

DEC 18 2007

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: )  
CLINTON FRIDLEY and SHANNON )  
FRIDLEY )  
Debtors. )

BAP No. WW-07-1276-KMoJ  
Bk. No. 06-40424-PBS

CLINTON FRIDLEY; SHANNON )  
FRIDLEY )  
Appellants, )

v. )  
KARLA FORSYTHE, Chapter 13 )  
Trustee )  
Appellee. )

O P I N I O N

Argued and Submitted on November 30, 2007  
at Seattle, Washington

Filed - December 18, 2007

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

Honorable Paul B. Snyder, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and JURY, Bankruptcy Judges.

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1 KLEIN, Bankruptcy Judge:  
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3 This appeal from denial of a motion for entry of discharge  
4 presents the problem of whether and how a debtor may prepay a  
5 chapter 13 plan and obtain an early discharge. The precise  
6 question is whether the phrases "completion by the debtor of all  
7 payments under the plan" and "completion of payments under [the]  
8 plan" in 11 U.S.C. §§ 1328(a) and 1329(a) include an implied  
9 temporal requirement that the plan remain in effect for its  
10 designated duration unless the plan is formally modified.

11 Our answer prior to the Bankruptcy Abuse Prevention and  
12 Consumer Protection Act of 2005 ("BAPCPA") was that early  
13 completion of a chapter 13 plan by paying a lump sum without full  
14 payment of allowed claims required a § 1329(a)(2) plan  
15 modification to reduce the time for payments. Sunahara v.  
16 Burchard (In re Sunahara), 326 B.R. 768, 781-82 (9th Cir. BAP  
17 2005). We now adhere to our Sunahara precedent in cases subject  
18 to BAPCPA. Hence, we AFFIRM the order refusing to enter an early  
19 discharge without a § 1329(a)(2) plan modification.  
20

21 FACTS

22 Debtors Clinton and Shannon Fridley filed a joint chapter 13  
23 case and plan on March 14, 2006, in the Western District of  
24 Washington. Appellee Karla Forsythe is the chapter 13 trustee.

25 The debtors scheduled monthly income of \$2,479, or \$29,748  
26 per year. As this was below Washington's median family income,  
27 the § 1325(b)(4) "applicable commitment period" was three years.

28 The plan confirmed in June 2006 provided for payments of

1 \$125 per month and, in paragraph 3.E.2, that the debtors would  
2 pay their projected disposable income of \$0 for no less than the  
3 applicable commitment period of thirty-six months. Allowed  
4 unsecured claims were \$48,049.38.

5 The order confirming the plan required the debtors to report  
6 changed circumstances and receipt of additional income and to  
7 submit copies of their annual tax returns to the trustee.

8 The 2006 tax return supplied to the trustee in 2007 revealed  
9 actual gross income for 2006 of \$43,076, which was 45 percent  
10 more than projected when the plan was confirmed. The debtors did  
11 not otherwise report changed circumstances or income.

12 In May 2007, during plan month fourteen, the debtors paid  
13 the trustee \$2,900. This prepayment brought the total paid to  
14 slightly more than the \$4,500 required by the 36-month plan.<sup>1</sup>

15 The debtors filed a motion for entry of discharge pursuant  
16 to § 1328(a), supported by their declaration that they had  
17 completed all payments required by the plan and that they are not  
18 required by a judicial or administrative order, or by statute, to  
19 pay a domestic support obligation.

20 The trustee opposed the motion, contending that the debtors  
21 had not completed all payments under their plan and indicating an  
22 intention to seek a plan modification.

23 The court denied the motion, ruling that all payments  
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25 <sup>1</sup>While the record does not establish whether the trustee  
26 communicated an intent to seek a plan modification before the  
27 payment was made, the court actually ruled that it was not too  
28 late for the trustee to make such a motion. The trustee advised  
during oral argument of this appeal that a plan modification  
motion has been deferred pending outcome of this appeal.

1 required under the plan were not "complete" and that it was not  
2 too late for the trustee to move for a plan modification. It  
3 also ruled that the debtors' plan, as well as § 1325(b)(4)(B),  
4 required a plan modification in order to shorten the applicable  
5 commitment period, unless unsecured creditors were paid in full.  
6 Moreover, the court ruled that the proposed early payoff was not  
7 in good faith because the debtors can afford to pay more to their  
8 creditors in light of their material increase in income.

9 This timely appeal ensued.

#### 11 JURISDICTION

12 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
13 We have jurisdiction under 28 U.S.C. § 158(a)(1) because we deem  
14 the order on appeal, which operates as a deferral but not a  
15 denial of discharge,<sup>2</sup> to be final under applicable principles of  
16 flexible, or pragmatic, finality. Lundell v. Anchor Constr.  
17 Specialists, Inc. (In re Lundell), 223 F.3d 1035, 1038-39 (9th  
18 Cir. 2000). A resolution in favor of appellants would be a  
19 definitive resolution of a concrete question of law that would  
20 end the case. To the extent the order may be interlocutory, we  
21 grant leave to appeal. 28 U.S.C. § 158(a)(3).

#### 23 ISSUE

24 Whether, in the absence of a § 1329 modification, a chapter  
25 13 plan may be "completed" early so as to qualify for discharge

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27 <sup>2</sup>Orders denying discharge are final. Weiner v. Perry,  
28 Settles & Lawson, Inc., 161 F.3d 1216, 1217 (9th Cir. 1998) (by  
implication).

1 by prepaying a lump sum without full payment of allowed claims.

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3 STANDARD OF REVIEW

4 We review issues of statutory construction of the Bankruptcy  
5 Code de novo. Einstein/Noah Bagel Corp. v. Smith (In re BCE W.,  
6 L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003); Mendez v. Salven (In  
7 re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007).

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9 DISCUSSION

10 The appellants can prevail only if the statute and the  
11 precise plan terms permit early plan completion by prepayment.

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13 I

14 The narrow statutory question is whether the phrases  
15 "completion by the debtor of all payments under the plan" and  
16 "completion of payments under [the] plan" in §§ 1328(a) and  
17 1329(a) include an implied temporal requirement that the chapter  
18 13 plan remain in effect for the "applicable commitment period,"  
19 as specified in the plan. This question transcends BAPCPA  
20 because neither statutory phrase was amended in 2005.

21 Under § 1328(a), a discharge of all debts provided for by  
22 the plan is to be entered "as soon as practicable after  
23 completion by the debtor of all payments under the plan." 11  
24 U.S.C. § 1328(a) (emphasis added).

25 Under § 1329(a), a plan may be modified on motion of a  
26 debtor, trustee, or holder of an allowed unsecured claim "at any  
27 time after confirmation of the plan but before the completion of  
28 payments under such plan." 11 U.S.C. § 1329(a) (emphasis added).

1 The procedure for a modification under Federal Rule of Bankruptcy  
2 Procedure 3015(g) requires a motion noticed to all creditors.  
3 Fed. R. Bankr. P. 3015(g).<sup>3</sup>

4 The interplay of §§ 1328(a) and 1329(a) invites a race  
5 whenever a debtor's income increases during the performance of a  
6 plan. The debtor tries to reach § 1328(a) payment completion  
7 before a trustee or creditor forces a § 1329(a)(1) increase in  
8 plan payments by way of motion made between plan confirmation and  
9 completion of payments. The debtor's competitors are handicapped  
10 by the need to comply with the Rule 3015(g) motion process.

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12 <sup>3</sup>Rule 3015(g) provides:

13 (g) Modification of Plan After Confirmation. A  
14 request to modify a plan pursuant to § 1229 or § 1329  
15 of the Code shall identify the proponent and shall be  
16 filed together with the proposed modification. The  
17 clerk, or some other person as the court may direct,  
18 shall give the debtor, the trustee, and all creditors  
19 not less than 20 days notice by mail of the time fixed  
20 for filing objections and, if an objection is filed,  
21 the hearing to consider the proposed modification,  
22 unless the court orders otherwise with respect to  
23 creditors who are not affected by the proposed  
24 modification. A copy of the notice shall be  
25 transmitted to the United States trustee. A copy of  
26 the proposed modification, or a summary thereof, shall  
27 be included with the notice. If required by the court,  
28 the proponent shall furnish a sufficient number of  
copies of the proposed modification, or a summary  
thereof, to enable the clerk to include a copy with  
each notice. Any objection to the proposed  
modification shall be filed and served on the debtor,  
the trustee, and any other entity designated by the  
court, and shall be transmitted to the United States  
trustee. An objection to a proposed modification is  
governed by Rule 9014.

