

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:

In Proceedings  
Under Chapter 13

PATRICIA E. LAWHON,  
  
Debtor(s).

Case No. 99-42068

PATRICIA E. LAWHON,  
  
Plaintiff(s),

Adv. No. 04-4143

v.

UNITED STATES OF AMERICA,  
RURAL HOUSING SERVICE,  
  
Defendant(s).

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IN RE:

In Proceedings  
Under Chapter 13

DANNY L. TANNER,  
  
Debtor(s).

Case No. 99-42037

DANNY L. TANNER,  
  
Plaintiff(s),

Adv. No. 04-4129

v.

UNITED STATES OF AMERICA,  
RURAL HOUSING SERVICE,  
  
Defendant(s).

OPINION

These two cases, consolidated for purposes of opinion, present the common issue of whether a Chapter 13 debtor who has completed payments under a confirmed Chapter 13 plan may be considered current on the debtor's residential mortgage despite the mortgage holder's assertion that a default exists based upon a post-petition increase in the amount of the mortgage payment.

The facts are not in dispute. In the first case, debtor Patricia Lawhon filed for bankruptcy relief on November 5, 1999, and her Chapter 13 plan was confirmed on January 26, 2000. The debtor's plan called for the trustee to make monthly mortgage payments of \$236.00 to defendant, the United States Department of Agriculture Rural Housing Service ("USDA"). In addition, the trustee was to pay 100% of mortgage arrearages, estimated at \$1,875.00, pro rata with other secured creditors. The debtor completed her Chapter 13 plan payments and was granted a discharge on August 16, 2004.

The debtor filed the instant complaint, seeking a declaration that, upon discharge, any fees or amounts incurred under the mortgage prior to discharge have been paid in full. In response, the defendant USDA points out that the debtor's mortgage contract includes a provision for the escrow of real estate taxes. The USDA alleges that the debtor became delinquent as to post-petition mortgage payments when, on October 28, 2001, the amount of the debtor's real estate tax escrow increased. The USDA contends that, as a result, despite the debtor's discharge under her Chapter 13 plan, a post-petition delinquency exists in the amount of \$1,958.34, for which she is responsible under the terms of her mortgage contract.

In the second case under consideration, debtor Danny Tanner filed for Chapter 13 relief on November 2, 1999, and his plan was confirmed on December 28, 1999. The debtor's plan called for the trustee to make monthly mortgage payments to the USDA of \$260.00, and to pay 100% of mortgage arrearages, estimated in the amount of \$1,200.00, pro rata with other secured creditors. The debtor completed his Chapter 13 plan and received a discharge on July 30, 2004.

Debtor Tanner, likewise, filed a complaint seeking a declaration that, as of the date of discharge, his mortgage with the USDA was current and in good standing and that any late fees or other amounts incurred before discharge have been paid in full. In response, the USDA asserts that

the debtor's mortgage contract includes a provision for payment assistance, with the amount of payment assistance being determined by the debtor's income and expenses. At the time the debtor filed his bankruptcy petition, the debtor's payment was \$254.80, and this amount remained the same until April 17, 2000, when the amount of payment assistance to which the debtor was entitled changed and the debtor's payment increased to \$365.66. The amount of the debtor's payment assistance further changed on January 17, 2002, March 17, 2003, and April 17, 2003. Each time the payment assistance available to the debtor was adjusted, the debtor's monthly payment on his mortgage changed. However, because the debtor's mortgage payment under his Chapter 13 plan was not increased, at the conclusion of his plan a delinquent amount was due in the amount of \$2,542.41.

At hearing on the complaints, counsel observed that there was no dispute concerning the reasonableness of the amounts sought by the USDA, as these amounts were based on automatic increases under the debtors' mortgages. As to debtor Tanner, counsel agreed that the USDA provided notice of the increased payment amounts and even sent a letter to the Chapter 13 trustee concerning the increases required under the debtor's mortgage. In addition, a USDA representative met with debtor Tanner in October 2001 and February 2003 to determine the amount of his monthly payment based on his changed subsidy amount. In the case of debtor Lawhon, counsel had no record that the USDA notified the debtor of the increased mortgage payment resulting from her real estate tax escrow amount. Neither debtor, however, filed a modified plan to reflect the increased mortgage amount, and the USDA did not amend its claim in either case to show the changed amounts due under the mortgages.

