

I. Attorney Fees and Discharge

“There was a time when a fool and his money were soon parted,
but now it happens to everybody.”

Adlai Stevenson

Reimbursement for post confirmation attorney fees is even more challenging for attorneys with the reduction in hours, bonus pay, and job losses that clients are experiencing. Monitoring your unpaid post confirmation attorney fees is increasingly important in today’s economic times.

Attorneys’ fees to debtor’s counsel are administrative expenses pursuant to 11 U.S.C. § 503 (b)(2) and 330 (a) (4) (B). They are entitled to priority under 11 U.S.C. § 507 (a) (2). Attorney fees are treated as priority claims entitled to full payment under 11 U.S.C. § 1322 (a) (2). Attorneys’ fees for post-petition and post-confirmation work may also be entitled to priority and full payment through the plan.

Compensation

Generally, counsel for debtor and the debtor are free to contract for services in a variety of ways. In bankruptcy cases, attorney fees are not only subject to ethical rules regarding reasonableness, but are also subject to review and approval by the bankruptcy judge pursuant to 11 U.S.C. §329. The code gives the Court the power to cancel fee agreements if the compensation “exceeds the reasonable value of any such services,” 11 U.S.C. §329(b). Bankruptcy Rule 2016(b) requires attorneys representing the debtor to file a Disclosure of Compensation within 15 days of the order for relief. The Disclosure Pursuant to Rule 2016(b) requires counsel to disclose the details of the fee agreement with the debtor, including any fee sharing arrangements with other attorneys. The disclosure requires the attorney to disclose any compensation received prior to the filing as well as any compensation promised by the debtor,

but not yet received by the attorney. The disclosure must be filed in every bankruptcy case and is required even if the attorney is not applying for compensation.

Chapter 13 cases there are three basic compensation scenarios. First, the engagement agreement could call for the debtor to pay the agreed fee and expenses for chapter 13 representation in its entirety prior to the filing of a bankruptcy petition. Under this scenario, debtor's counsel would not have to seek payments from the bankruptcy estate. Second, an agreement could provide that the petition is filed after receipt of a particular amount of money, but before payment of the entire agreed fee and counsel for debtor could then seek payment on the balance of the fee from the bankruptcy estate. Finally, an agreement could provide that the bankruptcy petition is filed before payment of any money toward the attorney fee and debtor's counsel would seek payment of the entire agreed fee through the bankruptcy estate. Whatever the fee agreement, Bankruptcy Rule 2016(b) requires disclosure. If counsel is seeking payment from then bankruptcy estate (from the chapter 13 trustee payments), Rule 2016(a) requires an Application for Compensation and Reimbursement of Expenses that must be approved by the Court.

Historically, Applications for Compensation and Reimbursement of Expenses were awarded to debtor's counsel in chapter 13 on a case-by-case basis. This required the judge in the case to review the attorney's fee application. Fee applications typically required the attorney to prepare and submit the written fee agreement and detail the time spent on the case. It was the debtor attorney's burden to establish the reasonableness of the compensation and expenses. The Court reviewed each application and awarded fees accordingly. Many courts reviewed debtor's attorney fees as part of the confirmation process, provided counsel submitted the application in

time for review at confirmation. Other courts required separate motions to approve fees and scheduled hearings.

This process is burdensome for all parties involved and often would produce inconsistent results within the same jurisdiction. It was time consuming for counsel to prepare detailed time itemizations and attend separate fee hearings. It was time consuming for the chapter 13 trustee to review each time itemization and make recommendations to the court. It was also time consuming for the Judge to review the applications, hold hearings, and issue orders relating to fees in every case. Judges within the same jurisdiction often disagreed about reasonable hourly rates and would differ regarding what constituted a “reasonable” length of time to complete essential tasks in the case. As bankruptcy filings in the 1990’s and 2000’s consistently exceeded 1 million consumer filings nationwide and court caseloads began increasing, it became more and more important to the efficient administration of cases to develop “standards” to help streamline the process and ensure consistent quality of legal representation among the bankruptcy bar.

In order to address these issues, many courts now have adopted Local Rules, published Standing or General Orders, or adopted practice procedures that streamline the fee application process in chapter 13 while also standardizing services across the bar. These processes have established “no look fees.” A “no look fee” refers to a jurisdiction’s established “maximum fee” that can be awarded to counsel for representation in typical chapter 13 cases which need not be supported by detailed time itemizations. In other words, if debtors’ counsel charges a flat fee that is equal to or less than the jurisdiction’s “no look fee,” the court would award the fees without requiring detailed time itemizations. Typically counsel must still file an Application for Compensation, but the Application would no longer have to be supported by detailed time itemizations and hourly rates to justify the fee charged.

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It is important to understand that Judges maintain discretion to award less than the “no look fee” if circumstances justify. It is also possible for debtors’ counsel to receive more than the “no look fee.” An award of a fee in excess of the “no look” amount would typically require counsel to submit time itemizations and other support to justify the fee sought.

A survey of generally accepted hourly rates charged and allowed by Bankruptcy Courts and the “no look fee” vary significantly throughout the Sixth (Michigan, Ohio, Kentucky, and Tennessee) and Seventh Circuits (Wisconsin, Illinois and Indiana).

