THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 99-52315
	)	
JOHN & CINDY OSTLUND	)	CHAPTER 13
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM

ORDER RE: MOTION TO VACATE ORDER CONFIRMING PLAN

This matter came before the Court on the motion of CitiFinancial Mortgage Company fka IMC Mortgage Company ("IMC") to vacate the order confirming debtors' chapter 13 plan and debtors' response. During a telephonic status conference, counsel for IMC and counsel for debtors represented to the Court that an evidentiary hearing was not necessary and that the matter could be decided on the pleadings. The matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (L) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein and the entire record in this chapter 13 case, the Court makes the following findings of fact and conclusions of law.

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FINDINGS OF FACT

The following facts are not disputed by the parties:

1. On May 11, 1998, John and Cindy Ostlund executed a mortgage on their primary residence (737 Alameda Avenue, Cuyahoga Falls, Ohio) in favor of Decision One Mortgage Company, LLC. That mortgage was subsequently assigned to IMC.

2. On August 2, 1999, debtors filed a voluntary chapter 7 bankruptcy petition. On Schedule D - Creditors Holding Secured Claims, debtors listed IMC as holding a $83,000 claim secured by a mortgage on debtors' primary residence.

3. On August 7, 1999, a notice of the commencement of the chapter 7 case **[docket #2]** was sent by the Bankruptcy Clerk of Court's Office to, *inter alia*, IMC at P.O. Box 31513, Tampa, Florida 33631-3513 (the "Florida Address").

4. On August 27, 1999, debtors and IMC entered into a reaffirmation agreement for their primary residence which was filed with the Court on August 31, 2000 **[docket #5]**.[1]

5. On October 6, 1999, debtors filed a "Notice of Conversion from Chapter 7 Proceeding to Chapter 13 Proceeding" **[docket #9]**. Pursuant to the certificate of service attached to that notice, a copy of the notice was sent by debtors' counsel to, *inter alia*, IMC at the Florida Address.

6. On October 6, 1999, debtors filed their chapter 13 plan **[docket #10]**. Paragraph 2(A) of debtors' plan set forth the following:

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[1] To date, debtors have not filed anything with the Court to indicate that they have rescinded this reaffirmation agreement nor have debtors or IMC discussed how or whether such reaffirmation could affect the outcome of this matter. *See* 11 U.S.C. §524(c).

> Secured creditors having duly perfected mortgage liens or security interest [sic] in collateral shall retain such mortgage lien or security interest until the amount of their allowed secured claims have been fully paid or until the Debtor [sic] has been discharged. Upon payment of the amount allowed by the Court as a secured claim in the Plan, the secured creditors included in the Plan shall be deemed to have their full claim satisfied and shall terminate any mortgage lien or security interest on the Debtor's [sic] property which was in existence at the time of the filing of the Plan, or the Court may order termination of such mortgage lien or security interest.

Paragraph 3(B) of debtors' plan set forth the following:

> Payments to secured creditors as shown below. Secured claims will be given priority as set forth over unsecured claims. Secured creditors shall be paid simple interest (direct reducing) on their allowed secured claims in the amount of 10% per annum. This interest shall be paid as a part of the payment shown as the monthly payment below.
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> 2. IMC Mortgage Company - IMC Mortgage Company shall receive $0.00 as a secured claim against the Debtors' principal residence. The mortgage lien in favor of Decision One Mortgage Company L.L.C. and assigned to IMC Mortgage Company was defectively executed and is not a valid and subsisting lien upon the principal residence of the Debtor [sic]. Such purported mortgage lien . . . shall be avoided and held for naught as a valid and subsisting lien against property owned by the Debtors . . . . Said creditor shall receive payment upon its claim in accordance with the provisions of this Plan affecting unsecured creditors and shall receive no further payments in consideration of its claims. Further, upon confirmation of this Plan, said creditor shall forthwith satisfy or release its mortgage interest appearing of record in Summit County, Ohio and acting as a purported encumbrance upon the Debtors' principal residence.

