

11 U.S.C. § 1325(b) (1)  
11 U.S.C. § 1329

In re LANA G. MCKINNEY

Case No. 393-31451-psh13

1/30/96

PSH

Published

The Chapter 13 trustee brought a motion to modify the debtors confirmed plan to increase the payments to be made to general unsecured creditors. The debtor objected on the grounds that the motion was untimely.

The debtor had no secured debt and the plan provided for 0% distribution to general unsecured creditors. Thus only priority debt was to be paid through the plan at \$125 per month for 12 months and \$230 per month for an unspecified time thereafter. The debtor's scheduled priority debt of \$10,000. Under the proposed payment schedule the debtor would have needed over 36 months to pay this amount. The actual priority claims filed and allowed totaled substantially less than 10,000. Consequently, it took the debtor only 12 months to pay the allowed priority claims in full.

The trustee contended that the plan called for payments to continue for at least 36 months. The court agreed, noting that under § 1325(b) the plan could not have been confirmed unless it required that the debtor commit all of his disposable income to it for a period of 3 years.

The debtor argued that regardless of the duration specified in the plan she completed her plan payments at the time she paid sufficient funds to the trustee to pay all of her priority unsecured debt. The trustee contended that when duration of a plan and the percent to be paid to creditors are inconsistent, plan payments are not completed until the debtor has made the number of payments provided for in the plan. The court concluded that where the terms of a confirmed plan are found to be internally inconsistent the debtors must continue their plan payments, at a minimum, for a time sufficient to meet the requirements of § 1325(b)(1).

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES BANKRUPTCY COURT  
9 FOR THE DISTRICT OF OREGON  
10

11 IN RE )  
12 LANA G. MCKINNEY, ) Case No. 393-31451psh13  
13 ) MEMORANDUM OPINION  
14 )  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
Debtor.

15 This matter came before the court on the trustee's motion to  
16 modify the debtor's Chapter 13 plan. Upon review it is clear that the  
17 trustee seeks two court rulings. First, he asks the court to  
18 interpret the current confirmed plan. Second, if he prevails on the  
19 issue of interpretation he asks the court to modify that plan to  
20 increase the stated percentage to unsecured creditors.

21 The plan was confirmed on February 13, 1994. The debtor has  
22 no secured debt and the plan provided for 0% distribution to general  
23 unsecured creditors. Thus only priority debt was to be paid through  
24 the plan at \$125 per month for twelve months and \$230 per month for  
25 an unspecified time thereafter. The debtor scheduled priority debt of  
26 \$10,000. Under the proposed payment schedule the debtor needed over

1 36 months to pay this amount. The actual priority claims filed and  
2 allowed totalled substantially less than \$10,000. Consequently, it  
3 took the debtor only 12 months to pay the allowed priority claims in  
4 full.

5 The trustee asks the court to interpret the confirmed plan as  
6 having a term of 3 years. He contends that, despite the fact that  
7 the plan did not specify its term, the parties understood that it  
8 would run for at least three years. Paragraph 2(c) of the plan  
9 requires all priority debt to be paid in full; under the facts as  
10 known at confirmation the proposed plan payments would not have paid  
11 the priority debt in full, as scheduled, in less than three years.  
12 He further argues that the local practice at the time this plan was  
13 confirmed was not to specify the number of payments required under a  
14 plan if it appeared that the plan, as here, would require longer than  
15 3 years to complete. Finally, he contends that the plan must have  
16 been intended to run for at least three years because a plan of  
17 shorter duration would have violated §1325(b)(1) and could not have  
18 been confirmed. Section 1325(b)(1) requires as a condition of  
19 confirmation that a proposed plan provide for either full payment of  
20 all allowed unsecured debt or for the debtor to apply all of his  
21 projected disposable income for a period of at least 3 years toward  
22 plan payments.  
23

24 The court agrees with the trustee. The parties intended that  
25 this plan continue for a period of at least 3 years; this requirement  
26

1 was incorporated into the plan by implication. My conclusion is  
2 bolstered by the fact that it would have taken more than 3 years for  
3 the debtor to pay the scheduled priority debt at the payment rate  
4 specified in the plan.

