

Selected Issues of Law Regarding Post Confirmation Plan Modifications¹

I. What is the legal standard to approve a post confirmation plan modification under § 1329?

Section 1329(a) states *when* a plan may be modified (at any time after confirmation of the plan but before completion of payments), identifies *who* may request a post confirmation plan modification (the debtor, the trustee, or the holder of an allowed unsecured claim), and states *what* a plan modification may do (increase or reduce payments, extend or reduce the time for payments, alter the amount of distributions to a creditor to take into account payments made to such creditor, or reduce plan payments by actual amounts expended by a debtor to purchase health insurance). Section 1329(b) imports certain specific provisions of §§ 1322, 1323 and 1325 of the Bankruptcy Code and applies those provisions to post confirmation plan modifications. Section 1329(c) provides that the post confirmation plan modification may not provide for payments over a period that expires beyond the applicable commitment period under § 1325(b) for the subject debtor. Although § 1329 states *when*, *who*, and *what* a post confirmation plan modification may and must contain, it does not set forth any criteria for the court to employ in deciding whether or not to approve a post confirmation plan modification. The absence of any stated criteria is important because of the existence of § 1327 of the Bankruptcy Code. Section 1327(a) states that the provisions of a confirmed plan bind the debtor and each creditor. The Sixth Circuit Court of Appeals has repeatedly stated that a confirmation order under § 1327 is res judicata and therefore not subject to collateral attack. See Ford Motor Credit Co. v. Parmenter (In re Parmenter), 527 F.3d 606 (6th

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Cir. 2008); and Ruskin v. DaimlerChrysler Services North America (In re Adkins), 425 F.3d 296 (Bankr. E.D. Mich. 2005) (“[C]onfirmation of a plan has been described as ‘res judicata of all issues that could or should have been litigated at the confirmation hearing.’”). If a confirmation order is res judicata under § 1327, then what standard should the court apply to determine *whether* to grant a post confirmation under § 1329 without violating this res judicata principle?

There is a split among the circuits regarding what a party must show to obtain approval of a post confirmation plan modification under § 1329. At one end of the spectrum, there are circuits that require a party requesting a post confirmation plan modification to demonstrate that there has been a substantial and unanticipated change in circumstances in order to obtain approval of a post confirmation plan modification under § 1329(a). At the opposite end of the spectrum, there are circuits that hold that § 1329 does not require any threshold showing in order to have a post confirmation plan modification approved. Finally, there are still other circuits that appear to be mixed on the issue.

Those courts holding that a plan modification requires a substantial and unanticipated change in circumstances frequently cite Arnold v. Weast (In re Arnold), 869 F.2d 240 (4th Cir. 1989). In that case, an unsecured creditor filed a request under § 1329 for a post confirmation plan modification to increase the amounts paid by the debtor due to an increase in the debtor’s salary. The bankruptcy court approved the plan modification and required an increase in the debtor’s payments. The district court affirmed the decision of the bankruptcy court. The Fourth Circuit Court of Appeals again affirmed the approval of the plan modification because there was a substantial and unexpected change in the debtor’s financial condition. Because of this substantial and unexpected change in the debtor’s financial condition, the doctrine of res judicata does not apply to prohibit the plan modification. See also In re Anderson, 21 F.3d 365, 368 (9th Cir. 1994) (“If the debtor or a

creditor objects to the modification, the trustee must bear the burden of showing a substantial change in the debtor's ability to pay since the confirmation hearing and that the prospect of a change had not already been taken into account at the time of confirmation.”).

Those cases at the other end of the spectrum, holding that § 1329 does not contain any threshold requirement for post confirmation plan modification, let alone a showing of substantial and unanticipated change in circumstances, frequently cite In re Witkowski, 16 F.3d 739 (7th Cir. 1994). Like Arnold, Witkowski involved a request by a chapter 13 trustee to approve a post confirmation plan modification. In that case, the trustee asked to modify the plan to increase the percentage distribution for unsecured creditors because of the fact that some unsecured creditors did not file claims by the claims deadline. The debtor opposed the trustee's proposed plan modification arguing that the bankruptcy court could not modify the plan unless the trustee demonstrated an unanticipated substantial change in the debtor's financial circumstances. The debtor claimed that the trustee was unable to meet that threshold test because creditors routinely failed to file proofs of claims in chapter 13 bankruptcy cases and therefore the failure of creditors to file proofs of claims in this case was not an unanticipated substantial change in the debtor's financial circumstances. The bankruptcy court overruled the debtor's objection and approved the plan modification. The district court affirmed. The Seventh Circuit Court of Appeals also affirmed holding that while it may be *permissible* for a bankruptcy court to consider the existence or non existence of a change of circumstances, § 1329 does not *require* any threshold showing of a change in circumstances in order to modify a plan. Noting the res judicata effect of § 1327, the court pointed out that by permitting post confirmation plan modifications under § 1329, “the statutory framework of the Bankruptcy Code plainly assumes the possibility of modifications of bankruptcy plans after they are confirmed,” and found nothing inconsistent with the binding effect of a plan under § 1327 and the possibility that it may be modified

under § 1329.