Paragraph 3(D) of debtors' plan set forth that "[u]nsecured debt shall be paid $.45 on the dollar and paid prorata with no interest if the creditor has no co-obligors provided that

where the amount or balance of any unsecured claim is less than $10.00 and may be paid in full." Debtors' estimate that it will take them 50 months to complete payments due under their plan.

7. The certificate of service attached to the plan indicates that a copy of the plan was sent by debtors' counsel to, *inter alia*, IMC at the Florida Address.

8. On or about October 10, 1999, IMC received the copy of debtors' chapter 13 plan but failed to make a notation of such receipt in its internal computer tracking system.

9. On October 13, 1999, the Court entered an "Order Converting Case Under Chapter 7 to Case Under Chapter 13" **[docket #13]**.

10. On October 20, 1999, a notice of the commencement of the chapter 13 case **[docket #15]** was sent by the Bankruptcy Clerk of Court's Office to, *inter alia*, IMC at the Florida Address. The front of that notice set forth February 16, 2000 as the deadline to file a proof of claim and December 2, 1999 as the date of the confirmation hearing. The front of that notice also set forth that objections to confirmation of debtors' chapter 13 plan should be filed and served 5 days prior to the confirmation hearing.

11. No objections to debtors' chapter 13 plan were filed and, pursuant to an Order entered on December 7, 1999 **[docket #20]**, debtors' chapter 13 plan was confirmed. A copy of that Order was sent by the chapter 13 trustee's office to, *inter alia*, IMC at the Florida Address **[docket #21]**.

12. On January 19, 2000, IMC filed a proof of claim in this case indicating that it held a $83,347.75 claim that was secured by debtors' principal residence and that was entitled to bear interest at a rate of 8.85% per annum **[proof of claim #9]**. Through that proof of claim IMC also indicated that the name and address where notices should be sent was Keith D. Weiner & Associates, 75 Public Square, Suite 600, Cleveland, Ohio 44113.

13. On January 31, 2000, the chapter 13 trustee filed a "Motion Stipulating Treatment of Claim" **[docket #25]** as is his practice when the treatment of a claim through a confirmed chapter 13 plan differs from the characterization of that same claim in a filed proof of claim. Through that motion and a corresponding interim order **[docket #26]**, it was indicated that, unless a party in interest filed a request for a hearing on the matter, IMC would be paid only as the holder of a $83,347.77 unsecured claim. A copy of the motion and interim order were sent by the chapter 13 trustee's office to, *inter alia*, IMC, c/o Keith D. Weiner & Associates, 75 Public Square, Suite 600, Cleveland, Ohio 44113.

14. IMC did not file a request for a hearing on the trustee's "Motion Stipulating Treatment of Claim" and the interim order granting the trustee's motion became final on February 17, 2000.

15. On May 30, 2000, IMC, through Keith D. Weiner & Associates as counsel, filed a "Motion of CitiFinancial Mortgage Company FKA IMC Mortgage Company to Vacate Order Confirming Plan Pursuant to Bankruptcy Rule 9024, Civ. R. 60(b)(4) and 11 U.S.C. §105(a)" **[docket #31]**.

16. On June 2, 2000, debtors filed a "Reply of Debtors John and Cindy Ostlund to Motion of City Financial [sic] to Vacate Order Confirming Plan" **[docket #32]**.

17. On June 8, 2000, IMC filed a "Reply to Debtors' Brief in Opposition to Motion of CityFinancial [sic] to Vacate Order Confirming Plan" **[docket #34]**.

18. On August 14, 2000, IMC filed a "Supplemental Pleading to CitiFinancial Mortgage Company's Motion to Vacate Order Confirming Plan" **[docket #39]**.

19. On August 23, 2000, debtors filed the "Reply of Debtors John and Cindy Ostlund to Supplemental Motion of City Financial [sic] Mortgage Company to Vacate Order Confirming Plan" **[docket #40]**.

DISCUSSION

The debtors' decision to convert their case to one under chapter 13 apparently was the result of the focus of their chapter 7 trustee on the potential avoidability of the mortgage held by IMC under Ohio law. In a nutshell, the failure of a mortgagee to have the mortgagor's execution of a mortgage witnessed by two individuals has been found to violate the requirements of Ohio law governing the recording of mortgages. *See* Ohio Revised Code §5301.01 and §5301.25(A) (Banks-Baldwin 1999). *See also Citizens National Bank in Zanesville v. Denison*, 133 N.E.2d 329, 165 Ohio St. 89 (Ohio 1956) (holding that a defectively executed mortgage was not constructive notice of the mortgage even though it had been recorded). In such circumstances, chapter 7 trustees may avoid such mortgages under §544 of the Bankruptcy Code and seek to realize the equity value for the benefit of holders of allowed, unsecured claims. *See, e.g., Simon v. Zaptocky (In re Zaptocky)*, 231 B.R. 260 (Bankr. N.D. Ohio 1998) *aff'd*, 232 B.R. 76 (B.A.P. 6th Cir. 1999).

Typically such avoidance occurs in the context of an adversary proceeding. *See* Fed. R. Bankr. P. 7001(2), (9). In the present case, after converting to a chapter 13, debtors' counsel chose a procedurally questionable shortcut of including a plan provision that "cut to the chase" and the quick of IMC's secured claim. This Court has expressed its view on the procedurally more appropriate manner to alert parties in interest when their rights are being affected by plan provisions. *See In re Fiorilli*, 196 B.R. 83 (Bankr. N.D.

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[2] In *In re Fiorilli*, debtor contended that a secured creditor's objection to confirmation of her chapter 13 plan based upon the valuation of its claim was untimely where the plan set forth that its filing constituted the filing of a motion to determine the secured status of each creditor and that secured creditors had only 25 days from the filing of the plan to object to the valuation of their claim. In rejecting debtor's contention, this Court noted that if creditor's failure to object pursuant to a provision in a proposed plan were allowed to dictate the value of the creditor's claim, other specific provisions of the

Ohio 1996).[2] However, on the facts of this case and the arguments of IMC, the question

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Bankruptcy Code (e.g., §502(a) and §506) would be rendered inoperative. *In re Fiorilli*, 196 B.R. 83, 85 (Bankr. N.D. Ohio 1996). This Court further noted that, because the plan at issue had not yet been confirmed, the valuation provision in the plan could not, by itself, bind the objecting creditor. *Id*. at 85-86. "Once a plan is confirmed, . . . the parties' rights generally become fixed by the terms of the plan as finally confirmed . . . [but] . . . during the pre-confirmation period the parties should be given every allowable opportunity under the Code to determine their rights." *Id.* at 85 (citations omitted).

Other courts have also examined the effect of including provisions in chapter 13 plans that alter substantive rights of creditors absent the filing of an adversary proceeding. For instance some courts have addressed the propriety of including a provision in a chapter 13 plan that the confirmation of the plan would constitute a finding of undue hardship and the student loans not paid during the life of the plan would be discharged. In *Anderson v. Higher Education Assistance Foundation*, 215 B.R. 792 (10th Cir. B.A.P. 1998), the Bankruptcy Appellate Panel, reversing the Bankruptcy Court, held that since the debtor's chapter 13 plan had been confirmed, and because there had been notice and an opportunity to be heard, the order of confirmation was *res judicata* on the issue of the discharge of the student loan obligations. The court pointed out that the plan contained an explicit provision stating that the confirmation of the plan would constitute a finding that payment of unpaid student loans would be an undue hardship of the debtor. The Court emphasized the facts that the debtor had completed payment of her confirmed plan and that a discharge had been entered before the creditor filed its untimely objection to the treatment of its claim in the plan. The court stressed that there could have been a different result had the creditor timely objected.