Fed. R. Bankr. P. 3015(g).



1 performance of the plan. Anderson v. Satterlee (In re Anderson),  
2 21 F.3d 355, 357-58 (9th Cir. 1994). Subsequent increases in  
3 actual income can be captured for creditors by way of a § 1329  
4 plan modification, which motion the debtors are entitled to  
5 oppose. Id. at 358.

6 When presented with the question of prepayment and early  
7 termination of a plan by a debtor who was refinancing a residence  
8 but not paying allowed unsecured claims in full, we reasoned that  
9 the pre-BAPCPA version of § 1325(b)(1) ("three-year period"  
10 instead of "applicable commitment period") is temporal in nature  
11 and held that the debtor was required to obtain a § 1329 plan  
12 modification. Sunahara, 326 B.R. at 781-82. This, of course,  
13 means that payments have not been "completed" and necessitates  
14 compliance with the procedure imposed by Rule 3015(g). Fed. R.  
15 Bankr. P. 3015(g).

16 Taking a position on a contentious issue, we also ruled in  
17 Sunahara that § 1325(b) does not apply to § 1329 plan  
18 modifications and that protection from overreaching lies in the  
19 § 1325(a)(3) requirement, as incorporated by § 1329, that plan  
20 modifications be proposed in good faith. Id. Although there was  
21 merit to both sides of that debate, interests of functional  
22 administration of chapter 13 cases within the circuit required  
23 that we take a position one way or the other - and we did.

24 To be sure, our reliance in Sunahara on the § 1325(a)(3)  
25 good faith standard is vulnerable to criticism that it introduces  
26 a level of subjectivity that could yield disparate results. See  
27 In re Keller, 329 B.R. 697, 702-03 (Bankr. E.D. Cal. 2005).

28 That subjectivity, however, is constrained by settled law of

1 the circuit that good faith is to be assessed through the matrix  
2 of whether the plan proponent "acted equitably" taking into  
3 account "all militating factors" in a manner that equates with  
4 the "totality" of circumstances. Goeb v. Heid (In re Goeb), 675  
5 F.2d 1386, 1390-91 (9th Cir. 1982); Nelson v. Meyer (In re  
6 Nelson), 343 B.R. 671, 677 (9th Cir. BAP 2006); cf. Platinum  
7 Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.),  
8 314 F.3d 1070, 1075 (9th Cir. 2002) (§ 1129(a)(3) decision citing  
9 Goeb as "our long settled interpretation of the good faith  
10 [confirmation] requirement"). That test dampens the risk of  
11 dysfunctionally divergent results that cannot be regulated by  
12 appellate review.

13 The existence of the controlling Goeb test of § 1325(a)(3)  
14 good faith means that Sunahara did not inadvertently license  
15 circumvention of § 1325(b) by the ploy of confirming a plan that  
16 complies with § 1325(b) and then promptly modifying the plan in a  
17 manner that does not comply with § 1325(b). Such a stratagem  
18 plainly would be an unfair manipulation of the Bankruptcy Code,  
19 which is a factor named in Goeb as indicative of a plan proponent  
20 not acting equitably and, hence, not in good faith. Goeb, 675  
21 F.2d at 1390.

22  
23 B

24 The enactment of BAPCPA in 2005 did not undermine the rules  
25 in Anderson, Goeb, and Sunahara.

26 There is much that BAPCPA did not change. Neither of the  
27 "completion" of plan payments provisions in §§ 1328(a) and  
28 1329(a) were amended. Nor was there any change to § 1329(a)(2),

1 which provides for using a plan modification to reduce or extend  
2 the time for payments. Good faith under § 1325(a)(3) remained an  
3 essential element for plan confirmation and, by incorporation  
4 through § 1329(b)(1), for plan modification.

5 In § 1325(b)(1), the term "applicable commitment period" was  
6 substituted by BAPCPA in lieu of "three-year period" so that a  
7 plan cannot be confirmed over objection by the trustee or a  
8 holder of an allowed unsecured claim unless all projected  
9 disposable income to be received during that period will be  
10 applied to payments to unsecured creditors.<sup>4</sup>

11 Before BAPCPA, the § 1325(b)(1) "three-year period" operated  
12 as a temporal requirement. Keller, 329 B.R. at 700; accord, In  
13 re Slusher, 359 B.R. 290, 302-03 (Bankr. D. Nev. 2007).

