IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

IN RE:	§	
	§	
PAUL J. JACKSON	§	Case No. 01-90090
and BILLIE D. JACKSON	§	
	§	
Debtors	§	Chapter 13

MEMORANDUM OF DECISION[1]

This matter is before the Court upon hearing of the "Motion of Michael Gross, Standing Chapter 13 Trustee, for Approval of Compromises of Controversies and Approval of Attorneys Fees: Claims of Billie Jackson and Paul L. Jackson Against Various Parties" (the "Motion to Approve Compromise") filed by the Chapter 13 Trustee (the "Trustee") in the above-referenced case. The debtors, Paul and Billie Jackson (the "Debtors"), filed a timely objection to such Motion. At the conclusion of the hearing, the Court offered the parties additional time within which to file post-hearing briefs, and upon the submission of such briefing, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court, including a subsequent motion by the Chapter 13 Trustee for modification of the existing Chapter 13 plan based upon the same subject matter.[2]

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[1] This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

[2] This Court has jurisdiction to consider the motion pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (E), (L), and (O).

Factual and Procedural Background

On January 16, 2001, the Debtors filed their Chapter 13 petition and concurrently filed their Chapter 13 plan. The Debtors listed on their original Schedule B, Line 17, an asset characterized as "William Drew Perkins and Mary K. Perkins note" (the "Note") with a value of $150,000.00. No portion of this asset was claimed by the Debtors as exempt.

The Debtors' original Chapter 13 plan was set for confirmation on September 20, 2001. The Trustee filed his confirmation report on August 6, 2001, objecting to confirmation because, *inter alia*, the Debtors' plan failed to satisfy the best interests test under 11 U.S.C. §1325(a)(4) by not providing at least as much to unsecured creditors as they would receive if the Debtors were to liquidate under Chapter 7 of the Bankruptcy Code.

Thereafter, in an attempt to cure the Trustee's best interests objection, the Debtors on August 27, 2001, amended their Schedule B and reduced the asserted value for the Note to $1.00. Based in part on this amendment,[3] the Trustee subsequently withdrew his objections and the plan, as modified by the confirmation order, was confirmed on September 21, 2001 with the Trustee's recommendation. Nothing in this original plan or

[3] The Court has been given no explanation as to why such an obvious artifice was acceptable to the Trustee.

the resulting confirmation order purported to require the Debtors to tender any of the Note proceeds to the Trustee.[4] Pursuant to 11 U.S.C. §1327, however, the Debtors' plan did provide that "[u]pon confirmation of this Plan, the property of the estate shall revest in Debtors."[5]

On July 5, 2002, the Debtors filed their Application to Employ James W. Volberding as Attorney for Specified Special Purpose. In this Application, the Debtors sought permission to employ Mr. Volberding to represent them in a suit to be filed in order to facilitate the collection of the Note from William and Mary Perkins. The Court granted this Application to Employ without objection on July 23, 2002, and the Debtors on August 15, 2002, filed a lawsuit in the District Court of Walker County, Texas, styled as *Billie Jackson and Paul J. Jackson v. William Drew Perkins, Mary Knotts Perkins, Holly Perkins-Meyers, Robin Perkins McBride, William Drew Perkins, Jr., and Giles Gilpin Perkins* (the "Walker County Litigation").

On January 21, 2004, the Debtors filed a motion to modify their confirmed Chapter

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[4] In fact, the "Order Confirming Debtor's Plan and Related Orders"[dkt.# 22] is silent as to the proceeds of the Note, stating only the general payment provisions required under the plan:

> The Debtors shall pay the sum of $525.00 per month for 12 months, $1025.00 per month for 10 months, and then $2048.00 per month for 14 months for a total of $45,222.00 to Michael Gross, Trustee, payable in Tyler, Smith County, Texas, beginning the 4th day of February, 2001, until all the allowed claims provided for under the Plan have been paid in accordance with the terms of the Plan, of this Order, or until the further order of this Court.