Another line of cases distinguishes *Anderson.* For instance, in *In re Hensley*, 249 B.R. 318 (Banrk. W.D. Okla. 2000), the court used strong language to warn and reprimand attorneys who file chapter 13 plans with provisions such as that in *Anderson*. "The Court does not believe that a fair reading of the opinion of the Tenth Circuit in *Anderson* can reasonably lead one to conclude that the Tenth Circuit intended to encourage the practice of intentionally inserting unlawful plan provisions in the hope that confirmation of the plan will occur and the time for appeal will pass before such provisions are noticed so that debtors and their counsel can then claim *res judicata*. Such a skewed reading of *Anderson* fails to account for the ethical obligations owed by members of the bar to the Court and to each other." *Hensley*, 249 B.R. at 321. The court went on to explain that the 10th Circuit decision had to be read in the context of its particular facts and pointed out that in *Hensley* none of the debtors had completed their plan payments or received their discharges, thus distinguishing it from *Anderson*. The Court stated that it had been unaware of the provisions to discharge the student loan obligations through the chapter 13 plans, would not have confirmed them if it had known the provisions were included, and would have required that the "offending language be stricken from the plans." "The Court rejects the contention [by debtors and their counsel] that in *Anderson* the Tenth Circuit was inviting counsel to intentionally include language in chapter 13 plans seeking to discharge student loan indebtedness in the hope of catching student loan creditors unaware." *Id.* at 322.

that presents itself is whether a final confirmation order should be set aside because the affected creditor was not sufficiently alert.

A. The Rule 60(b) Motion

Although IMC received a copy of debtors' chapter 13 plan, it failed to log the receipt of that document in its internal computer tracking system. *See* Exhibit A [Affidavit of Janese Barbon], as attached to "Supplemental Pleading to CitiFinancial Mortgage Company's Motion to Vacate Order Confirming Plan" **[docket #39]**. IMC contends that, due to such failure, the bankruptcy specialist servicing debtors' file did not review the plan, did not know of debtors' proposed treatment of IMC's claim and did not take the necessary steps to object to such treatment. *See id.* IMC further contends that, because the failure to comply with company procedure was inadvertent and excusable, the order confirming debtors' chapter 13 plan should now be vacated to allow IMC to file an objection to that plan. *See id.*[3]

Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure, states in relevant part, the following:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable

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[3] In its original motion to vacate, IMC contended that it never received a copy of debtors' proposed chapter 13 plan and that, accordingly, it could not be bound by the Order confirming the plan on due process grounds. *See* Exhibit A [Affidavit of Janese Barbon], as attached to "Motion of Citifinancial Mortgage Company fka IMC Mortgage Company to Vacate Order Confirming Plan Pursuant to Bankruptcy Rule 9024, Civ. R. 60(b) and 11 U.S.C. §105(a)" **[docket #31]**. Through its later pleadings, IMC acknowledged that it actually had received debtors' proposed chapter 13 plan. *See* Exhibit A [Affidavit of Janese Barbon], as attached to "Supplemental Pleading to CitiFinancial Mortgage Company's Motion to Vacate Order Confirming Plan" **[docket #39]**.

> neglect . . . . The motion shall be made within a reasonable time, and for reasons (1) . . . not more than one year after the judgment order, or proceeding was entered or taken.

Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b).

Excusable Neglect: Through its pleadings, IMC primarily focuses on the fact that its failure to comply with one of its standard operating procedures (that dealing with logging receipt of chapter 13 plans) was unthinking:

> The reason for the delay was that there was no notation in Movant's computer system showing that the plan was indeed received. Movant has thousands of files to service. Movant's employees who service these files, especially the files that contain non-performing loans, rely heavily on the computer system. It would be burdensome and inefficient to have the files scattered throughout Movant's offices, in the possession of the respective specialist handling the file. The computer system essentially puts the files in the hands of the specialists without them actually having a hard copy in their possession.
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> The system, however, is only as good as the data entry personnel. All correspondence received by Movant is supposed to be put into the computer system. This enables the respective specialists to review the file without actually having the hard copy. If receipt of a document is not noted in the computer system, short of reviewing the hard copy of the file to determine whether the document was received without being entered into the computer system, as happened here, the specialist will not be aware that the document was actually received. If the specialist is not aware that the document was received, (s)he cannot take the appropriate steps to service the file.
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> That is what happened in the instant case. The Plan was received, however, no notation was made that it was received. Without the notation, the specialist that handles the file did not know that it was actually received. If the Plan was properly noted in the computer system, the specialist would have retrieved a hard copy of that plan and reviewed it to determine whether Movant was adequately protected. In the instant case, Movant was not adequately protected and the Plan would have been forwarded to counsel to file a timely objection. This, of course, was not done. But for Movant's failure to have the receipt of the Plan properly noted in the computer system, Movant would have filed a timely objection.

> Movant's failure to properly note the receipt of the plan is excusable and inadvertent.

See "Supplemental Pleading to CitiFinancial Mortgage Company's Motion to Vacate Order Confirming Plan" at unnumbered pages 4-5 **[docket #39]** (citations omitted). IMC asks this Court to determine that one error of a data entry clerk is the source of all of the problems in this matter. In that vein, IMC contends that it was unaware that debtors' plan had been confirmed until it received a letter from debtors' attorney requesting that it release or satisfy the mortgage. *See* "Motion of Citifinancial Mortgage Company fka IMC Mortgage Company to Vacate Order Confirming Plan . . ." at unnumbered page 2 **[docket #31]**. That letter, which was attached to IMC's motion as Exhibit B, was dated December 13, 1999. *See id.* at Exhibit B.

Even if this Court were to assume that all of the foregoing is true, IMC's explanation does not establish "excusable neglect" in that it fails to explain how or why its initial, internal error was never discovered notwithstanding the numerous other notices and pleadings regarding this bankruptcy case that IMC plainly received and to which it responded. Further, IMC asks for a finding that the initial error was excusable without any explanation of why the unidentified data entry clerk did not function in the purportedly assigned manner.

It is undisputed that IMC filed a timely proof of claim. The notice of the proof of claim filing deadline was set forth in the notice of the commencement of the chapter 13 case that was sent by the Bankruptcy Clerk of Court's Office and received by IMC at the Florida Address. In addition to setting forth the claims bar date, that notice also set forth December 2, 1999 as the date for the confirmation hearing on debtors' chapter 13 plan and provided that any objections to confirmation must be filed and served 5 days prior to the confirmation hearing. If IMC was able to internally note and comply with the claims

bar deadline, why was it unable to note the December 2, 1999 confirmation hearing date and, upon approach of that date and the corresponding objection deadline, realize that its logging system did not show receipt of a chapter 13 plan? A simple call to debtors' counsel or review of the Court's docket which could then be accessed remotely through the Voice Case Information System[4] would have revealed that a copy of debtors' plan was, in fact, sent to IMC at the Florida address.

It is also undisputed that IMC, through counsel, received a copy of the chapter 13 trustee's "Motion Stipulating Treatment of Claim" which was filed more than one and one-half months after IMC acknowledges that it first became aware of the confirmation of debtors' chapter 13 plan through receipt of a letter from debtors' attorney. That motion clearly set forth that, unless a party in interest requested a hearing on the matter, IMC would be paid only as the holder of a $83,347.77 unsecured claim pursuant to the terms of debtors' confirmed chapter 13 plan. If IMC had enough organized information on this bankruptcy case to file a reaffirmation agreement while it was a chapter 7 proceeding and then file a timely proof of claim when it was converted to a chapter 13, why didn't it have enough organized information to catch its internal error upon receipt of a letter from debtors' counsel and then the trustee's motion, both of which referenced a confirmed chapter 13 plan? Again, a simple call to debtors' counsel would have revealed that a copy of debtors' plan was, in fact, sent to IMC at the Florida address.

