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JUDGE: M. A. Mahoney
PARTIES: Edward Leon Flennory, West Alabama Bank & Trust
CHAPTER: 13
ATTORNEYS: J. A. Lockett, Jr., R. P. Reynolds
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

EDWARD LEON FLENNORY Case No. 99-14099

Debtor.

ORDER DENYING THE MOTION TO MODIFY DEBTOR'S CONFIRMED PLAN

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Robert P. Reynolds, Tuscaloosa, Attorney for West Alabama Bank & Trust

This matter is before the Court on the Motion of West Alabama Bank & Trust ("WAB&T") to modify debtor's confirmed plan. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the motion of WAB&T to modify debtor's plan.

FACTS

Edward Flennory filed for relief pursuant to chapter 13 of the Bankruptcy Code on November 18, 1999. In his schedules, Flennory listed his income as $1,200 per month and his expenses as $892 per month. His expenses consisted of $525 for rent, $85 for electricity and heating fuel, $32 for telephone and $50 for transportation costs. WAB&T filed a claim in December of 1999. Flennory's confirmed plan, dated February 12, 2000, provides for unsecured, nonpriority claims to be paid 1% pro rata. Under Flennory's plan, WAB&T has a bifurcated claim secured by two vehicles. The secured portion of the claim totals $12,000.00 which the plan states is for the value of the two vehicles. The secured claim does not appear to include interest. The unsecured portion of the claim is in the amount of $5,174.93. Flennory

received an income tax refund this year in the amount of $3,447.00 which has already been spent. Debtor claims his income from work has decreased and/or that the expenses taken directly out of his paycheck, such as insurance, have increased since he filed bankruptcy. WAB&T points out that his pay rate and hours worked would indicate a slight increase in income. WAB&T asks this Court to modify Flennory's plan to provide for the present value of WAB&T's collateral as required by § 1325 of the Bankruptcy Code and to increase Flennory's plan payments to account for his increase in income as a result of the tax refund.

LAW

The issues in this case are: (1) whether a creditor can modify a debtor's plan over a year after it was confirmed to add interest to its secured claim; and (2) whether a creditor can modify a debtor's confirmed plan to include an unexpected tax refund in the disposable income calculation to increase the percentage to be distributed pro rata to unsecured creditors. The Court will address both issues below.

Modification of Secured Claim

The general rule as to the effect of a confirmed plan is provided by § 1327(a) which states that "The provisions of a confirmed plan bind the debtor and 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." As any other creditor, WAB&T is bound by the provisions of the confirmed plan. Postconfirmation creditors "may not later assert any interest other than that provided for it by the confirmed plan." *In re Eason*, 178 B.R. 908, 911 (Bankr. M.D. Ga. 1994). WAB&T did not object to the plan at confirmation and cannot now assert that its secured claim should be increased to include interest. The Bankruptcy Code does not give a secured creditor the right to modify a debtor's confirmed plan to alter the amount of

the secured claim. *See* 11 U.S.C. § 1329(a). Once confirmed, the plan became binding and absent a showing of fraud under § 1330(a), it cannot be challenged under § 1325 for failure to pay the creditor the present value of its claim. *In re Fesq*, 153 F.3d 113 (3rd Cir. 1998) (quoting *In re Szostek*, 886 F.2d 1405 (3d Cir.1989)); *see also United States v. Lee*, 89 B.R. 250, 256 (N.D. Ga. 1987), *aff'd per curiam*, 853 F.2d 1547 (11th Cir. 1988) (a court may not revoke or vacate a chapter 13 confirmation order absent allegations of fraud); *see, e.g., Wallace v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.*), 898 F.2d 1544, 1553 (11th Cir.), *cert. denied*, 498 U.S. 959, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990).

