

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 02-19446  
)  
SCOTT M. TAGLIARINI, ) Chapter 13  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**

The chapter 13 trustee moves to modify the debtor Scott Tagliarini’s confirmed chapter 13 plan over the debtor’s objection. (Docket 34, 37). For the reasons stated below, the trustee’s motion is denied.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

**FACTS**<sup>1</sup>

The courts in this district routinely confirm chapter 13 plans before the claims bar date has passed so that all parties concerned may have the benefit of early confirmation. In doing so, the debtors propose plans based on the assumption that all scheduled creditors will file claims in the full amount scheduled. The chapter 13 trustee, creditors, and the court evaluate the proposed plan using that same standard. That is what happened here. Based on the scheduled debts, the confirmed plan provides that the debtor will make bi-weekly payments of \$275.00 for

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<sup>1</sup> The undisputed facts are drawn from the parties’ briefs. See docket 34, 37, 40, 42, 43, 44. Neither party requested an evidentiary hearing.

approximately 52 months. Article 6 states that unsecured claim holders will be paid at least 60% of the amount of their allowed claims. The plan states further:

Pursuant to 11 U.S.C. § 1325(b), the Trustee would have objected to confirmation of a plan proposing dividends for unsecured creditors of less than 100% if the plan failed to provide that all projected disposable income would be committed to the Chapter 13 plan for the next three years. Therefore, the Trustee may file a motion to modify the plan to increase the dividend if a composite plan appears to require less than 36 months for completion, notwithstanding the [projected 52 month length of the plan].

(Docket 9).

After the claims bar date passed, the trustee found that the amount of the filed claims was less than the estimated claims, with the result that the confirmed plan will complete in only 30 months. The trustee then moved to modify the confirmed plan to provide for a 100% dividend to unsecured creditors; the plan payments would be the same amount and the modified plan is estimated to run 36 months. After the trustee filed his motion, the debtor sent the trustee sufficient funds to complete his original plan.

## **DISCUSSION**

### **Plan modification after confirmation**

Bankruptcy code § 1329 provides for the modification of a confirmed chapter 13 plan:

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, of the holder of any allowed unsecured claim, to—

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments; or
- (3) alter the amount of the distribution to a creditor whose claim is

provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

\* \* \*

11 U.S.C. §§ 1329(a) and (b).<sup>2</sup> The trustee has the burden of proof on his modification request. *See Max Recovery, Inc. v. Than (In re Than)*, 215 B.R. 430, 434 (B.A.P. 9th Cir. 1997); *In re Edwards*, 190 B.R. 91, 94 (Bankr. M.D. Tenn. 1995).

#### **The timing of trustee's motion**

A plan may be modified at the trustee's request "before the completion of payments under such plan[.]" 11 U.S.C. § 1329(a). The debtor argues that the trustee's motion does not meet this timing requirement because after the trustee filed his motion, the debtor sent in enough funds to complete the plan payments. He relies on case law which holds that modification is not available when a debtor has completed plan payments to the trustee. *See, for example, In re Sounakhene*, 249 B.R. 801, 803 (Bankr. S.D. Cal. 2000). The debtor's argument fails, however, because § 1329(a) is properly interpreted to require only that the trustee make the request before the payments are completed. *See Profit v. Savage (In re Profit)*, 283 B.R. 567, 573 (B.A.P. 9th Cir. 2002) ("The request for modification must be made 'any time after confirmation of the plan

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<sup>2</sup> There is also a time limit that is not at issue here. *See* 11 U.S.C. § 1329(c).

but before the completion of payments under such plan’.”). The trustee filed his motion before the debtor provided his final plan payments and it is, therefore, timely.

### **The proposed modification**

#### **11 U.S.C. § 1329**

“Modification of a plan is essentially a new confirmation.” *Ledford v. Brown (In re Brown)*, 219 B.R. 191, 194 (B.A.P. 6th Cir. 1998). The trustee proposes to increase the dividend to unsecured creditors from 60% to 100%, a type of modification permitted by § 1329. *See* 11 U.S.C. § 1329(a)(1) (providing for plan modification on the trustee’s motion to increase payments to a particular class of creditors provided for in the plan). The trustee, as the plan proponent, must satisfy the terms of § 1329(b)(1); that section in turn provides that §§ 1322(a), 1322(b), 1323(c), and 1325(a) apply to a modified plan. *See* 11 U.S.C. § 1329(b)(1). The trustee does not have to show an unanticipated or substantial change in a debtor’s circumstances to justify a modification. *See Barbosa v. Soloman*, 235 F.3d 31, 38 (1st Cir. 2000); *In re Brown*, 219 B.R. at 195. The court’s decision regarding plan modification is discretionary, however, and the court may consider the equities of the case. *In re Fields*, 269 B.R. 177, 180 (Bankr. S.D. Ohio 2001). Therefore, “as a practical matter, parties requesting modifications of Chapter 13 plans must advance a legitimate reason for doing so[.]” *Barbosa v. Soloman*, 235 F.3d at 41.

