

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 01-15299

Chapter 13

CHARLES BERNARD JOHNSON

Debtor

MEMORANDUM AND ORDER

On October 4, 2001, this chapter 13 case came to be heard upon the objection by the chapter 13 trustee to confirmation of the debtor's proposed plan. Also on for hearing were the Objection to Confirmation and a Motion to Reconsider or Vacate Confirmation filed by a creditor, Americredit Financial Services ("Americredit").

The original objection to confirmation by the chapter 13 trustee was that the debtor had failed to make plan payments. At the hearing, the parties stipulated that the debtor was current, and that deduction was being made monthly from the debtor's retirement from the United States Army and paid directly to the trustee. Accordingly, the trustee withdrew his original objection.

The debtor's original chapter 13 plan listed Americredit as the holder of a secured claim. The plan stated the value of the collateral, a 1997 Lincoln Mark VII automobile, as \$16,252.50. This value is stated in a chapter 13 plan for the purpose of establishing the amount of the allowed secured claim. 11 U.S.C. §506(a). When a Chapter 13 plan proposes that the debtor will keep the collateral, then the plan must provide for payment to the secured creditor of the value, *as of the effective date of the plan*, of the allowed secured claim. In other words, the plan must provide for payment of interest on the allowed secured claim. 11 U.S.C. § 1325(a)(5)(B)(ii);

Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997); *Hardy v. Cinco Federal Credit Union (In re Hardy)*, 755 F.2d 75 (6th Cir. 1985). The original plan did not specifically state an interest rate to be paid on the allowed secured claim.

On August 28, 2001, this court issued an order which provided in text that: “The creditors must file any objection to confirmation in writing at or before the meeting of creditors held pursuant to § 341 of the Bankruptcy Code.” This provision was in bold type. Also in bold type it is provided for secured claims: “The value of the collateral proposed by the debtor’s plan will become the value of the secured portion of the claim upon confirmation unless a timely objection to confirmation is filed.” This order was served on all scheduled creditors, including Americredit. The meeting of creditors was held as scheduled on September 26, 2001. Not until October 4, 2001, did Americredit file its objection to confirmation.

This court has repeatedly held in similar cases in this district that the notice and order requiring objections to confirmation be filed at or before the first meeting of creditors does not conflict with *Fed. R. Bankr. P.* 3015(f). *In re Vincent*, No. 99-15463 (Bankr. E.D. Tenn., May 25, 2000)(Stinnett); *In re Nimmons*, No. 99-16140 (Bankr. E.D. Tenn., Mar. 16, 2000)(Cook); and *In re Duncan*, No. 99-22144 (Bankr. E.D. Tenn., Jan. 5, 2000)(Parsons). The court must conclude that the objection to confirmation filed by Americredit was not timely filed.

However, in this case, prior to confirmation the debtor proposed a modification to his plan. The modified plan provides for interest on Americredit’s allowed secured claim at the rate of 18% per annum with the monthly payments to Americredit being increased from \$355 per month

to \$406 per month. Americredit acquiesced in this modification. Unsecured creditors are to be paid in full under the original plan and the plan as modified. The chapter 13 trustee objected to the modification of the plan as regards Americredit. The trustee's position is that because the objection by Americredit was not timely filed, the modification as to Americredit is improper.

Section 1323(a) of the Bankruptcy Code gives the debtor the right to modify the plan before confirmation and puts only one restriction on this right. The debtor cannot modify the plan so that it fails to meet the requirements of § 1322. 11 U.S.C. §§ 1323(a) & 1322. In his treatise, Judge Lundin's discussion raises the question of whether this restriction creates two issues where there would be only one if the court were dealing with an original, unmodified plan. Keith M. Lundin, *Chapter 13 Bankruptcy* § 209.1 at 209-4.