Modification to Increase Amount Paid on Unsecured Claims

WAB&T contends that debtor's tax refund is disposable income that was not considered at plan confirmation. WAB&T argues that to account for this increase in debtor's disposable income, debtor's plan should be modified to increase the pro rata share to be paid to unsecured creditors. Section 1329(a) provides that an unsecured creditor can modify a confirmed plan to "increase or reduce the amount of payments on claims of a particular class provided for by the plan." There is a split of authority as to whether or not such a modification shall be granted as a matter of right so long as it complies with the Code requirements of a plan or whether it is granted only upon a showing of substantial, unanticipated change in the debtor's ability to pay. *See Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000). The courts that hold that a substantial change is not necessary for modification reason that the plain language of § 1329(a) makes no such requirement. *Id.*; *In re Brown*, 219 B.R. 191 (B.A.P. 6th Cir. 1998); *In re Witkowski*, 16 F.3d 739 (7th Cir. 1994); *In re Powers*, 202 B.R. 618 (B.A.P. 9th Cir. 1996); *In re Meeks*, 237 B.R. 856 (Bankr. M.D. Fla. 1999); *In re Jourdan*, 108 B.R. 1020 (Bankr. N.D. Iowa 1989); *In re Evans*, 77 B.R. 457 (E.D. Pa. 1987). Other courts hold that the doctrine of res judicata requires a

substantial and unanticipated change in the debtor's circumstances for modification. *Eg., In re Arnold*, 869 F.2d 240 (4th Cir. 1989); *In re McCray* 172 B.R. 154 (Bankr. S.D. Ga. 1994); *In re Solis*, 172 B.R. 530 (Bankr. S.D.N.Y. 1994); *In re Fitak*, 92 B.R. 243 (Bankr. S.D. Ohio 1988). This is an issue of first impression for this Court; however the Northern and Middle Districts of Alabama have dealt with this issue before. *See Matter of Collier,* 198 B.R. 816 (Bankr. N.D. Ala. 1996); *In re Duke*, 153 B.R. 913 (Bankr. N.D. Ala. 1993); *In re Woodhouse*, 119 B.R. 819 (Bankr. M.D. Ala. 1990); *see also In re Tippins*, 221 B.R. 11 (Bankr. N.D. Ala. 1998) (discussing requirements for plan modification in a footnote). Both Alabama districts have concluded that an extraordinary or substantial change in the debtor's circumstances must be shown for the trustee or creditor to compel modification of a confirmed plan. *Id.* This Court agrees with the precedent from the Northern and Middle Districts of Alabama.

Some courts have questioned whether the disposable income test should be applied at all postconfirmation when there was no objection to the plan at the confirmation stage. *In re Grissom*, 137 B.R. 689, 691 (Bankr. W.D. Tenn. 1992) (citations omitted). The *Grissom* court explained that:

> the debtor may be unable to project whether a tax refund will be due for any one or more of the three years required under § 1325(b)(1)(B). Therefore, it is logical to focus on the fact that § 1325(b)'s disposable income test is applied only if there is an objection to confirmation and then the test is applied at the confirmation hearing stage of the case. Thus, if there is an objection, the debtor is expected to "make a 'best effort'" at the three year projection, and this "best effort" may become a factor in the good faith analysis required for confirmation under § 1325(a)(3).

Id. (citations omitted). The Southern District of Georgia found in *In re McCray*, 172 B.R. 154 (Bankr. S.D. Ga. 1994) that the debtor's receipt of a tax refund in that case did not justify modification of the plan, reasoning that:

> The Court's obligation to perform a disposable income analysis cannot consist simply of concluding that the funds in question are disposable income because Debtor has been able to subsist without the benefit of those funds for more than a year. Likewise, it is inappropriate to conclude that Debtor would not now restate one or more line items in his budget if the funds were to become available to him as a matter of regular monthly income.
> . . .
> In such a case it is clear that the debtor is simply adjusting his living circumstances to a point that is low enough to subsist on the funds which remain from his or her earnings after funding the minimum payment necessary to achieve confirmation of the Chapter 13 plan. At this income level, close analysis of the Schedule I and Schedule J information yields very little useful information.
> . . .
> [I]t is reasonable to consider that some debtors survive in financial circumstances which desperately justify the expenditure of additional funds for basic living expenses, even if a debtor's budget indicates otherwise. Further, the determination as to whether a debtor is making his best effort in the funding of a reorganization case can be determined by considering all of a debtor's circumstances including the percentage of income dedicated to repayment and the percentage of distribution to be received by holders of unsecured claim. Additionally, the receipt by Debtor of the tax refund in question is neither an "extraordinary" nor "substantial" change in Debtor's circumstances which would justify disturbing the plan of reorganization.

