

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.¹

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.

24 * * *

26 ¹The 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.²

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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23
24 FRANK R. ALLEY, III
25 Bankruptcy Judge
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²Pursuant to Code § 522(b), Oregon has excluded use of Federal exemptions. ORS 23.305.