

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
LANCE B. PRATT) CASE NO. 06-12410
PATRICIA A. PRATT)
)
Debtors)

DECISION AND ORDER

At Fort Wayne, Indiana, on June 22, 2007

In this Chapter 13 case, AmeriCredit Financial Services, Inc., the Chapter 13 trustee and CitiCorp Trust Bank all objected to confirmation of the debtors' proposed plan. Under the original schedule for the resolution of those disputes, the parties were to jointly file a proposed pretrial order by May 7, 2007 and the matter would then be set for trial. See, Order dated March 22, 2007. That deadline was subsequently extended thirty days. See, Order dated May 9, 2007. Prior to the expiration of the original deadline, the debtor, the trustee and counsel for AmeriCredit filed an agreed entry which was designed to resolve that creditor's objection to confirmation. See, Agreed Entry filed April 12, 2007. Then, on April 30, creditor's counsel filed a motion to approve the agreed entry. Counsel also served a notice of that motion and an opportunity to object to it upon all creditors and parties in interest, and there has been no response within the time stated in the notice. As a result, this matter is before the court with regard to the creditor's motion to approve the parties' agreed entry modifying the proposed plan.¹

The first issue the court must confront is the validity of the notice and opportunity to object

¹As for the other objections to confirmation, CitiCorp unilaterally withdrew its objection on the date the pretrial order was due. Why it had to act unilaterally, as opposed to jointly with the debtor, is not explained. As for the trustee's objection, the deadline for filing the required pretrial order has come and gone and the anticipated joint document has not yet been submitted.

procedure AmeriCredit used with regard to its motion. Most bankruptcy courts consider certain matters without holding a hearing unless a party in interest files a timely objection to the relief requested. The Bankruptcy Court for the Northern District of Indiana is no different. The court's local rules specify not only which requests are subject to this notice and opportunity to object type of procedure, but also the content of the required notice, and the amount of notice required. See, N.D. Ind. L.B.R. B-2002-2. The rule also provides for the possibility that the procedure it establishes can be used in other instances, which are not specifically covered by the rule, if "the court directs that particular relief may be granted without a hearing following the expiration of notice to creditors." N.D. Ind. L.B.R. B-2002-2(e). In that situation, in addition to complying with the other requirements of Local Rule B-2002-2, the notice must be accompanied by a copy of the court's order authorizing the notice and establishing the deadline for filing objections. Id.

The court mentions the requirements of Local Rule B-2002-2 because the matters to which it pertains and the mechanism it contains to utilize those procedures for other matters has a bearing on how the court responds to AmeriCredit's motion to approve the parties' agreed modification to the plan. AmeriCredit filed that motion, served notice of it and of the opportunity to object thereto upon all creditors and parties in interest; yet, pre-confirmation modifications of Chapter 13 plans are not among the twenty-four different requests for relief which Local Rule B-2002-2 provides will be considered following notice and the opportunity to object. See, N.D. Ind. L.B.R. B-2002-2(a). Furthermore, AmeriCredit never sought or obtained the court's permission to use that procedure for its motion. Consequently, even though creditors have been given some kind of notice of AmeriCredit's motion and advised of an opportunity to object thereto, the court must consider the validity of such a notice, and its associated deadline, when neither the notice nor the deadline has

been authorized by the applicable rules of procedure or a court order.

The whole purpose for procedural rules is to try to bring some structure and order to the bankruptcy process by specifying how certain things are to be done and preventing a haphazard, ad hoc approach to every filing. Thus, notice of a deadline which is not authorized by the applicable rules of procedure should be ineffective. This is especially so given the opportunity Local Rule B-2002-2(e) offers for an expansion of the notice and opportunity to object process – but doing so requires specific permission, through an order that both authorizes the process and establishes the deadline. If the court is going to consider any type of request for relief simply because notice of it has been given to creditors and no objection has been filed within the time stated in the notice, paragraph (e) and paragraph (a) of the local rule serve no purpose. If anything is going to be considered just because someone has noticed it out – so that notice of a deadline is self-validating and the act of giving notice is itself sufficient to authorize both the procedure and the so-called deadline – why bother to specify the circumstances under which the notice and opportunity to object procedure is to be used, and why create a mechanism by which that procedure can be adapted for use in other situations?

