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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DAVID HAROLD ABBOTT, Debtor.	BAP No. WY-02-058
DAVID HAROLD ABBOTT, Appellant, v. MARK R. STEWART, Trustee, Appellee.	Bankr. No. 98-21571 Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before BOULDEN, MICHAEL, and BROWN[1], Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

In this appeal, we are asked to consider whether the Chapter 13 plan at issue obligates the debtor to make a specific number of payments or to make whatever payments are possible during a specific period of time. The bankruptcy court determined that, under the terms of the plan and under applicable law, the debtor was obligated to make not less than 36 separate monthly payments in order to complete his plan. For the reasons set forth below, we affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable Elizabeth E. Brown, United States Bankruptcy Court for the District of Colorado, sitting by designation.

I. Background

David Harold Abbott ("Debtor" or "Mr. Abbott") filed a petition for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Wyoming on November 12, 1998. Mark R. Stewart ("Trustee" or "Mr. Stewart") was appointed to serve as trustee in the case. Debtor's original Chapter 13 plan was confirmed by order of the court on March 12, 1999. Thereafter, Debtor fell into default of his payments under said plan.[2]

On November 12, 1999, Debtor filed an amended Chapter 13 Plan (the "Plan"). The Plan contained the following provisions that are relevant to our analysis:

> 1. Future Income. The debtor(s)[3] will submit to the chapter 13 trustee the following future income and assets:
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> A. Future earnings of $144.00 per month for a term of 48 months; no payments will be made for June, July, August, September, October, November or December 1999; subject to the Provisions of paragraph 2;
>
> . . . .
>
> C. For purposes of determining disposable income, tax refunds to which the debtor(s) is entitled during the first 36 months of the plan are deemed disposable income unless otherwise ordered by the court and will be submitted to the chapter 13 trustee.
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> 2. Duration. The debtor(s) will make payments for a period of 36 months or extended as necessary for a period of up to 60 months. The debtor(s) request(s) that the plan be confirmed to so extend and show the court the following cause for the extension: The debtor(s) [sic] projected net disposable income, including receipt of projected tax refunds, is insufficient to pay all required plan payments, including the pro-rata sum required to be paid to general unsecured creditors in class 7 and therefore the debtors [sic] propose that the plan be extended as necessary, up to 60 months, until all classes receive the payment proposed under their class treatment herein, including the sum set forth in class 7.

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[2] Debtor was incarcerated for a period of 150 days as a result of a probation violation. The incarceration resulted in the loss of his income.

[3] Apparently the Plan is a form pleading used in multiple cases.

> Any tax refunds received by the trustee shall be applied in reduction of claims which are to be paid through the plan. Tax refunds applied to pay claims shall reduce the term of the plan to a term of not less than 36 months, provided, that all of the other terms of the plan have been met.[4]

Originally, the Trustee objected to the Plan; however, this objection was withdrawn and the Plan was confirmed by order entered on January 7, 2000.[5]

Debtor began making payments to the Trustee on December 21, 1998. Between that date and March 29, 2002, Debtor made a total of 33 plan payments. In addition, the Trustee received Debtor's federal tax refunds for calendar years 1998, 1999, 2000, and 2001. All of these refunds were treated as disposable income under the terms of the Plan.

The dispute before us arose when the Trustee received the 2001 tax refund. Upon receipt, the Trustee informed counsel for the Debtor that the funds had been delivered to him and would be treated as disposable income under the Plan. The Debtor objected, taking the position that he had completed all of his payments due under the Plan. Unable to reach a satisfactory resolution of the matter with the Trustee, Debtor filed his Motion to Reclaim Funds from Chapter 13 Trustee and for Order Declaring Completion of Chapter 13 (the "Motion") on June 12, 2002. In the Motion, Debtor asked the bankruptcy court to order the Trustee to return the 2001 tax refund, declare that the Debtor had successfully completed the Plan, and enter an order of discharge. The Trustee objected, arguing that the Plan would not be completed unless and until the Debtor made a total of 36 monthly payments and that, so long as the Plan had not been completed, the Trustee was entitled to take the 2001 tax refund for distribution to creditors.

The bankruptcy court held a hearing on the Motion on July 9, 2002. Thereafter, on July 24, 2002, it entered an order denying the Motion. The

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[4] Plan at 1, *in* Appellee's Supp. App. at 1 (emphasis in original).

[5] *Id*. at 5-6.

bankruptcy court found that, under the terms of the Plan as well as under applicable law, Debtor was required to make not less than 36 payments to the Trustee before the Plan could be considered completed. Having found that only 33 payments had been made, the court found the Debtor to have unfulfilled obligations under the Plan. The court further held that the 2001 tax refund was properly treated as disposable income under the Plan. This appeal followed.

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[6] Neither party elected to have this appeal heard by the United States District Court for the District of Wyoming; thus they have consented to our review.

III. Standard of Review

Where, as here, the salient facts are undisputed, we conduct a *de novo* review of the lower court's conclusions of law.[7] When conducting a *de novo* review, the appellate court is not constrained by the trial court's conclusions, and may affirm the trial court on any legal ground supported by the record.[8]

IV. Discussion

It is a fundamental proposition of bankruptcy law that "[t]he provisions of a confirmed [Chapter 13] 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

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[6] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

[7] *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253,1255 (10th Cir. 1999).

[8] *See Wolfgang v. Mid-America Motorsports, Inc.,* 111 F.3d 1515, 1524 (10th Cir. 1997).

creditor has objected to, has accepted, or has rejected the plan."[9] The United States Court of Appeals for the Tenth Circuit has recognized this principle and held that the terms of a confirmed plan control even if those provisions are contrary to one or more provisions of the Bankruptcy Code.[10] Therefore, the inquiry in this matter begins with an examination of the Plan. In doing so, the Court will construe the terms of the Plan against its drafter, the Debtor.[11]

Section 1(A) of the Plan requires Debtor to submit his excess disposable income (calculated at $144.00 per month) for a term of 48 months, excepting the months of June through December of 1999 (thus, the 48 month term calls for payments over not less than 41 months).[12] This section of the Plan is expressly subject to the provisions of Section 2, wherein the Debtor states that he "will make payments for a period of 36 months or extended as necessary for a period of up to 60 months."[13] Section 2 could not have a plainer meaning: "will make payments" means that the Debtor will, in fact, make payments (at least 36 of

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[9] 11 U.S.C. § 1327(a). Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

[10] *See Andersen*, 179 F.3d at 1258; *see also In re Midkiff*, 271 B.R. 383, 386 (10th Cir. BAP 2002).

[11] *See Fawcett v. United States (In re Fawcett)*, 758 F.2d 588, 591 (11th Cir. 1985) ("[T]he debtor as draftsman of the plan has to pay the price if there is any ambiguity about the meaning of the terms of the plan. This comports with the long-standing rule that ambiguous terms of a document are to be interpreted against the party that drafted them.").

[12] The dissent contends that the plan, as written, was for only 29 months: "the modified plan allowed this Debtor to skip his monthly payments for seven specific months that fell within the first 36 months of the plan." *See* Dissent at 2. While this statement may be correct, it ignores the fact that the Plan provides for a 48 month term. More importantly, under the dissent's construction of the Plan, paragraph 1 would modify paragraph 2, which establishes the outer parameters of the Plan's duration. Indeed, as the dissent correctly observes, "paragraph 2 controls in establishing the duration of the plan." *See* Dissent at 2.

[13] Plan at 1, *in* Appellee's Supp. App. at 1 (emphasis added).

them). Section 2 modifies Section 1(A).[14]

The provision in Section 2 that allows for the application of tax refunds in reduction of the terms of the Plan applies only if "all of the other terms of the plan have been met."[15] Debtor has not complied with all of the terms of the Plan as a result of his failure to make 36 payments of $144.00. He is not entitled to the application of the tax refunds to reduce his monthly obligations unless and until he makes 36 monthly payments. The bankruptcy court correctly interpreted the terms of the Plan.

This interpretation of the Plan is also consistent with the operative provisions of the Bankruptcy Code. Under § 1325(b)(1),

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan —
>
> > (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
> >
> > (B) the plan provides that all of the debtor's projected disposable income to be received in the three year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.[16]

Under this section, the minimum that a debtor can expect to be required to pay under a confirmable Chapter 13 plan is his excess disposable income during the first three years of the plan. This would consist of the monthly payment plus any

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[14] The plain language of the Plan supports this conclusion. Under Section 1(a) the Debtor has committed to pay $144.00 per month for a term of 48 months (less 7 months). Term is defined as "a time or date fixed or agreed upon for an action or as a boundary between periods." *Webster's Third New Int'l Dictionary* 2358 (Philip Babcock Gove ed., 1993). Section 2, on the other hand, requires the Debtor to make payments for a period of 36 months or, if needed, up to 60 months. Period is defined as "a point of time marking a termination of a course or an action." *Id.* at 1680. Under both provisions, the Debtor's required action is that he pay $144.00 per month. That requirement is met after the completion of 36 monthly payments.

[15] Plan at 1, *in* Appellee's Supp. App. at 1.

[16] 11 U.S.C. § 1325(b)(1).

additional sums that are not necessary for the support of the debtor or his or her dependents, such as tax refunds. Once the debtor has made those minimum payments, he or she has complied with the minimum terms of § 1325(b)(1).[17]

Under the terms of the Plan, Debtor promised to make not less than 36 monthly payments of $144.00. In addition, the Plan provides that "[t]ax refunds applied to pay claims shall reduce the term of the plan to a term of 36 months, provided, that all of the other terms of the plan have been met."[18] The only way that the Debtor was entitled to have the 2001 tax refund applied in such a manner as to reduce the number of monthly payments required under the Plan was if he had already made the minimum number of payments which he had promised to make under the Plan: namely, 36.[19] Unless and until he does so, he is not entitled

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[17] As one court has put it,

> The substance of a Chapter 13 plan is not found in the "arbitrary percentage allocations" to unsecured creditors. *See In re Beasley*, 34 B.R. 51, 54 (Bankr. S.D.N.Y. 1983). "Nowhere ... does the Code speak in terms of applicable percentages." *Id.* at 53. Rather, the substance of a Chapter 13 plan is found in its fulfillment of Congress' intent that the debtors repay their creditors to the extent of their ability during the Chapter 13 period. *See Arnold v. Weast (In re Arnold)*, 869 F.2d 240, 242 (4th Cir. 1989); *Beasley*, 34 B.R. at 54; *see generally* Arnold B. Cohen, *Pot Plans Should be Replacing Percentage Plans in Chapter 13*, 4 J. Bankr. L. & Pract. 305 (1995). This Congressional intent is embodied in 11 U.S.C. § 1325(b), which require debtors to devote to their plan their entire projected disposable income over three years if the trustee or a creditor objects to the plan.

In re Martin, 232 B.R. 29, 34 (Bankr. D. Mass. 1999). In the present case, the term of the Plan is 48 months, during which time the Debtor promised to make not less than 36 payments.

[18] Plan at 1, *in* Appellee's Supp. App. at 1 (emphasis added).

[19] The dissent contends that "[s]ince the modified plan allowed the Debtor to miss payments for seven months, it contemplated that only 29 monthly payments would be received within the initial 36 months. The plan did not then impose an additional requirement of a minimum number of monthly payments." *See* Dissent at 3. We respectfully disagree with this statement. Under Section 2 of the Plan, the Debtor was obligated to make no fewer than 36 payments of $144.00. If the dissent is correct, the Debtor need only make payments (whether from disposable

(continued...)

to his tax refunds or the entry of an order of discharge.

V. Conclusion

The decision of the bankruptcy court is affirmed.

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[19] (...continued)
income, tax refunds or any other source) in the total amount of $5,919.80 in order to be entitled to his discharge. The Plan is not so written.

BROWN, Bankruptcy Judge, Dissenting.

I respectfully dissent. While I agree with the majority that this Court is constrained to interpret the language of this plan, and not to consider whether the modified plan, as confirmed, violates provisions of the Bankruptcy Code, I disagree that the language is ambiguous. By its plain terms, the plan requires monthly payments for a term of no less than 36 months, but as other terms make clear, this does not equate to a requirement of 36 monthly payments. The Trustee's construction, adopted by the majority and the bankruptcy court alike, renders several terms of this plan superfluous.

As a preliminary matter, I observe that the modified plan in this case is a "pot" or base plan. "A pot plan provides that the debtor will pay a fixed amount, thus the percentage creditors receive will depend on the total amount of approved claims."[1] Under the present plan, creditors must receive the payment proposed for each class in the following amounts[2]:

Attorney's Fees	$1,060.00
Treasurer's Priority Claim	$ 325.92
Treasurer's Secured Claim	$ 458.88
Sears's Secured Claim	$ 500.00
Unsecured Claims	$3,575.00
	$5,919.80

The unsecured creditors are not promised a percentage return on their claims, but a pro rata share of the pot of $3,575.00 allocated to their class. The plan states that these payments will result in a distribution to unsecured creditors of "approximately 10%." Since the plan commits the Debtor to pay "at least $3,575"

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[1] *In re Than*, 215 B.R. 430, 432 n.2 (9th Cir. BAP 1997); *In re Witkowski*, 16 F.3d 739, 741 (7th Cir. 1994); *Hildebrand v. Hays Imports, Inc. (In re Johnson)*, 279 B.R. 218, 221-22 (Bankr. M.D. Tenn. 2002).

[2] Plan at 1-3, *in* Appellee's Supp. App. at 1-3.

to the unsecured class, it establishes a base or minimum payment. The actual percentage return to each unsecured creditor will increase or decrease depending on the actual amount of allowed claims in this class.

The means by which these payments will be made are twofold: monthly payments of $144.00; and contribution of certain tax refunds. In regard to the first source of contribution, the monthly payments, the plan discusses in several places the term or duration during which the Debtor must make his monthly payments. In paragraph 1, it states "for a term of 48 months; no payments will be made for June, July, August, September, October, November or December 1999; subject to the Provisions of paragraph 2." Paragraph 2 describes the term as "for a period of 36 months or extended as necessary for a period of up to 60 months . . . until all classes receive the payment proposed under their class treatment herein, including the sum set forth in class 7." The internal inconsistency between paragraphs 1 and 2 is resolved by paragraph 1's language that it is "subject to the Provisions of paragraph 2." Thus, paragraph 2 controls in establishing the duration of the plan.

In the typical case, there would be no distinction between 36 monthly payments and monthly payments for a term of 36 months. The result would be the same. In this case, however, the modified plan allowed this Debtor to skip his monthly payments for seven specific months that fell within the first 36 months of the plan. Whether this arrangement satisfied the requirements of 11 U.S.C. §§ 1325 and 1329 is no longer relevant. I agree with the majority that the Tenth Circuit has expressly held that, absent a timely appeal, a confirmed plan is *res judicata*, and its terms are not subject to collateral attack.[3] This is true even if the

[3] *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d at 1258.

plan's provisions may be contrary to the Bankruptcy Code.[4] This presumes that the party against whom the offending provision applies had an opportunity to object, in keeping with due process requirements. In this case, the Trustee filed an objection to the proposed modification and, thus, he had adequate notice of the plan's provisions. Once due process has been satisfied and the court has confirmed the plan, the policy favoring finality outweighs the bankruptcy court's and a trustee's obligations to verify a plan's compliance with the Bankruptcy Code.[5]

Since the modified plan allowed the Debtor to miss payments for seven months, it contemplated that only 29 monthly payments would be received within the initial 36 months. The plan did not then impose an additional requirement of a minimum number of monthly payments. It provided that the term or duration would be extended as necessary to allow the Debtor to pay the pot's requirements. This does not necessarily translate to a requirement of additional monthly payments. The modified plan established two forms of contribution, only one of which involved monthly payments.

As to the second source of contribution, paragraph 1(c) of the modified plan contemplated the contribution of "tax refunds to which the debtor(s) is entitled during the first 36 months of the plan . . . ." "A debtor's right to a federal income tax refund arises at the end of the tax year and not on the day of the filing of the tax return."[6] This Debtor filed bankruptcy in November 1998. Three tax years ended in the first 36 months of this plan, the tax years 1998, 1999, and 2000. Thus, the modified plan committed this Debtor to contribute his refunds for 1998 through 2000. The majority construes this plan to require the

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4 *Id.* (quoting *In re Mammel*, 221 B.R. 238, 240 (Bankr. N.D. Iowa 1998)).

5 *Id.* (quoting *In re Szostek*, 886 F.2d 1405, 1406 (3d Cir. 1989)).

6 *In re Midkiff*, 271 B.R. 383, 386 (10th Cir. BAP 2002).

contribution of the 2001 tax refund as well. There is no language in this plan that justifies this result. The plan does not refer to tax refunds to which the debtor becomes entitled during his first 36 monthly payments under the plan or even during the "duration" or "term" of the plan. It refers to refunds to which the Debtor becomes entitled during a set period of time, "the first 36 months of the plan."