[5] See paragraph 8 of the Debtors' original Chapter 13 plan filed on January 16, 2001 [dkt #3].

13 plan. The purpose of that modification request, which was highlighted in the title of the pleading, was to extend the term of the plan from 36 to 47 months, while providing for a slight increase in the total plan base. The Trustee subsequently objected to the Debtors' modification motion. In addition to complaining of a clerical omission of the IRS in the proposed order, the Trustee once again asserted a best interests objection. Specifically, after reviewing the status of the Walker County Litigation, the Trustee stated that:

> [b]ased upon information and belief, the Debtors, on behalf of the Bankruptcy Estate, will be able to collect a substantial amount. The Trustee asserts that any modification should provide that any such recovery should be turned over to the Trustee up to the amount to pay the unsecured creditors in full plus interest.[6]

Though the Debtors' modification motion was set for hearing, no resolution of the Trustee's objection was actually accomplished. Instead, prior to hearing, the parties essentially agreed to defer the issue by inserting the following asterisked language into the payment terms recited in the Order Confirming the Debtor's Motion For Modification and Clarification of Chapter 13 Plan:

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[6] *See* ¶ 13 of the "Trustee's Objection to Debtors' Motion For Modification and Clarification of Debtors' Chapter 13 Plan of Reorganization," filed on February 13, 2004 [dkt # 73].

> The Debtor [sic] shall pay the sum of $1000.11 per month for thirty-five (35) months; the sum of $1000.00 per month for eleven (11) months; and one (1) payment of $490.44; together with any income tax refunds the Debtor receives during the life of the plan, for 47 months for a total of $46,494.29* to Michael Gross, Trustee, payable in Tyler, Smith County, Texas, beginning the 4th day of February, 2001, until all the allowed claims provided for under the Plan have been paid in accordance with the terms of the Plan, of this Order, or until the further order of this Court.
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> * Such is subject to being increased based upon a potential recovery/settlement of claim against William and Mary Perkins, et al. Nothing herein prevents Trustee from bringing this issue before the Court for further consideration. No notice of plan completion or discharge will be entered in this case as long as this issue remains before the Court.

Thereafter, with the consent of the Trustee but over the objection of the Debtors, a settlement was negotiated by Mr. Volberding with the state court defendants whereby the Walker County Litigation would be settled for the sum of $70,000.00.[7] The Trustee thereafter filed the current Motion to Approve Compromise to which the Debtors timely objected on the basis that, pursuant to the vesting effect of 11 U.S.C. §1327, the cause of action belongs solely to them rather than the Estate.

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[7] At first glance, it appears as though Mr. Volberding is caught in the unethical position of trying to serve two masters and this appearance was exacerbated by the unnecessary application to employ filed by the Debtors which only served to confuse the circumstances. However, as outlined below, no such conflict actually existed.

In addition, after the conclusion of the August 18, 2004, hearing on the Trustee's Motion to Approve Compromise, the Trustee subsequently filed a Motion to Modify Confirmed Chapter 13 Plan (the "Trustee's Modification Motion"), seeking to modify the Debtors' confirmed plan in order to increase the plan base by the net settlement amount, if any, arising from the Walker County Litigation, so that such litigation proceeds would benefit the Estate.[8] The Debtors objected to the Trustee's Modification Motion on the grounds that the Trustee had no standing to pursue such a modification. By order entered on October 22, 2004, consideration of the Trustee's Modification Motion was abated pending a ruling on the Trustee's Motion to Compromise.[9]

Discussion

A claim or cause of action cannot be compromised or settled by a party unless that party actually possesses an ownership interest in that claim. In this instance, the promissory note upon which the Walker County Litigation is based was clearly identified on the Debtors' original schedules. Thus, the note, and any subsequent attempt to collect

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[8] The Trustee admits in his modification motion that the relief sought by such motion is completely subject to the determination regarding his interest, if any, in the Walker County Litigation, arising from his Motion to Compromise. As stated in the modification motion, "In the event the Court denies the Application to Compromise Controversy and/or the underlying lawsuit relating to the Perkins' claim does not generate any type of settlement for this bankruptcy estate, the Trustee's proposed Modification would have no other affect (sic) on the Debtors' Modified Plan approved on March 24, 2004."

