

JUN 27 2005

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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.	NC-04-1327-SHB
7	FRAYNE SUNAHARA,)	Bk.No.	03-32816 DM
8	Debtor.)		
9	_____)		
10	FRAYNE SUNAHARA,)		
11	Appellant,)		
12	v.)	O P I N I O N	
13	DAVID BURCHARD, Chapter 13)		
14	Trustee,)		
15	Appellee.)		
	_____)		

Argued and Submitted on
January 20, 2005 at San Francisco, California

Filed - June 27, 2005

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Before: SMITH, HOLLOWELL¹, AND BRANDT, Bankruptcy Judges.

¹ Hon. Eileen W. Hollowell, Bankruptcy Judge for the
District of Arizona, sitting by designation.

1 SMITH, Bankruptcy Judge:
2

3 At issue in this appeal is whether a debtor may modify a
4 confirmed 36-month chapter 13² plan so as to pay it off in a
5 single lump sum and receive an early discharge. The bankruptcy
6 court held that debtor, Frayne Sunahara, was not so entitled. We
7 REVERSE and REMAND.

8 FACTS

9 Debtor commenced his chapter 13 case on September 26, 2003.
10 The San Francisco and Oakland divisions of the Northern District
11 of California have adopted a mandatory model chapter 13 plan.
12 The model plan includes a provision providing that “[u]nless all
13 allowed claims are paid in full, this Plan shall not be completed
14 in fewer than 36 months from the first payment date.” All
15 versions of Debtor’s plan include this required provision.

16 The chapter 13 trustee objected to Debtor’s initial plan but
17 the objections were resolved through Debtor’s third amended plan
18 which was filed on May 3, 2004. This version of the plan
19 provides for payment of \$41,400 over 60 months, an estimated
20 dividend of 50% to unsecured creditors. The hearing on the
21 confirmation of the third amended plan was set for May 12.

22 One day prior to the confirmation hearing, on May 11, Debtor
23 filed a pleading entitled “Motion to Refinance Real Estate, Pay
24 Plan Base, and Terminate Case” (“Motion”). According to Debtor,
25 a condition of his refinance loan was that the chapter 13 plan be
26 completed and the case terminated. By the Motion, Debtor sought

27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 authority to refinance his real property for the purpose of
2 paying in full the plan base (\$41,400) and receiving an immediate
3 discharge. Debtor acknowledged that granting the relief
4 requested would effect a modification of that part of the model
5 plan which requires 100% payment to unsecured creditors if the
6 plan is completed in less than 36 months, but suggested that the
7 court reconsider the deletion of that provision on the ground
8 that neither the law nor equity requires a plan to run 36
9 calendar months.³ More specifically, Debtor argued that: 1)
10 while § 1325(b) prescribes the amount of money that must be paid
11 into the plan, i.e., based on projected disposable income over
12 the 36-month period, it does not prescribe the amount of time
13 that must elapse for distributing such amount of money; 2) the
14 required pledge of projected disposable income to the plan is not
15 synonymous with the commitment of actual disposable income; 3) as

16 _____
17 ³ At the hearing, the court affirmatively deemed the Motion
18 to be one to modify the confirmed plan pursuant to § 1329 and
19 treated the trustee's objection to be an opposition to proposed
20 modification. The dissent expresses due process concerns and
21 queries whether Debtor properly served its motion on all
creditors in the case as required under Rule 3015(g). We note,
however, that Debtor's counsel represented to the court that all
creditors had received notice of the Motion:

22 Well, we noticed it out to all creditors as though it
23 was a modification, Your Honor, so I thought we had --
24 we had addressed the issue that would be presented in
the modification, which is to tell the creditors what
we propose to do.

25 Transcript of Proceedings, May 28, 2004, 5:3-7. Notably, neither
26 the trustee nor the court challenged this representation. The
27 certificate of service, to which the dissent refers, does indeed
28 indicate service only to the Trustee. However, that particular
certificate does not conclusively establish that notice was not
sent to all creditors.

1 contrasted with a percentage plan, early payment of a fixed sum
2 under a "pot" or "base" plan does not result in a windfall to the
3 debtor; and 4) an early payoff protects creditors from the risk
4 of future default.

5 The third amended plan was confirmed, unmodified, at the May
6 12 confirmation hearing and an order regarding the same was
7 entered on May 21. Debtor apparently did not raise the issue of
8 modification of the plan at the confirmation hearing.

9 The court subsequently heard argument on the Motion. The
10 trustee objected that, under § 1327(a), Debtor was bound by the
11 terms of his confirmed plan and that allowing the modification
12 would violate the model plan's prohibition against payment of a
13 plan in fewer than 36 months unless all allowed claims are paid
14 in full. Further, the trustee argued, Debtor should have raised
15 the issue prior to confirmation of the plan. Finally, the
16 provision in the plan requiring annual review of Debtor's income
17 was included to permit the trustee to seek a modification of the
18 plan in the event Debtor's income increases over the life of the
19 plan and, therefore, Debtor should not be allowed to terminate
20 the plan early.