Limiting consideration of matters which have been noticed to creditors without objection to those authorized by the applicable rules of procedure and orders of the court has a virtue beyond simply administering cases according to the rules. To begin with, when the local rule does not specifically authorize the procedure, it contemplates that permission to use it will be sought and obtained before the notice is served, rather than afterward. N.D. Ind. L.B.R. B-2002-2(e). This allows the court to decide whether the procedure is appropriate before it is used. An after the fact approval either puts the movant rather, than the court, in charge of deciding whether or not the

procedure should be used, or, as here, creates delays by forestalling consideration of the issue until after the time stated in the notice has expired. More importantly, the procedural rules and the court's orders authorizing particular procedures are public documents which publicly validate the procedure being used. When creditors receive a notice, from someone other than the court, that tells them something may happen unless an objection is filed within a certain number of days, the court's local rules and its orders give the recipient a place it can turn to in order to determine whether the deadline they have been apprised of is genuine or if it is simply a figment of someone's imagination. It should also be a relatively simple process to determine whether a deadline is a real one: either it is on a list of matters which are considered in this fashion or there is an order authorizing the procedure. Unless one of those requirements has been fulfilled the deadline is not genuine and the procedure is not authorized. The recipient of such an unauthorized notice should be able to rely upon those propositions and that such an unauthorized deadline should mean nothing. Finally, the public also has a right to expect that the court will follow the proper procedures and that it will not consciously ignore those requirements by validating procedural short cuts. In re Taylor, 289 B.R. 379, 388-89 (Bankr. N.D. Ind. 2003). See also, In re Minton, 2006 WL 533352 (Bankr. N.D. Ind. 2006). To do so undermines the very order and certainty the procedural rules were designed to create. Thus, the court should not validate notice of a non-existent deadline by considering the underlying request for relief just because nobody has objected. This is especially so since paragraph (e) of Local Rule 2002-2 creates a mechanism by which the notice and opportunity to object procedure can be expanded to other matters.

Neither the court's local rules nor any order in this case authorized consideration of AmeriCredit's motion to approve the agreed entry modifying the debtors' proposed plan following

nothing more than notice to creditors and an opportunity to object thereto. Consequently, that notice and its deadline for any objections are ineffective.

Moving from consideration of the notice to the motion itself, the court notes that neither its local rules nor the Federal Rules of Bankruptcy Procedure contemplate using a motion to change a Chapter 13 plan prior to confirmation. A motion is certainly the way to make changes in the plan after it has been confirmed, see, 11 U.S.C. § 1329, Fed. R. Bankr. P. Rules 3015(g), 2002(a)(5), but pre-confirmation changes are dealt with differently. See, 11 U.S.C. § 1323. They do not require a motion. One of the reasons this may be so is that there is usually some type of proceeding scheduled to come before the court at which the issue of confirmation can be considered or discussed: this may be the initial confirmation hearing, a subsequent hearing, a pretrial conference or a trial. These scheduled proceedings provide an opportunity to seek the court's guidance as to how a pre-confirmation modification should be considered and processed, rendering a formal motion seeking that guidance unnecessary. When the case is called, the parties can simply inform the court about the modification and inquire whether its approval will require a full hearing on notice to all creditors, whether a notice and an opportunity to object procedure would be sufficient, or if notice can be dispensed with altogether. Post-confirmation modifications arise in a different context and, therefore, need a different procedure. The need to modify the plan may very well arise even though there are no scheduled hearings at which the issue of changing the plan and the procedures for doing so can be discussed. Thus, unless all such motions are automatically scheduled for a hearing (something which could be done but is not required) there is a real need for a local rule addressing the issue – a need which is not present where pre-confirmation modifications are concerned – and that is precisely what Local Rule B-2002-2(a)(12) does.

Even though the court's local rules do not have a specific procedure for dealing with pre-confirmation modifications to proposed plans, if a modification is being made in order to resolve an outstanding objection to confirmation, the notice and opportunity to object procedure established by Local Rule B-2002-2 may very well be available. Among the different types of requests that are subject to the rule's notice and opportunity to object procedure are motions to approve a compromise or a settlement. See, N.D. Ind. L.B.R. B-2002-2(a)(13). Consequently, if a plan is being modified in order to somehow compromise or settle issues raised by objections to confirmation, there is no theoretical reason why the debtor could not file a motion to compromise. The motion would explain what is being done and why, the changes the settlement makes to the proposed plan, whether and how those changes affect other creditors, and ask the court to confirm the plan as modified. Creditors and parties in interest could then be given notice of the motion to compromise and advised that they have at least twenty days to object to the proposed settlement. Thus, even though the local rules do not address all possible situations in which pre-confirmation changes might be made to a proposed plan, there is nothing about them that would prevent a particular type of pre-confirmation modification – modifications which are made in order to settle an outstanding objection to confirmation – from being considered upon an appropriate motion, following notice of an opportunity to object.

If we are going to allow a pre-confirmation modification to a proposed plan to be made in order to compromise or settle an outstanding objection to confirmation, and use the notice and opportunity to object procedure of Local Rule B-2002-2 to consider a motion to approve such a settlement – and there is no reason not to do so – we should measure AmeriCredit's motion by the requirements of a motion to compromise. When we do, the motion fails to fulfill those standards.

The first thing to remember about a motion to compromise is that the only one who has authority to settle a claim is the one who owns it. In bankruptcy matters, the one who has the authority to compromise claims belonging to the estate would be the trustee or, in some instances, a Chapter 11, 12 or 13 debtor. See, 11 U.S.C. § 363(b)(giving the trustee the power to use, sell or lease property of the estate); 11 U.S.C. §§ 1107, 1203, 1303 (giving powers of a trustee to Chapter 11 and 12 debtors in possession and Chapter 13 debtors). See also, Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339, 1342 (7th Cir. 1987); Matter of Perkins, 902 F.2d 1254, 1257 (7th Cir. 1990). Since we are dealing with confirmation of a Chapter 13 plan and only the debtor can propose such a plan, 11 U.S.C. § 1321, or modify that plan prior to confirmation, 11 U.S.C. § 1323, it would seem that only the debtor should have the authority to seek approval of a compromise which resolves an objection to confirmation by modifying a proposed plan. A motion brought by anyone else should be denied. Cf., Perkins, 902 F.2d at 1258 (“When a third party tries to assert an action still vested in the trustee, the court should dismiss the action.”). In this instance, construed as a motion to compromise, AmeriCredit’s motion has been brought by the wrong party. It has been filed by the objecting creditor, AmeriCredit, rather than by the debtors. Since, prior to confirmation, it is the debtors who have the sole authority over the provisions of the proposed plan, a motion to modify that plan in order to settle an objection to confirmation should really be brought by them.

Even when we overlook the fact that the present motion has not been brought by the proper party it is still deficient. Bankruptcy Rule 9013 requires that every motion “shall state with particularity” both the relief sought and “the grounds therefor.” Fed. R. Bankr. P. Rule 9013. In this instance, the only stated basis for approving the agreed entry resolving AmeriCredit’s objections to

confirmation is that the parties have agreed to the change. That is not sufficient.

Whether a proposed compromise is approved is a matter committed to the court's discretion and this involves something more than simply rubber stamping the parties' agreement. American Reserve Corp., 841 F.2d at 162 (7th Cir. 1987). Consequently, a motion to compromise should recite the facts necessary to allow the court to determine whether or not the requested compromise is an appropriate one. See e.g., Matter of Andreuccetti, 975 F.2d 413, 421 (7th Cir. 1992); American Reserve, 841 F.2d at 161-62. In the pre-confirmation context this means that the motion should contain some information concerning the nature of the dispute and what is at issue, how the terms of the original plan are being changed in order to resolve that dispute, why such a change is appropriate or preferable to litigation, whether the modification will impact the rights of any other parties and, if so, how. Only if this type of information is forthcoming will creditors and the court be in a position to make some sort of determination concerning the propriety of the proposed settlement, whether it should be objected to, or, absent objection, approved. See, Minton, 2006 WL 533352 at *2 (the motion "must allege specific facts that, if true, would lead the court and others to the conclusion that granting the relief sought is the proper thing to do."). Without that information, the only reason for approving the change is because that is what the parties agreed to, and that is not a sufficient basis upon which to approve a settlement which may have an impact upon the rights of other creditors. Matter of Egolf, 102 B.R. 706, 710-11 (Bankr. N.D. Ind. 1989).

AmeriCredit's motion contains none of the facts that the court needs in order to consider the propriety of the parties' agreed entry modifying the proposed plan. It states nothing more than the fact they have agreed to the modification in order to resolve the creditor's objections to confirmation. It does not even explain how the plan is being changed. Consequently, AmeriCredit Financial

Services Inc.'s motion to approve agreed entry is DENIED, without prejudice to a further motion.

SO ORDERED.

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