUGHN, )  
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Debtors. )

CASE NO. 88-50076-INH  
CHAPTER 13  
ORDER DENYING  
MOTIONS TO MODIFY  
CHAPTER 13 PLAN

In compliance with and recognition of the Memorandum of Decision Re:  
Motions to Modify Chapter 13 Plan entered this day,

IT IS HEREBY ORDERED THAT Debtors Todd W. and Pamela J. Vaughn's Motion to  
Modify Chapter 13 Plan and Second Motion to Modify Chapter 13 Plan are DENIED;  
and

IT IS FURTHER ORDERED that Debtors shall file any amended motion to modify  
their Chapter 13 plan within thirty days of entry of this order.

So ordered this \_\_\_\_\_ day of March, 1991.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)