SIXTH CIRCUIT

Court	Range of Chapter 13 Hourly Fee	“No Look Fee”
Western District of Michigan	\$175.00 - \$195.00	\$2,400, but up to \$2,600 with certain CLE attendance including ABI Central States Workshop, or up to \$2,900 with Board Certification pursuant to Local Bankruptcy Rule 2016(e)(6)(B) & Exhibit 7 to the Local Rules
Eastern District of Michigan	\$175.00 - \$275.00	\$3,000 for all fees and expenses through confirmation pursuant to Local Bankruptcy Rule 2016-1(c) (see attached)
Northern District of Ohio	No Mandate. Typical range is from \$200 to \$300.	<p>Akron Location = \$3,000 pursuant to Administrative Order 08-04 (see attached)</p> <p>Canton Location = \$1,500 or less and the fee arrangement provides that \$500 or less will be paid prior to filing with the balance through the plan, plus \$500 case termination fee plus \$250 extended commitment fee, if applicable pursuant to Administrative Order 08-05 (see attached).</p> <p>Cleveland Location = \$3,000 pursuant to Administrative Order</p>

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		07-2 (see attached) Toledo Location = no written or established “no look” standard Youngstown Location = \$3,000 pursuant to Administrative Order 08-01 (see attached)
Southern District of Ohio	No Mandate. Hourly rates range from upper 100’s to \$300	\$3,000 pursuant to Local Rule 2016-1(b). (see attached)
Eastern District of Kentucky	No Mandate. Hourly rates range from \$200 - \$350	None
Western District of Kentucky	No Mandate. Rates looked at for reasonableness based upon attorney’s ability/experience. Range from \$150 - \$350	\$2,750
Eastern District of Tennessee		\$3,000 “Base Fee” pursuant to Local Rule 2016-1 (see attached)
Western District of Tennessee		

*Distinctions may be made for board certification

SEVENTH CIRCUIT

Court	Range of Chapter 13 Hourly Fee	“No Look Fee” in non-business cases
Western District of Wisconsin	\$175.00 - \$195.00	\$3,500 as observed in practice.
Eastern District of Wisconsin	Up to \$265.00	\$3,000 pursuant to “Court Policy Regarding Fee Applications in Chapter 13 Cases (No-Look Fees).” (see attached)
Northern District of Illinois	No Mandate. Typical range is from \$150 to \$300.	\$3,500 pursuant to General Order 07-02 (see attached)
Central District of Illinois	No Mandate. Hourly rates range from upper 100’s to \$300	Peoria Division = \$3,000.00 Springfield Division = \$3,000.00 Danville Division = \$3,000.00 pursuant to Standing Orders (see attached)
Southern District of Illinois	No Mandate. Hourly rates range from \$200 - \$350	\$3,500 pursuant to General Order 05-04 (see attached)
Northern District of	No Mandate. Rates looked at	\$2,800 pursuant to Notice to the

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Indiana	for reasonableness based upon attorney's ability/experience. Range from \$150 - \$350	Bar, but some judges allow up to \$3,500 without seeking time itemizations as observed in practice. (see attached).
Southern District of Indiana	No Mandate. Rates based on reasonableness standards. Range from \$150-300	\$3,500 pursuant to Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases (see attached).

Post-Confirmation

1. Allowance of Post-Confirmation fees in excess of "no look fee"

It is important to review your court's Standing Orders regarding fees, if applicable. In some cases the Standing Orders provide that the "no look fee" is for work done throughout the entire case. Some courts award the "no look fee" for work through confirmation and leave open the possibility of debtor's counsel seeking supplemental fees for post-confirmation work.

2. Procedure

Ordinarily 11 U.S.C. § 1326 (b) allows the debtor's attorney to be compensated before or at the same time as payments to other creditors under a confirmed chapter 13 plan. Depending on the amount of the monthly payment, counsel may be paid the entire "no look fee" within months of confirmation.

As a case progresses, additional work and fees are inevitable. The appropriate procedure for approval of post-confirmation attorney's fees and reimbursement of expenses, and one most often utilized by chapter 13 practitioners who seek fees or expenses in addition to those approved in a confirmation order, is an application for the court's approval of attorney's fees and expenses pursuant to § 330, which states, in pertinent part:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing...the court may award to a...professional person employed under section 327 or 1103-

(A) reasonable compensation for actual, necessary services rendered by the... attorney and by any paraprofessional person employed by such person; and

(B) reimbursement of actual, necessary expenses.

* * * * *

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable, based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

* * * * *

(4)(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

See: In re Phillips, 219 B.R. 1001 (Bankr. W.D. Tenn.1998).

Holding: The Court examined whether attorney's post-petition claims for fees and expenses should have been disallowed for procedural reasons. The Court held that each of the attorney's post-petition claims for fees filed under § 1305(a)(2) were disallowed for being procedurally defective. The Court held it was proper to file written applications for fees and reimbursement of expenses to be supported by documentation evidencing time expended and expenses incurred pursuant to § 330(a)(4)(B). In the event such applications are filed, all attorneys in chapter 13 must document all time and expenses related to the case, not merely the post-confirmation time and expenses. While the orders of confirmation may have given presumptive approval of fees up to a certain amount, when the attorney is seeking more than the fee found in the confirmation order, that attorney must demonstrate that the total fees and expenses for that case are in compliance with § 330(a)(4)(B), which makes no distinction between pre- and post-confirmation services.

