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APR 28 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No. WW-09-1301-HMOMk
)	
7	RICHARD E. GIESBRECHT, JR.;)	Bk. No. 09-12491-TTG
	JOANNE P. GIESBRECHT,)	
8)	
	Debtors.)	
9)	
10	_____)	
	RICHARD E. GIESBRECHT, JR.;)	
11	JOANNE P. GIESBRECHT,)	
)	
12	Appellants,)	
13	v.)	O P I N I O N
)	
14	K. MICHAEL FITZGERALD,)	
	Chapter 13 Trustee,)	
15)	
	Appellee.)	
16	_____)	

Argued and Submitted on February 19, 2010
at Seattle, Washington

Filed - April 28, 2010

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

Before: HOLLOWELL, MONTALI and MARKELL, Bankruptcy Judges.

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1 HOLLOWELL, Bankruptcy Judge:

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3 In this appeal we are asked to determine whether Cohen v.
4 Lopez (In re Lopez), 372 B.R. 40 (9th Cir. BAP 2007), aff'd, and
5 adopted by Cohen v. Lopez (In re Lopez), 550 F.3d 1202 (9th Cir.
6 2008) (Lopez)¹ allows a debtor the absolute right to pay an
7 unimpaired² claim directly to the creditor if the plan is
8 otherwise confirmable. We find that a debtor has no absolute
9 right to make such payments but that, in this case, the
10 bankruptcy court erred when it failed to articulate clear
11 standards regarding when it is permissible to pay a creditor
12 directly. Accordingly, we REVERSE.

13 **I. FACTS**

14 Richard and Joanne Giesbrecht (the Debtors) filed a chapter
15 13³ bankruptcy petition on March 18, 2009. On that date and
16 thereafter, the Debtors were current on the loan from Whidbey
17 Island Bank (the Bank), secured by their 2006 Honda. The Debtors

18
19 ¹ Because the Ninth Circuit adopted verbatim the analysis
20 set forth in the BAP decision, all citations to Lopez are to the
BAP case.

21 ² We use the term "unimpaired" in this case because the
22 claim being paid directly to the creditor was not in default at
23 the petition date and there was no alteration or modification of
treatment of the claim by the debtors' chapter 13 plan.
24 Accordingly, there was no impairment, even under the Ninth
Circuit's very broad definition of impairment. See, L & J
25 Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc., (In re L & J
26 Anaheim Assocs.), 995 F.2d 940, 942 (9th Cir. 1993).

27 ³ Unless otherwise indicated, all chapter, section, and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 filed a chapter 13 plan on April 2, 2009, which proposed to
2 continue to pay the Bank direct monthly payments, under the same
3 terms, of \$331.01.⁴ The plan also proposed to pay the other
4 creditors semi-monthly payments of disposable income to the
5 chapter 13 trustee (the Trustee) in the amount of \$175.00 for
6 thirty-six months and \$240.21 for the next twenty-four months.

7 On April 24, 2009, the Trustee objected to plan confirmation
8 because of the proposed direct payments to the Bank. The Trustee
9 contended that the car payments had to be paid through the plan
10 in order to comply with § 1322(a)(1). Additionally, the Trustee
11 asserted it was the general local practice that all payments be
12 made through the plan in order for the Trustee to monitor
13 payments and provide accurate independent accounting.

14 The Debtors filed a response contending that nothing in
15 §§ 1322 or 1326 required all debts be paid through the plan.
16 Additionally, the Debtors contended Lopez permits direct payments
17 of unimpaired claims.

18 A hearing on plan confirmation took place on June 10, 2009.
19 At the close of the hearing, the bankruptcy court denied the
20 confirmation of the Debtors' plan because the car payments were
21 not made to the Trustee. An Order Denying Confirmation of Plan
22 (Order Denying Confirmation) was entered on June 12, 2009.

23 The Debtors amended their chapter 13 plan on June 24, 2009.
24 The amended plan proposed to pay the car loan through the plan,
25 lowered the interest rate on the car loan from 6.99% to 3.25% and
26

27 ⁴ Whidbey Island Bank filed a proof of claim on April 13,
28 2009, asserting a secured claim for an automobile loan in the
amount of \$10,263.49 with an annual interest rate of 6.99%.

1 the monthly payments to the Trustee from \$330.01 to \$322.00.
2 Additionally, the Debtors changed the plan payments to \$175.00
3 for two months, then semi-monthly payments of \$289.31 for thirty-
4 four months, and \$240.21 for the next twenty-four months.