In arguing that they should be considered current on their mortgage obligations upon completion of their Chapter 13 plans, debtors Lawhon and Tanner rely on 11 U.S.C. § 1327, which

sets forth the binding effect of a confirmed plan. Section 1327 states in pertinent part:

(a) 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 . . . .

. . . .

(c) Except as otherwise provided [in the plan or confirmation order], the property vesting in the debtor [upon confirmation of the plan] is free and clear of any claim or interest of any creditor provided for by the plan.

11 U.S.C. § 1327(a), (c). The debtors maintain that, based on § 1327, their confirmed plans are res judicata as to the rights of all creditors, including the USDA. Thus, they assert, the USDA cannot now collaterally attack these plans by seeking treatment other than that provided by the plan.

The USDA counters that it is entitled to receive the mortgage arrearages that accrued during pendency of the debtors' Chapter 13 plans because, under the anti-modification provision of 11 U.S.C. § 1322(b)(2), Chapter 13 debtors are precluded from modifying their residential mortgages under the terms of a Chapter 13 plan.<sup>1</sup> The USDA points out that the arrearages deriving from the post-petition increases in the amount of each debtor's mortgage payment were a function, not of the debtors' Chapter 13 plans, but of the mortgage documents themselves. The USDA contends, therefore, that the debtors are bound by the terms of the mortgages and must pay the past-due amounts despite completion of their Chapter 13 plans.

Many courts interpreting § 1327(a) have stressed the res judicata effect of a confirmed Chapter 13 plan. Indeed, the Seventh Circuit Court of Appeals has characterized such a plan as operating "like a court-approved contract or consent decree," binding the debtor and all creditors. See In re Harvey, 213

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<sup>1</sup> Under § 1322(b)(2), a Chapter 13 plan may –

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . .

11 U.S.C. § 1322(b)(2) (emphasis added).

F.3d 318, 321 (7th Cir. 2000). Courts have likewise been zealous in enforcing the anti-modification provision of § 1322(b)(2), holding that a residential mortgagee retains its rights pursuant to the mortgage despite the terms of a debtor's Chapter 13 plan. See In re Bateman, 331 F.3d 821, 834 (11th Cir. 2003); see also In re Nobleman, 508 U.S. 324, 331-32 (1993). In the present cases, the parties outline their positions as posing a conflict between these two statutes, arguing, in effect, that the Court must either uphold each debtor's confirmed plan as binding under § 1327(a) or safeguard the creditor's residential mortgage from modification of its terms pursuant to § 1322(b)(2).

Under the facts here presented, however, the Court need not prefer one statute and its underlying policy over the other in reaching a decision. Pursuant to § 1327(a), an order confirming a Chapter 13 plan is res judicata as to all issues actually litigated, as well as to any issues that could have been raised by the parties at the time of confirmation. See 8 Collier on Bankruptcy, ¶ 1327.02[1][c], at 1327-5 (15th ed. rev. 2004); see Harvey, 213 F.3d at 323. It follows, then, that issues arising after confirmation are not subject to the res judicata effect of a confirmed plan, as factual circumstances surrounding post-confirmation events could not have been considered and resolved at the time of confirmation. See In re Carvalho, 335 F.3d 45, 50 (1st Cir. 2003).

Here, each of the debtors' proposed plans provided that the debtor would maintain regular mortgage payments through the trustee for the duration of the Chapter 13 plan. The term of the debtor's mortgage in each case extended well beyond the Chapter 13 plan,<sup>2</sup> and the plans contained nothing to indicate that the debtor's mortgage would be paid off upon completion of the plan or, more importantly, that the debtor's mortgage would be considered current upon completion of Chapter 13 payments.