Suppose the court is dealing with an original plan (an unmodified plan). Of course, the court is not faced with the question of whether a modification should be disallowed or denied on the ground that the plan *as modified* does not meet the requirements of § 1322. Nevertheless, even with regard to an original plan, the court must still answer the question of whether the plan meets the requirements of § 1322. This question arises under § 1325(a)(1). It provides that the court can confirm a plan only if it meets the requirements imposed by other provisions of Chapter 13 of the Bankruptcy Code. 11 U.S.C. § 1325(a)(1). In summary, the court can confirm an original plan only if it meets the requirements of § 1322. Whether an original plan meets the requirements of § 1322 is a confirmation issue.

Now, consider a plan that has been modified before confirmation. Must the court apply § 1322 first for the purpose of deciding whether to disallow the modification, rather than for the purpose of deciding whether to confirm the modified plan? Under this procedure, the court could disallow the modification without expressly ruling on confirmation.

The court fails to see any gain for the court or the parties from following this procedure. It is essentially a piecemeal procedure for dealing with confirmation issues that can be and should be dealt with all at once for the sake of efficiency in handling chapter 13 cases. The court should proceed to the overall question of whether the modified plan can be confirmed under all the requirements set out in § 1325, instead of addressing a preliminary question of whether the modification can be allowed under § 1322, since that is actually a question of whether the plan can be confirmed under § 1325.

Section 1323(b) supports this result. It provides that when the debtor files a modified plan, the modified plan becomes the plan. It does not say that the modified plan becomes the plan only after the court decides that the modification can be allowed because it meets the requirements of § 1322. 11 U.S.C. § 1323(b). With regard to “the plan,” the question is whether it can be confirmed, not whether a pre-confirmation modification can be allowed. Judge Lundin seems to agree with this result. Keith M. Lundin, *Chapter 13 Bankruptcy* § 209.1 at 209-4 citing *Nielson v. DLC Investment, Inc. (In re Nielson)*, 211 B.R. 19, 22-23 (B.A.P. 8th Cir. 1997).

How does this discussion relate to this case? When the debtor modifies the plan before confirmation, the question is whether the modified plan can be confirmed under the usual

standards for confirmation. Likewise, the grounds for objecting to confirmation are the usual grounds.

This raises the question of the legal basis for the trustee's objection. The trustee may object to confirmation of a plan that treats a claim as secured when the lien can be avoided. *In re Arnold*, 88 B.R. 917 (Bankr. N.D. Iowa 1988); *Tower Loan of Mississippi, Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347 (5th Cir. 1994). The objection in this case is similar. The trustee is arguing, in essence, that the debtor cannot modify the plan to provide for interest because the original plan could have been confirmed without paying interest as a result of the creditor's failure to file a timely objection to confirmation.

How does this reasoning fit with any of the usual grounds for objecting to confirmation? The situation is not the same as it is with a creditor whose lien is avoidable. In that situation, the plan attempts to discriminate in favor of a claim that should be unsecured by treating it as secured. 11 U.S.C. § 1322(b)(1). The modified plan in this case does not attempt to treat Americredit's claim more favorably than allowed by the confirmation standards set out in §§ 1325 and 1322.

If there is a possible objection, it might be lack of good faith in proposing the modified plan. 11 U.S.C. § 1325(a)(3). The court fails to see it. The trustee does not contend that the modified plan treats Americredit's claim better than the treatment required by § 1325(a)(5). The trustee assumes the debtor must attempt to take advantage of every creditor's failure to file a timely objection to confirmation of the debtor's original plan, and if the debtor does not do so, then the debtor is acting in bad faith when it modifies the plan before confirmation to meet the unfiled or

untimely objection. The court disagrees. First, the debtor may have doubts as to whether the court would allow the late objection by the creditor. Second, the court is not prepared to say that it is bad faith for the debtor to modify a plan before confirmation as to a particular allowed secured claim when the plan, as modified, meets the confirmation standard for the allowed secured claim. Accordingly,

It is ORDERED that the objection by the chapter 13 trustee to confirmation of the plan as modified is OVERRULED;

It is FURTHER ORDERED that the Objection to Confirmation and the Motion to Reconsider or Vacate Confirmation filed by Americredit are DENIED as moot; and

It is FURTHER ORDERED that the debtor's plan as modified shall be confirmed by separate order.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 10-15-01]