5 The amended plan was confirmed by order entered on September
6 2, 2009 (the Confirmation Order). The Debtors filed a notice of
7 appeal on September 10, 2009, appealing the Order Denying
8 Confirmation and the Confirmation Order.

9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 § 157. We address below our jurisdiction over the appeal under
12 28 U.S.C. § 158.

13 **III. ISSUE**

14 (A) Does the Panel have jurisdiction over the appeal?

15 (B) Did the bankruptcy court err in denying confirmation of
16 the Debtors' original chapter 13 plan solely on the basis that
17 the plan provided for the direct payment of the Debtors'
18 unimpaired car loan?

19 **IV. STANDARDS OF REVIEW**

20 We review issues of law de novo and findings of fact for
21 clear error. Shook v. CBIC (In re Shook), 278 B.R. 815, 820 (9th
22 Cir. BAP 2002). We review chapter 13 plan confirmation issues
23 requiring statutory interpretation de novo. Villanueva v. Dowell
24 (In re Villanueva), 274 B.R. 836, 840 (9th Cir. BAP 2002). When
25 there is a question as to our jurisdiction, we are "entitled to
26 raise [that issue] sua sponte and [address it] de novo." Menk v.
27 Lapaglia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).
28

1 F.2d 643, 644-45 (10th Cir. 1990) (collecting cases). Thus, if
2 the bankruptcy case is not dismissed, a debtor is effectively
3 precluded from appellate review of an order denying confirmation
4 of a plan unless he or she files a successful motion for leave to
5 appeal an interlocutory order. 28 U.S.C. § 158(a)(3); compare
6 Maiorino v. Branford Sav. Bank, 691 F.2d 89, 91 (2d Cir. 1982)
7 (dismissing appeal as interlocutory) and Sparks v. HSBC Auto
8 Fin., 299 F. App'x 499 (6th Cir. 2008) (same) with Ransom v. MBNA
9 Am. Bank, N.A. (In re Ransom), 380 B.R. 799 (9th Cir. BAP 2007)
10 (leave to appeal interlocutory order denying confirmation of
11 debtor's chapter 13 plan granted), aff'd, 577 F.3d 1026 (9th Cir.
12 2009), cert. granted, 2010 WL 333672 (U.S. Apr. 19, 2010).

13 While the denial of plan confirmation is interlocutory, it
14 is well-settled that an order confirming a plan is a final order
15 from which an appeal can be properly taken. Great Lakes Higher
16 Ed. Corp. v. Pardee (In re Pardee), 193 F.3d 1083, 1087 (9th Cir.
17 1999). In this case, the Debtors amended their original plan to
18 accommodate the bankruptcy court's reasons for denying
19 confirmation of their original plan and then appealed the
20 Confirmation Order. See In re Simons, 908 F.2d at 645; Rady v.
21 Brothers, 2003 WL 21180694, at *1 (S.D. Ind. 2003) ("To achieve a
22 final appealable decision, [d]ebtors have the option of waiting
23 until a plan is confirmed, then appealing that confirmation, or
24 refusing to submit another plan and then appealing the
25 dismissal[.]"). The Trustee asserts that the Order Denying
26 Confirmation of the original plan finally determined a discrete
27 issue of law, which the Debtors should have sought leave to
28 appeal. However, the Debtors' right to appellate review when the

1 final confirmation order is entered should not be forfeited
2 simply because they did not seek the opportunity for earlier
3 review. See e.g., Chase Manhattan Mortg. Corp. v. Rodriguez (In
4 re Rodriguez), 272 B.R. 54, 57 (D. Conn. 2002).

5 Here, the interlocutory Order Denying Confirmation merged
6 into the court's final confirmation order, and is sufficient to
7 support appellate jurisdiction of the earlier interlocutory
8 order. See Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364 (9th
9 Cir. 1981); Pearson v. Stewart (In re Pearson), 390 B.R. 706,
10 710 (10th Cir. BAP 2008) vacated as moot by 309 F. App'x 216
11 (10th Cir. 2009). Accordingly, we accept the Confirmation Order
12 as the final order that challenges the Order Denying
13 Confirmation.

