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11 USC § 1328(a)  
Laches  
Equitable Estoppel  
Discharge

In Re Goude

Case # 690-64256-aer13

9/23/96

Radcliffe

Published

Debtors made 60 payments in the amount required under ¶1 of her Chapter 13 plan. However, because the claims came in higher than expected, there still remained a balance owing to a secured creditor and to two priority tax creditors, who were required to be paid in full under the plan's terms. Debtors represented they could not pay the deficiency.

Debtors moved for a discharge on the basis that they had completed "all payments under the plan" under § 1328(a). The Trustee moved to dismiss. The Debtors opposed based on laches and equitable estoppel.

In a prior oral ruling the Court held that laches and equitable estoppel were not available defenses because the Debtors were charged with the same knowledge of the facts regarding feasibility as the creditors and Trustee.

Because the plan required payment in full of the priority and secured debts, and same had not been paid, the Court held the Debtors had not completed all their payments under the plan, quoting with approval: "the substance of a plan looks to the nature of the debtor's obligation to the debtor's creditors, not to the number of payments proposed." Debtor's motion was thus denied.

Because the plan could no longer be modified to cure the feasibility defect, the Trustee's motion to dismiss was granted.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
          ) 690-64256-aer13  
CHARLES D. GOUDE and )  
CHERYL L. WALLERSTEDT-GOUDE, ) MEMORANDUM OPINION  
                                  ) )  
                                  ) Debtors. )

This matter comes before the court upon the Trustee's Motion to Dismiss and the debtors' Motion for Discharge Pursuant to 11 U.S.C. § 1328(a).

**BACKGROUND**

The debtors filed their petition for relief under Chapter 13, herein, on November 13, 1990. Their Chapter 13 plan dated November 26, 1990 was confirmed by an order entered, herein, on February 20, 1991. The plan provides for payments of \$70 per month to the trustee for an unspecified period. Paragraph 2 of the plan provides in pertinent part:

From the payments so received, the trustee shall make disbursements as follows:

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1 (c) Debts entitled to priority under and in the  
2 order prescribed by § 507 of the Bankruptcy Code.<sup>1</sup>

3 The plan further provides for monthly payments of \$63 to be made on  
4 a secured claim owing to Lane County, Oregon (a secured real  
5 property tax claim) on a balance due Lane County of \$2,431.

6 Lane County filed a timely claim for \$3,086.91. The Oregon  
7 Department of Revenue (ODR) filed a claim which, as amended, claimed  
8 an amount due of \$1,174.12, \$687.50 of which was claimed as a  
9 priority claim. The Internal Revenue Service (IRS) filed a timely  
10 claim for \$2,122.82 as a priority claim.

11 The debtors have made sixty monthly payments of \$70 in  
12 accordance with their confirmed plan. By letter dated November 2,  
13 1995, however, the Chapter 13 trustee advised debtors's counsel that  
14 in spite of the fact that 60 monthly plan payments had been made, an  
15 estimated payoff of \$3,331 was needed as the claims of Lane County,  
16 ODR and IRS had not been paid in full as required by both the  
17 confirmed plan and by law. The debtors have indicated that they are  
18 unable to make up this shortfall.

19 Accordingly, on January 23, 1996 the trustee filed a motion  
20 to dismiss this case alleging that the plan is no longer feasible.  
21 On February 16, 1996, the debtors countered by filing a motion for  
22 discharge pursuant to 11 U.S.C. § 1328(a). The IRS has joined in  
23 the trustee's motion.

24 <sup>1</sup>11 U.S.C. § 1322(a) provides in pertinent part:

25 The plan shall - (2) provide for the full payment, . . .  
26 of all claims entitled to priority under § 507 of this  
title, . . .