Courts frequently cite a change in a debtor’s financial circumstances as a factor to be considered in evaluating a modification request. *See In re Brown*, 219 at 195. The legislative history of § 1329 supports this practice:

Prior to 1984, . . . only a debtor was authorized to request a plan modification. The 1984 amendment, which allowed Chapter 13 trustees and unsecured creditors to request plan modifications, was

intended ‘to carry the ability-to-pay standard forward in time, allowing upward or downward adjustment of plan payments in response to changes in the debtor’s financial circumstances which affect his/her ability to make payments.’

*In re Fields*, 269 B.R. at 180 (quoting *Barbosa v. Solomon*, 235 F.3d 31, 40 (1st Cir. 2000))

(citation omitted). Here, because the creditors filed fewer claims than the debtor anticipated, the debtor will receive a discharge of the scheduled but unfiled debts without payment to those creditors, thus affecting the debtor’s financial condition. *See Fields*, 269 B.R. at 180. The reduced number of claims means that the plan will run for a shorter time than the 52 months projected at confirmation. This states a legitimate reason for the trustee’s request.

The remaining issue is whether the trustee’s modified plan complies with § 1329(b)(1), including the requirement that the modification satisfy the § 1325(a) feasibility requirements. The trustee asserts he met his burden by pointing to the debtor’s schedules and his history of making payments throughout the plan. The reasoning is that if the debtor made all payments to date, and with his expenses the same as those scheduled, he must be able to continue to make payments in the same amount. The debtor denies that the schedules and payment history are sufficient to satisfy the trustee’s burden, stating that his expenses have increased and his parents have been helping him meet his obligations. The court agrees with the debtor. When the debtor contested feasibility by identifying two changes in circumstances, the trustee could not rely on two-year-old schedules and a payment history to prove that the debtor is able to continue making payments and thus that the modified plan is feasible. The trustee did not, therefore, meet his burden of proof.

### **The applicability of 11 U.S.C. § 1325(b)**

The trustee requested modification based on the fact that the debtor's plan will complete in less than 36 months. The 36-month plan requirement is found in bankruptcy code

§ 1325(b)(1)(B):

(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.

11 U.S.C.A. § 1325(b)(1). Under this section, a plan cannot be confirmed over the trustee's objection unless it provides payment in full on unsecured claims or proposes to pay all the debtor's disposable income into the plan for a period of three years. The debtor argues that this section does not apply to post-confirmation plan modifications. The direct applicability of § 1325(b) need not be decided here, however, because § 1329(a) permits the modification requested by the trustee without the need to incorporate § 1325(b) directly. *See Fields*, 269 B.R. at 180.<sup>3</sup>

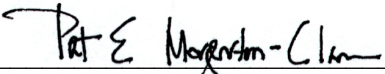
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<sup>3</sup> Similarly, the court does not need to decide whether the trustee's motion is defective because it does not include a proposed modified plan. *See* FED. R. BANKR. P. 3015(g); *In re Breeden*, 304 B.R. 318, 321 (Bankr. N.D. Ohio 2003).

**CONCLUSION**

The trustee did not meet his burden of proof on the motion to modify the debtor's confirmed plan. The motion to modify the debtor's confirmed plan is, therefore, denied. A separate order will be entered reflecting this decision.

Date: 4/1/05

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

THIS OPINION IS NOT INTENDED FOR PUBLICATION

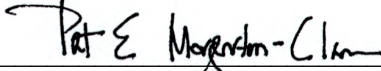
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SCOTT M. TAGLIARINI, ) Chapter 13  
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Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date,  
IT IS, THEREFORE, ORDERED that the chapter 13 trustee's motion to modify the  
debtor's confirmed plan is denied. (Docket 34).

Date: 4/1/05

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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