

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 05-23656  
 )  
FRANCES A. SMITH, ) Chapter 13  
 )  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
 )  
 )  
 ) **MEMORANDUM OF OPINION AND**  
 ) **ORDER** (NOT FOR COMMERCIAL  
 ) PUBLICATION)

The chapter 13 trustee moves to modify the debtor Frances Smith's confirmed plan over the debtor's objection. For the reasons stated below, the motion is conditionally granted.<sup>1</sup>

**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**

The debtor Frances Smith filed a chapter 13 petition on September 6, 2005.<sup>2</sup> The court confirmed her amended plan on February 7, 2006.<sup>3</sup> The plan provides that creditors holding

---

<sup>1</sup> This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

<sup>2</sup> Docket 1. The case was filed before October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. All citations are, therefore, to the bankruptcy code as it existed before that date.

<sup>3</sup> Docket 11, 30.

unsecured claims will receive 2% of the amount of their allowed claim.<sup>4</sup> To meet this obligation, the plan calls for the debtor to pay the trustee \$194.00 monthly, for an estimated 53 months.<sup>5</sup>

A chapter 13 unsecured creditor must file a proof of claim by the claims bar date as a prerequisite to receiving payment under the plan. To expedite the confirmation process, the court confirmed this plan before the claims bar date had passed. The proposed plan and the trustee's evaluation of it were based on the assumption that all scheduled creditors would file claims in the full amount scheduled. This is a routine practice for courts in this district because it facilitates early payment to creditors and debtors' counsel. In this case, however, not every unsecured creditor filed a claim, and as a result, at the current payment rate, the debtor will fulfill her obligations under the plan in approximately 14 months by paying only 2% to unsecured creditors.

In response to these events, the trustee filed a motion to modify the plan to increase the dividend to unsecured creditors to 100%, which will require a plan term of about 36 months.<sup>6</sup> The debtor objected, the trustee replied, and the parties filed briefs.<sup>7</sup>

## **DISCUSSION**

### **Plan modification after confirmation**

Bankruptcy code § 1329 provides that a confirmed chapter 13 plan may be modified in this manner:

(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, or the holder of an allowed unsecured claim, to—

---

<sup>4</sup> Docket 11, ¶ 6.

<sup>5</sup> Docket 11, ¶¶ 1, 8.

<sup>6</sup> Docket 37.

<sup>7</sup> Docket 39, 47, 76, 77.

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; [or]

(2) extend or reduce the time for such payments[.]

(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), (b).<sup>8</sup> Modification under § 1329 is discretionary and the court may consider the equities of the case. *Ledford v. Brown (In re Brown)*, 219 B.R. 191, 192 (B.A.P. 6th Cir. 1998); *In re Fields*, 269 B.R. 177, 180 (Bankr. S.D. Ohio 2001).

Of the sections cross-referenced in § 1329(b)(1), only § 1325(a) is relevant here. Section 1325(a) states: “(a) Except as provided in subsection (b), the court shall confirm a plan if—(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title; [and] . . . (6) the debtor will be able to make all payments under the plan and to comply with the plan . . . .” 11 U.S.C. § 1325(a)(1), (6). To a limited extent, the parties debate the application of § 1325(b) to the modification. In deciding the present dispute, however, the court does not find it necessary to determine if Congress intended § 1325(b) to apply to post-confirmation modifications. *See In re Fields*, 269 B.R. at 179.

### **Position of the parties**

The debtor argues that the trustee has the burden of proof on his motion and that the burden includes proving that the proposed modification is feasible—i.e., that the debtor will be

---

<sup>8</sup> There is also a time limit that is not at issue here. *See* 11 U.S.C. § 1329(c).

able to make the proposed payments. The crux of the debtor's argument is that the trustee cannot satisfy his burden by relying on the debtor's schedules filed in 2005 and the motion must, therefore, be denied. The trustee responds that he has no burden of proof unless the debtor alleges a change in circumstances that would affect ability to pay, which the debtor has not done. Both parties rely on this court's decision in *In re Tagliarini*, Case No. 02-19446 (Bankr. N.D. Ohio Apr. 1, 2005) (unpublished memorandum of opinion).<sup>9</sup>

### **Issues**

- (1) Who has the burden of proving the feasibility of the modified plan; and
- (2) If that burden is on the trustee, may the trustee satisfy the burden by relying on the debtor's most recent schedules.