[9] *See* ¶1 of the "Agreed Order on Motion to Modify Plan After Confirmation" [dkt # 104].

the proceeds of that note, constituted property of the Debtors' bankruptcy estate as of the filing date under 11 U.S.C. §§541 and 1306. However, though the note constituted property of the bankruptcy estate of which the Trustee and all of the creditors were aware, the Debtors proposed a Chapter 13 plan which did not contemplate the dedication of any income ultimately received from the collection of that note to the plan payments. They instead proposed the payment of an established amount on a monthly basis in order to satisfy the obligations addressed by the plan. Though the value of the note receivable had actually been the subject of discussions between the Debtors and the Trustee, and though the Trustee had originally objected to the plan based upon an alleged failure of the Debtors to comply with the best interests test because of the dispute regarding the note's valuation and collectibility, that objection was withdrawn by the Trustee.[10] The Debtors' plan was confirmed with the recommendation of the Trustee and, more importantly, without any requirement that any portion of the note receivable, if realized, be tendered to the Trustee for the benefit of the Estate. As a result, once the plan was confirmed,

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[10] A §1325(b)(1) "disposable income" objection was also raised, but subsequently withdrawn, by American Express Travel Related Services Co., Inc. and American Express Centurion Bank, Optima Account. Since no party maintained such an objection, under the literal language of the statute and the established jurisprudence construing it, the disposable income requirement otherwise imposed by §1325(b) was waived in the absence of a timely objection and any property which might otherwise have been committed to the plan vested free and clear in the Debtors. *See, e.g., In re Smith*, 237 B.R. 621, 624-25 (Bankr. E.D. Tex. 1999); *Collier v. Valley Fed. Sav. Bank (In re Collier),* 198 B.R. 816, 817 (Bankr. N.D. Ala. 1996); *In re Edwards*, 190 B.R. 91, 95-96 (Bankr. M.D. Tenn. 1995); *In re Davis,* 160 B.R. 577, 580 (Bankr. E.D. Tenn. 1993).

ownership of the note receivable which subsequently became the subject of the Walker County Litigation, and all other property of the estate not expressly committed to the composition of the payments contemplated by the plan, vested solely in the Debtors.[11]

Thus, in order to prosecute his Motion to Approve Compromise, the Trustee is compelled to demonstrate how he retained any ownership interest in the note receivable and the resulting Walker County Litigation following the entry of the original confirmation order. He has wholly failed to do so. At the hearing, the Trustee attempted to rely upon the reservation language contained in the order confirming the Debtors' modification motion which was entered on March 24, 2004.[12] Though the effect of that asterisked language is even arguably ambiguous regarding the preservation of any best interests objection raised by the Trustee *to the Debtors' modification motion*, that ambiguity issue never becomes germane to the determination of this dispute because the Trustee had long since forfeited or abandoned any ownership interest in the note receivable or in any resulting litigation to collect it. There could have been no preservation of the Trustee's right to object because there was no existing right to object.

There can be no serious dispute that the effect of a confirmed Chapter 13 plan is to

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[11] As stated previously, the Debtors' plan specifically provided that "[u]pon confirmation of this Plan, the property of the estate shall revest in Debtors." *See supra*, note 5. Yet, even without this specific reference, the same result would have been achieved through the provisions of §1327(b).

[12] *See supra*, note 5.