14 2. Standing

15 Even though we find the Debtors have timely appealed a final
16 order, to have jurisdiction over the appeal, we must also address
17 whether the Debtors have standing to pursue the appeal. Paine v.
18 Dickey (In re Paine), 250 B.R. 99, 104 (9th Cir. BAP 2000). A
19 party has standing to appeal an order if it diminishes his or her
20 property, increases his or her burdens, or detrimentally affects
21 his or her rights. Fondiller v. Robertson (In re Fondiller), 707
22 F.2d 441, 442 (9th Cir. 1983).

23 The Debtors argue they were denied the right to have their
24 original chapter 13 plan confirmed because the bankruptcy court
25 erred in its interpretation of the Bankruptcy Code and Ninth
26 Circuit case law by requiring them to amend their original plan
27 to include a provision they believed was erroneous. If the
28 bankruptcy court misapplied the correct legal standard in

1 considering confirmation of the Debtors' original plan, and
2 thereby denied them the right to have their original plan
3 confirmed, then the Debtors are sufficiently aggrieved to have
4 standing to appeal. As the Eighth Circuit reasoned in Zahn v.
5 Fink (In re Zahn), 526 F.3d 1140, 1143 (8th Cir. 2008):

6 Not to allow a debtor to appeal confirmation of her own
7 plan would require a debtor to comply with a plan that
8 contains provisions the debtor does not believe are
9 required by the Bankruptcy Code, while losing her right
10 to appeal those provisions. In this case, the pre-
11 confirmation requirement by the bankruptcy court to
12 include the IRA distributions . . . is an issue
13 strongly disputed . . . because she believes the
14 Bankruptcy Code does not mandate such inclusion. [The]
15 confirmed amended plan may be contrary to bankruptcy
16 law and should be subject to appellate review.

17 Thus, because "a party may appeal from a judgment in his
18 favor when there has been some error prejudicial to him, or he
19 has not received all he is entitled to," the Debtors have
20 standing to appeal the Confirmation Order. Id. at 1142.

21 3. Mootness

22 Finally, we address whether the appeal is moot. The Trustee
23 argues there is no longer a live controversy because the Debtors'
24 amended plan has been confirmed. We have jurisdiction only over
25 actual cases and live controversies. Pilate v. Burrell (In re
26 Burrell), 415 F.3d 994, 998 (9th Cir. 2005).

27 When parties have an interest in the outcome of litigation,
28 there is a live case or controversy. However, an appeal is moot
when the appellate court cannot grant effective relief to the
appealing party even if it decides the merits in his or her
favor. Id. Conversely, if we can grant such relief, the appeal
is not moot. Garcia v. Lawn, 805 F.2d 1400, 1402 (9th Cir.
1986).

1 As discussed above, the Debtors amended their original plan
2 to include a provision they believed was erroneous in order to
3 have the plan confirmed. If we determine the bankruptcy court
4 erred when it required the Debtors to pay their unimpaired car
5 loan through their plan, the Debtors' may have their original
6 plan confirmed and the Confirmation Order vacated. Thus, it is
7 possible to fashion some relief and therefore, the appeal is not
8 moot.

9 Having established our jurisdiction over the appeal, we turn
10 to its merits.

11 **B. Merits**

12 The parties' positions are as follows: the Debtors argue
13 that they have an absolute right to make payments on unimpaired
14 claims directly to the creditor; and the trustee argues that
15 while not all unimpaired claims must be paid through the plan,
16 the bankruptcy court has the discretion to determine when a
17 payment must be paid through the plan, and the bankruptcy court
18 properly exercised its discretion here. Each party relies on
19 Lopez to support its position.

20 1. The Code Does Not Prohibit Direct Payments To A
21 Creditor

22 The bankruptcy trustee in Lopez argued that §§ 1322 and 1326
23 required that the chapter 13 trustee make all distributions to
24 creditors. Lopez, 372 B.R. at 50-51. The court in Lopez
25 concluded that simply because Congress intended for chapter 13
26 trustee's fees to be paid from plan payments, it did not
27 "inherently lead to a conclusion that all payments must therefore
28 be made under the plan." Lopez, 372 B.R. at 55 (emphasis in

1 original).