5 Under § 1329(a)(1) a plan may be modified at the request of the  
6 trustee to provide for an increase in the amount of payments to  
7 classes of creditors provided for by the plan. This request may be  
8 made "at any time after confirmation of the plan but before  
9 completion of payments under such plan." The debtor argues that  
10 since her plan provided for payments only to priority debt and since  
11 that debt has been paid in full, the "payments under [the] plan"  
12 have been completed and the trustee's motion to modify the plan to  
13 increase the percentage to be paid to general unsecured creditors is  
14 untimely. Arguing that the plan requires the debtor to make 36  
15 monthly payments the trustee asserts that there has been no  
16 "completion of payments under such plan."  
17

18 The court has interpreted the plan as one of 3 years' duration.  
19 Modification is urged because the terms of the plan, having been  
20 structured on inaccurate information regarding the amount of priority  
21 debt, are internally inconsistent. Where the terms of a confirmed  
22 plan are internally inconsistent, has the debtor "completed payments  
23 under the plan" under § 1329(a)(1) when, as she urges, she has paid  
24 the general unsecured creditors the amount provided for their class  
25  
26

1 or when, as the trustee insists, payments are made for the complete  
2 plan term?

3 The court addressed a similar issue in In re Phelps 149 B.R. 534  
4 (Bankr. N.D. Ill. 1993). In Phelps the debtor's confirmed Chapter 13  
5 plan provided for payments of \$282 per month for a period of 43  
6 months. General unsecured creditors were to receive 10% of their  
7 claims. However, because the amount of the unsecured claims actually  
8 filed was less than anticipated, it took the debtors only 37 months  
9 to pay sufficient funds to the trustee to pay 10% on the unsecured  
10 creditor's claims. Thereafter the trustee moved to modify the  
11 debtors' plan to increase the payments to these creditors. The  
12 debtors objected, arguing that the trustee's motion was not timely  
13 because they had completed their plan payments. The court agreed,  
14 stating:

16 "The substance of a plan looks to the nature of the  
17 debtor's obligation to the debtor's creditors, not to the  
18 number of payments proposed. A simple example makes this  
19 conclusion clear.

20 Assume that the Debtor proposed to pay unsecured creditors  
21 100% in 43 months, but due to the failure of some scheduled  
22 creditors to timely file proofs of claim, she is able to  
23 provide the Trustee with enough money to pay 100% to  
24 unsecured creditors with allowable claims in 37 months. It  
25 is inconceivable that the Debtor could be made to continue  
26 payments for six more months to pay unsecured creditors  
more than 100% of their claims.

23 Id. Consequently, it held that "'completion of payments [under §  
24 1329(a)]' occurs when the debtor has paid the percentage owed to each  
25 class of creditors as provided for in the plan."  
26

1           In In re Casper 153 B.R. 544 (Bankr. N.D. Ill. 1993) rev 154  
2 B.R. 243 (N.D. Ill.1993). the plan called for 60 monthly payments of  
3 \$550. The debtors would pay secured and priority creditors in full  
4 and the general unsecured creditors would receive 10% of their  
5 claims. The filed and allowed priority and secured claims were  
6 substantially less than scheduled. In addition, approximately two  
7 years after the plan was confirmed, the debtors made a lump sum  
8 payment to the trustee of several thousand dollars. Consequently,  
9 approximately 25 months after beginning payments the debtors had paid  
10 the trustee sufficient funds to pay the general unsecured creditors  
11 10%. The trustee moved to modify the plan and the debtors objected  
12 to modification because they had completed their plan payments within  
13 the meaning of § 1329(a)(1).

15           The bankruptcy court rejected the debtors' argument that plan  
16 payments were completed when all creditors had been paid the amounts  
17 provided for in the plan. Rather, it held that payments would not be  
18 complete until the debtor had made all 60 payments provided for in  
19 the plan. In reaching this conclusion the bankruptcy court noted:

20           "The real impetus for requiring the debtor to complete all  
21 payments versus a percentage of the scheduled debt is to  
22 ensure that the debtor complies with the essential terms of  
23 a confirmed plan. Section 1325(b) permits a bankruptcy  
24 court to confirm a plan over objections as long as that  
25 plan commits all of the debtor's projected disposable  
26 income to making plan payments for a three year period. A  
majority of plans are confirmed pursuant to this section.  
If the amount of the debt paid through the plan decreases  
without a corresponding increase in the amount of payments  
or period over which payments are to be made then the  
debtor has not really devoted all of his/her disposable

1 income to the completion of the plan. Thus the percentage  
2 of debt paid has no impact on the construction of the  
3 confirmed plan because it is the number of payments (amount  
of disposable income) allocated over a certain period of  
time that controls."