Section 1329 does not require any threshold requirement of a creditor, debtor or trustee to seek modification of an approved bankruptcy plan. The common law doctrine of res judicata also does not impose any minimal showing of a “change in circumstance.” Rather, a creditor, debtor, or trustee has the absolute right to seek modification of a bankruptcy plan after its confirmation but before completion of the plan payments. . . . It is not an abuse of [the court’s] discretion to modify an approved “percentage plan” thereby changing it to a “pot plan.” Id. at 748.

Some circuits have followed In re Arnold in requiring a higher showing, see Murphy v. O’Donnel (In re Murphy), 474 F.3d 143 (4th Cir. 2007); Green Tree Acceptance Inc. v. Hoggle (In re Hoggle), 12 F.3d 1008 (11 th Cir. 1994), and other circuits have followed Witkowski’s statement that no threshold showing is required, see Meza v. Truman (In re Meza), 467 F.3d 874 (5th Cir. 2006). For a more detailed discussion of the approach taken by other circuits on this issue, see William A. McNeal, Modification of a Confirmed Chapter 13 Plan: What Does It Take In Each Circuit ?, Am. Bankr. Inst. J., Sept. 2008.

There are several cases decided by the Sixth Circuit Court of Appeals under § 1329 of the Bankruptcy Code. In In re Nolan, 232 F.3d 528 (6th Cir. 2000), the Sixth Circuit held that debtor’s proposed modification to surrender the secured creditor’s collateral and reclassify the deficiency as unsecured, would contravene § 1327(a). Relying on Nolan, the court in In re Adkins held that the “ban against post-confirmation reclassifications equally applies to” a case in which a debtor’s own actions in defaulting on its payments have provided cause to lift the automatic stay. 425 F.3d 296, 303. More recently, In re Parmenter held that § 1329 permits modifications related to the amount and timing of payments, but does not permit the creation of a new obligation, specifically an administrative expense claim, that would trump other claims. 527 F.3d 606, 609. None of the reported decisions by the Sixth Circuit Court of Appeals have squarely addressed the question of what showing, if any, is required to approve a post confirmation plan modification under § 1329.

However, there are two Sixth Circuit Bankruptcy Appellate decisions that do address this issue.

In Ledford v. Brown (In re Brown), 219 B.R. 191 (B.A.P. 6th Cir. 1998), the debtors filed a motion to settle a personal injury claim and distribute proceeds from the settlement in part to themselves and in part to the chapter 13 plan. The chapter 13 trustee objected and proposed a plan modification providing for the payment of the personal injury proceeds into the chapter 13 plan. The debtors argued that they had scheduled this personal injury claim on their original schedules and claimed an exemption in it on schedule C. The bankruptcy court held that the trustee's proposed plan modification to have the personal injury proceeds paid into the plan could not be approved because principles of res judicata barred this modification. The trustee appealed. The trustee first argued that even though § 1327 may bind the debtor and creditors of the debtor, it does not bind the trustee and therefore res judicata is inapplicable. The Bankruptcy Appellate Panel rejected that argument and found that confirmation of the debtor's plan constituted a final judgment on the merits of those matters that could have been raised in the bankruptcy case. For support, the Bankruptcy Appellate Panel cited a number of Sixth Circuit decisions in chapter 11 cases addressing the effect of confirmation. However, the court then noted its agreement with Witkowski in finding that "the mechanism to change the binding effect of § 1327 is § 1329, which allows for modifications." Id. at 194. The court then considered those decisions from other courts holding that a request for plan modification by a unsecured creditor or a trustee can only be granted where there is a showing of unanticipated and substantial change in the debtor's circumstances. Ultimately, the court rejected those cases and observed that while a bankruptcy court "may properly consider changed circumstances in the exercise of its discretion, § 1329 does not contain a requirement for anticipated or substantial change as a prerequisite to modification." Id. at 195 (citation omitted). The Bankruptcy Appellate Panel then held that "the Bankruptcy Court applied the wrong legal standard

by determining that the Trustee had to demonstrate certain threshold changes and circumstances before it could determine whether to grant or deny the modification.” Id. at 195. While the Brown decision clearly held that there is no requirement to show an unanticipated and substantial change in circumstances, it did not exactly specify what, if anything, has to be shown in order to approve a plan modification.