The actual refunds for 1998 - 2000 aggregated $1,621. Combining the 29 monthly payments paid within the first 36 months with the three refunds, totals $5,797.00, which is slightly below the plan's requirements. Thus, the Debtor needed to make an additional contribution in order to satisfy the "pot." The plan adequately anticipated this possibility by allowing his payments to continue up to month 60, as necessary to satisfy his payment obligation. In keeping with the plan, the Debtor made a monthly payment in the 37th month of $144.00. Once he made this payment, he had overpaid by almost $22. Consequently, by month 37, he had paid "at least" $3,575 to the unsecured creditors' class. The modified plan, by its express terms, required nothing further. Once the Debtor had completed his plan payments, no party could request further modification to require additional contribution.[7]

The majority finds that paragraph 2's language obligating the Debtor to "make payments for a period of 36 months" equates to an obligation to make 36 monthly payments of $144.00. This construction ignores paragraph 1's language which specifies that monthly payments will be only one source of contribution to the plan. It also ignores the clear intent of paragraph 2 to provide a flexible term, which has 36 months and 60 months as its outer parameters, but which will depend on the amount of time necessary to satisfy the pot's requirements. The Trustee's construction renders the term of the plan inflexible as to its duration. If

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[7] 11 U.S.C. § 1229(a).

the plan requires 36 monthly payments, and it provides for a seven-month suspension in payments, then the term could be no less than 43 months in duration. The clear language, however, allows it to be reduced to 36 months. The Trustee's construction renders this reference to 36 months superfluous.

The last sentence of paragraph 2 in particular states, "Tax refunds applied to pay claims shall reduce the term of the plan to a term of not less than 36 months, provided, that all of the other terms of the plan have been met." This sentence makes it mandatory to reduce the term, albeit not to less than 36 months, with the application of the tax refunds. The Trustee's construction does not give effect to this mandatory reduction provision. It continues to require 43 months and tax refunds through 2001. Under this construction, the tax refunds do not alter the length of the plan in any way.

The majority justifies this result by noting the mandatory reduction sentence's qualifier, "provided, that all other terms of the plan have been met." Since it construes the plan to require 36 monthly payments, it finds that until 36 monthly payments have been made, no reduction is required. But there is no reduction possible if the plan is an inflexible 43 months in length. I construe this qualifier to refer to paragraph 2's numerous references to the Debtor's requirement to satisfy the payment obligations set forth in the plan, i.e. his "pot" obligation. The majority's construction renders the mandatory reduction sentence superfluous.

In construing the modified plan, I begin with the maxim that the terms of a contract are to be viewed as a whole. According to Blackstone, "construction be made upon the entire deed, and not merely upon disjointed parts of it."[8] One

[8] 5 William Blackstone, *Commentaries* § 24.21, at 204 (citing the dissenting opinion in *Pierce v. Adams*, 18 A.2d 792, 795 (Me. 1941), which quoted Blackstone). *See also Bowers Hydraulic Dredging Co. v. United States*, 211 U.S. 176, 188 (1908).

corollary of this general rule is that preference should be given to a construction that gives effect to as many of the contract terms as possible. When there are two possible meanings to a contract, only one of which construes the provisions harmoniously, that construction should be favored over one that requires the court to choose giving effect to one provision of the contract over another.[9] The Debtor's construction of the modified plan gives effect to all of the terms of the plan.

Like the majority, the bankruptcy court also concluded that this plan required 36 monthly payments, not merely certain payments over a 36-month period. The bankruptcy court's conclusion was predicated on the following analysis:

> First, the intent of the Code is obvious and basic. It contemplates actual payments during the three-year period, either 36 monthly payments or in rare instances, 12 quarterly payments. . . .
>
> . . . [The debtor] cannot alter the terms of the plan by simply skipping payments. . . .
>
> . . . A debtor without disposable income does not belong in a chapter 13 case. To reiterate . . ., if a debtor misses payments during the first three years of the plan, the plan must be extended, the payments must be caught up, or the case should be dismissed.[10]

The court's analysis centered, not on the actual language of the plan, but on its belief that the Code would not allow a debtor to skip payments. It did not acknowledge that that is precisely what the modified plan allowed. While the Trustee initially objected to the Debtor's proposed modification, he subsequently withdrew his objection and the court entered a second confirmation order.[11] However much we would prefer to interpret the plan in accordance with the Bankruptcy Code's requirements, we are limited by its actual language.

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[9] Blackstone, *supra* note 8, § 24.28, at 309.

[10] Memorandum Opinion at 3-4, *in* Appellant's Amended App. at 10-11.

[11] Confirmation Order, *in* Appellee's Supp. App. at 5-6.

For these reasons, I would reverse the decision of the bankruptcy court and remand with instructions to enter a discharge order and to direct the Trustee to remit the excess contributions to the Debtor.