### **The burden of production**

"Modification of a plan is essentially a new confirmation. It must be consistent with the statutory requirements for confirmation." *In re Brown*, 219 B.R. at 194. The proposed plan must, therefore, satisfy the terms of § 1329(b)(1), which includes the feasibility requirement of § 1325(a). 11 U.S.C. §§ 1325(a)(6), 1329(b)(1). As the party bringing the motion, the trustee has the burden of proof, and therefore, as an initial matter, the trustee has the burden of showing that the modified plan is feasible. *In re Tagliarini*, Case No. 02-19446, at 3 (citing *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)).

---

<sup>9</sup> In resolving the present issues, the court does not find its decision in *In re Tagliarini* to be dispositive.

### **The proposed modification**

The trustee proposes to increase the dividend to unsecured creditors from 2% to 100% because of a change in circumstances triggered by fewer than all creditors filing claims. Without this modification, the debtor will pay less than she promised to pay, while at the same time she will receive a discharge of debts that were scheduled but not paid.<sup>10</sup> This is a legitimate factor to consider in deciding whether a plan should be modified. *See In re Fields*, 269 B.R. at 180. An additional consideration is whether the modification is feasible. The trustee, relying on the debtor's schedules, says that it is feasible because it does not increase the amount paid per month and the debtor has been making her payments for quite some time.

To determine whether the proposed plan is feasible, the court must examine the debtor's current financial condition. *See id.* at 181. The only financial information provided by the debtor to the court is that found in her schedules, filed under penalty of perjury at the time she filed her bankruptcy petition. Those schedules show that the debtor is able to make the proposed payments because they are the same amount as the payments she has been making since the plan was confirmed. The trustee is justified in relying on the schedules in support of his motion. *See In re Osborne*, Case No. 05-27728, at 3 (Bankr. N.D. Ohio Feb. 5, 2007) (unpublished memorandum of opinion) ("The Court and the trustee should be able to rely upon the Debtors' petition and schedules as originally filed, unless such have been amended by the Debtors to reflect differently.").

The debtor argues that the trustee cannot rely on the schedules because her circumstances may have changed. This is an unreasonable argument. The debtor cannot expect the trustee to

---

<sup>10</sup> Docket 37. An increase to the amount of payments on claims of a particular class is a permissible modification under the bankruptcy code. 11 U.S.C. § 1329(a)(1).

prove that the filed schedules no longer accurately reflect the debtor's financial situation when the debtor has given no reason to doubt the continued veracity of the information. The court finds, therefore, that the trustee satisfied his initial burden of production by relying on the debtor's schedules to show that the modified plan is feasible.

Because the trustee met his initial burden, the burden shifts back to the debtor to prove that her financial circumstances have changed such that she cannot make the additional payments. If she does so, the burden will shift back to the trustee, who has the ultimate burden to prove that the modification is feasible.

As of yet, the debtor has not amended her schedules to reflect an increase in expenses or a decrease in income or presented any evidence in support of this proposition. At oral argument, the debtor asked for an opportunity to do so should the court find that the trustee has met his burden. This is far from ideal practice, but the court will permit the debtor to present evidence before issuing a final ruling on the motion to modify. *In re Fields*, 269 B.R. at 181.

### **CONCLUSION**

For the reasons stated, the trustee satisfied his initial burden of proof by relying on the debtor's filed schedules and the debtor has not proffered any facts to show that she cannot make the requested payments. The motion is, therefore, conditionally granted. The debtor is given 20 days from the date on which this order is entered to file an affidavit and a supplemental brief in support of her objection to the motion to modify. If the documents are not filed, the court will enter a final order granting the trustee's motion. If the documents are filed, the trustee may file a response brief 10 days after that date. In that case, the trustee's motion to modify will be placed

back on the court's docket for hearing on **April 10, 2007 at 1:30 p.m.** The only issue will be whether the debtor is able to make the payments requested in the motion to modify.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Pat E. Morgenstern-Clarren". The signature is written in a cursive, somewhat stylized font. The "P" is large and loops around the "at". The "E" is written as a simple horizontal line. "Morgenstern-Clarren" is written in a more standard cursive script.

---

Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge