

Less than three months after confirmation of the plan, on April 5, 1991, Debtors filed their first post-confirmation modification, proposing to reduce payments to \$200.00 per month for the duration of the plan and to surrender a vehicle to Bank South in full satisfaction of the debt. On April 12, 1991, Debtors filed their second post-confirmation modification of the plan seeking to reduce the plan payments to \$100.00 per month for the duration of the plan. On May 30, 1991, the Court confirmed the modified plan with payments of \$23.00 per week (\$100.00 per month) for the remaining 56 months of the plan. The modification reduced the dividend to the unsecured creditors from 100.0% to 30.1%.

On January 6, 1993, Debtors filed a motion to incur debt seeking the Court's permission to obtain a student loan for Debtor, Mrs. Pearson, in the amount of \$2,625.00. On April 27, 1993, the Honorable John S. Dalis entered an order granting the Debtors' motion to obtain the student loan on the grounds that "the granting of the motion would not work a hardship upon the Debtors nor result in deprivation of the plan."

On April 12, 1994, Debtors filed a second motion to incur debt, seeking permission from the Court to refinance and lower their home-mortgage payments from \$432.00 per month to \$341.13 per month. The amended budget information submitted with the motion reflected disposable income of \$93.22, based upon a gross monthly income of \$1,600.00 for Mr. Pearson and a gross monthly income was \$326.22 for Mrs. Pearson. The

budget also indicated that there were five people living in the Debtors' household. The Trustee filed a response to the motion requesting that the Debtors increase their plan payments by \$90.00, which was the amount the Debtors' mortgage payments would be reduced. On May 13, 1994, the Court granted the Debtors' motion to incur debt to refinance the mortgage and increased the plan payments by \$90.00 per month to \$190.00 per month, thereby increasing the dividend to the unsecured creditors to 53.95%.

On January 25, 1995, the Debtors filed the modification presently before the Court. The modification seeks to reduce the length of the plan to the number of months that the debtors have been in the plan. Essentially, Debtors are seeking a discharge through the cessation of all future plan payments. Debtors' basis for requesting the modification is a decrease in their gross income, which is the result of Mrs. Pearson voluntarily quitting her job so that she can concentrate on being a full-time student. Mrs. Pearson testified at the hearing on the modification that she is, understandably, unable to work, attend school full-time and care for her three children.

Debtors' amended budget submitted in support of the modification reflects a negative disposable income. Presently, the Trustee's records reflect that all administrative, secured, and priority claims have been paid in full, and that unsecured creditors are the only creditors remaining to be paid under the plan. To date, the Trustee has paid \$2,292.70 on

a total of \$9,324.17 in unsecured claims, yielding a dividend of 24% to these creditors.¹ Thus, Debtors contend that, because they have already paid more than the minimum dividend of 10%² required for a plan to be proposed in good faith within this district, and because they have committed all of their disposable income to their plan for more than three years, *see* 11 U.S.C. § 1325(b)(1)(B), their modification should be confirmed.

The Chapter 13 Trustee opposes the modification, contending that Debtors have not carried their burden of proving that their modification meets the Code requirements for confirmation of a modified plan. Specifically, the Trustee argues, among other things, that Debtors must demonstrate that they have experienced a substantial, unanticipated change in circumstances after confirmation of their plan as either a threshold requirement to modification or as part of the good-faith standard for confirmation of a modification, and that the Debtors' voluntary reduction in income does not constitute a substantial, unanticipated change in circumstances.

CONCLUSIONS OF LAW

Debtors' proposed modification presents the difficult issue of whether their

¹ Counsel for Debtors indicated on brief that another modification would be forthcoming. This modification, according to Counsel, will propose to continue payments at a lower monthly amount for the full sixty months proposed in Debtors' original Chapter 13 plan. To date, however, the Court has not received any such modification, and will, therefore, consider only Debtors' request to cease making payments under their plan.

² Debtors misapprehend the 10% "rule." To constitute good faith, a plan must *inter alia* represent debtor's "best effort" and must devote all of debtor's disposable income to the plan. It must also meet the requirement that the purpose of Chapter 13 is repayment. While the Chapter 13 Trustee gives heightened scrutiny to plans which provide *de minimus* "repayment" (i.e., 10% or less), simply meeting the 10% threshold does not constitute good faith.

reduction in gross income, which is the result of Mrs. Pearson's voluntary decision to quit her job, forms a sufficient basis for Debtors to modify their confirmed Plan by reducing the number of months that they will pay into the Plan to the number that they have already paid. This issue implicates two provisions of Chapter 13, sections 1327 and 1329. Section 1327(a) is entitled "Effect of confirmation", and it provides that

the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1327(a). This provision makes clear that an element of finality attaches to the confirmation of a Chapter 13 plan: "It is well settled that 'under § 1327, a confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation.'" In re Klus, 173 B.R. 51, 54 (Bankr. D.Conn. 1994) (*quoting In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989)).³

Section 1329, on the other hand, is the provision dealing specifically with post-confirmation modification of Chapter 13 plans, and it provides:

(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

³ *Accord In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993); In re Howard, 972 F.2d 639, 642 (5th Cir. 1992); In re Evans, 30 B.R. 530, 531 (9th Cir. BAP 1983).

holder of an 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) 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.

(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329. In contrast to section 1327(a), this provision clearly suggests that a post-confirmation modification of the kind specified in section subsection (a) is appropriate as long as it is brought by a party listed therein, (ie. the debtor, the Chapter 13 Trustee or an unsecured creditor), it satisfies subsection (b)(1) (i.e., it conforms with sections 1322(a) and (b), 1323(c), and 1325(a)), and it does not violate subsection (c) (i.e., does not cause the plan to exceed three, or with court approval, five years). Certainly there is no suggestion within

the text of section 1329 that the *res judicata* effect of a confirmed plan has any bearing upon a proposed modification.

Thus, sections 1327 and 1329, separated by only one section within Chapter 13, seem to attribute markedly different consequences to the confirmation of a plan. Whereas section 1327 suggests an irrevocable finality as to all issues adjudicated (or which could have been adjudicated) at the confirmation hearing, section 1329 suggests that a confirmed plan may be modified almost as a matter of course and regardless of whether the issue was or could have been litigated at the confirmation hearing, as long as the modification conforms with subsection (a) and satisfies those provisions of Chapter 13 made applicable through subsection (b).

Not surprisingly, the incongruency between these two provisions has led to inconsistent results among the courts that have considered the issue of when and under what circumstances a confirmed plan may be modified. A number of courts have attempted to give effect to both provisions by requiring, as a threshold requirement to modification, the proponent of modification to demonstrate that an "unanticipated, substantial change in circumstance" has occurred subsequent to confirmation of the plan.⁴ Such a change,

⁴ See e.g., In re Arnold, 869 F.2d 240 (4th Cir. 1989); In re Solis, 172 B.R. 530, 532 (Bankr. S.D.N.Y. 1994); In re Cook, 148 B.R. 273, 279-80 (Bankr. W.D.Mich. 1992) (Chapter 12 case); In re Algee, 142 B.R. 576, 580 (Bankr. D.D.C. 1992); In re McNulty, 142 B.R. 106, 109 (Bankr. D.N.J. 1992); In re Bostwick, 127 B.R. 419, 420 (Bankr. N.D. Ill. 1991); In re Weissman, 126 B.R. 889, 893 (Bankr. N.D. Ill. 1991); In re Bereolos, 126 B.R. 313, 326 (Bankr. N.D. Ind. 1990); In re Woodhouse, 119 B.R. 819, 820 (Bankr. M.D. Ala. 1990); In re Lynch, 109 B.R. 792, 796 (Bankr. W.D. Tenn. 1989); In re Fitak, 92 B.R. 243, 249-50 (Bankr. S.D. Ohio 1988), *aff'd*, 121 B.R. 224 (S.D. Ohio 1990); Matter of Grogg Farms, Inc., 91 B.R. 482, 485 (Bankr. N.D. Ind. 1988) (Chapter 12); In re

according to these courts, is both consistent with the purpose of section 1329 and necessary to overcome the effect of confirmation:

Confirmation is a significant event and parties need to be bound by the plan achieving court approval. The Code specifically mandates this. Unless something new happens, the debtor, the trustee and unsecured creditors should remain governed by the terms of the confirmed plan. And, unless the new event is unforeseen, parties should not be able to change a plan when the circumstances were known to them at confirmation. Ultimately, requiring a substantial and unanticipated change in circumstances is in accord with the idea that a confirmed plan is *res judicata* as to the debtor and scheduled unsecured creditors.

In re Cook, 148 B.R. at 279-80.⁵

A growing number of courts, however, have rejected this approach. These courts, focusing upon the plain language of section 1329, have concluded that, rather than being subject to a threshold requirement, section 1329 actually creates an exception to the *res judicata* effect of section 1327(a).⁶ The most recent decision reflecting this approach is

Eurle, 70 B.R. 72, (Bankr. S.D.Ohio 1988); In re Gronski, 86 B.R. 428, 431-32 (Bankr. E.D.Pa. 1988); In re Moseley, 75 B.R. 791, (Bankr. C.D.Cal. 1987), *vacated by* 101 B.R. 608 (9th Cir. BAP 1989).

⁵ As noted *supra*, note 3, Cook was case under Chapter 12 of the Code. However, the relevant provisions of Chapter 12, sections 1227(a) and 1229, are substantially identical to sections 1327(a) and 1329 of Chapter 13.

