THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: January 18, 2019

G. Michael Halfenger
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Gary E. Huenerberg and Jody M. Huenerberg,	Case No. 17-28645-gmh Chapter 13
Debtors.	

DECISION AND ORDER SUSTAINING THE UNITED STATES' OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN

The United States' Internal Revenue Service (IRS) objects to confirmation of the debtors' amended plan. It argues that its appeal of an order disallowing in part the priority status of its claim divests this court of jurisdiction to confirm the plan and that the amended plan mischaracterizes the court's decision adjudicating its claim.

I

Some background is necessary to put the IRS's objection to confirmation in context. The debtors' original chapter 13 plan—filed with their bankruptcy petition on August 31, 2017—provided for an IRS claim entitled to priority in the estimated amount

of $4,000. ECF No. 2, §5(B). On September 7, the IRS filed proof of its claim in the amount of $6,502.96, stating that $5,988.34 is entitled to priority under 11 U.S.C. §507(a)(8), which gives priority to claims based on certain taxes and penalties owed to governmental units. See Claim No. 1, at 2–3. Chapter 13 plans must pay all such priority claims in full, unless the claim holder agrees to a different treatment. 11 U.S.C. §1322(a)(2).

The debtors disputed the extent to which the IRS's claim is entitled to priority under §507(a)(8). They asserted that part of the claim is not entitled to priority because it is based on the debtors' failure to pay the so-called individual mandate under the Affordable Care Act (ACA). They made this assertion in two filings. First, they filed a plan amendment providing for payment of the IRS's claim as a priority claim "in the amount of $5,988 minus the ACA individual mandate penalty". ECF No. 30, at 2, §3(B). Second, they objected to the IRS's claim contending that $1,052.18 of the debt arose from their failure to pay the "penalty known as the individual mandate under the [ACA]", not an "excise tax", as the IRS asserted, or any other kind of tax or penalty covered by §507(a)(8). ECF No. 31, ¶3.

On September 28, 2018, the court, having considered the parties' briefs and arguments, sustained the debtors' objection to the IRS's claim, disallowed as a priority claim the portion of the claim attributable to the ACA individual mandate, and allowed that portion of the claim as a nonpriority unsecured claim only. ECF No. 44. The IRS appealed. The appeal is pending before the district court. *IRS v. Huenerberg (In re Huenerberg)*, No. 18-CV-1617 (E.D. Wis. filed Oct. 12, 2018).

On December 14, the debtors filed another plan amendment. That amendment again provides for full payment of the priority portion of the IRS's claim "minus the ACA individual mandate penalty", which the amendment states is "not a tax subject to priority treatment." ECF No. 52, at 2, §3(B). The amendment also provides as follows: "Debtors will pay the priority claim of the IRS in full as determined by the outcome of

the appeal. The plan shall be modified, if necessary, if the IRS prevails . . . ." *Id.* The debtors' counsel filed certificates of service indicating that notice of the amendment was served on the trustee and all creditors, and only the IRS objects to confirmation of the plan as amended.

II

The IRS's principal basis for objecting to plan confirmation is that its pending appeal divests this court of jurisdiction to confirm the plan. As the Supreme Court has explained, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the [appellate court] and divests the [trial] court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). The important limitation on this divestiture doctrine is that it "applies only to 'those aspects of the case involved in the appeal.'" *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) (quoting *Griggs*, 459 U.S. at 58). The question then is whether an order confirming the plan as amended would affect any aspects of the case involved in the IRS's appeal.

"Jurisdictional questions are pervasive in bankruptcy cases" in part "because . . . each bankruptcy proceeding contains many claims and problems, each of which may come to a final conclusion before the estate has been wrapped up." *Bulk Petroleum Corp. v. Ky. Dep't of Revenue (In re Bulk Petroleum Corp.)*, 796 F.3d 667, 670 (7th Cir. 2015) (quoting *In re Morse Elec. Co.*, 805 F.2d 262, 264 (7th Cir. 1986)). A final order adjudicating a dispute as to the priority of a claim or a portion thereof concludes a problem that must be addressed before the estate is "wrapped up." Plan confirmation is another such problem.

The IRS argues that confirming the plan will "interfere with" its pending appeal because "[a]n order confirming a Chapter 13 plan binds the debtor and each creditor." ECF No. 55, ¶10. But the binding effect of a confirmation order—or, more precisely, the binding effect of 11 U.S.C. §1327(a), which provides that "[t]he provisions of a

confirmed plan bind the debtor and each creditor"—only matters if confirming the plan would affect an aspect of the case involved in the appeal. The issue on appeal is whether the portion of the IRS's claim attributable to the ACA individual mandate is entitled to priority. And the plan as most recently amended provides for the possibility that the IRS may carry the day on appeal; it states that the debtors will pay the IRS's claim in full based on the outcome of the appeal and will modify the plan, if necessary, if the IRS prevails on appeal. If this were the extent of the amended plan's language with respect to the pending appeal, a confirmation order would not affect the appeal.

What concerns the IRS, however, is that the plan as amended also states that "the ACA individual mandate penalty . . . is not a tax subject to priority treatment" and that "[t]he $1,052.18 classified as an excise tax with interest, is the penalty, and is dischargeable." ECF No. 52, at 2, §3(B). This language, which seems wholly unnecessary, is problematic. As the IRS observes, this court's decision does not conclude that the individual mandate is in substance a penalty for purposes of §507(a)(8), though the ACA refers to the payment as a "penalty." 26 U.S.C. §5000A(b)(1) (imposing on taxpayers a "penalty" for failing to maintain minimum essential health benefits coverage). The decision instead reasons that the individual-mandate debt is not for an "excise tax" for purposes of §507(a)(8), regardless of whether it is in substance a tax rather than a penalty. Whether the mandate is a penalty or a tax for purposes of §507(a)(8) is thus an open issue on appeal—and, consistent with the divestiture doctrine, this court cannot now revisit that issue.

To be sure, one might understand the amended plan's use of "ACA individual mandate penalty" as merely a means of identifying the portion of the debt at issue—again, the ACA itself calls the individual-mandate payment a "penalty." §5000A(b)(1). But one might also understand the amended plan to treat the individual-mandate payment as a penalty (rather than a tax) for purposes of §507(a)(8), which affords priority to debts for what are in substance excise taxes, rather than penalties.

§507(a)(8)(E). Perhaps the amended plan's statement that the nature of the IRS's claim—and the extent to which it is entitled to priority—will be determined on appeal is sufficient to deprive its unfortunate retention of earlier language referring to the individual mandate as a "penalty" of adjudicative force. But the principle underlying the divestiture doctrine cautions against confirming a plan that even potentially affects an issue over which a higher court is exercising appellate jurisdiction, especially given the fact that the debtors can simply amend the plan to provide that it will pay the IRS's claim to the extent that it is entitled to priority as finally determined on appeal.

III

For the reasons set forth above, IT IS ORDERED that the IRS's objection to confirmation of the plan as amended on December 14, 2018, is sustained without prejudice to the debtors' further amending the plan to provide for full payment of the IRS's claim to the extent it is entitled to priority under 11 U.S.C. §507(a)(8) as finally determined on appeal of this court's September 28, 2018 order.

IT IS FURTHER ORDERED that if the debtors file an amendment that addresses only payment of the IRS's claim in the full priority amount determined on appeal, they need only serve the amendment and notice of the time to object to it on the IRS and those parties who receive electronic notice.

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