3. Timing

Some chapter 13 cases may create a situation that leaves funds on hand with the Trustee to pay the "no look fee" in full upon the order for confirmation. However, in many cases, a balance may still be owed to the debtor's attorney, even after receipt of the no-look fee.

In these situations, does the Bankruptcy Code allow for the filing of a fee petition within 120 days of the confirmation order? 11 USC § 331 provides for interim compensation and reads as follows:

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

A Chapter 13 case involving a business may require significant attorney time. It may be appropriate to file a fee petition soon after entry of a confirmation order. Chapter 11 case law provides support for such an application.

In re Commercial Financial Services, Inc., 231 B.R. 351 (Bankr. N.D. Okla. 1999).

Holding: Chapter 11 debtor moved for entry of order allowing partial payment of monthly invoices of professionals prior to interim scrutiny and allowance by bankruptcy court under § 331. The Court held that the Code does not authorize court to permit professionals to apply estate funds to current billings prior to allowance by court, and that professionals could file applications for interim compensation more frequently than once every 120 days only upon presentation of credible evidence that complying with this 120-day rule would impose serious financial hardship on professional. The Court noted that permitting interim payments at 120-day intervals was sufficient to relieve the financial burden in all cases except those in which unusual circumstances warranted more frequent applications and payment, such as very large cases

where the legal work is extensive and merits more frequent payments. Section 331 provides, however, that defining the circumstances under which deviation from the 120-day period is appropriate lies solely within the discretion of the Court before whom the case is pending. This determination must be made on a case-by-case basis. The Court concluded they had discretion to permit the application for, and authorize the interim payment of, professional fees and expenses more frequently than every 120 days upon presentment of credible evidence that complying with the 120-day rule will impose serious financial hardship.

In re Mariner Post-Acute Network, Inc., 257 B.R. 723 (Bankr .D. Del.2000).

Holding: Chapter 11 debtors filed motion for order modifying procedures for professionals' interim compensation that would allow them to be paid monthly. The U.S. Trustee objected. The Court approved the motion and held that while section 331 expresses the normal rule that interim fee applications may be filed only once every 120 days, it expressly permits the Court, in appropriate circumstances, to permit fee applications to be filed more often. The Court held they were permitted to approve a procedure which allows monthly conditional interim payments to be made to a professional without prior Court approval, subject to later review and disgorgement. The Court also noted that before any monies are paid to any professional, they must approve the procedure which allows professionals to receive a conditional payment. Even then, those payments are conditional and the Court retains the right to later disallow payment of those fees or expenses during its review of the formal fee application and, consequently, the Court may order disgorgement of any fees which were improperly received. Further, as noted above, the Court always retains the power to modify such a procedure if it later proves unworkable or improvident.

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At a minimum, attorneys should regularly review fees to determine the appropriate timing for filing of fee applications.

Another issue arises when a fee application could cause a case to exceed 60 months or make the plan otherwise not feasible. Do fees once reasonable and necessary become non-compensable because of prejudicial delay by the late filing of a fee application? Can Courts rely on Section 330 to deny fee applications in these situations? 11 USC § 330 provides in pertinent part:

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--

* * * * *

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

* * * * *

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

Chapter 13 Trustees and Debtors may argue that the unreasonable delay in filing a chapter 13 fee application, which leads to a plan exceeding 60 months, should be denied.

4. Reasonable and Beneficial Services

See: In re Williams, 378 B.R. 811 (Bankr. E.D. Mich. 2007).

Holding: Chapter 13 trustee and Debtor filed objections to counsel's fee application for \$5,654.15 of additional post-confirmation fees and costs. The Court held that Debtor's attorneys were entitled to be compensated only up until hearing on debtor's proposal to modify the already significantly underfunded plan in order to further delay payments to creditors, and reduced the requested amount of fees by awarding \$3,206. The Court held that while debtor may have requested that attorneys represent her at this hearing and may have derived some benefit by further delaying creditors, it should have been obvious that debtor did not have the income to afford the assets she sought to retain for herself and her husband. To be compensable from the estate, professional's services must relate to some realistically obtainable goal; counsel for debtor or debtor-in-possession will not be compensated for time spent in preparing plan which has no realistic hope of confirmation. The first question that must be asked and answered by chapter 13 debtor's counsel in rendering post-confirmation services is whether those services are reasonably likely to benefit debtor, if not the estate; if answer to that question is yes, then next question becomes whether burden of legal fees being incurred is disproportionate to benefit to be gained by debtor.

5. Eve of Discharge – Attorney Fees

See: In re 5900 Associates, Inc., 468 F.3d 326 (6th Cir. 2006).

Holding: The Chapter 7 trustee brought an adversary proceeding to set aside an alleged fraudulent transfer. The transferee defended on theory that debtor was not insolvent at time of transfer or rendered insolvent thereby. The debtor's solvency turned on the enforceability of a claim for attorney's fees from a prior bankruptcy case. In that case, the bankruptcy court authorized the attorney's representation of the debtor, but the attorney never submitted a fee application to the court. The bankruptcy case was later dismissed. Debtor executed a promissory note in favor of his attorney for amounts owed partly from the bankruptcy proceeding. Six years later, the second bankruptcy proceeding was instituted. The bankruptcy court held that the claim for fees from the prior case was unenforceable because the debtor's attorney never sought bankruptcy court approval of those fees under 11 U.S.C. § 330(a). The district court affirmed. The Sixth Circuit agreed that 11 U.S.C. § 330 establishes the exclusive means of allowing a claim for professional fees in a bankruptcy proceeding and affirmed the judgment of the bankruptcy court, holding that the debtor was solvent at the time of the transfer. The Court held that court approval under § 330(a) creates the liability to pay attorney's fees, not the performance of the services, and that absent court approval neither the debtor nor the estate is ever liable. The Court noted the Code "assigns to courts a comprehensive duty to review fees in a particular case, and 11 U.S.C. § 330 is the sole mechanism by which fees may be enforced. Dismissal of a case, or a private agreement between the debtor and its attorney, cannot abrogate the bankruptcy court's statutorily imposed duty of review."

But See: In re Carter, 2008 WL 5604725 (Bankr. W.D. Wis., Nov. 7, 2008)

Holding: Debtor's counsel sought fees for post-confirmation chapter 13 work by fee application filed on July 2, 2008. The Debtors objected and subsequently received a discharge on July 23, 2008. The Court first decided it did have jurisdiction over a fee dispute between a debtor and debtor's counsel after the debtor has obtained a discharge. The Court then held unpaid post-confirmation attorney fees owed by the debtor to debtor's counsel were not discharged by a Chapter 13 discharge. The Court held that attorney fees due at the time of confirmation must be included in the plan as administrative expenses and that § 1328 directs the court to "grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title" with certain exceptions not relevant to the case. The Court held those fees were discharged at the conclusion of the case, but that post-confirmation fees are a different sort of debt which may but don't have to be included in the plan. If they were not, as was the case with Debtor's counsel's fees, the Court held they are a debt that survives bankruptcy.

6. After Discharge

In re Vitagliano, 2007 WL 3244241, 2007 Bankr. LEXIS 3783 (Bankr. N.D. Ohio, Nov. 2, 2007).

Holding: Debtors received a discharge in a chapter 13 proceeding. Thereafter, Debtors' counsel reopened the case in order to file a supplemental request for compensation. Debtors filed a response. The fees billed for work done post-confirmation were not submitted or approved by the court prior to the discharge. The Court held that because post-confirmation fees were treated as administrative expenses, the plan's provision for payment of administrative expenses included payment of those fees. Because the fees billed after the discharge were never submitted or approved by the court, as administrative expenses, the fees were discharged at the conclusion of the chapter 13 case under § 1328(a). The Court held that counsel's failure to submit a fee

application prior to Debtors' discharge was "calamitous" and to the extent the attorney had a cognizable claim for fees, the claim was discharged. The Court held this despite noting that equity was clearly on the side of counsel. The Court noted that the result was compelled by the law, despite counsel's hard pursuit of issues for uncooperative clients, additional legal work, and Debtors' failure to provide proof or cooperation.

In re Hanson, 223 B.R. 775 (Bankr. D. Ore. 1998).

Holding: The Court considered an attorney's practice of sending, after clients were discharged, a congratulatory letter which included a demand for additional post-confirmation fees. The Court concluded it was not appropriate for Debtors' counsel to come in to the court after the case had been closed to disclose pre-discharge fees that were not mentioned prior to the discharge. The court found that a section 1328(a) discharge operates to discharge debtors of all "unsecured debts provided for by the plan." Pursuant to section 1322(a)(2), a plan must provide for payment in full "of all claims entitled to priority under section 507 of this title" Attorney's fees are an administrative expense claim allowable under § 503(b)(2), and administrative expenses claims for attorney's fees are afforded priority in accordance with § 507(a)(1). Since the plan must afford full payment of priority administrative expense claims, it follows that such claims are "provided for by the plan" and therefore subject to discharge under § 1328(a). The Court also held that that § 1305 does not apply to post-confirmation fees of chapter 13 debtors' counsel and that post-confirmation fees need not be specifically provided for under the plan in order to be discharged by plan performance or by a hardship discharge.

In re Reed, Case No. 03-20058, 2007 WL 2900331, 2007 Bankr. LEXIS 3348 (Bankr. E.D.Wis., Oct. 1, 2007).

Holding: Debtors were granted a discharge and the case was closed. Debtors' counsel subsequently filed a lawsuit in state court for post-confirmation fees. The chapter 13 case was reopened when Debtors' attorney applied for the additional post-confirmation fees through the bankruptcy court. The Court noted that it was likely the fees and expenses were not disclosed or applied for sooner because the allowance of the additional \$2,300 in priority claims may have prevented the Debtors from completing their plan and receiving their discharge. Despite this, the Court held that the supplemental attorney's fees were part of the priority claim provided for by the plan and were discharged by the Debtors' completion of that plan and discharge. The Court noted such fees could survive the discharge by a disclosure and court approval of the debtor's and the attorney's agreement that the additional fees would be paid outside the plan, after the discharge. Such disclosure would be required prior to the discharge to be effective.

7. Following conversion from Ch. 7 to Ch. 13

In re Zion, Case No. 07-58999-R, (Bankr. E.D. Mich., Feb. 27, 2009) (not published).

Holding: Debtors filed a chapter 7 and, following a § 707(b) motion, converted the case to chapter 13. The case was subsequently confirmed and Debtors' counsel filed a fee application requesting fees, a large portion of which resulted from work done on the chapter 7 matter. The chapter 13 trustee objected to compensation for services rendered during the pendency of the chapter 7 case. The Court held that compensation for an attorney representing a chapter 7 debtor is permitted from the estate only if the attorney is employed under § 327, and that attorney's request for fees and expenses attributable to services rendered in conjunction with the Debtors' chapter 7 case prior to conversion could not be allowed.