Taken in isolation, IMC's failure to log its receipt of debtors' chapter 13 plan into its internal computer tracking system may be the result of negligence which might, if

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[4] The Voice Case Information System ("VCIS") provides general access to the information and records on bankruptcy cases. Public case information may be obtained without charge through VCIS ((800) 898-6899) using a touch tone telephone.

delineated, have been found to be excusable. However, when viewed in light of what actually transpired in this case, IMC's failure to discover its internal error and to appraise itself of the status of debtors' chapter 13 plan is the result of more than just negligence and, therefore, fails to constitute "excusable neglect" for purposes for Rule 60(b)(1).

Reasonable Time: Even if IMC had demonstrated "excusable neglect," to prevail on a Rule 60(b)(1) motion it must also demonstrate that its motion was brought within a "reasonable time." "[T]he one-year period represents an extreme limit, and the motion will be rejected as untimely if not made within a 'reasonable time,' even though the one-year period has not expired." *Kagan v. Caterpillar Tractor Co.,* 795 F.2d 601, 610 (7th Cir. 1986), *citing* Wright & Miller, Federal Practice and Procedure, Civil §2866, p. 232. What constitutes "reasonable time" depends upon the facts of each case, taking into consideration issues such as the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. *Kagan v. Caterpillar Tractor Co.,* 795 F.2d 601, 610 (7th Cir. 1986), *citing Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981).

Through its pleadings, IMC offers a skeletal explanation as to why it failed to timely object to confirmation of debtors' chapter 13 plan. IMC does not, however, offer any explanation as to why it failed to bring its Rule 60(b)(1) motion until more than 5 months after it received the December 13, 1999 letter from debtors' counsel and learned that the plan had been confirmed. Moreover, IMC does not offer any explanation as to why it failed to request a hearing on the chapter 13 trustee's "Motion Stipulating Treatment of Claim."

Within the context of a chapter 13 bankruptcy proceeding, consideration of a Rule 60(b)(1) motion is tempered by the need for finality of confirmed plans. Section 1325 of

the Bankruptcy Code provides 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 that plan." 11 U.S.C. §1325(a). Section 1330 of the Bankruptcy Code provides that "the court may revoke such [confirmation] order if such order was procured by fraud." 11 U.S.C. §1330(a).[5]

IMC has not contended that the confirmation of debtors' chapter 13 plan was procured by fraud but merely that IMC was not accorded an opportunity to object to confirmation of that plan because of an internal tracking error. Such a reason is not, however, sufficient to override the strong need for finality of confirmed plans in bankruptcy.

> [T]he purpose of bankruptcy law and the provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute; that if courts should relax provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated; that creditors would not participate in reorganization if they could not feel that the plan was final, and that it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

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[5] Many courts have determined that §1330 and a finding of fraud is the only permitted ground for obtaining relief from an order confirming a chapter 13 plan. *See Branchburg Plaza Associates, L.P. v. Fesq (In re Fesq)*, 153 F.3d 113, 119 (3rd Cir. 1998) (and cases cited therein). The Sixth Circuit Court of Appeals has not passed upon whether any other avenue exists for undoing a confirmed chapter 13 plan but this Court need not decide the issue in the instant case as IMC has not demonstrated that it is entitled to relief under Rule 60(b).

[6] Although *Duryee v. Erie R.R. Co.* dealt with the confirmation of a plan of reorganization in a chapter 11 case, the import of the cited text is equally applicable to the confirmation of a plan under chapter 13.

Duryee v. Erie R.R. Co., 175 F.2d 58, 61, 63 (6th Cir. 1949).[6] *See also In re Szostek*, 886 F.2d 1405 (3rd Cir. 1989) (citing to *Duryee v. Erie R.R. Co.* and holding that, once confirmed, the policy favoring finality of the confirmation is stronger than the obligations to verify that a debtor's chapter 13 plan is in compliance with the Bankruptcy Code). *See also In re Brenner*, 189 B.R. 121 (Bankr. N.D. Ohio 1995) (holding that the propriety of a chapter 13 plan should be addressed before confirmation and, if necessary, pursued on direct appeal because once confirmed, a creditor is precluded from seeking court review of a plan based upon an objection on the merits of the plan).