14 After BAPCPA, the § 1325(b)(1) "applicable commitment  
15 period" continues to operate as a temporal requirement. Nothing  
16 in the statutory structure suggests that Congress meant to alter  
17 this aspect of the statute. In effect, the "applicable  
18 commitment period" is a device to force certain debtors to have  
19 chapter 13 plans that are longer than three years. Thus, we

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21 <sup>4</sup>Section 1325(b)(1)(B) provides:

22 If the trustee or the holder of an allowed unsecured  
23 claim objects to the confirmation of the plan, then the  
24 court may not approve the plan unless, as of the  
25 effective date of the plan - ... (B) the plan provides  
26 that all of the debtor's projected disposable income to  
27 be received in the applicable commitment period  
beginning on the date that the first payment is due  
under the plan will be applied to make payments to  
unsecured creditors under the plan.

28 11 U.S.C. § 1325(b)(1)(B).

1 agree with the analysis articulated in Slusher concluding that  
2 the “applicable commitment period” is temporal. Slusher, 359  
3 B.R. at 300-05; accord, In re Casey, 356 B.R. 519, 527 (Bankr.  
4 E.D. Wash. 2006).

5 Congress also required in BAPCPA that chapter 13 debtors  
6 provide postpetition tax returns, upon request, together with an  
7 annual statement that includes the amount and sources of income.  
8 11 U.S.C. §§ 521(f)-(g). The obvious purpose of this self-  
9 reporting obligation is to provide information needed by a  
10 trustee or holder of an allowed unsecured claim in order to  
11 decide whether to propose hostile § 1329 plan modifications.

12 This power of the trustee and of creditors holding allowed  
13 unsecured claims to request that a confirmed plan be modified by  
14 increasing payments in order to capture material increases in net  
15 income that occur during the life of the plan is an important  
16 feature of chapter 13. See 11 U.S.C. § 1329(a)(1). The addition  
17 in 2005 of postpetition reporting requirements at §§ 521(f) and  
18 (g) operates to bolster the efficacy of § 1329 modifications.

19 Thus, part of the statutory bargain inherent in chapter 13  
20 is that the debtors must, for the prescribed life of the plan,  
21 run the gauntlet of exposure to trustee or creditor requests to  
22 increase payments. BAPCPA, by creating a debtor’s duty to make  
23 information available to those who could propose modifications,  
24 actually reinforced this aspect of the statutory bargain.

25 A debtor desiring to prepay a chapter 13 plan and obtain an  
26 early discharge without paying allowed unsecured claims in full  
27 must follow the § 1329 modification procedure prescribed by Rule  
28 3015(g). In exchange for a § 1328(a) discharge of more debts

1 than can be discharged in chapter 7,<sup>5</sup> the debtor's increases in  
2 income are exposed to the risk of being captured by way of § 1329  
3 modifications proposed by the trustee or an unsecured creditor.  
4 The debtor cannot short-circuit that exposure merely by  
5 prepayment, but rather must obtain a § 1329 plan modification  
6 after having given the notice required by Rule 3015(g).

7 Hence, the court's ruling on the underlying question of law  
8 was correct.

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10 III

11 A focus on the specific terms of the debtors' plan reveals  
12 an adequate, independent basis to affirm.

13 The plan requires that the debtors either pay 100 percent to  
14 unsecured claimants, or pay their projected disposable income  
15 (calculated to be zero) for no less than the applicable  
16 commitment period of thirty-six months,<sup>6</sup> under § 1325(b).

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18 <sup>5</sup>Although § 1328(a)'s so-called chapter 13 "superdischarge"  
19 was eroded by BAPCPA, there are still at least eleven categories  
20 of debt that are dischargeable in chapter 13 but not in chapter  
21 7: 11 U.S.C. §§ 523(a)(6) (in part), (7), (10), (11), (12),  
(14B), and (15)-(19). See Slusher, 359 B.R. at 304 n.25.

22 <sup>6</sup>Paragraph 3.E.2 of the debtors' plan:

23 Other Unsecured Claims. The Debtor(s) will pay 100% to  
24 claimants in this class, or pay projected disposable  
25 income for no less than the Applicable Commitment  
26 Period of either 36 or 60 months as stated below  
(choose a. or b., but not both): . . . .  
27 (b). Pursuant to 11 [U.S.C.] § 1325(b), debtor(s)  
28 projected disposable income during the applicable  
commitment period of no fewer than 36 months totals \$0.  
. . . .