2 Under § 1322(a), a chapter 13 plan must:

- 3 (1) provide for the submission of all or such
4 portion of future earnings or other future income of
5 the debtor to the supervision and control of the
6 trustee as is necessary for the execution of the plan;
7 (2) provide for the full payment, in deferred cash
8 payments, of all claims entitled to priority under
9 section 507 of this title, unless the holder of a
10 particular claim agrees to a different treatment of
11 such claim;
12 (3) if the plan classifies claims, provide the
13 same treatment for each claim within a particular
14 class; and
15 (4) notwithstanding any other provision of this
16 section, a plan may provide for less than full payment
17 of all amounts owed for a claim entitled to priority
18 under section 507(a)(1)(B) only if the plan provides
19 that all of the debtor's projected disposable income
20 for a 5-year period beginning on the date that the
21 first payment is due under the plan will be applied to
22 make payments under the plan.

14 11 U.S.C. § 1322(a).

15 Section 1326(c) provides that "[e]xcept as otherwise
16 provided in the plan or in the order confirming the plan, the
17 trustee shall make payments to creditors under the plan." 11
18 U.S.C. § 1326(c). Additionally, a bankruptcy trustee has duties,
19 which require the trustee to monitor performance under the plan.
20 11 U.S.C. §§ 1302(b)(1); 1307(c). However, none of these
21 provisions create an inherent presumption that all payments must
22 be made by the trustee:

23 Section 1322(a)(1) does not require that all debts must
24 be paid through the plan; it merely requires that the
25 debtor must submit enough money from his future
26 earnings to "the supervision and control of the
27 trustee" as is necessary to fund the plan. Section
28 1322(a)(1) says nothing else, though, about what
exactly must be paid through the plan.

27 Lopez, 372 B.R. at 51 (emphasis added).

1 Furthermore,

2 [a] plain reading of [§ 1326(c)] leads to the
3 conclusion that Congress intended that some debts other
4 than those specifically enumerated in Section
5 1326(a)(1) could also be paid by the debtor outside the
6 plan, so long as either the plan itself or the order
7 confirming the plan allows it.

8 Id. at 52; see also, In re Vigil 344 B.R. 624, 629 (Bankr. D.N.M.
9 2006) (Because § 1326(c) contemplates that some payments will not
10 be made by the trustee, a general rule requiring all payments be
11 disbursed by the trustee is inappropriate.). Therefore, under
12 the Code, a chapter 13 debtor may directly pay a creditor.

13 2. The Code Provides Bankruptcy Courts With The Discretion
14 To Determine When Direct Payments May Not Be
15 Appropriate

16 The Debtors argue that under Lopez they have an absolute
17 right to make direct payments to creditors on unimpaired claims.
18 We disagree. As the Lopez court stated, "the power to make
19 payments in Chapter 13 directly to creditors has never been in
20 doubt," but "[t]he problem, however, lies in setting proper
21 boundaries to the power contained in Section 1326(c)." Lopez,
22 372 B.R at 46.

23 The Bankruptcy Code provides no direction as to "when it is
24 appropriate to insert such direct payment provisions in the plan
25 or in the confirmation order." Id.; see also, In re Aberegg, 961
26 F.2d 1307, 1309 (7th Cir. 1992) (The language of § 1322(a)(1) has
27 been "uniformly interpreted as giving bankruptcy courts the
28 discretion to permit debtors to make payment directly to some
secured creditors, provided that the plan meets all the
confirmability requirements set forth in § 1325(a)."). Thus,

1 bankruptcy courts have been afforded the discretion to make the
2 determination of when direct payments may or may not be
3 appropriate based upon the confirmation requirements of § 1325,
4 policy reasons, and the factors set forth by case law, local
5 rules or guidelines. Lopez, 372 B.R. at 46-47 ("Reflecting the
6 discretion granted by the Code, different courts and different
7 circuits have different rules on the permissibility of direct
8 payment, a fact unchanged by or since [Fulkrod v. Barmettler (In
9 re Fulkrod), 126 B.R. 584 (9th Cir. BAP 1991) aff'd sub. nom.,
10 Fulkrod v. Savage (In re Fulkrod), 973 F.2d 801 (9th Cir.
11 1992)].") (collecting cases).

12 Bankruptcy courts may require that payments be made through
13 the plan based on specific factors or reasons such as
14 administrative efficiency, tracking of payments, fairness and
15 treatment of creditors, and the determination that there is a
16 reduction of plan failure when all payments are made through the
17 plan. See, e.g., Barber v. Griffin (In re Barber), 191 B.R. 879,
18 884-85 (D. Kan. 1996); In re Perez, 339 B.R. 385, 409 (Bankr.
19 S.D. Tex. 2006); In re Miles, 415 B.R. 108, 116 (Bankr. E.D.
20 Penn. 2009) (citing various factors).

