Unsecured Creditors Obtain a Victory with the Eleventh Circuit's *Tennyson* Decision

By Camille J. Iurillo and Sabrina C. Beavens

Generally speaking, a Chapter 13 bankruptcy is reorganization for individuals or small proprietary business owners (not corporations or partnerships) who meet certain income and debt criteria. It allows a reduction of unsecured debt through a payment plan while retaining certain assets which may otherwise be liquidated by a Chapter 7 trustee. In addition, Chapter 13 is an attractive choice for debtors who have fallen into arrears on their mortgages, real estate taxes or car loans as it allows debtors to force a repayment plan on creditors to repay those arrearages over time. Income tax debt may also be repaid similarly. Debtors propose a repayment plan which typically allows for payment of on-going secured debt obligations such as a mortgage or car loan, payments to bring arrearages current and payments to unsecured creditors of an amount equal to the debtor's "disposable income".

One of the most common questions we are asked by our clients is "How long must I stay in Chapter 13?" For most people, the answer is straightforward – the "applicable commitment period" is 3 to 5 years depending on the debtor's income. However, what happens when a debtor does not have "disposable income" to pay unsecured creditors but falls into the 5 year commitment period? Can a plan with a shorter commitment period be confirmed because the debtor does not have disposable income to pay unsecured creditors? This issue was recently resolved by the 11th Circuit Court of Appeals in *In re Tennyson*, No. 09-14628, 2010 WL 2793941 (11th Cir. July 16, 2010).

Mr. Tennyson was an "above median" debtor under 11 U.S.C. § 1325(b)(4)(A)(ii)(I) meaning his income was greater than the median income for his state. He was required to calculate his "disposable income" pursuant to 11 U.S.C. § 1326(b)(3)(A) using a predetermined set of expenses found in 11 U.S.C. § 707(b)(2)(A) and (B). Mr. Tennyson's "disposable income" was negative $349.30 and he proposed a repayment plan of 3 years which did not repay his unsecured creditors in full. *Id.* at *1. The Chapter 13 trustee objected, arguing that "above median" debtors like Mr. Tennyson had to propose a 5 year repayment plan, unless unsecured creditors were paid in full.

The term "applicable commitment period" was added with the 2005 amendments to the Bankruptcy Code, specifically § 1325. It is defined in § 1325(b)(4) in pertinent part as follows:

(4) For purposes of this subsection, the "applicable commitment period" –

(A) subject to subparagraph (B), shall be –

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less then –

(I) the case of a debtor in a house of 1 person, the median family income of the applicable State for 1 earner;

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(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

As to Mr. Tennyson, the Chapter 13 trustee argued that because he was an above median debtor, the "applicable commitment period" was 5 years, without regard to whether he had disposable income, unless he paid his unsecured creditors in full. *Id.* at *2.

In contrast, the bankruptcy court expanded the analysis of the issue and considered the use of the term "applicable commitment period" under § 1325(b)(1) which provides that

(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…

(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 applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Analyzing this provision, the bankruptcy court adopted the "monetary view" and held that the statute only requires a debtor to use the applicable commitment period as a multiplier for disposable monthly income to calculate the minimum amount due to unsecured creditors. When the disposable income is zero (or negative), the projected disposable income is also zero. Accordingly, the length of the plan or "applicable commitment period" is inconsequential. *Id.* at *2.

The opposing majority view, adopted by the 11th Circuit, takes a "temporal view" of the term "applicable commitment period" and concludes that the "applicable commitment period" is a fixed number of years, not a multiplier of months. Rejecting Mr. Tennyson's argument, the Court stated "[I]f we were to interpret 'applicable commitment period' as Tennyson advocates, as a multiplier that exists only for § 1325(b)(1), then § 1325(b)(4)(B) would be rendered meaningless and superfluous…We find that the plain reading of § 1325(b)(4) defines 'applicable commitment period' as a temporal requirement independent of the § 1325(b)(1)(B) calculation." *Id.* at *4.

Initially, one may ask "If a debtor does not have disposable income from which to pay unsecured creditors, why does it matter whether the plan is 3 years or 5 years?" The problem is that after a plan has been confirmed and the debtor has made all of his/her required payments, the debtor receives a discharge and the unsecured creditors can no longer ask the Court to modify the plan to require payments to unsecured creditors based on an increase in the debtor's income under § 1329. If a plan continues for an additional period of time, the unsecured creditors' ability to exercise their rights under 11 U.S.C. § 1329 would also continue.

Thus, unsecured creditors received a "victory" with the *Tennyson* decision. Whether in practice it results in a measurable benefit to unsecured creditors in most cases is unlikely, however the diligent unsecured creditor may find the ability to modify a plan in later years valuable in certain cases.

Iurillo & Associates, P.A., located in downtown St. Petersburg, is comprised of **Camille J. Iurillo**, Shareholder, **Gina M. Pellegrino**, Associate and **Sabrina C. Beavens**, Associate. The primary areas of practice of **Iurillo & Associates, P.A.** are Commercial and Bankruptcy Litigation, Debtors' and Creditors' Rights, and Foreclosures/Workouts.