⁶ See e.g., Matter of Witkowski, 16 F.3d 739, 742-46 (7th Cir. 1994); In re Frost, 123 B.R. 254, In re Powers, 140 B.R. 476, 479-80 (Bankr. N.D.Ill. 1992); In re Perkins, 111 B.R. 671, 673 (Bankr. M.D.Tenn. 1990); In re Stone, 91 B.R. 423, 425 (Bankr. N.D.Ohio 1988); In re Jourdan, 108 B.R. 1020, 1022-23, (Bankr. N.D.Iowa 1989); In re Jock, 95 B.R. 75, 77 (Bankr. M.D.Tenn. 1989); In re Evans, 66 B.R. 506, 511 (Bankr. E.D.Pa. 1986), *aff'd* 77 B.R. 547 (E.D.Pa. 1987). Cf. In re Klus, 173 B.R. 51, 59 (Bankr. D.Conn. 1994) (simultaneously

the Seventh Circuit's decision in Witkowski, wherein the court concluded:

[T]he statutory framework of the Bankruptcy Code plainly assumes the possibility of modifications of bankruptcy plans after they are confirmed . . . "If the drafters of the Bankruptcy Code intended for a confirmation hearing to have res judicata effect, there would be little or no reason for Section 1329." In re Williams, 108 B.R. 119, 123 (Bankr. N.D.Miss. 1989). Moreover, Congress could have specifically imposed a precondition to a § 1329 modification, but it did not do so. In fact, where it deemed appropriate, Congress has specifically provided a "change in circumstance" prerequisite under another provision of the Bankruptcy Code. § 1328(b) . . . This provision makes it clear that Congress did not intend the common law doctrine of res judicata to apply to § 1329 modifications.

Matter of Witkowski, 16 F.3d at 745 (citations omitted). The Court did note, however, that section 1329 does not prevent a court from considering whether a change in circumstance has occurred:

This is not to say that in determining whether to modify a bankruptcy plan, the bankruptcy court may not consider whether a change in circumstances occurred; but, § 1329 and the doctrine of res judicata do not require a minimal showing of a change in circumstances.

Id. at 746.⁷

concluding that substantial, unanticipated change in circumstances is not threshold requirement under section 1329, but that court should only allow modification if there is a substantial, unanticipated change in circumstances).

⁷ Accord In re Klus, 173 B.R. at 59; In re Perkins, 111 B.R. at 673.

Neither approach is fully satisfactory. The former introduces a standard into section 1329 which is not apparent from the text of the Code, while the latter substantially eviscerates section 1327(a). Given this conundrum, and the ambiguity it creates in the statutory scheme of Chapter 13, I look to legislative history for clarification. That history, while not definitive, does suggest that the "unanticipated, substantial" change approach is the better one:

The purpose of th[e] amendment [to section 1329(a)] is to permit the debtor or the holder of an allowed unsecured claim to request modification of a confirmed chapter 13 plan in response to *changes in circumstances of the debtor substantially affecting* (favorably or unfavorably) the ability of the debtor to make payments under the plan, as determined by reference to the ability-to-pay test set forth in § 1325.⁸

Moreover, although the Eleventh Circuit Court of Appeals has not dealt with this precise issue, it has clearly suggested that section 1329 is intended to address those modifications necessitated by an unanticipated change in circumstances: "Congress designed § 1329 to permit modification of a plan due to changed circumstances of the debtor unforeseen at the time of confirmation." In re Hoggle, 12 F.3d 1008, 1011 (11th Cir. 1994). In light of the legislative history and the Eleventh Circuit's statement in Hoggle, I conclude that the proponent of a post-confirmation modification under section 1329 must demonstrate, as a

⁸ In re Fitak, 92 B.R. at 249 (*quoting* Oversight Hearings on Personal Bankruptcy Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 97th Cong., 1st Sess. 181, 221 (1981-82)) (emphasis added).

pre-condition to modification, that the debtor has undergone a substantial, unanticipated change in circumstances following confirmation.

In determining whether a change in circumstance is unanticipated, the following objective test has been articulated: "whether a debtor's altered financial circumstances could have been reasonably anticipated at the time of confirmation by the parties seeking modification." Arnold, 869 F.2d at 243.⁹ As applied to these facts, I hold that the decision to cease work and pursue a degree full-time does not qualify as something that Debtors' could not have been reasonably anticipated at the time of confirmation. Moreover, the phrase "unanticipated and substantial" connotes a change in circumstances that is both material and beyond the debtor's control. Illness, disability, and reductions in force not associated with any conscious decision by a debtor to cease work, are the clearest examples of such a change in circumstances. Here, Debtors were both working when the case was filed. They proposed a 60-month plan which was confirmed. The wife took on a crushing burden of schoolwork in addition to her duties as a wife and mother, and her employment outside the home. She found it to be too physically and mentally exhausting to continue, and for good reason. Few people could sustain her schedule. However, having committed at confirmation to a five-year plan at a time when she and her husband were both working, her current lack of income, arising from a choice to quit work rather than quit school, a choice within her control, is not the type of unanticipated change necessary to sustain the burden for approval of a post-confirmation modification. Accordingly, the

⁹ Adopting standard set forth in In re Fitak, 92 B.R. at 250.

modification is denied.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtors' Motion to Modify Plan After Confirmation is hereby DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1995.