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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF: )  
)  
VAUGHN HENRY ENSLEY, SR. ) CASE NO. 07-10261  
BARBARA ANN ENSLEY )  
)  
Debtors )

## DECISION AND ORDER

At Fort Wayne, Indiana, on August 28, 2009.

On January 13, 2009, the court granted the debtors' motion to modify their confirmed Chapter 13 plan, after all creditors and parties in interest had been given notice of the motion and no objections were filed within the time required. A little more than a month later, EquiCredit Corporation of America filed a motion to reconsider the order of January 13, 2009. The motion has been filed pursuant to the Bankruptcy equivalent of Rule 60 of the Federal Rules of Civil Procedure, Bankruptcy Rule 9024. It argues that the modification is improper and that the failure to file a timely objection was the result of excusable neglect. The motion is opposed by both the debtors and the Chapter 13 trustee, has been fully briefed by all parties, and is now before the court for a decision.

The trustee's initial argument is that Rule 60(b) does not apply to orders confirming plans (and, by extension, orders modifying them) because of the exception found at Rule 9024(3), which provides: "a complaint to revoke an order confirming a plan may be filed only within the time allowed by . . . § 1330." Based upon this provision, she argues that § 1330 is the only vehicle by which an order confirming a Chapter 13 plan may be undone and the only basis it allows is fraud, which is not alleged here. Although the trustee cites a number of decisions to support the argument, the Seventh Circuit has not decided the issue and it does not appear that it would adopt such a

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position. In Disch v. Rasmussen, 417 F.3d 769, 778-79 (7th Cir. 2005), it rejected a similar argument, based upon the provisions of Rule 9024(2), that a Chapter 7 discharge could only be set aside using § 727(e) and not through Rule 9024. See also, In re Hansen, 397 F.3d 482 (7th Cir. 2005) (affirming use of Rule 60(b) to set aside a Chapter 13 discharge). Given that the provisions of Rule 9024(2), concerning the revocation of a Chapter 7 discharge, and Rule 9024(3), concerning the revocation of confirmation orders, are functionally identical, there is no reason to believe that the Seventh Circuit would completely exclude confirmation orders from the operation of Bankruptcy Rule 9024 and Rule 60(b).

A motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, is addressed to the court's discretion. See, e.g., Lee v. Village of River Forest, 936 F.2d 976, 979 (7th Cir. 1991); Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990). See also, C.K.S. Engineers v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984). "Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances." C.K.S. Engineers v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984). To succeed, "the moving party must demonstrate that the exceptional circumstances create a substantial danger that the underlying judgment or order is unjust." Allen v. Shalala, 835 F.Supp. 462, 464 (N.D. Ill. 1993) (citing Lee, 936 F.2d at 978). See also In re Betts, 157 B.R. 631, 634 (Bankr. N.D. Ill. 1993) aff'd, 1994 W.L. 24318 (D. N.D. Ill. Jan. 26, 1994). Determinations of excusable neglect are, at their core, equitable ones, taking into account all the relevant circumstances surrounding a party's omission including, among other things, the length of the delay and the reasons for it, whether that delay was within the reasonable control of the movant and its impact upon the proceedings. Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380,

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395, 113 S.Ct. 1489, 1498 (1993).

Counsel's explanation for the failure to timely object to the proposed modification is that because of the high volume of notices their office receives, and the addition of new staff to handle that volume, notice of the proposed modification was not brought to her attention. Yet, the Supreme Court has clearly stated that internal office problems will not excuse an attorney's failure to comply with a clearly stated filing deadline, Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 398, 113 S.Ct. 1489, 1499-1500 (1993), see also, Connecticut Nat. Mortg. Co. v. Brandstatter, 897 F.2d 883, 884-85 (7th Cir. 1990); United States v. Fraya, S.E., 170 F.R.D. 346, 349 (D. Puerto Rico 1997), and that type of excuse is essentially all that counsel offers here. Furthermore, counsel was served with more than simply a single notice concerning the modification. The proposed modification, the motion to approve it, and the notice of the opportunity to object were all filed separately, appear as three separate entries on the docket, and were the subject of three separate notices of electronic filing, all of which were automatically served upon creditor's counsel by the court's ECF system. Case No. 07-10261, Docket Nos. 56, 58, and 60. In addition to this electronic service, debtor's counsel served a hard copy of the notice, which was accompanied by the motion and the proposed modification, upon both creditor's counsel and Equi-Credit. Case No. 07-10261, Certificate of Service, Docket No. 60. Thus, it was not just one document, but several different documents, served at different times and in different ways, that counsel's staff failed to bring to her attention.

While the court is sympathetic to counsel's plight, it is incumbent upon attorneys to adopt internal office procedures that ensure the court's notices and orders are brought to their attention once they have been received. In re Schlosser, 100 B.R. 348, 350 (Bankr. S.D. Ohio 1989); Greene

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v. Union Mut. Life Ins. Co., 102 F.R.D. 598, 603 (D. Maine 1984). A busy law practice and new employees do not demonstrate extraordinary circumstances which justify relief from the court's order. See, Pioneer, 507 U.S. at 398, 113 S.Ct. at 1499 (“[W]e give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date.”); In re Harlow Fay, Inc., 993 F.2d 1351 (8th Cir. 1993); Clinkscales v. Chevron U.S.A., Inc., 831 F.2d 1565, 1569 (11th Cir. 1987) (attorney's busy practice does not establish excusable neglect); In re O.W. Hubbell & Sons, Inc., 180 B.R. 31, 35-36 (N.D. N.Y. 1995); In re Benny's Leasing, Inc., 166 B.R. 823, 825 (Bankr. W.D. Pa. 1993).

EquiCredit's motion to reconsider the order modifying the debtors' confirmed chapter 13 plan is DENIED.

SO ORDERED.

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