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Tuesday, August 29, 2000

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

FRANK E. PAGANO,

No. 98-11035

[Debtor](#)(s).

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### **Memorandum re [Claim](#) of UEF**

Debtor Frank Pagano filed his [Chapter 13](#) petition on March 25, 1998. His Chapter 13 [plan](#), calling for relatively nominal payment to unsecured creditors, was confirmed without objection on July 1, 1998. Claimant State of California Uninsured Employers Fund ("UEF") was properly noticed but did not object to [confirmation](#). After confirmation, the UEF obtained relief from the [automatic stay](#) to pursue its claim against Pagano resulting from the death of an employee. On January 27, 2000, the California Workers Compensation Appeals Board affirmed an award against Pagano in the amount of \$157,910.00. The precise issue now before the court (and the only issue addressed by the parties) is whether the UEF is entitled to [priority](#) status for this amount. The real issue, lurking in the background, is the effect allowance has on the confirmed plan. The UEF's position is that its claim is treated as a tax under bankruptcy law. As such, it is entitled to priority under § 507(a)(8) of the [Bankruptcy Code](#). The court is resistant to this conclusion for three reasons. First, priority taxes are exempt from [discharge](#) and, as such, should be narrowly construed. *In re Riso*, 978 F.2d 1151, 1154 (9th Cir.1992). Second, allowance of the claim at this late date is

entirely inconsistent with the confirmed plan. Third, Pagano's [schedules](#)<sup>i</sup> reflect a very modest income and complete inability to pay even a fraction of the award. Nonetheless, it appears that Pagano's objection to priority status cannot be sustained. In *In re Camilli*, 94 F.3d 1330 (9<sup>th</sup> Cir. 1996), the court held that an award in favor of a state compensation fund arising out of a failure to have workers compensation insurance is a nondischargeable tax. The court finds no merit in Pagano's attempt to distinguish that case from this one. Accordingly, Pagano's objection must be overruled. However, *Camilli* was a [Chapter 7](#)<sup>i</sup> case. The ramifications are very different in a Chapter 13 case with a confirmed plan. This is the real issue here. In a Chapter 7 case, priority taxes are made nondischargeable by § 523(a)(1). In Chapter 13 cases, exceptions to dischargeability are listed in § 1328(a) and *do not include priority taxes*. This is because § 1322(a)(2) requires plans to provide for the payment in full of priority taxes. This statutory scheme makes it clear that when a Chapter 13 plan does not provide for full payment of priority taxes, the issue is to be raised by objection to the plan *before* the plan is confirmed. The order confirming the plan is a judgment, with *res judicata* effect even if it contains improper provisions. *In re Pardee*, 193 F.3d 1083, 1086 (9<sup>th</sup> Cir.1999). There is no provision in the Bankruptcy Code for the setting aside of confirmed plans, except pursuant to § 1330 on grounds not applicable here.<sup>(1)</sup> The court notes some cases which, on equitable grounds, have dismissed cases when undisclosed or unanticipated priority claims have come to light. However, in this case the amount of the award was known prepetition and the UEF was given proper notice of the Chapter 13 filing. Its failure to object to confirmation leaves it with a valid priority claim, but the claim will be discharged upon completion of the plan. The only issue properly before the court is Pagano's objection to the UEF claim. As noted above, that objection must be overruled. However, unless this court orders otherwise pursuant to a proper motion or [adversary proceeding](#)<sup>i</sup>,<sup>(2)</sup> this case will not be dismissed and the unpaid portion of the UEF claim will not survive Pagano's discharge. Counsel for the UEF shall submit an appropriate form of order, which counsel for Pagano has approved as conforming to this decision.

Dated: August 29, 2000

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Alan Jaroslovsky

U.S. [Bankruptcy Judge](#)<sup>i</sup>

1. The UEF attempted to circumvent this conundrum by seeking an order amending Pagano's plan to increase the payments to over \$4,000.00 per month. The court denied this motion, as the UEF failed to demonstrate that Pagano would be able to make the payments. 11 U.S.C. § 1325(a)(6). Pagano's income is less than \$2,000.00 per month. His disposable income is a small fraction of that.
2. Disputes over dischargeability must be resolved by adversary proceeding pursuant to FRBP 7001(6). A request to revoke confirmation of a Chapter 13 plan requires an adversary proceeding pursuant to FRBP 70

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