"bind the debtor and each creditor" to the terms of that plan, 11 U.S.C. §1327(a), and such terms are protected from a subsequent collateral attack by the provisions of §1327(a), as well as by the general principles of claim preclusion (res judicata). *Adair v. Sherman*, 230 F.3d 890, 894 (7th Cir. 2000); *United States v. Richman (In re Talbot)*, 124 F.3d 1201, 1209 (10th Cir. 1997). *See also* 3 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY ¶ 229.1 at p. 229-21 (3d ed. 2000 & Supp. 2002) [observing that "§1327(a) is a comprehensive statutory declaration of binding effect" which stands independently of the "judge-made" rules of preclusion and any limitations associated therewith]; and 8 COLLIER ON BANKRUPTCY ¶ 1327.02[1][c] at p. 1327-5 (15th ed. rev. 2004) ["It is quite clear that the binding effect of a chapter 13 plan extends to any issue actually litigated by the parties and any issue necessarily determined by the confirmation order, including whether the plan complies with sections 1322 and 1325 of the Bankruptcy Code."]. Supplementary to the enactment of §1327(a), the principles of claim preclusion also insure that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action," *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). These finality principles are significant because they "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions,

encourage reliance on adjudication." *Id.* at 94, 101 S.Ct. at 415. *See generally* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §4403 (2d ed. 2002). As the Seventh Circuit has noted,

> It is a well-established principle of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan. 11 U.S.C. §1327(a). The reason for this is simple and mirrors the general justification for res judicata principles – after the affected parties have an opportunity to present their arguments and claims, it is cumbersome and inefficient to allow those same parties to revisit or recharacterize the identical problems in a subsequent proceeding.
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> This is especially true in the bankruptcy context, where a confirmed plan acts more or less like a court-approved contract or consent decree that binds both the debtor and all the creditors. Bringing the various creditors' interests to the table once is difficult enough; permitting one of the creditors to launch a later attack on a confirmed plan would destroy the balance of interests created in the initial proceedings.

In re Harvey, 213 F.3d 318, 321 (7th Cir. 2000) (citations omitted and emphasis in original). Thus, under §1327 and the general principles of claim preclusion, the Trustee was generally prevented in this instance from re-litigating at the plan modification stage in March, 2004 any and all issues which were decided or which could have been decided at the original hearing on confirmation. *See generally, In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989) [construing §1327]; *see also*, *Educ. Credit Mgmt. Corp. v. York (In re*

York), 250 B.R. 842 (Bankr. D. Del. 2000) [when a creditor received specific notice of a debtor's request in an original plan to discharge post-petition interest on that creditor's debt, and that creditor had the opportunity to object but failed to do so, it cannot subsequently raise such an objection to the debtor's plan modification request due to the application of res judicata when the proposed modification does not address, affect or change that creditor's position].

As the *York* opinion suggests, the only means through which the Trustee in this instance could possibly escape the application of these finality principles to preclude his best interests objection in March, 2004 is if the Debtors' modification motion somehow opened the door for such a re-examination.[13] However, no such opening occurred as a result of the Debtors' modification motion in this case. That modification motion only sought to extend the term of the plan from 36 to 47 months, while providing for a slight increase in the total plan base. That was not sufficient to allow the Trustee to avoid the application of §1327 and assert a best interests objection regarding the application of a note receivable that was clearly disclosed in the pre-confirmation period and could have been litigated in the original confirmation hearing. *See, e.g., In re Eason*, 178 B.R. 908

[13] Of course, any confirmation order may be revoked under §1330 upon a showing that such order was procured by fraud. However, no such allegations have been made by the Trustee in this instance.

(Bankr. M.D. Ga. 1994) [The IRS was precluded under §1327 of the Code and by the doctrine of res judicata from presenting an objection to a proposed modification motion providing for the payment of its claim at 0% interest when it had made no objection to the originally confirmed plan and an earlier modification which both provided for 0% interest on the IRS's claim.].[14] Thus, the same prohibition applies in this context to proscribe the Trustee's attempt at the plan modification stage to preserve a right to re-litigate the ownership of the note receivable and the dedication of its proceeds to the payments contemplated by the plan.