4 On appeal the district court reversed and, citing Phelps, held  
5 that the trustee's motion was untimely because "'completion of  
6 payments' under 11 U.S.C. § 1329(a) occurs when the debtor pays the  
7 trustee the full amount the plan requires the debtor to pay which  
8 satisfies the percentage the debtor proposed to pay to a class of  
9 creditors."

10  
11 In re Rivera 177 B.R. 332 (Bankr. C.D. Cal. 1995) also addressed  
12 this issue. There the debtors' confirmed plan required 36 monthly  
13 payments of \$2,300. The plan provided that unsecured creditors would  
14 receive 65% of their allowed claims. However the actual allowed  
15 claims were substantially higher than the scheduled debt. As a  
16 consequence the 36 monthly payments were insufficient to pay the 65%  
17 dividend. Alleging a plan default the trustee moved to dismiss. The  
18 debtors sought a discharge, arguing that they had completed their  
19 obligations under the plan by making 36 monthly payments.

20 The Rivera court, citing Phelps, held that the debtors had not  
21 completed their plan payments because they had not paid each creditor  
22 the amount provided for in the plan. The court noted that "the  
23 substance of the plan looks to the nature of the debtor's obligation  
24 to the debtor's creditors, not to the number of payments proposed."Id  
25 at 334. (citations omitted) However, the court noted that it agreed  
26

1 "with the logic of Phelps [only] so long as its application does not  
2 circumvent the 'best efforts' requirement of 11 U.S.C. § 1325(b)."  
3 Id at 335 FN 3. (emphasis added)

4 The Rivera court's reasoning points out the flaw in the  
5 district court's opinion in Casper. Under § 1325(b)(1) a plan cannot  
6 be confirmed unless it provides for full payment of all allowed  
7 unsecured claims **or** provides that the debtor apply all of his  
8 projected disposable income to it for a period of three years.

9 In Phelps the debtors had made 37 monthly plan payments.  
10 Consequently, they had met the requirements of § 1325(b)(1) at the  
11 time the trustee brought his motion. Therefore in its analysis the  
12 court did not focus on the impact of that statute.

13 By contrast the Casper debtors had made only 25 monthly payments  
14 at the time the trustee brought his motion to modify the plan. Thus,  
15 although the debtors had paid the stated percentage under their plan,  
16 they had not met the requirements of § 1325(b)(1). The court  
17 erred in failing to consider whether the fact that the debtors had  
18 paid the amount dictated by their plan relieved them of their  
19 obligation to comply with the requirements of §1325(b)(1). This  
20 court believes that it does not. This court holds that where the  
21 terms of a confirmed plan reveal themselves to be internally  
22 inconsistent the debtors must continue their plan payments, at a  
23 minimum, for a time sufficient to meet the requirements of §  
24 1325(b)(1). See Rivera supra. As the debtor's plan payments are  
25  
26

1 not completed, the trustee may file a motion under § 1329(a)(1) to  
2 modify the plan to increase the percentage to be paid to the general  
3 unsecured creditors.

4 The debtor argues that the trustee's motion should be denied,  
5 even if timely, because a plan modified after confirmation need not  
6 comply with the disposable income requirements of § 1325(b). That is  
7 incorrect. Section 1329, which governs postconfirmation plan  
8 modification, states, in relevant part:

9 "(b)(1) the requirements of section 1325(a) of this title  
10 apply to any modification under this subsection."  
11

12 Section 1325(a) in turn states, in relevant part:

13 "(a) Except as provided in subsection (b), the court shall  
14 confirm a plan if --

15 (1) the plan complies with the provisions of this chapter  
16 and with the other applicable provisions of this title.

17 Although this statutory language is not a model of clarity, it  
18 generally has been interpreted as incorporating, upon objection, the  
19 requirements of § 1325(b). By filing his motion the trustee has  
20 clearly stated his position that the provisions of § 1325(b)(1) must  
21 apply to the plan.

22 The debtor also argues that the trustee cannot object to the  
23 plan at this time because he failed to do so prior to confirmation.  
24 This argument mischaracterizes the trustee's motion. The trustee is  
25 not objecting to the debtor's confirmed plan. He is asking that it be  
26

1 interpreted and modified. This court has ruled that under the facts  
2 of this case he may do so. The trustee's motion will be granted.

3 This memorandum opinion contains the court's findings of  
4 fact and conclusions of law and pursuant to Fed. R. Bankr. P. 7052,  
5 and they will not be separately stated.  
6

7  
8 POLLY S. HIGDON  
9 Bankruptcy Judge  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26