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Best interests of creditors test  
§ 1325(a)(4)  
Exemptions

In re Vijay and Joycelyn Nakka  
Case No. 693-60770-fra13

6/19/96 FRA Unpublished

Debtors modified their Chapter 13 plan, rejecting a contract with an automobile finance company and increasing their plan payments. The trustee objected to the modified plan on the ground that it failed to meet the best interests of creditors test found at § 1325(a)(4) which requires that creditors receive at least as much under the Chapter 13 plan as they would in a hypothetical liquidation under Chapter 7. The objection was premised on the assumption that debtors' homestead exemption is limited to \$20,000, the amount of the homestead exemption in 1993 on the petition date, rather than to \$33,000, the amount of the homestead exemption at the date of the modified plan.

When a plan is modified, the hypothetical liquidation of § 1325(a)(4) would occur at the date of the modified plan. § 522(b)(2) exempts from property of the estate any property that is exempt under state law that is applicable at the petition date. Under Oregon law, the value of the exemption is determined at the time of the sale as opposed to the time the judgment lien or levy attached. Since the estate takes property subject to this state law doctrine, a hypothetical Chapter 7 trustee would be bound by the exemption amount in effect at the time he sold the homestead property and not the amount at the petition date. In this case, the exemption amount to be used is \$33,000. Using this amount, the best interests test was met.

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UNITED STATES BANKRUPTCY COURT

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FOR THE DISTRICT OF OREGON

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In Re:

) Bankruptcy Case No.

) 693-60770-fra13

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VIJAY R. NAKKA and

)

JOYCELYN R. NAKKA,

)

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Debtors.

) MEMORANDUM OPINION

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INTRODUCTION

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Debtors have proposed to modify their Chapter 13 plan of

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reorganization. 11 U.S.C. § 1329. The original plan, dated

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February 25, 1993, was confirmed on April 26, 1993, and modified

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once previously on October 11, 1993. The current modification

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rejects a contract with an automobile finance company which had

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received payments under the original plan, and increases monthly

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plan payments from \$330 to \$375.

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The Trustee objects to the modified plan because it fails to

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satisfy the best interest of creditors test. The trustee's

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calculation is based on an assumption that Debtors' exemption in

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their residence is limited to \$20,000, the amount of the Oregon

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homestead exemption in 1993. See former ORS 23.240. In 1993 the

1 Oregon Legislature increased the combined exemption for "two or more  
2 members of the household who are debtors" to \$33,000. The increase  
3 became effective on November 4, 1993. Debtors claim that the best  
4 interest test calculation should use this figure, and that, using  
5 the higher exemption, their modified plan passes the test.<sup>1</sup>

6 Section 1325(a)(4) requires that unsecured creditors receive  
7 at least as much under the plan as they would under a hypothetical  
8 chapter 7 liquidation. The issue here is how the hypothetical  
9 liquidation is constructed. In other words, where the figures used  
10 are variable due to market and legislative shifts, to what point in  
11 time does the analyst look to calculate the effect of a liquidation?

#### 12 DISCUSSION

13 The starting point is 11 U.S.C. §1329:

14 § 1329. Modification of plan after confirmation.

15 (a) At any time after confirmation of the plan but  
16 before the completion of payments under such plan, the  
17 plan may be modified, upon request of the debtor, the  
18 trustee, or the holder of an allowed unsecured claim, to—

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

26 (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.

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26 <sup>1</sup>The Trustee also objected because the proposed plan is under funded by \$171. Debtors concede this point, and now propose to increase the plan payments to \$395 per month.

1 Section 1325(a) includes the so-called best interests of  
2 creditors test:

3 (a) Except as provided in subsection (b), the court  
4 shall confirm a plan if-

5 \* \* \*

6 (4) the value, *as of the effective date*  
7 *of the plan*, of property to be distributed  
8 under the plan on account of each allowed  
9 unsecured claim is not less than the amount  
10 that would be paid on such claim if the estate  
11 of the debtor were liquidated under chapter 7  
12 of this title on such date; (italics added)

13 The phrase "effective date of the plan", in this context, must  
14 be construed as meaning the date of the modified plan. The  
15 legislative history states as much:

16 In applying the standards of proposed 11 USC 1325(a) (4)  
17 to the confirmation of a modified plan, "the plan" as  
18 used in this section will be the plan as modified under  
19 this section....This, the application of the liquidation  
20 value test must be redetermined at the time of the  
21 confirmation of the modified plan. H.R. Report No 595,  
22 95th Cong. 1st Sess., 431 (1977)

23 This rule has been followed in this District. In re Walker,  
24 153 BR 565, 568 (Bankr. D.Or. 1993).

25 The trustee argues that, notwithstanding the fictional "date"  
26 of the liquidation, the value to be given to the homestead exemption  
is fixed as of the date of the petition for relief, by operation of  
Code § 522(b) (2), which exempts from property of the estate:

(2) (A) any property that is exempt under Federal law,  
other than subsection (d) of this section, or State or  
local law that is applicable on the date of the filing of  
the petition at the place in which the debtor's domicile  
has been located for the 180 days immediately preceding  
the date of filing of the petition, or for a longer  
portion of such 180-day period than in any other  
place....

The statute does not by itself establish the nature or value

1 of any exemption: it simply provides that the exemption is to be  
2 determined according to state law.<sup>2</sup>

3 Oregon law exempts from seizure by or for creditors the  
4 debtor's homestead. The value of the exemption is determined at the  
5 time of the sale, as opposed to the time the judgement lien or levy  
6 attached. ORS 23.240 ("A homestead shall be exempt from sale on  
7 execution...."); ORS 23.445 (Court authorization required for sale  
8 of residence). If the value of the exemption is increased by the  
9 legislature after a judgement lien attaches, but before sale on  
10 execution, the debtor is nevertheless entitled to benefit from the  
11 increased exemption. Wilkinson v. Carpenter, 277 Or. 557, 561 P.2d  
12 607 (1977). Since the estate takes property subject to this state  
13 law doctrine, a (hypothetical) Chapter 7 trustee is bound by the  
14 exemption amount in effect at the time he sells the homestead  
15 property. This would be the time of the modified plan, and not the  
16 time the petition was filed.

17 It follows that the hypothetical liquidation must be premised  
18 on a \$33,000 homestead exemption. Given that, there appears to be  
19 no equity available for unsecured creditors, and therefore the best  
20 interest of creditors test is satisfied by the proposed modified  
21 plan. An order overruling the objection shall be entered.

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24 FRANK R. ALLEY, III  
25 Bankruptcy Judge  
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<sup>2</sup>Pursuant to Code § 522(b), Oregon has excluded use of Federal exemptions. ORS 23.305.