Recently, the Sixth Circuit Bankruptcy Appellate Panel again addressed a case involving a proposed post confirmation plan modification under § 1329(a). In Storey v. Pees (In re Storey), 392 B.R. 266 (B.A.P. 6th Cir. 2008), a chapter 13 trustee moved for a post confirmation plan modification to increase the dividend to unsecured creditors because it had come to the trustee’s attention that the projected length of the plan did not meet the applicable commitment period required by § 1325(b)(4). Apparently, in a routine review of a confirmed plan, the trustee realized that he had mistakenly calculated the length of the plan at 48 months but had learned that it would actually last only 27 months. Therefore, the trustee moved to modify the plan to extend its length. The debtor objected. The bankruptcy court approved the modification over the debtor’s objection because the court concluded that the trustee was correct that the plan did not meet the applicable commitment period requirement of § 1325(b)(4) when the plan was confirmed. The debtor appealed.

The Sixth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court and held that it was error to approve the trustee’s plan modification. The Panel began its discussion by noting that the appeal “puts at issue the interplay between §§ 1327 and 1329 of the Bankruptcy Code.” Id. at 270. Citing Parmenter and Adkins, the court noted that a confirmation order is res judicata and not subject to collateral attack. The court then turned to § 1329 regarding post confirmation plan modifications and noted the absence of a statutory standard within that section.

By its own terms, § 1329 sets forth no standard as to when post-confirmation

modification is permitted. Given this absence and the res judicata effect of a confirmed plan, the courts have disagreed over whether a party seeking to modify a confirmed plan must establish as a threshold requirement a post-confirmation change in circumstances.

Id. The court then accurately observed first that the Sixth Circuit Court of Appeals has not addressed this issue and second, that the Bankruptcy Appellate Panel previously held in In re Brown that § 1329 does not contain a requirement to show unanticipated or substantial change in circumstance as a prerequisite to modification. The Storey court then reviewed the various Sixth Circuit decisions regarding the res judicata effect on a confirmation order and, following those cases, concluded that “§ 1327 precludes modification of a confirmed plan under § 1329 to address issues that were or could have been decided at the time the plan was originally confirmed.” Id. (citation omitted). The court then explained that “the practical impact of this conclusion is that modification under § 1329(a) will be limited to matters that arise post confirmation.” Id.

The Storey court then held that:

Regardless of whether the Plan as originally confirmed failed to satisfy the requirements of § 1325(b)(1), no timely objection was raised. The fact that the Trustee’s failure to object was because of his mathematical miscalculation or due to the unsettled law regarding the meaning of “applicable commitment period” is of no avail. The required plan length was an issue that could have been decided at confirmation had the Trustee or an unsecured creditor with an allowed claim objected. As such, the Trustee is barred from now raising the issue by means of a plan modification under § 1327(a). Accordingly, we find it was error for the bankruptcy court to grant the Trustee’s Motion to Modify.

Id. at 273 (citation omitted).

In the Sixth Circuit we do not have a pronouncement by the Court of Appeals. Instead, we have two Bankruptcy Appellate Panel decisions that bookend the spectrum. On the one hand, In re Brown makes it clear that § 1329 does not require a showing of a substantial unanticipated change in the financial circumstances of the debtor. Whatever else may be required by § 1329, the Brown

decision does not set the bar as high as the standard in In re Arnold. On the other hand, at the other end of the spectrum, In re Storey emphasizes res judicata principles in holding that post confirmation plan modifications under § 1329(a) “will be limited to matters that arise post-confirmation.” These two cases read together apparently mean that a proponent of a post confirmation plan modification under § 1329 must show that the basis for the plan modification is grounded in facts that arise post confirmation but need not show that there have been substantial or unanticipated changes in the debtor’s financial condition, although a bankruptcy court *may* consider the existence of any change of circumstances. Until the Sixth Circuit Court of Appeals rules on the issue, practitioners should be aware that post confirmation plan modifications may well be denied if there is no change in the facts and circumstances since confirmation but may be successful if they are based upon facts and circumstances arising after confirmation, even if falling short of substantial or unanticipated changes in the financial circumstances of the debtor. Not knowing quite where the standard will ultimately be set by the Sixth Circuit Court of Appeals, practitioners are well advised to emphasize in their request for post confirmation plan modifications those facts and circumstances that arose after confirmation of the original plan.

II. If the Trustee or an unsecured creditor objects to the post confirmation plan modification, must the post confirmation plan modification meet the disposable income test of § 1325(b)?

As noted above, § 1329(b) takes certain specific provisions of §§ 1322, 1323 and 1325 and states explicitly that they apply to post confirmation plan modifications under § 1329(a). However, § 1329(b), whether pre-BAPCPA or post-BAPCPA, does not incorporate all of § 1325, but only § 1325(a), and does not expressly incorporate § 1325(b). Section 1325(b) contains what is known as the disposable income test. By failing to expressly import § 1325(b) into § 1329(b), did Congress intend that post confirmation plan modifications need not meet the disposable income test of

§ 1325(b)? There is no controlling case in the Sixth Circuit and the case law that has developed in the other circuits appears to be split.

