

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF:	)	CASE NO.	03-12324
	)	CHAPTER	13
LOUIS EMILIO HERNANDEZ	)	REG/tb	
TERESA LYNN HERNANDEZ	)		
	)		
Debtor(s)	)		

**DECISION AND ORDER**  
**DENYING MOTION TO WAIVE NOTICE REQUIREMENT**

At Fort Wayne, Indiana, on December 4, 2006.

The debtors in this Chapter 13 case recently filed a motion to modify their confirmed plan to increase their payments to \$1,320.50 per month. The stated reason for the change is to pay tax refunds for the years 2004 and 2005, totaling \$5,082.00, which apparently should have been paid to the Chapter 13 trustee as soon as they had been received by the debtors. For reasons which are not disclosed in the motion, the debtors failed to make these payments and now wish to correct the problem by increasing their monthly payments to the trustee until the originally required sum has been paid in full, and, to the extent necessary, extend the term of the confirmed plan to sixty months.

This matter is not before the court on the Debtors' motion to modify their plan. Instead, the court is called upon to consider a separate motion the debtors also filed which seeks to dispense with the notice to creditors otherwise required before the court considers the motion for post-confirmation modification. In support of this request, the debtors indicate that they are doing a little more than increasing their plan payments, thus the proposed modification is immaterial and does not adversely affect the rights of creditors. The court disagrees.

Pursuant to Rule 3015(g), all creditors and parties in interest are entitled to at least twenty days notice of the opportunity to object to the modification of a confirmed Chapter 13 plan. Fed. R.

Bankr. P. Rule 3015(g). This rule is implemented through the court's local bankruptcy rule B-2002-2, which places the responsibility upon the movant for preparing and serving notice of the motion and the opportunity to object thereto. See, N.D. Ind. L.B.R. B-2002-2(a)(12), (b)(2), (d). The requirement of notice, however, is subject to an exception. The court is authorized to dispense with notice "with respect to creditors who are not affected by the proposed modification." Fed. R. Bankr. P. Rule 3015(g). See also, N.D. Ind. L.B.R. B-2002-2(a) ("Except as otherwise ordered, the court will consider the following matters without holding a hearing, unless a party in interest files a timely objection to the relief requested . . .").

Whether the court authorizes the debtors to dispense with giving all creditors and parties in interest notice of the proposed modification is a matter committed to its discretion. Yet, as indicated by Rule 3015, the exercise of that discretion turns on whether the modification will have no impact – or at least no adverse impact – upon creditors. If creditors are going to adversely affected by the proposed modification, they are entitled to notice before the court imposes it upon them.

The court readily acknowledges that if the debtors were doing nothing more than increasing their payments to the trustee there would be little reason to require notice to creditors. If the consequence of increasing payments is that creditors receive more than they would under the plan as originally confirmed, no reasonable creditor could be expected to complain about the modification and insist, instead, upon the original, smaller distribution called for by the confirmed plan. In this case, however, it appears that the debtors' proposed modification is doing something other than increasing the distribution its creditors would otherwise receive. Based upon the court's interpretation of the motion, the reason the debtors need to increase their payments and pay the trustee an additional \$5,082.00 is because they failed to perform their obligation under the originally

confirmed plan to pay the trustee all, or at least a portion, of their income tax refunds for the years 2004 and 2005. Accordingly, the debtors are seeking additional time to make payments that should have been made long ago. Not only do they need to increase their payments but they also need to increase the length of their confirmed plan. The plan as originally confirmed was only for 36 months; if the modification is approved it will now be extended up to 60 months.

The court considers the proposed modification to be material for at least three reasons. First, it is axiomatic that a dollar tomorrow is not worth as much as a dollar today. Interest is generally regarded as compensation for the delay in receiving payment. Thus, a proposal to pay over the next two years the same amount of money that should have already been tendered does not give the payee the same value as originally promised, and being compelled to accept a less valuable performance adversely affects the rights of the recipient.

The need to increase the payments to the trustee arises out of the fact that the debtors have failed to preform the obligations they undertook when they proposed the plan the court subsequently confirmed. By failing to make the payments required, the debtors have, at least arguably, materially defaulted in the performance of their obligations under the confirmed plan. If so, cause may exist to convert or dismiss this case. See, 11 U.S.C. § 1307(c)(6). At least to some extent it seems that the proposed modification is designed to correct this default and, if approved, prevent parties in interest from seeking conversion or dismissal because of it. If so – in other words if approval of the modification is designed to prevent creditors and parties in interest from complaining about the debtors' prior default – depriving them of a claim they might otherwise possess would constitute an adverse impact upon their rights.

Somewhat related to the foregoing is the fact that the original three year term of the debtors'

confirmed plan has apparently expired and they have failed to fulfill their obligations under that plan. This may also constitute cause to convert or dismiss the case. See, Matter of Escobedo, 169 B.R. 178 (Bankr. N.D. Ind. 1993). In order to circumvent this problem the proposed modification contemplates extending the term of the plan for up to 60 months. Such an extension, at least arguably, adversely affects the rights of creditors and parties in interest, without regard to the issue of whether cause exists to convert or dismiss the case, either by reason of the debtors' default or the expiration of the original plan term. When this case began, or at least when the plan was confirmed, creditors were led to expect that these proceedings would last only three years, after which time they would be freed of the automatic stay or the debtors would be discharged and the case would be closed. By extending the term of the plan, the debtors are prolonging the case and continuing to subject creditors to the imposition of the automatic stay beyond the term originally promised. If the purpose behind doing so were to increase the distribution to creditors or pay all claims in full, the court would not be so concerned. However, that is not the purpose of the proposed modification. It seems that creditors will be paid no more under the modified plan than they were originally promised. Thus, not only will the value of their distribution be diminished, but the amount of time they are subjected to this proceeding, the automatic stay, and the court's jurisdiction is going to be prolonged.

The combination of these considerations leads the court to believe that, despite its title, the proposed modification is not an immaterial one. Its impact upon creditors and parties in interest will be sufficiently significant or sufficiently adverse such that they are entitled to notice of the motion and the opportunity to object thereto before the court considers it. Debtors' motion to waive the requirement of notice is therefore DENIED.

SO ORDERED.

/s/ Robert E. Grant  
Judge, United States Bankruptcy Court