21 Indeed, some bankruptcy courts have enacted local rules
22 defining the parameters of what payments will be allowed to be
23 made directly to creditors. For example, after researching the
24 effectiveness of chapter 13 plans, the bankruptcy court in the
25 Southern District of Texas developed a local rule that requires,
26 unless a debtor can justify an exemption, that all mortgage
27 payments be made through the plan. In re Perez, 339 B.R. at 391-
28 92; S. Dist. of Tex., Local Bankr. R. 3015(b). In contrast, the

1 Central District of California bankruptcy court has established
2 local rules that give debtors the discretion of paying post-
3 confirmation mortgage payments directly to creditors. See Cent.
4 Dist. of Cal., Local Bankr. R. 3015-1(m) (2) and (3).
5 Additionally, a bankruptcy court may assert its discretion by
6 defining certain guidelines for when payments must be made
7 through chapter 13 plans by enacting standing or general orders.
8 See, e.g., Dist. of Ariz., Standing Bankruptcy Order on Conduit
9 Mortgage Payments in Tucson Chapter 13 Cases.

10
11 3. The Bankruptcy Court Failed To Properly Apply
12 §§ 1326(c) And 1322(a) Because Its Decision Was Not
13 Based On Any Disclosed Standard Or Rule

14 In this case, the Trustee contends that it is the general
15 practice in Western Washington that debtors must make all
16 payments to creditors through the plan. However, there is no
17 local rule, general order, judge's requested procedure, or
18 chapter 13 plan guideline that imposes such a requirement. A
19 debtor or debtor's counsel unfamiliar with the practice in the
20 district would have no way of knowing that a plan proposal to pay
21 a creditor directly would be disallowed or understand the reasons
22 why such a proposal would bar confirmation of a plan.

23 The Trustee contends, however, that the bankruptcy judges in
24 the Western District of Washington exercise their discretion by
25 applying the factors set out in In re Genereux, 137 B.R. 411,
26 412-13 (Bankr. W.D. Wash. 1992) to determine if payments may be
27 made directly to creditors. Such factors include: (1) the
28 ability of the bankruptcy trustee to monitor future direct
payments; (2) the potential burden on the trustee of monitoring

1 direct payments; and (3) the possible effect on the bankruptcy
2 trustee's salary or funding of the Trustee's Office. However, in
3 this case, the bankruptcy court made no mention of any of these
4 factors. It based its decision instead on an undefined policy
5 reason:

6 I mean, the goal of a debtor in a Chapter 13 has to be
7 performance. And they didn't perform prior to
8 bankruptcy, for whatever reason. The structure of
9 bankruptcy, particularly a 13 where we're trying to
help them save some assets like houses and cars, has to
be to put them in a situation where they get the best
shot at that, candidly, in spite of themselves.

10 Hr'g Tr. at 7:16-22.

11 Neither did the bankruptcy court make a finding that the
12 Debtors' proposal to make direct payments to the Bank on its
13 unimpaired claim failed to meet the confirmation requirements of
14 § 1325(a). See, e.g., First Bank & Trust v. Gross (In re Reid),
15 179 B.R. 504, 507 (E.D. Tex. 1995) (denying plan that proposed
16 direct payments because the plan failed to treat all impaired
17 secured creditors equally under § 1322(a)(3)).

18 The bankruptcy court made no determination that the Debtors'
19 originally proposed plan was proposed in bad faith, was not
20 feasible, or otherwise did not meet the requirements of
21 § 1325(a). It provided no clear enumerated factors or general
22 standard against which it made its decision to preclude
23 confirmation of the Debtors' original plan. Thus, the bankruptcy
24 court abused the discretion afforded to it by the Code when it
25 denied the confirmation of Debtors' original plan.

26 VI. CONCLUSION

27 Because the Debtors had no notice of the standard used by
28 the bankruptcy court to require that car payments be made through

1 the plan, we REVERSE the Confirmation Order, VACATE the Order
2 Denying Confirmation, and REMAND the matter to the bankruptcy
3 court with instructions to enter an order confirming the Debtors'
4 originally proposed plan.⁶

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26 ⁶ We note that the undisclosed standard which mandates
27 reversal in this case can be avoided in future cases by having
28 the standard publicized in whatever way the bankruptcy judges in
the district deem appropriate.