Those same preclusion principles also apply to prevent the Trustee from presenting his own modification motion to bring the note receivable proceeds from the Walker County Litigation into the Estate. Such a scenario was addressed in *In re Grissom,* 137 B.R. 689 (Bankr. W.D. Tenn. 1992), in which the debtor confirmed his Chapter 13 plan without any objections and an unsecured creditor subsequently filed a modification motion to compel the debtor to pay to the trustee any tax refund received in the post-confirmation period, asserting that such payment was required as a component of the disposable income requirement. The Tennessee bankruptcy court found that it was "not

[14] Neither could the Trustee escape the binding effect of the original confirmation order because the Debtors presented an application for employment of Mr. Volberding. While certain of the allegations contained in that application suggest that the note receivable proceeds arising from the Walker County Litigation might be applied to the claims of creditors, those rights were already governed by the existing confirmation order and no modification of those rights ever occurred.

required to go back now and conduct a disposable income inquiry" because the debtor's case has already been confirmed "with the effect of binding the debtor and creditors to the plan terms." *Id.* at 691. The *Grissom* Court observed that because there was no disposable income inquiry at confirmation due to the absence of any objection, the unsecured creditor could not "evade now the binding effect of confirmation under §1327." *Id.* This analysis was previously utilized by this Court in its unpublished opinion in *In re Caudle*, case no. 00-10202, in which the Trustee's attempt to bring a modification motion to force the dedication of certain tax refunds by joint debtors to their plan payments was rejected. As stated in that opinion, while a tax refund (or any other realized income) could certainly constitute projected disposable income under §1325(b)(1)(B), when the availability of such sums were clearly subject to scrutiny at the time of the original confirmation hearing but no objection was raised regarding the applicability of such funds, "the actual subsequent receipt of such a refund by the Debtors cannot now open the door for the Trustee to take the action under the auspices of §1329(a) which should have been taken under §1325(b)(1)(B) at the original confirmation hearing." *Caudle* at p. 12. As this Court concluded in that case, "[t]o grant at this stage a post-confirmation modification based upon grounds which should have properly been raised at the time of the original confirmation hearing would dramatically diminish the binding effect which §1327(a) and the common-law principles of res judicata seek to

invoke and which this Court is under a duty to protect." *Id*. at 13.

As the foregoing authorities establish, finality regarding the adjudication of rights is a highly cherished commodity and one which any litigant must recognize. As the Seventh Circuit observed in *Harvey*,

> Forcing parties to raise concerns about the meaning of Chapter 13 filings at the original confirmation proceedings does not impose an unreasonable burden on bankruptcy participants. Quite the contrary – it is perfectly reasonable to expect interested creditors to review the terms of a proposed plan and object if the terms are unacceptable, vague, or ambiguous.

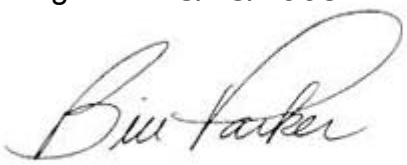
213 F.3d at 322.

Because those expectations apply to the Chapter 13 Trustee as equally as they apply to any other bankruptcy litigant, the opportunity of the Trustee to take any action to exercise control over the note receivable and the resulting Walker County Litigation or to object to the Debtors' exclusion of those proceeds from the sums dedicated to their plan payments has been waived and he may not utilize the provisions of §1329 to resurrect that opportunity. Accordingly, the Trustee's Motion to Approve Compromise and the Trustee's Motion to Modify Confirmed Chapter 13 Plan must each be denied. The "Application for Compensation and Reimbursement of Expenses of Special Counsel Pursuant to 11 U.S.C. Section 330" filed by James W. Volberding is dismissed as moot because the payment of any compensation to him arising from the Walker County

Litigation does not require approval of this Court since the bankruptcy estate has no interest in that litigation.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[15] pursuant to Fed. R. Civ. P. 52, as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9014. Separate orders regarding these various contested matters will be entered which are consistent with this opinion.

Signed on 3/23/2005



THE HONORABLE BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE

[15] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.