Modification
11 U.S.C. § 1329
Confirmation

In re Samuel Richards 696-62812-fra13
In re Rex and Kimberly Morris 696-63076-fra13
In re Thomas Chambers 696-63243-fra13

10/3/96 FRA Unpublished

These three chapter 13 cases were consolidated for opinion at the suggestion of the parties. In each case, the plan provided for the payment of the debtor's disposable income for longer than 36 months plus payment, in addition to the monthly payment, of "any lump sum payment after 36 months." The parties agreed that the underlying issue is whether a debtor may include such a provision in a plan with the effect of avoiding the need to modify the plan under § 1329 if and when the income becomes available to make a lump sum payment.

The court cited Anderson v. Saterlee, 21 F.3d 355,358 (9th Cir. 1994)which held that projected disposable income must be determined at the time the plan is confirmed. The bankruptcy court stated that if a debtor intends to make a lump sum payment at some point during the life of the plan, there must be evidence that the funds will be available. The plan must also provide that the lump sum constitutes all of the funds necessary to complete execution of the plan and the court must be assured that the debtor has the ability to make all of the payments required by the plan. None of the plans being reviewed had any such assurances. The plans as drafted give the debtors the option of making an additional lump sum payment if the money became available and if the debtors chose to make the payment.

The court also cited to § 1329(a)(1) which states that a plan may be modified to increase or reduce the amount of payments to a particular class. Since the lump sum would be an increase or decrease in the amount and number of payments, making this additional payment would necessarily be a modification of the original plan and all of the requirements of § 1329 would have to be met. The court, in denying confirmation of the plans, stated that the requirements of § 1329 cannot be evaded by the simple expediency of a plan provision which hints at the prospect of an additional payment in the future.

E96-18(5)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE SAMUEL RICHARDS, Debtor.	)	Case No. 696-622812-fra13
REX L. MORRIS and KIMBERLY C. MORRIS, Debtors.	)	Case No. 696-63076-fra13
THOMAS A. CHAMBERS, Debtor.	)	Case No. 696-63243-fra13 MEMORANDUM OPINION

These three cases present a common legal question, and were consolidated for decision at the suggestion of the parties.[1] Each is a Chapter 13 case in which the Trustee has objected to confirmation. For the reasons stated in this memorandum confirmation will be denied in each case.

[1]The parties submitted written memoranda on the issue at bar in the Richards case. Shortly thereafter Chambers and Morris came up for confirmation. It was agreed by the parties that the issues were identical, and that all three cases should be decided on the Richards memoranda.

I. BACKGROUND

The plans proposed in these cases are substantially similar. Two (Richards and Chambers) are barely distinguishable: each plan provides for:

a. A monthly payment of Debtors' disposable income;

b. Payment, in addition, of "any lump sum payment after 36 months";

c. No secured creditors;

d. No payments to unsecured creditors; and

e. A request that the plan extend beyond 36 months in order to pay priority debt.

(Morris differs in three respects: there is secured debt for furniture, tools and property taxes, and a 15% composition rate to unsecured creditors. Extension beyond 36 months is sought to "pay secured debt").

In each case the amount of the specific monthly payment is equal to the Debtors' net disposable income disclosed on Schedule J. None of the schedules or plans reveal the amount, source, or estimated time of arrival of income to be applied to any lump sum payment.

The trustee objects to confirmation because of the inclusion in the plans of "any lump sum payment after 36 months."

II. ISSUE

May a Chapter 13 plan provide for an undefined, optional payment after confirmation? The parties agree that the underlying issue is whether a debtor may include such a provision

in a plan committing future income, with the effect of avoiding the need to modify the plan under Code § 1329 if and when the income becomes available.

III. DISCUSSION

A plan of reorganization under Chapter 13 must "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." Code § 1322(a)(1). Projected disposable income is determined at the time the plan is confirmed. Anderson v. Saterlee, 21 F.3d 355, 358 (9th Cir. 1994). In order to confirm a plan the court must find that the Debtor has the ability to make all the payments required by the plan. § 1325(a)(6).

The provision for payment of "any lump sum" available in the future is problematical in several respects. If a debtor actually intends to make a lump sum payment at some point during the life of the plan, there must be evidence that the funds will be available. The plan must also provide that the lump sum constitutes all of the funds necessary to complete execution of the plan. The plans in these cases contain no such commitment.

The plans as drafted effectively give debtors the option of making the lump sum payment *if* the funds are available *and* debtors elect to use the funds for the plan. That option

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certainly exists, but the exercise of the option is necessarily a modification of the original plan under Code § 1329.[2]

The Code allows for modification in order to increase or decrease the amount or number of payments. Logically, it follows that any such increase or decrease is in fact a modification. If a plan is to be modified, all the requirements of § 1329 must be satisfied. This requirement cannot be evaded by the simple expedient of a plan provision which hints at the prospect of an

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[2]§ 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; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

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

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

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

additional payment in the future.

IV. CONCLUSION

Confirmation in each case should be denied. Debtors may submit amended plans which are consistent with this opinion. [3] This memorandum contains the court's findings of fact and conclusions of law, which will not be separately stated. An order consistent with this opinion will be entered in each case.

FRANK R. ALLEY, III
Bankruptcy Judge

cc: Mr. Eric Olsen
Mr. Ronald Becker

[3] In Richards and Morris the trustee had additional objections based on failure to schedule certain creditor or to submit assessments value information. These requests must be complied with prior to confirmation of any amended plans.