But see:

In re LaVallee, Case No. 07-41756 (Bankr. E.D. Mich, Jul. 28, 2008)(not published).

Holding: Debtors filed a chapter 7 and, following a successful § 707(b) motion, converted their case to a chapter 13. Thereafter, Debtors’ attorney filed a fee application which included approximately \$9,000 of fees resulting from the Chapter 7. Trustee objected only to the reasonableness of the fees and did not assert that the fees incurred in the Chapter 7 could not be paid from the estate. Judge Shapiro concluded that the fees were reasonable.

Plan Length Modifications

“If you want to make enemies, try to change something.”

~Woodrow Wilson

A. Overview

Post-confirmation plan modifications are controlled by 11 USC § 1329 and Fed. R. Bankr. P. 3015. A debtor, trustee, or holder of an allowed, unsecured claim may seek to modify a chapter 13 Plan anytime after confirmation but before completion of plan payments. A plan may be modified post-confirmation as follows:

1. To increase or reduce the amount of payments on claims of a particular class provided for by the plan;
2. To extend or reduce the time for such payments;
3. To alter the amount of distribution to a creditor whose claim is provided for by the plan so as to reflect any payment of such claim other than under the plan; or
4. to reduce plan payments for actual reasonable, necessary and documented health expenditures.

Although § 1329 incorporates certain specific provisions of the Code, it does not incorporate § 1325(b), which contains what is referred to as the “disposable income test.”

However, some courts have incorporated 1325(b) through 1325(a)(1) which requires that the plan, as modified, comply with all provisions of Title 11 in general and Chapter 13 in particular. “All provisions” includes 1325(b).

1. Legal Standard for Post Confirmation Plan Modification

Section 1327(a) provides that a confirmed plan binds the debtor and each creditor to the plan terms. Echoing previous decisions, the Sixth Circuit Bankruptcy Appellate Panel recently held that a confirmation order is *res judicata* and therefore not subject to collateral attack. *In re Storey*, 392 B.R. 266 (6th Cir. B.A.P. 2008). The Seventh Circuit Court of Appeals has held the opposite, that the doctrine of *res judicata* does not apply to § 1329 plan modifications. *Matter of Witkowski*, 16 F.3d 739 (7th Cir. 1994).

To the extent a confirmation order is *res judicata* under § 1327, what legal standard must the court apply in granting a modification under § 1329 without trampling over §1327 *res judicata* mandates? Currently no Sixth or Seventh Circuit Court of Appeals case specifically defines a standard for § 1329 modifications. The Seventh Circuit Court of Appeals attempted to address the issue in the *Witkowski* case cited above. Below is a discussion of the *Witkowski* case, and a list of some cases from courts in the Sixth Circuit that have addressed these issues.

1. *Matter of Witkowski*, 16 F.3d 739 (7th Cir. 1994).

Holding: Under § 1329, the doctrine of *res judicata* does not apply and establishes that no threshold change of circumstances is required. Instead, the language of the statute is discretionary and it was not an abuse of discretion for the bankruptcy judge to modify an approved “percentage plan” to a “pot plan.” The Court in *Witkowski* specifically stated that Congress “provided a mechanism to change the binding effect of § 1327 when it passed § 1329 to allow for modifications.” “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” (quoting from *In re Williams*, 108 B.R. 119, 123 (Bankr.N.D.Miss.1989). “Moreover, Congress would 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 of circumstance” prerequisite under another provision of the Bankruptcy Code. § 1328(b). This provision makes clear that Congress did not intend the common law doctrine of res judicata to apply to §1329 modifications.” (pg. 745).

The Court went on to state that the statute expressly limits modifications to three circumstances. Citing § 1329(a), the court stated that the plan could be modified to “(1) increase or reduce the amount of the 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” (pg. 745). The Court also identified limitations to plan modifications by pointing out that modification was only available when §§ 1322(a), 1322(b), 1325(a) and 1323(c) of the Bankruptcy Code are met and if proposed in good faith. (*see pp.* 745-746).

Later in the opinion the Court said that since plan modification under § 1329 is phrased with permissive language, i.e. “the plan may be modified,” it is discretionary and therefore limited its review of the lower court’s decision to an abuse of discretion standard (*see p.* 746). The Court acknowledged that § 1329(a) does not explicitly state what justifies modification and that there is little guidance as to the standard to be applied by a bankruptcy court in determining whether a request for a post-confirmation modification of a Chapter 13 plan should be granted. But, the Seventh Circuit ruled that the bankruptcy judge who decided that the Bankruptcy Code favored

“pot plans” over “percentage plans” did not abuse its discretion in modifying the confirmed “percentage plan” to a “pot plan” (*see* p. 746). The Court also addressed the debtor’s § 1329(c) argument that the bankruptcy court did not make a finding of “cause” when modifying the plan.