1 The sole question presented to this court is to construe the  
2 provisions of 11 U.S.C. § 1328(a) to determine whether or not the  
3 debtors are entitled to receive a discharge pursuant to that  
4 statute.<sup>3</sup>

#### 5 **DISCUSSION**

6 All statutory references are to the Bankruptcy Code, Title  
7 11, United States Code, unless otherwise indicated.

8 The closest case arising out of this district concerning this  
9 matter appears to be a decision rendered by Judge Higdon in In re  
10 McKinney, 191 B.R. 866 (Bankr. D. Or. 1996). There, as in this case,  
11 the debtor's plan provided for monthly payments for an unspecified  
12 time. Based upon the scheduled priority debt in the case, it  
13 appeared that more than 36 months would be required to pay all  
14 priority claims in full. The plan provided (as in this case) for a  
15 0% distribution to general unsecured creditors. The actual priority  
16 claims filed and allowed were substantially less than anticipated.  
17 Accordingly, the debtor was able to pay all allowed priority claims  
18 in full in only 12 months. The trustee sought to propose a modified  
19 plan pursuant to § 1329 to increase the payment to general unsecured  
20 creditors.<sup>4</sup> The debtor argued that she had completed payments under

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22 <sup>3</sup>11 U.S.C. §1328(a) provides in pertinent part:

23 As soon as practicable after completion by the debtor of  
24 all payments under the plan, . . . the court shall grant  
25 the debtor a discharge of all debts provided for by the  
26 plan. . .

<sup>4</sup>Section 1329(a) provides in pertinent part:

(continued...)

1 the plan, as such, it could no longer be modified. The court  
2 disagreed. The court noted that since the plan provided for less  
3 than full payment to all creditors, it was required to last at least  
4 thirty-six months pursuant to § 1325. Accordingly, Judge Higdon  
5 concluded that the trustee could propose a modified plan pursuant to  
6 § 1329.

7 Reading §§ 1329(a) and 1328(a) together, it is clear that the  
8 statutory scheme provides that a confirmed Chapter 13 plan may be  
9 modified at any time before "the completion of payments under such  
10 plan," but that after "completion. . .of all payments under the  
11 plan," the court shall grant the debtor a discharge. There is no  
12 reason to attach a different meaning to the completion of payments  
13 required in § 1328(a) from the same requirement in § 1329(a). Thus,  
14 the reasoning of Judge Higdon in McKinney is persuasive here. In  
15 order for the debtors' confirmed plan to comply with § 1322, it must  
16 provide for payment, in full, of all debts entitled to priority.  
17 Since the debtors have not paid the priority debts in full, they  
18 have not completed all of the payments under the plan such as would  
19 entitle them to receive a discharge pursuant to § 1328(a).

20 In addition, this court notes that other courts have been  
21 presented with the same question concerning the interpretation of  
22 § 1328(a) as is presented in this case. In In re Carr, 159 B.R. 538

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23  
24 <sup>4</sup>(...continued)

25 At any time after confirmation of the plan but before the  
26 completion of payments under such plan, the plan may be  
modified, . . .

1 (Bankr. D. Neb. 1993), the court noted that "[t]he substance of a  
2 plan looks to the nature of the debtor's obligation to the debtor's  
3 creditors, not to the number of payments proposed." 159 B.R. at 542  
4 quoting from In re Phelps, 149 B.R. at 537. The court concluded  
5 that discharge should be denied. See also, In re Rivera, 177 B.R.  
6 332 (Bankr. C.D. Ca. 1995) and In  
7 re Escobedo, 28 F.3d 34 (7th Cir. 1994). Again, the reasoning of  
8 these cases is persuasive.

9 **CONCLUSION**

10 This court concludes that the debtors have not completed all  
11 of the payments under their confirmed plan such as would entitle  
12 them to receive a discharge pursuant to § 1328(a). Since the plan  
13 can no longer be modified to cure the feasibility defect, the  
14 trustee's Motion to Dismiss must be granted. Orders consistent  
15 herewith shall be entered.

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18 ALBERT E. RADCLIFFE  
19 Bankruptcy Judge  
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