Some courts have concluded that the disposable income test of § 1325(b) does not apply to post-confirmation modifications under § 1329. These courts generally base their conclusion on the plain meaning of § 1329(b)(1), which only references §§ 1322(a) and (b), 1323(c), and 1325(a), in the language of § 1329(b)(1), but does not mention § 1325(b). One such case is Sunahara v. Burchard (In re Sunahara), 326 B.R. 768 (B.A.P. 9th Cir. 2005). In In re Sunahara, before confirmation of the original plan, the debtor filed a motion requesting authorization to modify the plan post-confirmation in order to refinance real property and use the funds from the refinancing to pay the plan in full and receive an immediate discharge. The debtor alleged that in order to obtain the refinance loan, the plan had to be completed and the case terminated. The original plan was confirmed and the debtor did not raise the modification request at the confirmation hearing. The court then scheduled a hearing on the debtor's motion to modify. The trustee objected, arguing that under § 1327(a), the debtor was bound by the terms of the confirmed plan and that allowing a modification would violate the model plan's prohibition against payment of a plan in less than 36 months unless all allowed claims are paid in full. Moreover, the trustee argued that the debtor should have raised the issue at the confirmation hearing. The bankruptcy court denied the debtor's motion holding that the debtor should have challenged the model plan prior to confirmation. Moreover, the court held that the debtor may not terminate a plan in fewer than 36 months where an objection is made, but that the debtor had the option of voluntarily dismissing the case in order to complete the refinance.

The Ninth Circuit Bankruptcy Appellate Panel analyzed the case law finding in favor of applying § 1325(b) to post confirmation modifications under § 1329, and the case law against such

a finding. The court held that the “plain language of § 1329(b) does not mandate satisfaction of the disposable income test of § 1325(b)(1)(B) with respect to modified plans” except as a factor in determining good faith. The court adopted the approach taken by the court in In re Sounakhene, 249 B.R. 801 (Bankr. S.D. Cal. 2000). “Under this approach, important components of the disposable income test are employed as part of a more general analysis of the total circumstances militating in favor or against the approval of a modification” 326 B.R. at 781. Therefore, a court should consider whether a modification has been proposed in good faith which requires an analysis of the debtor’s overall financial condition, including the debtor’s current disposable income, whether the debtor’s income is likely to increase or decrease, the time period between the modification and confirmation of the original plan, and the risk of default over the term of the plan, balanced against certainty of immediate payment to creditors. Id. at 781-82.

The Eighth Circuit Bankruptcy Appellate Panel in Forbes v. Forbes (In re Forbes), 215 B.R. 183, 192 (B.A.P. 8th Cir. 1997), also concluded that § 1325(b) “is not a factor to be considered by a court in approving postconfirmation modifications.” In Forbes, a creditor and former spouse of the debtor appealed from two orders of the bankruptcy court approving the debtor’s post confirmation modification of the plan. The debtor’s former spouse had been awarded maintenance and a monetary judgment against the debtor in the divorce decree. The judgment was secured by a lien upon certain property owned by the debtor. After the debtor received a post confirmation settlement award, and more than three years after the debtor began making payments under the plan, the debtor proposed a modification of the plan, changing it for the third time. The debtor proposed to reduce the term of the plan from 60 to 40 months by making a lump sum payment to the trustee on the remaining amount owed under the plan. The bankruptcy court approved the modification over the objections of the debtor’s former spouse and the trustee. On appeal, the debtor’s former spouse

argued that the bankruptcy court erred in failing to include the debtor’s “windfall” in its determination of the “best interest of creditors” test; and in failing to consider the “windfall” as “disposable income” under the “best efforts” test in § 1325(b)(1)(B). *Id.* at 186. The former spouse argued that the settlement proceeds should be distributed to unsecured creditors.

The Eighth Circuit Bankruptcy Appellate Panel disagreed with the debtor’s former spouse and held that the “best efforts” test found in § 1325(b) should not be considered by a court in approving a post confirmation modification. The court held that the debtor met the requirements of § 1325(b)(1)(B) by devoting all of his disposable income in the three years since his first payment was due under the original confirmed plan and “[t]he Bankruptcy Code requires no more from [the debtor] than the performance he has already rendered.” *Id.* at 192.

Recent opinions of bankruptcy courts in the Sixth Circuit have also determined that § 1325(b) does not apply to post confirmation modifications under § 1329. First, in *In re Hill*, 386 B.R. 670 (Bankr. S.D. Ohio 2008), the debtor’s original confirmed plan provided for monthly payments of \$236 with a dividend of 16% to nonpriority unsecured creditors. This was subsequently modified with the agreement of the trustee, to \$330 with a 100% dividend to nonpriority unsecured creditors. Since the debtor was an above median income debtor, the plan was based on his current monthly income (CMI), minus his statutorily defined § 707(b)(2)(A) expenses. After the first modification was granted, the debtor filed a motion to again modify the plan in order to reduce his monthly payments to nonpriority unsecured creditors and the dividend to be paid to nonpriority unsecured creditors, to the same amounts included in the original confirmed plan. The debtor’s basis for this modification was a state domestic relations court order concerning a domestic support obligation in the amount of \$1,719 per month. The trustee argued that the disposable income formula and the projected disposable income requirement of § 1325(b) are incorporated into § 1329, and that the

debtor's proposed modification should be denied because the modification fails to meet these standards. The debtor argued that § 1325(b) is not incorporated in § 1329, and therefore he did not need to comply with these standards.

The bankruptcy court held that § 1325(b) *is not* incorporated into § 1329. The court based its decision on the plain meaning of § 1329(b)(1) and the fact that this provision refers only to §§ 1322(a), 1322(b), and 1323(c), and to the requirement of 1325(a). Further, the court held that the separate reference in § 1325(a) to subsection (b), stating that the phrase “except as provided in subsection (b)” does not demonstrate an intent to also incorporate § 1325(b). “[W]hen Congress wanted to incorporate a particular subsection of Chapter 13 into § 1329, it did so explicitly, directly and unambiguously” as evidenced in its reference to both §§ 1322(a) and (b). 386 B.R. at 676. Once the court held that the disposable income test was not incorporated into § 1329, the court then proceeded to address the question of whether, in the court's discretion, this modification should be granted. The court ultimately denied the debtor's proposed plan modification because the debtor sought to deviate from the confirmed plan by substituting the debtor's actual income and expenses reflected in his amended schedules, in place of the debtor's CMI and expenses incorporated in the debtor's confirmed plan, which was based upon the § 1325(b) formula. The court held that the only explanation for the modification was an adjustment in the debtor's domestic support obligations and this alone did not provide a sufficient basis to support a modification to adjust debtor's CMI. *Id.* at 677.

Second, in In re Hall, No. 06-61733, 2008 WL 2388628 (Bankr. N.D. Ohio June 11, 2008), the debtor and her spouse divorced during the bankruptcy case. As a result, the debtor proposed to modify her plan to reduce the monthly payments and to reduce the plan's length from 60 to 36 months. The trustee objected to the modification to reduce the plan's length arguing that the ability

to extend or reduce the time for such payments does not extend to reduce the time for such payments below that of the “applicable commitment period” which is fixed at the time of filing. The bankruptcy court acknowledged that “[i]t is true that § 1325(a) references § 1325(b) (providing that courts shall confirm plans that meet the requirements of subsection (a), ‘[e]xcept as provided in subsection (b)’); however, such indirect incorporation of § 1325(b) into § 1329 through §1325(a) has been a bridge too far for other bankruptcy courts to accept in this and other contexts.” Id. at *2 (citing In re Sunahara, 326 B.R. 759 (B.A.P. 9th Cir. 2005); In re Ewers, 366 B.R. 139 (Bankr. D. Nev. 2007); In re Kidd, 374 B.R. 277 (Bankr. D. Kan. 2007)). Moreover,

[t]he argument against indirect incorporation is further bolstered by the fact that, in § 1329(b)(1) Congress *did* expressly incorporate the requirements of both § 1322(a) and (b) into plan modifications, despite the fact that the § 1322(b) begins with an incorporative reference to § 1322(a); the former is subject to the requirements of the latter. Congress did not incorporate only § 1322(b) into § 1329 and expect that doing so would bring § 1322(a) along for the ride

Id. at *2 (citing In re Hill, 386 B.R. 670).

Finally, the bankruptcy court stated that “[b]y incorporating § 1325(a), § 1329(b)(1) still guarantees that, among others, the requirement of good faith (articulated in § 1325(a)(3)) applies to plan modifications just as it does to confirmations.” Id. at *3. The court reasoned that this would prevent bad faith attempts by debtors who would try to propose a plan that satisfies the requirements of § 1325(b) and then proceed to modify the plan without good cause to one that would not have survived confirmation. The court found that there was no evidence of bad faith in this case and allowed the debtor to reduce the time for her payments without the barrier of the applicable commitment period calculations of § 1325(b)(4).

On the other hand, some courts have concluded that the requirements of § 1325(b) are included in the analysis of post confirmation modifications under § 1329. These courts tend to find

that § 1325(b) is implicated in the preface to § 1325(a) which states “*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 provision of this title*” 11 U.S.C. § 1325(a) (emphasis added). As such, those courts hold that it must have been Congress’ intent to include § 1325(b) in a § 1329 analysis and calling the omission of § 1325(b) in § 1329(b)(1), a “legislative oversight.” Collier on Bankruptcy, § 1329.05[3].

A case taking this position is In re Keller, 329 B.R. 697 (Bankr. E.D. Ca. 2005). In Keller, following the confirmation of the chapter 13 plan, the debtors sought leave to refinance their home proposing to use the proceeds in order to pay their existing liens on their home in full and to complete their chapter 13 plan early. When the request for leave was sought the debtors had only made 14 of the 48 monthly payments provided for in the confirmed plan. The bankruptcy court held that if the debtors wanted to complete their plan early through a lump-sum payment, they would have to either pay unsecured claims in full, or show the court that in light of their particular economic circumstances, making payments for less than 3 years satisfies the “good faith” requirements of § 1325(a)(3). The court specifically took issue with Sunahara, calling the Ninth Circuit Bankruptcy Appellate Panel’s logic “debatable” and “contrary to the weight of authority.” Id. at 701-02 (citing Alan N. Resnick and Henry J. Sommer, eds., Collier on Bankruptcy, 15th Ed. Rev., Vol. 8, ¶ 1329.05[3] (2005); Keith M. Lundin, Chapter 13 Bankruptcy, 3rd Ed., vol. 3, § 255.1 (2000)). The Keller court held that the “omission of section 1325(b) from section 1329(b) should not be taken to mean that section 1325(b) is not applicable to modified plans[,]” reasoning that “[t]he cross-reference in section 1325(a) to section 1325(b) suggests that subsection (b) comes into play whenever subsection (a) is applicable.” Id. at 702.

Another case holding that the disposable income requirements do apply to post confirmation

plan modifications is In re Baxter, 374 B.R. 292 (Bankr. M.D. Ala. 2007). In Baxter, the trustee filed a motion to modify a confirmed plan and requested that the non-exempt, net proceeds due to the debtors from settlement of a lawsuit be paid under the plan for the benefit of unsecured creditors. The debtors objected. The court acknowledged that § 1325(b) is “[c]onspicuously missing from [the] list of applicable provisions” in § 1329(b), but still held that the preface of § 1325(a), referencing § 1325(b), has the “effect of capturing both subsections” making all other provisions of chapter 13 applicable to plan confirmation, including the disposable income requirements under § 1325(b). Id. at 296.

Other cases concluding that the disposable income test is applicable to post confirmation plan modifications include In re Solis, 172 B.R. 530, 532 (Bankr. S.D. N.Y. 1994) (finding that modifications of a plan include an analysis under § 1325(b)), and In re Klus, 173 B.R. 51, 58 (Bankr. D. Conn. 1994) (holding that a post confirmation modification may implicate section 1325(b)).

The Sixth Circuit Court of Appeals has not ruled on this issue.

PLAN MODIFICATIONS IN CHAPTER 13

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Chapter 13 Plan Modifications: may be brought by the debtor, the trustee or a creditor. Plan modifications are divided into two distinct categories: pre and post confirmation.

Pre-Confirmation Modifications

Modified plans proposed pre-confirmation are typically filed to address creditor and/or trustee objections to change treatment to a particular creditor or class of creditors, correct errors and increase or decrease funding or plan length. Debtors have greater flexibility in what may be proposed in a pre-confirmation modification as it is not governed by §1329. LBR 3015-2 (a) sets forth the allowable forms and requirements of pre-confirmation amended plan.

Post-Confirmation Modifications

Few Chapter 13 plans make it from confirmation to discharge without the need for modification in some form. 11 USC §1329 governs post-confirmation plan modifications:

§1329 Modification of plan after confirmation

(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—

- (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;
- (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; or
- (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor....(remainder of (c) addresses details regarding health insurance modification)

(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.

1. 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 the applicable commitment period under section 1325(b)(1)(B) 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.

The reasons for plan modifications tend to fall into four common categories.

Increases in continuing mortgage payments. Local Bankruptcy Rules allow for the mortgage companies to file notices of increases in payment for escrow changes or adjustable interest rates.

The local bankruptcy rule governing these notices was amended in May of 2008, and requires the following:

LBR 3001-2 Adjustment in a Periodic Payment of a Secured Claim in Chapter 13

(a) Creditor's Statement. A creditor with a claim under §1322(b)(5) or (b)(7) shall file and serve on the debtor a statement of any proposed increase or decrease of periodic payments and file a certificate of service. The deadline to file this statement is 45 days before the effective date of the adjustment of the payment amount. The statement shall fully disclose the calculations on which the adjustment is based.

(b) Objection. The deadline to file an objection to the creditor's statement under paragraph (a) is 21 days after the statement is filed. If an objection is filed, the court will schedule a hearing with notice to the debtor, the creditor and the trustee.

(c) Trustee's Analysis. Within 14 days after the later of the deadline in paragraph (b)(or the date that the court enters an order resolving any objection under paragraph (b), the trustee shall file a notice stating whether the plan will still be adequately funded with the current plan payment amount and if not, stating the necessary increase in plan payments.

(d) Debtor's Proposed Plan Modification. Within 21 days after the trustee filed the notice under paragraph (c), the debtor shall file a plan modification under Local Rule 3015-2(b), if necessary to assure adequate funding of the plan.