Id. at 157-58. The Southern District of Ohio in analyzing this issue noted the split in authority and concluded:

> "Even if *res judicata* were not a bar, a modest increase in a debtor's income . . . is not a change which is so substantial that a trustee's motion for modification should be granted over the debtor's opposition. . . . Given the uncertainty about the application of the disposable income test to a post-confirmation modification on the motion of a creditor or the trustee, such modifications should be limited to egregious situations designed to protect the Chapter 13 remedy from misuse or abuse.
> . . .
> Absent bad faith, concealment, specific superdischarge advantages, or other egregious facts, this Court finds that the provisions of Chapter 13 should not be interpreted in a manner which punishes a debtor who chooses to pay more to unsecured claimants than such parties would receive in a Chapter 7 case. Such an interpretation would undercut the philosophy of Chapter 13 and encourage the filing of a Chapter 7 case. Where there is no evidence of bad faith or even of the use of the Chapter 13 superdischarge, the Court cannot understand why the debtor should be penalized for filing a Chapter 13 instead of a Chapter 7. Elevating a modest improvement in financial condition to the status of a substantial change in circumstances would be such a penalty.

In re Wilson, 157 B.R. 389, 391-92 (Bankr. S.D. Ohio 1993) (citations omitted).

This Court finds the cases requiring a substantial change in debtor's circumstances persuasive. Section § 1329 does not indicate a standard to be applied to requests to modify a confirmed plan, but it does not prohibit one either. To allow a creditor to compel modification of a plan absent a substantial change in the debtor's circumstances would contravene the res judicata effect of confirmation. This Court does not think it is appropriate to allow a creditor or trustee to modify a debtor's confirmed plan whenever the debtor has a slight increase in income or a slight decrease in an expense. As the *McCray* court explained, the expenses a debtor lists in his schedules often do not really cover the debtor's needs sufficiently. In addition, debtors often have unexpected expenses and have to cope with even less money for their regular monthly expenses. A small increase in income is not likely to raise the debtor's standard of living or give debtor a windfall. A debtor in chapter 13 is attempting to pay his creditors at least as much as they would receive if the debtor filed chapter 7. To require the debtor to account for his expenses and income every time the debtor receives a small increase in income or a small decrease in an expense would be unrealistic. If the debtor is current in his plan and there is no evidence of concealment or fraud, then unless there has been a substantial change in debtors ability to pay, the confirmed plan is binding and any increase in income may be used by the debtor at his own discretion. If creditors or the trustee have objections to the plan, they should be raised at confirmation.

In this case, WAB&T filed its claim in December 1999, before confirmation. Debtor's plan was confirmed without objection in February 2000. WAB&T did not raise any objection to the fact that no provision was included in the plan to deal with any possible tax refunds Mr. Flennory might receive during the life of the plan. Flennory received an unexpected income tax refund in the amount of $3,447.00. Flennory has already spent the tax refund. Flennory

testified that the money he has left monthly after paying all necessary expenses has decreased since the filing of his bankruptcy case and the tax refund was used for necessary items. It appears that even if this Court were to follow the line of cases that allow modification as a matter of right, in this case a full analysis of Flennory's income and expenses results in little or no increase at all in disposable income. If this Court were going to conduct a new analysis of debtor's income, without regard to debtor's previous schedules or plan, then debtor would be entitled to set out a new list of expenses. The expenses Flennory listed in his schedules appear modest. His expenses do not include many items that other debtors list as expenses such as haircuts, entertainment, dry cleaning, charitable contributions, or a provision for miscellaneous expenses. Although Flennory's tax refund constitutes approximately $287 per month additional income for this year, that amount could easily be spent on necessary expenses and Flennory would still be below the standard of living of many other debtors whose plans have been confirmed by this Court with less than 100% payment on unsecured claims. The fact that the refund has already been spent is not surprising. This Court finds that Flennory's receipt of the tax refund does not amount to a substantial change in his ability to pay. To constitute a substantial change, the added income must be an ongoing increase which considerably raises a debtor's disposable income or must be a "one time" sum in an amount which could considerably affect creditors, such as a lawsuit recovery. Also, the motion must be made in time to put a debtor on notice to hold the money.

THEREFORE, IT IS ORDERED AND ADJUDGED that the motion of West Alabama Bank and Trust to modify the confirmed plan of Edward L. Flennory is DENIED.

Dated: May 23, 2001

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE