

Modification  
11 U.S.C. § 1329  
Confirmation

3	<u>In re Samuel Richards</u>	696-62812-fra13
4	<u>In re Rex and Kimberly Morris</u>	696-63076-fra13
4	<u>In re Thomas Chambers</u>	696-63243-fra13

5 10/3/96 FRA Unpublished

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

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

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

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

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

These three cases present a common legal question, and were consolidated for decision at the suggestion of the parties.<sup>1</sup> 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.

<sup>1</sup>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.

1 I. BACKGROUND

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

- 5 a. A monthly payment of Debtors' disposable income;
- 6 b. Payment, in addition, of "any lump sum payment after 36  
7 months";
- 8 c. No secured creditors;
- 9 d. No payments to unsecured creditors; and
- 10 e. A request that the plan extend beyond 36 months in order  
11 to pay priority debt.

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

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

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

23 II. ISSUE

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

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

4 III. DISCUSSION

5 A plan of reorganization under Chapter 13 must "provide for  
6 the submission of all or such portion of future earnings or other  
7 future income of the debtor to the supervision and control of the  
8 trustee as is necessary for the execution of the plan." Code  
9 § 1322(a)(1). Projected disposable income is determined at the  
10 time the plan is confirmed. Anderson v. Saterlee, 21 F.3d 355,  
11 358 (9th Cir. 1994). In order to confirm a plan the court must  
12 find that the Debtor has the ability to make all the payments  
13 required by the plan. § 1325(a)(6).

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

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

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1 certainly exists, but the exercise of the option is necessarily a  
2 modification of the original plan under Code § 1329.<sup>2</sup>

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

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10 <sup>2</sup>§ 1329. Modification of plan after confirmation.

11 (a) At any time after confirmation of the plan  
12 but before the completion of payments under such plan,  
13 the plan may be modified, upon request of the debtor,  
14 the trustee, or the holder of an allowed unsecured  
15 claim, to--

- 16 (1) increase or reduce the amount of  
17 payments on claims of a particular class  
18 provided for by the plan;  
19 (2) extend or reduce the time for such  
20 payments; or  
21 (3) alter the amount of the  
22 distribution to a creditor whose claim is  
23 provided for by the plan to the extent  
24 necessary to take account of any payment of  
25 such claim other than under the plan.

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

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

26 (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.

1 additional payment in the future.

2 IV. CONCLUSION

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

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FRANK R. ALLEY, III  
Bankruptcy Judge

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17 cc: Mr. Eric Olsen  
18 Mr. Ronald Becker

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25 <sup>3</sup>In Richards and Morris the trustee had additional  
26 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.