Counsel for the debtor must carefully review these statements to ensure compliance by the creditor of the advance notice requirements and also to review changes in payment amounts which may have catastrophic effects upon the feasibility of debtor's plan. Carefully review any claims for recovery of advances for taxes and/or insurance to ensure such advances were appropriate and not duplicate expenses already incurred by your client.

Once you have determined an increase is procedurally and contractually correct, the next step is to determine whether a plan modification is required. The Chapter 13 trustee will review the effect of the proposed payment change on the plan and file a report of that analysis with the court, including the plan payment increase that would be necessary to complete the plan timely without modification. As counsel, you will need to make an independent review of your debtor's case and current financial situation to determine whether an increase in plan payments is a viable option. Debtors with confirmed plans less than 60 months in length also have the available option to seek to increase the plan length, although increases in continuing claims rarely are accommodated by increases in plan length alone and would likely require decreasing the dividend to unsecured creditors if debtor's prepetition liquidation analysis would have allowed for a smaller dividend.

Claim amounts greater than scheduled. Confirming a chapter 13 plan before the claims bar date leaves open the possibility that claims filed will be greater than scheduled and require a modification of the plan. Debtor may seek to increase plan payments to account for payment of larger claim amounts or may seek to decrease the dividend to general unsecured creditors to satisfy such claims. At issue in this second of these options for modification may be the debtor's good faith in the scheduling of the initial claim amount in the original schedules.

Plan delinquencies. Delinquencies caused by failure to make regular plan payments or income tax refund payments to the trustee will result in motions for relief from stay by creditors and motions for dismissal from the trustee. Modifications filed to excuse delinquencies should always specifically identify what delinquencies are being sought to be excused and the reason debtor was unable to make required payments. A trustee reviewing modifications to excuse delinquencies will likely request documentation evidencing unbudgeted expenses of the debtor, loss of employment or decrease of income which gave rise to the payment delinquencies along

with proof of current income for debtors. Debtors who have experienced a change of income or expenses should also file amended schedules I and J when filing a plan modification as is noted in the local rules in the Eastern District of Michigan.

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(b) Post-Confirmation Plan Modification. The proponent of a post-confirmation plan modification shall serve a copy of the plan modification on all parties in interest that are adversely affected by the plan modification and file a certificate of service. If the plan modification is proposed by the debtor, the debtor shall file, prior to or contemporaneously with the modified plan, all amended schedules that are necessary for approval of the plan modification. If the plan modification adversely affects any party in interest, the proponent shall attach to the plan modification the papers required under Local Rule 3015-1(b). The plan modification shall become effective when the proponent files a certification that no timely objection was filed or when the court enters an order overruling or resolving all objections.

Post petition claims. Post petition creditors may file claims in the debtor's case pursuant to §1305 for taxes and consumer debt necessary for the debtor's completion of the plan. A debtor may not file a post-petition claim on behalf of a creditor as §1305 affords this ability only to the creditor. A post-petition creditor may be bound by the automatic stay during the pendency of the case but may not be discharged unless they agree to receive payments under the plan evidenced by the filing a proof of claim.

§1305 Filing and Allowance of Post-Petition Claims

- (a)** A proof of claim may be filed by any entity that holds a claim against the debtor –
- (1) for taxes that become payable to a governmental unit while the case is pending; or
 - (2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.
- (b)** Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 501 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b) or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.
- (c)** A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of debtor's incurring the obligation was practicable and was not obtained.

The local rules for the Eastern District of Michigan specifically address post-confirmation modifications resulting from the filing of a post-petition claim and setting for a basis for the allowance of that claim and its effect upon the disbursements to be received by other creditors.

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(b) Payment of a §1305(a) Post-Petition Claim.

- (1) The debtor shall serve a notice of the filing of a §1305(a) post-petition claim on all creditors whose claims are allowed and file a certificate of service. The notice shall state: the name of the post-petition creditor; the amount of the claim; the nature of the debt; the impact that allowance of the claim would have upon disbursements to other creditors; and the following procedural information:
“If no objection to paying the post-petition claim as provided for in the plan is filed within 15 days, the trustee may pay the claim in the manner provided in the plan. If you have any objection to the claim itself or to the effect that payment of the claim will have on your dividend, then you must file a written objection within 15 days or the objection will be deemed waived.”
The debtor shall file a certificate of service of such notice.
- (2) If no party files an objection, the chapter 13 trustee may disburse payments to the creditor with the post-petition claim commencing 19 days after the notice is served. If a party timely files an objection, the court will schedule a hearing with notice to the debtor, the creditor and the trustee.

In re Storey, WL #3077511 6th Cr. BAP (Ohio), 2008, addressed the issue of when a modification is allowable and is the first case post-BAPCPA to address the issue in our circuit. In this recent ruling the 6th Circuit followed its earlier set precedent in the cases of In re Parmenter, 527 F.3d 606 (6th Cr. 2008) and In re Adkins, 425 F.3d 296 (6th Cir. 2005) which stand for the proposition that the effect of confirmation is binding on all parties and the effect of confirmation is res judicata as to any and all issues that were decided as part of confirmation. The Storey court goes further to include not only issues decided as of confirmation, but issues which *could have been decided* at confirmation. In Storey, the Chapter 13 trustee proposed a modification of the plan based upon a mistake in calculating the amount of secured debt to be paid under the plan which resulted in a confirmed plan that was completing well prior to the required commitment period required under 1325(b)(4).

Beyond the issue of whether terms of the plan are non-modifiable due to the res judicata effect of confirmation is the issue of whether a change in the circumstances of the debtor are necessary in order to seek modification under 1329. A split of authority on this issue currently exists amongst the judicial circuits. In the Storey opinion, the panel acknowledges the fact that the 6th Circuit has not specifically addressed the issue but points to its decision in In re Brown, 219 BR 191(6th Cir BAP 1998) for guidance. In Brown, the court acknowledges that neither §1329 or §1327 contains any requirement for unanticipated or substantial change when seeking modification. However, it also acknowledges that changed circumstances may be considered by the court in the exercise of its discretion in allowing such modifications.

This showing of changed circumstances in a post-confirmation modification is akin to a showing of “special circumstances” in a pre-confirmation setting and a modification under §1329 is subject to the good faith requirements §1325(a)(3). Where a post-confirmation modification of a plan sought to reduce the dividend below that which was required to be provided pursuant to the means test at confirmation, a debtor would likely need to show the existence of changed circumstances to meet the burden of good faith. Although not specifically addressed by the 6th Circuit decisions listed above, there is authority for the premise that a showing of changed circumstances would not be required where a deviation from the means test is sought.

PLAN MODIFICATIONS IN CHAPTER 13

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When can a confirmed plan be modified:

In re Plummer, 378 B.R. 569, Bankr.C.D.Ill., 2007. Modifications to confirmed Chapter 13 plan are not limitless, rather, such modifications are allowed only in the circumstances set forth in Code provision governing such postconfirmation modifications.

In re Hill, 386 B.R. 670, Bankr.S.D.Ohio.W.Div., 2008. Modification of a Chapter 13 plan is discretionary. Only limits is those set forth in the language of the Bankruptcy Code and the bankruptcy judges discretion and good judgment in reviewing the motion to modify.

Thompson v. Quarles, 2008 WL 2794799, S.D.Ga.Augusta.Div., 2008;

In re Hill, 386 B.R. 670, Bankr.S.D.Ohio.W.Div., 2008;

In re Wilson, 383 B.R. 729, BAP.8.Ark., 2008;

Where there is a material change in Debtor(s) financial circumstances and/or Debtor(s) ability to pay creditors

In re Matsen 2008 WL 2967102, Bankr.N.D.Iowa, 2008, Unanticipated expenses

In re Payne, 387 B.R. 614 Bankr.D.Kan., 2008, Postpetition fees and charges and postpetition defaults.

In re Disney, 386 B.R. 292, Bankr.D.Colo., 2008, To recharacterize allowed secured claim postconfirmation following surrender of collateral.

Examples of when a confirmed plan can be modified

Decrease/increase in income;

Interruption in income;

Change in marital/dependent status;

Unexpected medical expenses;

Unexpected home/auto repair expenses;

Refinance of mortgage;

Mortgage loan modification;

Purchase/lease of vehicle;

Missed plan payments;

Need to keep income tax refunds;

Purchase of home;

Claims filed higher than scheduled;

Step payment increase required and unable to make increase;

Surrender of secured home/vehicle included in plan

When can you not modify a confirmed plan

In re Storey, 2008 WL 3077511 BAP .6.Ohio, 2008,
In re Matsen, 2008 WL 2967102 Bankr.N.D.Iowa, 2008,
To address issues that were or could have been decided at the time the plan was originally confirmed.

In re Parmenter, 527 F.3d 606 C.A.6.Mich., 2008;
In re Smith, 388 B.R. 603, Bankr.E.D.Pa.,2008,
To create a new obligation on the bankruptcy estate

In re Braune, 385 B.R. 167, Bankr.N.D.Tex.Fort.Worth.Div., 2008;
In re Heyward, 386 B.R. 919, Bankr.S.D.Ga.Savannah.Div., 2008;
When projected disposable income/applicable commitment period is not met.

In re Smith, 388 B.R. 603, Bankr.E.D.Pa., 2008, To add omitted creditor from the plan.

Examples of when a confirmed plan cannot be modified:

Objections to an issue could have been raised at confirmation but were not;

No material change in circumstances;

Create a new obligation on the bankruptcy estate;

Does not meet projected disposable income;

Reduces time of plan to less than the applicable commitment period;

Attempt to put direct pay debt in plan after stay lifted;

To add omitted creditors;

No unexpected or unanticipated expenses;