If IMC were permitted to lodge an objection to debtors' chapter 13 plan at this late date, other parties in interest could be prejudiced. In their schedules, debtors list 28 unsecured creditors and through their confirmed chapter 13 plan, debtors are obligated to pay a 45% dividend to creditors (including IMC) holding allowed, unsecured claims. If IMC were instead treated as the holder of an allowed, secured claim, the percentage distribution to unsecured creditors would be far less than 45%. It is a very real possibility that the prospect of receiving almost half the amount due them by debtors precluded unsecured creditors from objecting to the confirmation of the chapter 13 plan. To undue that expectation at this late date could prejudice the rights of those unsecured claimants.[7]

B. Meritorious Defense

IMC also contends that it has a meritorious defense to debtors' claim that their

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[6] Although *Duryee v. Erie R.R. Co.* dealt with the confirmation of a plan of reorganization in a chapter 11 case, the import of the cited text is equally applicable to the confirmation of a plan under chapter 13.

[7] Despite IMC's argument that other parties in interest would not be prejudiced if the Court granted its motion to vacate, the Court notes that IMC served its original motion to vacate and supplemental pleadings only on debtors, debtors' counsel, the chapter 13 trustee and the United States trustee.

mortgage was defectively executed. Such contention, however, is premised upon IMC's mistaken assumption that recently enacted Ohio Revised Code §5301.234 applies to bankruptcy cases filed after that statute's enactment.

> O.R.C. §5301.234 became effective on June 30, 1999. Debtors did not convert their bankruptcy from Chapter 7 to Chapter 13 until October 7, 1999. Consequently, since O.R.C. §5301.234 became effective prior to the Court issuing its order confirming the Debtors' Chapter 13 Plan, it must be applied to the instant case. It is a well-settled rule that a court must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

See "Supplemental Pleading to CitiFinancial Mortgage Company's Motion to Vacate Order Confirming Plan" at unnumbered page 6 **[docket #39]** (citations omitted).

Ohio Revised Code §5301.234, which became effective on June 30, 1999, provides for an irrebuttable presumption that, under certain circumstances, a mortgage has

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[8] Ohio Revised Code §5301.234 sets forth the following:

> (A) Any recorded mortgage is irrebuttably presumed to be properly executed, regardless of any actual or alleged defect in the witnessing or acknowledgment on the mortgage, unless on the following applies:
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> (1) The mortgagor, under oath, denies signing the mortgage.
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> (2) The mortgagor is not available, but there is other sworn evidence of a fraud upon the mortgagor.
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> (B) Evidence of actual or alleged defect in the witnessing or acknowledgment on the mortgage is not evidence of fraud upon the mortgagor and does not rebut the presumption that a recorded mortgage is properly executed.
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> (C) The recording of a mortgage is constructive notice of the mortgage to all persons, including without limitation, a subsequent bona fide purchaser or any other subsequent holding of an interest in the property. An actual or alleged defect in the witnessing or acknowledgment or the recorded mortgage does not render the mortgage ineffective for purposes of constructive notice.

been properly executed.[8] However, because that statutory provision does not include any direct statement that it applies retroactively, it has been held that O.R.C. §5301.234 must be applied prospectively only so that it does not effect mortgages executed prior to the statute's effective date. *See, e.g., Simon v. Chase Manhattan Bank (In re Zaptocky)*, 232 B.R. 76, 82 at note 2 (B.A.P. 6th Cir. 1999). *See also Helbling v. Ducksworth (In re Ducksworth)*, 1999 WL 970273 (Bankr. N.D. Ohio 1999). Because IMC has not set forth any legal authority or argument to refute the cases holding that O.R.C. §5301.234 should be applied prospectively and because the mortgage at issue in the instant case was executed on May 11, 1998, the irrebuttable presumption provided for in O.R.C. §5301.234 would not have been available to IMC in this case.