(continued...)

1           Because the debtors did not plan to pay 100 percent to  
2 unsecured claimants, they expressly committed themselves to make  
3 monthly payments for the entire applicable commitment period of  
4 no fewer than thirty-six months.

5           The pertinent plan language comported with the requirement  
6 of § 1325(b) (4) that the "applicable commitment period" be three  
7 or five years, from which the statute permits deviation "only if  
8 the plan provides for payment in full of all allowed unsecured  
9 claims over a shorter period." 11 U.S.C. § 1325(b) (4). The  
10 debtors committed themselves to three years of payments.

11           Here, the debtors attempted to complete all payments under  
12 the plan by a lump-sum payment made at plan month fourteen.  
13 However, both the debtors' plan and the specific language of the  
14 Code require that the "applicable commitment period" not be less  
15 than thirty-six months unless the plan provides for payment on  
16 allowed unsecured claims in full. Since the debtors' plan would  
17 not pay all allowed unsecured claims in full and since they  
18 committed themselves to thirty-six months, their prepayment does  
19 not "complete" their plan for purposes of §§ 1328(a) or 1329.

20           If a plan calling for payment in the fourteenth month of a  
21 lump sum insufficient to pay allowed unsecured claims in full had  
22 been proposed at the outset, it could not have been confirmed  
23 over the trustee's objection and hence cannot be ratcheted into  
24 effectiveness without a formal plan modification. The result  
25 conceivably could be achieved through a plan modification in  
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27           <sup>6</sup>(...continued)  
28 Amended Chapter 13 Plan, ¶ 3.E.2 (bold in original).

1 light of our holding in Sunahara that § 1325(b) does not apply to  
2 § 1329 modifications, but only after the trustee and all  
3 creditors have the opportunity to oppose modification that is  
4 afforded by the modification procedure prescribed by Rule  
5 3015(g). Sunahara, 326 B.R. at 781-82.<sup>7</sup>

6 In this instance, the debtors did not seek to modify their  
7 plan, but instead proposed to circumvent the modification process  
8 through an early lump-sum payment. Construing the plan that it  
9 had confirmed, the court determined that because paragraph 3.E.2  
10 of the plan required either thirty-six months of payments or a  
11 100 percent payment to holders of allowed unsecured claims, the  
12 debtors could not unilaterally "short circuit" that provision of  
13 their plan absent a modification. This was not error.

14 Thus, the court correctly denied the debtors' motion to  
15 enter discharge under § 1328(a) because they had neither made  
16 payments for thirty-six months nor paid allowed unsecured claims  
17 in full, as required by the terms of their confirmed plan and as  
18 required by the explicit language of §§ 1325(b)(4)(A) and (B).<sup>8</sup>

19 \_\_\_\_\_  
20 <sup>7</sup>As the bankruptcy court noted in Keller:

21 Of course, creditors may prefer to be paid sooner  
22 rather than later. If the debtor initially proposes to  
23 fund a plan with an exempt asset, a gift, or the  
24 proceeds from a sale or refinance of property,  
25 creditors may jump at the chance to trade the right to  
26 receive three years of disposable income for a quicker  
27 lump sum payment.

28 Keller, 329 B.R. at 701.

<sup>8</sup>We are presented with no question whether, and express no  
view whether, other preconditions to discharge were satisfied.

(continued...)

1 CONCLUSION

2 The debtors were not entitled to entry of discharge because  
3 there had not yet been "completion by the debtor[s] of all  
4 payments under the plan" within the meaning of § 1328(a). The  
5 "applicable commitment period" in § 1325(b) is a temporal  
6 requirement of thirty-six months in this case, rather than a  
7 multiplicand of monthly payments. Hence, the statutory concept  
8 of "completion" of payments includes the completion of the  
9 requisite period of time. Moreover, the terms of the debtors'  
10 plan actually required payments for thirty-six months. AFFIRMED.  
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26 <sup>8</sup>(...continued)  
27 E.g., 11 U.S.C. § 1328(a) (domestic support obligations); id.  
28 § 1328(g) (financial management education); id. § 1328(h)  
(regarding § 522(q)).