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**IT IS SO ORDERED.**



  
Guy R. Humphrey  
United States Bankruptcy Judge

**Dated: March 31, 2010**

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**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

In re: NORMAN W. WHEELER,

*Debtor*

Case No. 08-31792

Judge Humphrey  
Chapter 13

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**Decision Denying Debtor's Objections (Docs. 45 - 48)  
to the Proofs of Claim of American Tax Funding, LLC**

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**I. Introduction**

This contested matter concerns a dispute between a creditor and a debtor about whether an in rem real property tax claim held by a non-governmental entity, which otherwise would be an undersecured claim, can be bifurcated into separate secured and unsecured claims pursuant to 11 U.S.C. § 506(a) and only paid interest on the secured claim. The parties also dispute the proper interest rate for the secured claim and whether the unsecured claim should be paid pursuant to the debtor's Chapter 13 plan when under state

law a real property tax claim is in rem only and does not create in personam liability. The court determines that all of the debtor's arguments are barred by the binding effect of the plan and confirmation order and the related orders entered in this case.

## II. Procedural and Factual Background

On April 16, 2008 the debtor, Norman W. Wheeler (the "Debtor"), filed a Chapter 13 petition (Doc. 1) and a Chapter 13 plan (the "Plan") (Doc. 6). The Plan provided non-priority unsecured creditors would be paid 100 % of their allowed claims. The Plan also stated in the section titled "Special Plan Provisions" that "[t]he delinquent real property taxes owing to Montgomery County Treasurer shall be paid in full in the amount of \$11,609.94." The Plan did not specifically address any claims held by American Tax Funding, LLC (the "Creditor"). The Creditor, through an auction process under Ohio statutory law, holds tax certificates for unpaid real property taxes originally owed to the Montgomery County Treasurer. See *In re Cortner*, 400 B.R. 608, 612-13 (Bankr. S.D. Ohio 2009) (describing the tax certificate auction process under Ohio law).

The Plan states as to "Class 2":

Secured claims listed on Schedule D for which the plan does not provide specific monthly payments; and, any scheduled claim designated for inclusion in this class. This class will include mortgage arrearages, additional post-petition attorney fees, Certificates of Judgment and secured real estate taxes. The listing of mortgage arrearage is an estimate only and will be paid pursuant to the filed Proof of Claim subject to the claims objection process. **Paid only after Class 1 claims are paid current.**

(Doc. 6, p. 5). On May 6, 2008 the Debtor filed an appraisal stating that the value of the property at 159 Reisinger Avenue, Dayton, Ohio securing the real estate taxes (the

“Property”) was \$5,000.00 (Doc. 14). In his original Schedule D the Debtor listed real property taxes owed to the Montgomery County Treasurer as fully secured (Doc. 1, p. 13).

On June 6, 2008 the Creditor filed four proofs of claim (8-1, 9-1, 10-1 and 11-1). All of these claims concern tax certificates held by the Creditor under Ohio law for delinquent pre-petition real estate taxes owed on the Property. These four claims total \$10,852.30 and are in the following amounts: 8-1 (\$5,609.24); 9-1 (\$1,306.29); 10-1 (\$536.77); and 11-1 (\$3,400.00) (collectively, the “Claim”). The Debtor and the Creditor eventually stipulated that the value of the Property was \$6,000 at the time the stipulation was filed (Doc. 77), \$1,000 more than the Debtor’s appraisal.

On June 6, 2008 the Creditor filed an objection to confirmation (Doc. 19), raising only two issues: 1) the Creditor was not listed on Schedule D as a secured class 2 creditor and, therefore, the Plan did not provide any treatment for the Claim; and 2) the Claim was entitled to the interest rate provided for by the tax certificates (18 %) rather than the *Till* interest rate provided for by Section 8 of the Plan.<sup>1</sup> On August 4, 2008 the Debtor filed a response to the Creditor’s Objection arguing that the Claim could be modified to provide interest at the *Till* rate of interest (Doc. 25). In addition, the Chapter 13 Trustee argued that the interest rate was modifiable under 11 U.S.C. § 1322(b)(2).<sup>2</sup> The Debtor did not assert any issue concerning the bifurcation of the Creditor’s Claim. Also, on August 4, 2008 the Debtor

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<sup>1</sup> Section 8 of the Plan, which is based upon the Dayton Chapter 13 Trustee’s model plan, provides that Class 2 secured creditors receive the national prime interest rate plus an “appropriate risk factor” of 1.5 %. This provision is based on the United States Supreme Court’s interpretation of 11 U.S.C. § 1325(a)(5)(B) in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

<sup>2</sup> 11 U.S.C. § 1322(b)(2) states that “[s]ubject to subsections (a) and (c) of this section, the plan may—modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of any class of claims[.]”

filed an amended Schedule D,<sup>3</sup> which lists the Creditor as holding a secured claim in the amount of \$11,609.94, an amount which exceeded the total of the Creditor's proofs of claim (Doc. 26).<sup>4</sup>

On August 12, 2008 the court held the confirmation hearing on the Plan at which the court determined that the Plan be confirmed subject to the issues raised by the Creditor's objection being preserved for determination post-confirmation with further briefing by the Debtor, the Chapter 13 Trustee, and the Creditor. On August 15, 2008 the court entered an order consistent with those rulings (Doc. 27) and the Plan, as amended, was confirmed through an order entered on September 12, 2008 (Doc. 30).

Following the confirmation hearing, the Chapter 13 Trustee filed a memorandum in support of the Plan, as amended, which argued that the Creditor's Claim should be paid at the *Till* interest rate provided by Section 8 of the Plan (Doc. 29). In addition, on October 6, 2008 the Trustee filed objections to all of the Creditor's proofs of claim on the same basis

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<sup>3</sup> The amendment stated in relevant part:

**Schedule D – Creditors Holding Secured Claims**

<u>Creditor</u>	<u>Date</u>	<u>Amount of Claim</u>
American Tax Funding, LLC c/o John N. Zomoida, Jr. 55 Public Square, Suite 1800 Cleveland, OH 44113	Pre-petition Real property taxes	\$ 11,609.94

<sup>4</sup> Of course, the amount owed to the Creditor can be resolved through the claims allowance process. See *In re McLemore, Amended Decision Granting Debtor's Objection to Allowance of Claim Nos. 1, 2, 3 and Denying Debtor's Objection to Allowance of Claim No. 4 of American Tax Funding*, \_\_ B.R. \_\_, Case No. 07-33720, Bankr. S.D. Ohio March 30, 2010 (Doc. 84) - a decision of the court being issued contemporaneously with this decision. The key point for this decision is that nothing in the language of the pre-confirmation amended Schedule D or any other document the Debtor filed pre-confirmation indicated to the Creditor the Claim might be bifurcated.

(Docs. 33 – 36). Like the Debtor’s confirmation-related filings, the Chapter 13 Trustee did not raise an issue as to bifurcation of the Claim.

On February 4, 2009 the court entered an order granting the Creditor’s objection to the Plan and denying the Debtor’s and Chapter 13 Trustee’s objections to the Creditor’s Claim, determining that the Creditor was entitled to be paid its 18% tax certificate rate of interest (Doc. 38). That order was based on this court’s determination, pursuant to 11 U.S.C. § 511,<sup>5</sup> that a holder of a tax certificate under Ohio law was entitled to the interest rate provided for by the tax certificate rather than the interest rate provided for under 11 U.S.C. § 1325(a)(5)(B)(ii),<sup>6</sup> as interpreted by the *Till* decision. *Cortner*, 400 B.R. at 612. The court concluded that creditors holding tax certificates, which represent delinquent real estate taxes purchased from Ohio counties, had a “tax claim” within the meaning of 11 U.S.C. § 511. *Id.* As such, the Bankruptcy Code, as amended by the inclusion of 11 U.S.C. § 511 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, requires the payment of the state law interest resulting from the auction of such tax certificates, which in this instance is 18 %. *Id.* at 610. Based on *Cortner*, the court issued its order requiring the secured claim of the Creditor be paid at the auction rate of 18 % (Doc. 38).

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<sup>5</sup> 11 U.S.C. § 511 states that:

“a) If any provision of this title requires the payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.

(b) In the case of taxes paid under a confirmed plan under this title, the rate of interest shall be determined as of the calendar month in which the plan is confirmed.”

<sup>6</sup> 11 U.S.C. § 1325(a)(5)(B)(ii) provides that “with respect to each allowed secured claim provided for by the plan— . . . the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claims is not less than the allowed amount of such claim[.]”

On February 26, 2009, post-confirmation and after the court ruled in favor of the Creditor on the reserved interest rate question, the Debtor filed additional claim objections to the Creditor's Claim (Docs. 45 – 48) (the "Post-Confirmation Objections") and the Creditor filed a response to the Post Confirmation Objections on March 28, 2009 (Docs. 49 & 50). In addition, on May 12, 2009 the Debtor filed a further amendment to Schedule D (Doc. 59). Unlike the first amendment to Schedule D, the second amendment did provide for the bifurcation of the Claim into secured and unsecured amounts (Doc. 59). After various status reports and conferences, a briefing schedule was set for this contested matter and memoranda were filed by the parties (Docs. 78 – 80).

Through the Post-Confirmation Objections and the memoranda, the Debtor seeks to bifurcate the Claim based on 11 U.S.C. § 506(a) and the \$6,000 stipulated value of the Property,<sup>7</sup> pay the *Till* rate of interest on the bifurcated secured claims, and not pay the bifurcated unsecured claims because the Claim is in rem against the Property only with no in personam liability of the Debtor. The Creditor insists its entire Claim is secured under state law and that it is entitled to be paid the tax certificate rate of interest on the total amount of the Claim.

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<sup>7</sup> The stipulation only states the value of the property at the time of the stipulation (Doc. 77) and does not address the effect of the plan. Further, the Debtor cannot rely on the pre-confirmation valuation of \$5,000.00 to attempt to bifurcate the Claim. A valuation by itself does not establish the treatment of a secured creditor unless clear language in the plan put a creditor on notice that its lien rights would be modified by that valuation. *Bivens v. M&I Bank FSB (In re Bivens)*, Adv. No. 08-3361, *Decision Denying Motion for Summary Judgment* at \*14-16 (Bankr. S.D. Ohio Sept. 30, 2009) (Chapter 13 plan must provide specific notice that confirmation hearing would address valuation under 11 U.S.C. § 506(a) to bind a creditor). In fact, such an interpretation would directly contradict the plain language of the Plan.

### III. Legal Analysis

Although the parties briefed a variety of legal issues arising out of the Post-Confirmation Objections, a review of the record reveals that the Debtor's arguments are all precluded by the terms of his own Plan, 11 U.S.C. § 1327(a), and prior orders entered in this case.

#### A. Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334 and the standing order of reference in this District. This contested matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

#### B. The Debtor's Bifurcation Arguments Are Barred by the Binding Effect of the Confirmed Plan and 11 U.S.C. § 1327(a)

The Debtor's bifurcation arguments are precluded by the terms of the Plan. Section § 1327(a) of Title 11 states that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Neither a debtor nor a creditor can raise legal issues post-confirmation that could have been addressed during the confirmation process. *Ruskin v. DaimlerChrysler Servs. N. Am., L.L.C. (In re Adkins)*, 425 F.3d 296, 302 (6th Cir. 2005) ("[C]onfirmation of a plan has been described as res judicata of all issues that could or should have been litigated at the confirmation hearing." (citation and internal quotation omitted)); *Storey v. Pees (In re Storey)*, 392 B.R. 266, 270 (B.A.P. 6th Cir. 2008) ("Under § 1327(a), [t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the

plan.’ 11 U.S.C. § 1327(a). Thus, absent a timely appeal, a confirmation order is *res judicata* and not subject to collateral attack.”). Although the Creditor did not directly raise this issue, the court must enforce the binding effect of the confirmation order it entered. See Keith M. Lundin, Chapter 13 Bankruptcy, 3d Ed. Vol. 3, § 229.1, p. 229-1, quoting Webster’s New 20th Century Dictionary of the English Language 185 (unabridged 2d ed. 1983) (“‘Bind’ means ‘to put under . . . legal restraint, or contract . . . to be obligatory.’”).

In this instance, the Debtor treated the Claim of the creditor as secured. First, the Debtor treated the claim of the Montgomery County Treasurer as fully secured and indicated it would be “paid in full.” See Plan, Special Plan Provisions, p. 9. The Claim of the Creditor is based on the rights of the Montgomery County Treasurer to collect these taxes being transferred to the Creditor through the tax certificate auction process. See *Cortner*, 400 B.R. at 614. Second, the Plan, as amended at the time of confirmation (Docs. 2, 17 and 20), treated the Creditor as secured because it was a Class 2 claim. Prior to confirmation, the Debtor amended Schedule D to treat the Creditor as secured (Doc. 26). This filing directly addressed the issue raised by the Creditor in its objection to confirmation of the Plan that because it was not listed on Schedule D it was not a Class 2 creditor and, therefore, was not receiving any treatment under the Plan. As noted, the language in the Plan states Class 2 includes “[s]ecured claims listed on Schedule D for which the plan does not provide specific monthly payments” and specifically includes “secured real estate taxes.” The Debtor’s amendment to Schedule D did not seek to bifurcate the Claim and listed a balance due as

secured which exceeds the Creditor's Claim.<sup>8</sup> Third, the Debtor never raised nor briefed the issue of bifurcation of the Claim prior to confirmation of the Plan.

At confirmation the only issue reserved was the interest rate for the Claim. The filings of the Debtor and the Chapter 13 Trustee solely were focused on the appropriate interest rate. The modification of a fully secured claim by changing the interest rate provided under contractual documents or state law is a common Chapter 13 issue intersecting the effect of 11 U.S.C. §§ 1322(b)(2) and 1325(a)(5)(B)(ii). This issue was litigated in *Cortner* and this case because of the impact of the "tax claim" provisions of 11 U.S.C. § 511. At no point prior to confirmation, in any filing of record, or during the August 12, 2008 confirmation hearing, did the Debtor ever raise the right to bifurcate the Claim.

The Debtor also never amended the Plan prior to confirmation to treat the Creditor's Claim other than as fully secured. Secured claims subject to bifurcation under § 506 and other modifications can be addressed within a proposed chapter 13 plan.<sup>9</sup> In this case the Plan payments were changed from \$635.00 a month to \$568.00 a month (Doc. 17). Also, the Debtor reduced the dividend to unsecured creditors from 100 % to 0 % and further reduced the payment each month to \$510.00, based on a \$5,000 valuation of the Property (Doc. 20).

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<sup>8</sup> Schedules can be amended at any time prior to the case closing. Bankruptcy Rule 1009(a). However, the Plan defines Class 2 claims by the claims listed on Schedule D. The court is applying the language chosen in the Plan. If the Debtor could amend the schedules post-confirmation to re-classify a secured claim to unsecured, a creditor could not rely on a confirmed plan for its treatment. See *McLemore* at \*17-22 regarding the distinctions between the plan confirmation process and the claims allowance process.

<sup>9</sup> The secured status of a claim can be established post-confirmation, such as through an adversary proceeding to avoid a "wholly unsecured mortgage" or under other legal theories. Indeed, Bankruptcy Rule 7001(2) sometimes requires it. However, the plan cannot treat the claim as secured and attempt later to change the treatment by filing an adversary proceeding directly contradicting the treatment of the claim in the confirmed plan. See, e.g. *Bivens v. M&I Bank FSB (In re Bivens)*, Adv. No. 08-3361, *Decision Denying Motion for Summary Judgment* (Bankr. S.D. Ohio Sept. 30, 2009) and *Schmid v. Irwin Home Equity (In re Schmid)*, Adv. No. 07-3169, *Decision Granting Irwin Home Equity's Motion for Summary Judgment* (Bankr. S.D. Ohio Feb. 6, 2008).

However, the Debtor never sought to change the treatment of the Creditor's Claim to bifurcate it into secured and unsecured claims based on that valuation.

The other issues raised by the Debtor's Post-Confirmation Objections contradict the confirmed Plan. The Plan, as amended, binds the Debtor as well as the Creditor. Storey, 392 B.R. at 270 ("Confirmation of a plan has been described as 'res judicata of all issues that could or should have been litigated at a confirmation hearing.'). See also *Schmid v. Irwin Home Equity (In re Schmid)*, Adv. No. 07-3169, *Decision Granting Irwin Home Equity's Motion for Summary Judgment* (Bankr. S.D. Ohio Feb. 6, 2008). The special plan provision for the Montgomery County Treasurer, the Class 2 claim language, and the pre-confirmation Schedule D all consistently treat the tax claims in question as secured. The Plan is unambiguous as to the Creditor's secured status. The Debtor never argued otherwise when the Creditor's confirmation objection was reserved for post-confirmation determination.

Besides being proscribed by the general impact of the confirmation order under § 1327(a), the Sixth Circuit also prohibits such a modification when a confirmed plan treats an allowed claim as secured. In *Adkins*, the Sixth Circuit held that, following a relief from stay motion premised on a debtor's default, a creditor's allowed secured claim must be paid on a secured basis. 425 F.3d at 303. Similarly, in an earlier decision the Sixth Circuit determined a debtor could not modify a plan to treat a secured claim as unsecured after the collateral was surrendered. *Chrysler Fin. Corp. v. Nolan (In re Nolan)*, 232 F.3d 528, 535 (6th Cir. 2000). While the facts of those cases differ from those in this case, the underlying legal principle remains the same: if a claim is treated as secured in a confirmed plan, that claim cannot, absent consent, be reclassified. The Sixth Circuit, citing a bankruptcy court decision to support its

conclusion, reinforced this principle in a recent decision specifically addressing the reclassification of a claim post-confirmation:

In *White* [370 B.R. 713 (Bankr. E.D. Mich. 2007)], the debtors assumed a car lease with Ford under a Chapter 13 plan, which listed the lease as a class three claim and noted that the debtor “would make the monthly payments directly to Ford.” 370 B.R. at 715. After confirmation, the debtors defaulted on the lease and turned the vehicle over to Ford. *Id.* at 715-16. Ford filed a motion for administrative expenses for excess mileage, sales tax and a monthly lease payment, *id.* at 716, which the court denied, *id.* at 717. The court reasoned that, when the debtors opted to assume the lease, they became obligated to make the monthly payments and to pay “any other sums that became due at any time in the future under the terms of the [l]ease.” *Id.* at 718. “Under § 1327(a),” the court explained, “confirmation of a Chapter 13 plan is, in effect, an adjudication of litigation over the issues of the classification and treatment of claims provided for in a proposed Chapter 13 plan, and is *res judicata* on those issues.” *Id.* Reasoning that the plan designated the lease as a class three claim rather than a class one claim, the court held that any claim for “sums due under the assumed lease” should follow the treatment of the claim provided in class three—“that such sums are to be paid directly by Debtors, not by the Chapter 13 Trustee.” *Id.* Reclassification of the claim, it added, was not a permissible modification under § 1329(a). *Id.* at 718-19 (citing *In re Nolan*, 232 F.3d 528, 533 (6th Cir.2000)).

*Ford Motor Credit Co. v. Bankr. Estate of Paramenter (In re Parmenter)*, 527 F.3d 606, 609 (6th Cir. 2008). See also *In re Marrow*, 397 B.R. 876, 879 (Bankr. N.D. Ohio 2008) (A debtor is not permitted to modify the interest rate of a secured claim established in a confirmed plan).

Prior to confirmation of the Plan and through the Plan the Debtor treated the Claim as secured in the entire amount due and is bound by this treatment. The Debtor’s attempt to bifurcate the Claim post-confirmation, under the classifications within the Plan, necessarily seeks to reclassify a secured claim because of the in rem character of the Claim.<sup>10</sup>

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<sup>10</sup> As noted, the Debtor’s position is the unsecured portion of the claim would not be paid in the Plan because it is in rem. To the extent the Debtor is alternatively advocating that the asserted unsecured claim is a Class 5 claim under the Plan, as amended (See Doc. 6, p. 5, defining Class 5), the analysis is the same because the Plan pays nothing to Class 5 nonpriority unsecured creditors. In either instance, the Debtor is reclassifying a secured claim in direct contravention of the Debtor’s confirmed plan.

For the reasons stated, this change in treatment of the Claim is not permitted post-confirmation.

**C. The Interest Rate Issue Was Previously Determined and That Determination Is Law of the Case**

The issue as to the appropriate rate of interest to apply to the Claim was decided in the order entered in this case on February 4, 2009 (Doc. 38). The Debtor has not provided any basis to vacate or modify that order. See generally *Federal Rule of Civil Procedure 60(b)* (applicable through Bankruptcy Rule 9024). This court, citing *Cortner*, determined the Creditor is entitled to the rate of interest established at the tax certificate auction under Ohio law (Doc. 38). The Debtor addressed that issue and the court ruled in favor of the Creditor. Accordingly, the court's prior ruling on that issue is law of the case. See *Brady-Morris v. Schilling (In re Kenneth Allen Knight Trust)*, 303 F.3d 671, 676 (6th Cir. 2002) (Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute law of the case; internal citation omitted).

The law of the case doctrine is "directed to a court's common sense" and is not an "inexorable command," and precludes a court from reconsideration of identical issues. *Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997). The three exceptional reasons that courts have held justify reconsideration of previously decided issues are: (1) when substantially different evidence is raised at a subsequent trial; (2) when a subsequent contrary view of the law is decided by a controlling authority; or (3) when a decision is clearly erroneous and would work a manifest injustice. *Id.* and *United States v. Rayborn*, 495 F.3d 328, 337 (6th Cir. 2007).

The Debtor has not described an exceptional circumstance justifying the court's reconsideration of the interest rate issue determined in *Cortner* and previously followed in this case. Accordingly, the court's earlier ruling on the interest rate is law of the case and will not be re-examined.

**IV. Conclusion**

For the foregoing reasons, the Debtor's objections to the proofs of claim of American Tax Funding, LLC (Docs. 45 – 48) are **denied**. The court will enter a separate order consistent with this decision.

**IT IS SO ORDERED.**

Copies to:

Default List

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