C. The Effect of Debtors' Confirmed Chapter 13 Plan on IMC's Mortgage

In their plan, debtors set forth that "*upon confirmation* . . . [IMC] shall forthwith

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[8] Ohio Revised Code §5301.234 sets forth the following:

(A) Any recorded mortgage is irrebuttably presumed to be properly executed, regardless of any actual or alleged defect in the witnessing or acknowledgment on the mortgage, unless on the following applies:

(1) The mortgagor, under oath, denies signing the mortgage.

(2) The mortgagor is not available, but there is other sworn evidence of a fraud upon the mortgagor.

(B) Evidence of actual or alleged defect in the witnessing or acknowledgment on the mortgage is not evidence of fraud upon the mortgagor and does not rebut the presumption that a recorded mortgage is properly executed.

(C) The recording of a mortgage is constructive notice of the mortgage to all persons, including without limitation, a subsequent bona fide purchaser or any other subsequent holding of an interest in the property. An actual or alleged defect in the witnessing or acknowledgment or the recorded mortgage does not render the mortgage ineffective for purposes of constructive notice.

satisfy or release its mortgage interest appearing of record in Summit County, Ohio and acting as a purported encumbrance upon the Debtors' principal residence." *See* Debtor's Chapter 13 Plan at Paragraph 3(B) **[docket #10]** (emphasis added). Pursuant to that provision, debtors' counsel sent IMC a letter on December 13, 1999 requesting that it immediately cause its mortgage lien to be satisfied or released. *See* "Motion of Citifinancial Mortgage Company fka IMC Mortgage Company to Vacate Order Confirming Plan . . ." at Exhibit B **[docket #31]**. Notwithstanding the confirmation of debtors' plan, Paragraph 3(B) cannot, standing alone and without the full performance of debtors' obligations under their plan, act to invalidate IMC's mortgage.

Debtors ability to avoid IMC's mortgage arises only within the context of their bankruptcy filing and is a right derived from trustee avoiding powers under the Bankruptcy Code. *See* 11 U.S.C. §544 - §550. Because IMC has not argued otherwise, whether debtors have standing to exercise trustee avoidance powers in their chapter 13 case is not at issue and need not be addressed further. *See Realty Portfolio, Inc. v. Hamilton (In re Hamilton)*, 125 F.3d 292, 296 (5th Cir. 1997) (discussing cases holding opposite views of whether chapter 13 debtors may exercise a trustee's strong-arm avoidance powers and setting forth citations of same). These chapter 13 debtors cannot, however, be permitted to take personal advantage of a trustee's avoidance powers by merely inserting language in their plan that "upon confirmation," that avoidance is to be given full effect.

In bankruptcy proceedings, trustees are given the power to avoid certain liens to create value for the benefit of creditors holding allowed, unsecured claims. In this case, debtors' avoidance of IMC's mortgage is being done for the same purpose, that is to enable creditors holding allowed, unsecured claims to receive a 45% dividend. However,

because debtors estimate that it will take 50 months to make all payments due under their chapter 13 plan, creditors holding allowed, unsecured claims will not immediately realize on the benefit created by avoiding IMC's mortgage. If, for instance, IMC were required to release its mortgage lien before it and all other creditors holding allowed, unsecured claims received a 45% dividend and if this chapter 13 cases were dismissed, the only party that would have

benefitted from the Bankruptcy Code's avoidance provisions are the debtors. *See* 11 U.S.C. §349 and §1307(b).

CONCLUSION

Based upon the foregoing, the Court finds that IMC's motion to vacate debtors' confirmed chapter 13 plan is not well taken. Accordingly, that motion is hereby denied. The Court further finds that the portion of Paragraph 3(B) of debtors' plan requiring the release of IMC's mortgage cannot be given full effect until debtors have made all payments due under their chapter 13 plan.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 1/30/01