There are several courts within the Seventh Circuit that have recently ruled on plan modifications citing *Witkowski*. In one reported case, the Court denied the Trustee’s Motion to Modify the Plan Post-Confirmation because the motion was not brought prior to the completion of payments and, even assuming timeliness, refinancing of the debtor was not in the nature of change in debtor’s financial circumstances which would warrant modification of the confirmed plan. *In re Forte*, 341 B.R. 859 (Bankr. N.D. Ill. 2005). In another reported case, the Court granted the debtor’s motion to modify the plan post-confirmation to provide for a reduced distribution to a creditor under the plan. The debtor wanted to reduce the distribution to a creditor in order to reflect insurance proceeds received by the creditor outside of the Plan. *In re Turnbull*, 350 B.R. 429 (Bankr. N.D. Ill. 2006). In another case, the Court denied debtor’s motion for plan modification to add omitted pre-petition creditors. *In re Plummer*, 378 B.R. 569 (Bankr. C.D. Ill. 2007). The Court granted the trustee’s motion for modification to increase the dividend to unsecured creditors to 100% based on positive, post-confirmation change in debtors’ financial circumstances. In this case the debtors had received an inheritance post-confirmation. *In re Wetzel*, 381 B.R. 247 (Bankr. E.D. Wis. 2008).

In another reported case, the Court denied trustee’s motions to modify plans post-confirmation to allow a special distribution to unsecured creditors based on the debtors receiving proceeds from their class action or workers’ compensation claims post-petition. The decision considered three separate cases with debtors represented by the same counsel and issued the opinion in one case applicable to each of the pending bankruptcy cases. All the plans called for the debtors to turn

over any money received from the pending claims to the chapter 13 trustee and distribute to creditors under the plan. However, the trustee in these cases was seeking to give all of the proceeds in a lump sum distribution directly to unsecured creditors. The Court ruled that while the trustee need not make any showing of substantial or unanticipated change in debtors' circumstances under *Witkowski*, the Court denied the trustee's request noting that the trustee could not satisfy any of three categories under § 1329(a) authorizing modification because the trustee was not seeking to change the amount received by any particular creditor and the trustee was not seeking to change the duration of the plan. The trustee was attempting to modify the "distribution scheme" which was not a permitted statutory purpose for modification. The Court went on to say that if the trustee's attempted actions fell within one of the three provisions of § 1329(a), the trustee could not compel a debtor to exercise his/her permissive § 1322(b)(4) option. The debtors in these cases chose to pay secured and unsecured creditors contemporaneously and the trustee could not force the debtor to pay unsecured creditors before secured creditors. *In re Baines*, 263 B.R. 868 (Bankr. S.D. Ill. 2001).

2. *In re Brown*, 219 B. R. 191 (6th Cir. B.A.P. 1998).

Holding: Chapter 13 debtors filed application to settle and distribute proceeds of post-confirmation settlement of pre-confirmation personal injury action, part of which were claimed as exempt. Trustee filed motion to modify plan to include proceeds, including those claimed as exempt, as disposable income to be devoted to plan payments. The bankruptcy court granted debtors' application and denied trustee's motion because the principals of *res judicata* barred the modification. Trustee appealed. The Bankruptcy Appellate Panel held that confirmation of a debtor's plan constitutes a final judgment on the merits of the matters that could have been raised in the case. However, the Court noted that the proper manner to change the binding effect of

§1327 is §1329, which allows for plan modifications. Ultimately, the court held that while a bankruptcy court may consider changed circumstances, §1329 does not contain a requirement for “anticipated or substantial change as a prerequisite to modification.” Accordingly, the BAP held the bankruptcy court abused its discretion by requiring trustee to show unanticipated and substantial change in debtors' circumstances before reaching merits of modification motion. Despite this finding, the BAP did not specify what must be shown in order to approve a plan modification.

3. *In re Storey*, 392 B.R. 266 (6th Cir. B.A.P. 2008).

Holding: Chapter 13 trustee filed motion to modify confirmed plan, seeking to correct his pre-confirmation mistake in calculating the plan's length with a resulting increase in the dividend to unsecured creditors from 7% to 50%. Debtors objected. The bankruptcy court granted the motion by concluding the trustee was correct that the plan did not meet the applicable commitment period requirement of §1325(b)(4) when confirmed. Debtors appealed. The Bankruptcy Appellate Panel held it was error to approve the trustee's modification and reversed the decision. The BAP addressed the interplay between § 1327 and § 1329, noting that a confirmation order is *res judicata* and not subject to collateral attack, and further the lack of a statutory standard for plan modifications in § 1329. The BAP concluded that § 1327 prevents consideration of matters that could have been decided at the time the plan was confirmed, that modification under § 1329 would be limited to matters arising post-confirmation and that counsel's advocacy for a plan modification must establish new facts and circumstances that did not exist prior to, or at the time of, confirmation. Accordingly, the trustee was barred from raising the calculation mistake issue by means of a proposed plan modification under § 1327.

4. *In re Morrow*, 397 B.R. 876 (Bankr. N.D. Ohio 2008).

Holding: Chapter 13 debtor moved to modify her confirmed plan to reduce interest rate that was payable on bank's secured claim following decline in market rates of interest. The Court denied debtor's motion, holding that a confirmed plan has binding effect on both debtor and debtor's creditors under § 1327(a), and that the binding effect of a confirmed plan precludes modification of plan to address issues that were or could have been decided at time plan was originally confirmed. Accordingly, the Court held the *res judicata* effect of the confirmed plan, as well as unfairness of permitting debtor to seek modification based on drop in interest rates when bank could not have sought to modify confirmed plan if interest rates rose, prevented debtor from modifying plan.

2. Do Plan Modifications Have to Meet § 1325(b) Standards?

Does § 1329 provide debtors refuge from a court ruling that an “applicable commitment period” is a fixed temporal commitment that would require the debtors to remain in a chapter 13 plan for a minimum term of 3 or 5 years, absent 100% payment to unsecured creditors? In other words, by excluding § 1325(b) from § 1329 (whether intentionally or not) did Congress intend for post confirmation plan modifications to be free of the disposable income test of 1325(b)? There is currently no Sixth or Seventh Circuit case law. However, courts throughout the two circuits, and from other jurisdictions, have ruled on the issue. Courts are split. Here is a sampling of those cases, some of which are pre-BAPCPA but which may be relevant under BAPCPA.

1. *In re Hall*, Case No. 06-61733, 2008 WL 2388628 (Bankr. N.D. Ohio June 11, 2008).

Holding: Debtor was married when she filed for bankruptcy. Combined, her income and that of her husband was above the median. Debtor and her husband separated and then divorced during the case. Alone, Debtor's income was below the median. Debtor proposed to reduce her monthly

payment and reduce the plan's length from 60 months to 36 months. Trustee argued that the ability to extend or reduce the time for payments under 1329(a) does not extend to the ability to reduce the time for such payments below that of the applicable commitment period established at the outset of the case. The Court ruled in Debtor's favor, holding that 11 U.S.C. § 1329(a)(2) permits Debtor to reduce the time for her payments unimpeded by the applicable commitment period calculations of § 1325(b)(4). The Court noted that 11 U.S.C. § 1329(b)(1) provides that the requirements of § 1325(a) apply to modifications of plans under § 1329(a), but makes no reference to § 1325(b), which contains the provision restricting confirmation to plans satisfying the applicable commitment length based on CMI. The fact that Congress enumerated four specific Bankruptcy Code provisions in § 1329(b)(1) that do apply to plan modifications under § 1329(a) compels the conclusion that the absence of other provisions from that list is not an accident. The Court concluded that the good faith requirements referenced in § 1325(a) still apply, and that CMI may remain a number frozen in time, but that number is both irrelevant to the Code provisions that affect plan modifications under the terms of § 1329(b)(1) and no longer an accurate reflection of Debtor's financial situation.

2. *In re Hill*, 386 B.R. 670 (Bankr. S.D. Ohio 2008).

Holding: The Court held that an above-median-income debtor could not modify his confirmed chapter 13 plan so as to substitute his actual income and expenses in place of his current monthly income (CMI) and expenses derived from means test formula based solely upon one particular expense, debtor's domestic support obligation. However, in its ruling, the Court determined that § 1329(a)(1) allows for the modification of confirmed chapter 13 plans to reduce or increase the amount of payments to non-priority unsecured creditors and other classes of creditors and that the § 1325(b) disposable income test is not incorporated into § 1329. The Court noted that

“when Congress wanted to incorporate a particular subsection of Chapter 13 into § 1329, it did so explicitly, directly and unambiguously.” 386 B.R. at 676.

3. *In re McCully*, 398 B.R. 590 (Bankr. N.D. Ohio 2008).

Holding: Chapter 13 debtors moved to modify their previously confirmed plan to reduce its term after debtor-wife lost her job and debtors' income declined below the median level for debtors in that state. The Court held that post-confirmation change in chapter 13 debtors' circumstances, when debtor-wife lost her job and debtors' income declined to point that they were no longer above-median-income debtors but debtors' whose income was less than median income level for debtors in their state, warranted a modification of their confirmed plan to decrease its term from 60 to 52 months. Citing *In re Hill*, and other similar decisions, the Court held that when construing § 1329, courts have looked to the plain meaning of the language and determined that § 1329 lacks a reference to § 1325(b), so that to force its incorporation where a reference does not exist would be inconsistent with Congressional intent.

4. *In re Kidd*, 374 B.R. 277 (Bankr. D. Kan.2007).

Holding: The Court held it could not confirm, over objection of chapter 13 trustee, proposed plans under which debtors purported to reserve for themselves a right to pay off their plans early, and to emerge from chapter 13 prior to conclusion of their applicable three- or five-year commitment periods, simply by paying creditors what they otherwise would have received over these applicable three or five-year periods. Chapter 13 plans containing “cash-out” options allowing debtors to “cash out” before the expiration of the applicable commitment period without meeting the requirements of § 1329 could not be confirmed. However, the Court held that the door did remain open for good-faith modifications after confirmation of a plan under §

1329 because Congress did not apply the provisions relating to the applicable commitment period to modified plans.

5. *In re Ewers*, 366 B.R. 139 (Bankr. D. Nev. 2007)

Holding: Debtors' means test form B22C identified them as above median income debtors, and a five year applicable commitment period was established. However, Debtors' income dropped significantly when they retired after the petition date. Debtors moved to modify their confirmed plan in order to shorten its five year term and the Trustee objected, claiming the plan had to extend for five years unless unsecured creditors were paid in full. The Court held the mere fact that the chapter 13 Debtors, as Debtors whose income was above the median income for debtors in that state on the date the petition was filed, were required to propose a five year plan in order to obtain confirmation over objection of the Trustee or unsecured creditors did not mean that Debtors could not subsequently modify their plan to reduce its term.

6. *In re Ireland*, 366 B.R. 27 (Bankr. W.D. Ark. 2007).

Holding: On Form B22C, filed with Debtors' original petition, they reported a combined annual gross income of \$66,499.04, which was above the median income of \$38,438.00 for a family of two in Arkansas. On September 20, 2006, Debtors filed an amended Schedule I that evidenced a net monthly income, reduced from \$4,559.88 to \$3,710.98, an \$848.99 reduction of net monthly income resulting from Mr. Ireland's new job. Debtors argued that a modified plan allowed by § 1329 of the Bankruptcy Code may change the dividend to unsecured creditors if warranted by the debtors' circumstances. The Court ruled for the Debtors, holding that because § 1325(b) is not mentioned in § 1329, except for other discreet purposes, it does not appear that § 1325(b) is directly applicable to modification under § 1329.

7. *In re Sunahara*, 326 B.R. 768 (9th Cir. B.A.P. 2005)

Holding: Chapter 13 Debtor moved for authority to refinance his real property for the purpose of paying off his confirmed chapter 13 Plan in a lump sum prior to the expiration of 36 months without paying 100% to his unsecured creditors. The Court held that Debtor could not seek to modify his plan under § 1329 without paying a 100% dividend to unsecured creditors, even if that resulted in completing the plan in fewer than 36 months. The Bankruptcy Court sustained the Trustee’s objection to the Debtor’s motion to modify and on appeal, the BAP reversed. The BAP relied on *Lamie v United States Trustee*, 540 U.S. 526 (2004), in holding the “plain language of § 1329(b) does not mandate satisfaction of the disposable income test of § 1325(b)(1)(B) with respect to a modified Plan.” Surveying the extant case law on the issue, the BAP held that “section 1329(b) expressly applies certain specific code sections to Plan modifications but does not apply to Section 1325(b). Period. The incorporation of Section 1325(a) is not, as has been posed by some courts, the functional equivalent of an indirect incorporation of 1325(b).” (pre-BAPCPA case).

8. *In re Forbes*, 215 B.R. 183 (8th Cir. B.A.P. 1997)

Holding: Three years into his chapter 13 Plan, Debtor received settlement proceeds that would enable him to reduce the plan term from 60 to 40 months. Debtor filed a § 1329 motion to modify his plan. The trustee and a creditor objected to the proposed modification on the ground that settlement constituted a windfall, enabling the Debtor to pay all of his creditors in full. The Bankruptcy Court overruled the objections, and approved the plan as modified by the debtor. The trustee and the creditor appealed. The issue before the BAP was whether the Bankruptcy Court erred by failing to consider the settlement funds as disposable income under § 1325(d). In affirming the Bankruptcy Court’s decision, the BAP held that Congress clearly did not include §

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1325(b) in the requirements of post confirmation plan modifications under § 1329(b). and that it would not read the statute to hold otherwise. (pre-BAPCPA case).

9. *In re Tozer*, 392 B.R. 758 (Bankr. W.D. Wis. 2008)

Holding: Debtor moved to modify plan to extend the duration of the plan from 48 to 54 months so as to permit payment of attorney's administrative expense claim. The Court ruled that a change in debtor's financial circumstances was not a prerequisite to modification of a confirmed plan and "cause" existed to modify in order to permit the payment of the attorney's administrative expense claim for supplemental compensation allowed by the Court.

BUT SEE:

10. *In re Keller*, 329 B.R. 697 (Bankr. E.D. Cal. 2005).

Holding: Debtors sought court approval to refinance their residence and use proceeds to pay off chapter 13 Plan early. When the approval was sought, Debtors had completed 14 of 48 monthly payments provided for in their confirmed plan. The Court held that in order to complete the plan early by payoff, they were required to pay 100% of unsecured claims, or show the Court that in their particular economic circumstances, making payments for less than three years would satisfy the good faith requirements of § 1325(a)(3). The Court also held that the exclusion of § 1325(b) from § 1329(b) did not mean that §1325(b) is not applicable to modified plans because the reference of § 1325(b) within §1325(a) suggests that subsection (b) comes into play whenever subsection (a) is applicable. (pre-BAPCPA case).

11. *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997)

Holding: The chapter 13 debtor's wife moved for permission to pay the remaining balance owed under confirmed plan in one lump sum payment following the death of debtor husband. The court held that there was no authority for the court to shorten the life of debtor's

confirmed chapter 13 plan to 23 months, when she was paying unsecured creditors only 45% of their allowed claims. The court held that “A plan so modified, however, is still subject to the good faith requirements necessary to confirm the plan in the first place. One such good faith requirement is for the debtor to apply all of her disposable to her plan payments for at least 3 years, or to pay 100% of her unsecured creditors’ claims.” (pre-BAPCPA case).

12. *In re Solis*, 172 B.R. 530 (Bankr. S.D.N.Y. 1994)

Holding: The Chapter 13 Trustee moved to modify a confirmed chapter 13 plan to include proceeds from the post-confirmation sale of the debtor’s medical practice. The Court held that a trustee’s application should be limited to situations in which there has been a substantial change in the debtor’s income or expenses that was not necessarily anticipated at the time of the confirmation hearing. The court found that the sale of the medical practice was such a change. The court went on to state that once there is a determination that the plan should be modified, the new plan must comply with the bankruptcy code. Section 1329(b)(1) incorporates, by reference, § 1325(a). These provisions require the plan to be proposed in good faith, § 1325(a)(3), and in accord with the ability to pay test. (pre-BAPCPA case).