21 The court denied Debtor's Motion, finding that if Debtor
22 wanted to challenge the model plan, he should have done so prior
23 to confirming a plan under it.⁴ Further, the court concluded

24 ⁴ We respectfully disagree with the implication of our
25 distinguished colleague in dissent that because Debtor did not
26 challenge the provisions of the model plan at the time of
27 confirmation, he was precluded from later seeking the
28 modification of such provisions, and that, therefore, the issue
is not properly before us. Nothing in § 1329 prohibits a debtor
from seeking the modification of any plan term affecting the

(continued...)

1 that the local rule mandating use of the model plan does not
2 abridge any substantive debtor rights because, pursuant to
3 § 1325(b), a debtor is not entitled to terminate a plan in fewer
4 than 36 months from the date of the first plan payment where an
5 objection has been made. The court also noted that Debtor always
6 had the option of voluntarily dismissing the case in order to
7 complete the refinance.

8 JURISDICTION

9 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
10 and § 157(b) (1) and (b) (2). This panel has jurisdiction under 28
11 U.S.C. § 158(b) (1).

12 ISSUES

13 1. Whether the Bankruptcy Code allows a chapter 13 debtor
14 to modify his plan under § 1329 to pay the plan off in fewer than
15 36 months where unsecured claims will not be paid in full.

16 2. If such a modification is permitted under the Code,
17 whether a court-mandated form plan which contains a contrary
18 provision impermissibly abridges substantive debtor rights.

19 STANDARD OF REVIEW

20 The panel reviews de novo a bankruptcy court's
21 interpretation of the Bankruptcy Code and Rules. Predovich v.
22 Staffer (In re Staffer), 262 B.R. 80, 82 (9th Cir. BAP 2001).
23 The validity of a local rule is also reviewed de novo. Jones v.
24 Hill (In re Hill), 811 F.2d 484, 485 (9th Cir. 1987). The

25 _____
26 ⁴(...continued)
27 amount of payments on claims, the time for making such payments,
28 or the amount of distributions to creditors. That the term to be
modified involves a form provision in a court-mandated model plan
should be of no consequence.

1 bankruptcy court's rulings with respect to plan modification are
2 reviewed for abuse of discretion. Powers v. Savage (In re
3 Powers), 202 B.R. 618, 621 (9th Cir. BAP 1996).

4 DISCUSSION

5 I. Does the Bankruptcy Code permit payment of a chapter 13 plan
6 in fewer than 36 months where debtor is not paying 100% of
7 all allowed unsecured claims?

8 At issue here are §§ 1322(d), 1325(a), 1325(b) and 1329, and
9 whether, collectively, they ought to be interpreted as requiring
10 a debtor to make projected disposable income payments for a
11 minimum term of 36 months, or, whether a debtor is entitled to
12 modify the plan to complete such payments in fewer than 36 months
13 without having to pay 100% of allowed unsecured claims.

14 Section 1322(d) provides:

15 The plan may not provide for payments over a period
16 that is longer than three years, unless the court, for
17 cause, approves a longer period, but the court may not
approve a period that is longer than five years.

18 Section 1325(a) provides in part:

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

21 (1) the plan complies with the provisions of this chapter
and with the other applicable provisions of this title;

22 (2) any fee, charge, or amount required under chapter 123 of
23 title 28, or by the plan, to be paid before confirmation,
has been paid;

24 (3) the plan has been proposed in good faith and not by any
25 means forbidden by law;

26 (4) the value, as of the effective date of the plan, of
27 property to be distributed under the plan on account of each
allowed unsecured claim is not less than the amount that
28 would be paid on such claim if the estate of the debtor were
liquidated under chapter 7 of this title on such date;

1 Section 1325(b)(1) provides:

2 If the trustee or the holder of an allowed unsecured
3 claim objects to the confirmation of the plan, then the
4 court may not approve the plan unless, as of the
5 effective date of the plan -

6 (A) the value of the property to be
7 distributed under the plan on account of
8 such claim is not less than the amount
9 of such claim; or

10 (B) the plan provides that all of the
11 debtor's projected disposable income to
12 be received in the three-year period
13 beginning on the date that the first
14 payment is due under the plan will be
15 applied to make payments under the plan.

16 Section 1329, which governs the modification of a confirmed
17 plan prior to completion of plan payments, provides:

18 (a) At any time after confirmation of the plan but
19 before the completion of payments under such plan,
20 the plan may be modified, upon request of the
21 debtor, the trustee, or the holder on an allowed
22 unsecured claim, to --

23 (1) increase or reduce the amount of payments on
24 claims of a particular class provided for by the
25 plan;

26 (2) extend or reduce the time for such payments; or

27 (3) alter the amount of the distribution to a creditor
28 whose claim is provided for by the plan, to the
extent necessary to take account of any payment of
such claim other than under the plan.

(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.