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<sup>2</sup> Debtor Lawhon's mortgage runs from August 1996 to August 2029, while debtor Tanner's mortgage runs from November 1995 to November 2028.

Each of the plans included a statement that the trustee would “pay 100% of arrearages pro rata with other secured creditors.” In addition, the plans provided:

[if] an arrearage claim is filed and allowed, . . . the Trustee may move to increase the plan payments [in] an amount sufficient to pay the current mortgage payment and the arrearage claim [without objection by the debtor].

(Par. III.C. of the debtors’ respective Chapter 13 plans, at pg. 4). Because the debtors’ plans were filed at the commencement of their cases before any claim amounts could be known, it appears this latter provision was intended to address pre-petition mortgage arrearages – those existing at the time of filing – or even, conceivably, post-petition arrearages that might accrue based on missed plan payments. However, nothing in the debtors’ plans purported to deal with arrearages that might accrue post-confirmation based on changes in tax escrow amounts or changed subsidy amounts.

Even assuming this language could be read as requiring the USDA to amend its claims in order to be entitled to arrearages resulting from post-confirmation payment increases, such a reading is not clearly evident and is understandable only in light of subsequent events. The debtors themselves drafted the plans and were obligated to state as clearly as possible the terms of their payment to creditors. Therefore, any ambiguity in this regard must be construed against the debtors. See In re Wickersheim, 107 B.R. 177, 181 (Bankr. E.D. Wis 1989).<sup>3</sup> While the USDA could have amended its claims during the course of the debtors’ plans to reflect arrearages resulting from the increased amounts coming due under the mortgages, the debtors’ plans did not specifically require this as a condition of

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<sup>3</sup> It is settled that the debtor, as draftsman of a Chapter 13 plan, “has to pay the price if there is any ambiguity about the meaning of the terms of the plan.” In re Fawcett, 758 F.2d 588, 591 (11th Cir. 1985). The Fawcett court observed:

The crucial point is that the plan was confirmed by the court. It is the debtor’s obligation when seeking the court’s confirmation to specify as accurately as possible the amounts which it intends to pay the creditors.

Id. at 590 (emphasis added).

receiving payment. Accordingly, the debtors cannot rely on this provision to avoid the consequences of having failed to provide for post-petition payment adjustments in their Chapter 13 plans.

Other than the language contained in paragraph III.C., the plans did not refer to the debtors' mortgages with the USDA, and there was no mention of possible post-petition changes in payment amounts due to the adjustable nature of the mortgage agreements. In the absence of any language affecting its rights to payment increases based on subsequent events specified in its mortgages, the USDA had no reason to object to confirmation of the debtors' plans and is not, therefore, foreclosed from pursuing these rights by the res judicata effect of the debtors' confirmed plans.

Rather than being precluded by the confirmation order, issues arising after confirmation may be brought before the Court by a motion to modify the confirmed plan filed pursuant to § 1329.<sup>4</sup> In the cases under consideration, neither debtor sought a modification to provide for increased payments that came due following confirmation based on the terms of the USDA's mortgages. While it is unclear whether debtor Lawhon received notice of the increase in the amount of her payment based upon her real estate tax escrow, debtor Tanner admittedly had sufficient notice of the increased payments owed to the USDA to file a modified plan to provide for such increase. In any event, both debtors were presumed to have knowledge of their mortgages with the USDA, including the adjustable payment provisions of

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<sup>4</sup> Section 1329 provides in pertinent part:

(a) 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; [or]

(2) extend or reduce the time for such payments[.]

11 U.S.C. § 1329(a).



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UNITED STATES OF AMERICA,  
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Defendant(s).

**ORDER**

Pursuant to the Court's opinion entered this date, IT IS ORDERED that judgment is entered in favor of the defendant, United States of America, Rural Housing Service, and against the plaintiff, Danny Tanner, on plaintiff's complaint for declaratory judgment.

ENTERED: May 19, 2005

/s/ Kenneth J. Meyers  
UNITED STATES BANKRUPTCY JUDGE