

CONSUMER BANKRUPTCY

Victory for Chap 13 Debtors Seeking Mort Mods

Recent decision permits debtors to keep savings

By Craig D. Robins

Consumer debtors in Chapter 13 cases are required to pledge all of their disposable income to the plan. But what happens after confirmation when the debtor is successful in obtaining a mortgage modification that results in lower monthly payments? Does the debtor have to pay the amount they save into the plan? That was the subject of a recent decision before Judge Grossman, sitting in the Central Islip Bankruptcy Court.

In June, Judge Grossman held that a Chapter 13 debtor can keep the savings, a major boon for debtors seeking modification. *In re Edmund and Lisa Salpietro*, No. 08-73092-reg (Bankr. E.D.N.Y., June 10, 2013).

In the past few years, mortgage lenders have become much more receptive to providing mortgage modifications, even to those who are in bankruptcy. However, some consumer bankruptcy practitioners have been hesitant to recommend this possibility to their Chapter 13 clients because of the belief that any savings the debtors would reap would have to be paid into any plan that offers less than 100 percent to unsecured creditors.

In the *Salpietro* case, the Chapter 13 debtors filed their case in 2008. Their amended plan provided for a distribution of 10 percent to unsecured creditors. In March 2013, which was 57 months into their 60 month plan, the debtors were able to obtain a mortgage modification that, among other things, greatly reduced their rate of interest, and also reduced their monthly mortgage payments from \$3,570

to \$2,600, a savings of \$970.

Their bankruptcy counsel, Richard F. Artura, brought a routine motion seeking approval of the modification. However, the Chapter 13 trustee, Michael Macco, cross-moved, seeking an upward plan modification which would capture most of that monthly expense savings for the benefit of unsecured creditors for the remainder of the plan period.

At the hearing on the motions on May 16, 2013, Judge Grossman granted the debtors' motion for mortgage modification and denied the trustee's motion seeking increased plan payments. In addition, Judge Grossman announced at the hearing that since this issue is becoming increasingly common as we emerge from our recent economic turmoil, it is important enough to warrant a written decision with his full reasoning, which he issued a month later.

The judge pointed out that in his decision that the trustee was essentially asking the court to conduct a post confirmation disposable income analysis. This pointed observation is quite important as it led the judge to address the court's willingness (or lack thereof) to engage in a post-confirmation review of a debtor's net disposable income as the basis for granting an upward modification of the amount of the plan payment.

Judge Grossman began his analysis by stating that the Bankruptcy Code provides scant guidance when it comes to post-confirmation modification of a Chapter 13 plan to account for a decrease in a debtor's



Craig D. Robins

post-confirmation expenses. Bankruptcy Code section 1329 provides that the debtor, trustee or unsecured creditor has the absolute right to seek a modification of the plan. Yet, there is no specific statutory provision that requires the court to revisit the projected disposable income analysis.

The judge opined that post-confirmation modification of a confirmed Chapter 13 plan, absent a debtor's consent, is a process that should be used sparingly and only after the movant shows that the Chapter 13 debtor has acted in bad faith. The judge stated that the court will not upend a confirmed Chapter 13 plan at the request of the trustee where a debtor has upheld his or end of the bargain and is in full compliance. "In this Court's view, it was never Congress's intention that increases or decreases in a debtor's monthly expenses, alone, would be grounds to revisit a confirmed Chapter 13 plan."

One thing that I love about the decision is that Judge Grossman summarized the salient points on the second page. "This Court will not graft onto section 1329(a) a post-confirmation review of a debtor's net disposable income as the basis for granting an upward modification under section 1329. Nor does this Court believe that section 1322(a) compels the result sought by the Trustee. The excess disposable income seemingly available to the Debtors was generated not by an increase in the Debtors' earnings or income (which might arguably be captured by section

1322(a)), but rather by a decrease in their expenses."

"Without deciding this issue, it is this Court's belief that an increase in a debtor's disposable income should provide the grounds for an upward modification when it is the result of income or earnings that did not exist on the date of the original confirmation."

The judge set forth his belief that the disposable income analysis conducted at the time of confirmation should be afforded some finality, and should not be disturbed solely on the basis of fluctuations in a debtor's expenses.

Although the judge states that his decision is limited to the facts of this case, counsel can glean from this case how the court will likely rule on similar issues. For example, the judge distinguishes changes in expenses, which is the case here, with changes to income. Thus, a debtor may not be so successful in defeating a trustee's motion for upward plan modification if the debtor has additional disposable income due to a post-confirmation increase in actual income.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty years. He has offices in Coram, West Babylon, Patchogue, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.