* * *

(c) A plan modified under this section may not provide for
payments over a period that expires after three years
after the time that the first payment under the
original confirmed plan was due, unless the court, for
cause, approves a longer period, but the court may not
approve a period that expires after five years after
such time.

1 The trustee argues that the foregoing provisions ought to be
2 read to require the payment of monthly projected disposable
3 income for a minimum of 36 months while Debtor contends that
4 these sections include no such provision mandating the minimum
5 length of a plan. According to Debtor, 36 months is not a
6 measure of the lapse of time that must occur but, rather, a
7 measure of the value that creditors must receive under the plan,
8 i.e., 36 months worth of a debtor's projected monthly disposable
9 income.⁵

10 Adopting the trustee's interpretation that a debtor must
11 make payments for a minimum of 36 months or pay all creditors in
12 full requires reading § 1325(b)(1)(B) into § 1329 such that:

13 If the trustee or the holder of an allowed unsecured
14 claim objects to the **modification** of the plan, then the
15 court may not approve the **modified** plan unless, as of
16 the effective date of the plan -

17 (B) the plan provides that all of the
18 debtor's projected disposable income to
19 be received in the three-year period
20 beginning on the date that the first
21 payment is due under the plan will be

22 ⁵ As a practical matter, chapter 13 debtors often do pay
23 off their plans in fewer than 36 months, but frequently do so
24 without first seeking plan modification. By the time the trustee
25 objects to the early payout, it is too late because courts
26 generally hold that once all payments required under the plan
27 have been made, the debtor is entitled to his discharge. See
28 e.g., Profit v. Savage (In re Profit), 283 B.R. 567, 573 (9th
Cir. BAP 2002) (trustee may not request a modification under
§ 1329 after payments under a confirmed plan have been
completed); In re Sounakhene, 249 B.R. 801, 804 (Bankr. S.D. Cal.
2000) (court denied trustee's motion to modify debtors' plan as
time-barred because plan was "complete" when debtors refinanced
their home and made a lump sum prepayment to the trustee, prior
to expiration of the plan's 37 months).

In this case, one of the conditions of Debtor's refinancing
agreement was that the loan bring about the termination of his
chapter 13 case, so Debtor was forced to seek the modification
first rather than simply pre-paying the plan.

1 applied to make payments under the plan.
2 11 U.S.C. § 1325(b)(1)(B) (emphasis and language added).

3 Courts are split as to the application of § 1325(b)(1)(B),
4 i.e., the “disposable income test,” to a plan modification that
5 provides for an early payout. As one court put it, “[b]ankruptcy
6 courts have arrived at vastly different results when faced with a
7 debtor’s motion to make a one-time lump sum payment.”

8 Massachusetts Housing Finance Agency v. Evora, 255 B.R. 336, 342
9 (D. Mass. 2000).

10 **A. SURVEY OF CASES**

11 1. Cases decided within the Ninth Circuit.

12 In re McKinney, 191 B.R. 866 (Bankr. D. Or. 1996):

13 Modifications of post-confirmation plans, if objected to, must
14 comply with the disposable income requirements of § 1325(b). The
15 debtor’s confirmed plan provided for 0% percent to unsecured
16 creditors and payment of scheduled priority debt in the amount of
17 \$10,000 to be paid over 36 months. Id. at 867. The actual
18 priority claims filed and allowed totaled substantially less than
19 \$10,000, however, and the debtor was able to pay the allowed
20 priority claims in only 12 months. Id. The trustee moved to
21 modify the plan to increase the percentage to unsecured creditors
22 and to require the debtor to continue paying all projected
23 disposable income for at least three years as required under
24 § 1325(b)(1). Id. The court granted the trustee’s motion,
25 holding that modifications of post-confirmation plans, if
26 objected to, must comply with the disposable income requirements
27 of § 1325(b). Id. at 869. Importantly, the court reasoned that
28 while § 1325(b) is not directly incorporated into § 1329(b), it

1 is indirectly incorporated therein via its reference in
2 § 1325(a). Id.

3 Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430 (9th
4 Cir. BAP 1997): Section 1325(b) might apply where an objection
5 is made by the trustee or a creditor to the confirmation or
6 modification of a plan. The plan in this case was confirmed,
7 without objection, with provisions providing for monthly payments
8 of \$300 for 38 months and an 11% payout to unsecured creditors.
9 Id. at 432. When the amount of the filed claims came in lower
10 than anticipated, and it was determined that the plan would pay
11 the 11% to unsecured creditors in 32 months instead of 38, a
12 creditor moved to increase the term of the plan to not less than
13 36 months pursuant to § 1325(b). Id. at 433. The bankruptcy
14 court found § 1325(b) was inapplicable and denied the creditor's
15 motion. Id. at 436.

16 Because no objection to either the plan or the modified plan
17 had been made by the trustee or a creditor, on appeal this panel
18 did not have to address the interplay between §§ 1329(b) and
19 1325(b). Nevertheless, we did note in passing that § 1329(b)
20 does not expressly incorporate § 1325(b). Id. at 434. In
21 affirming the bankruptcy court's ruling, we observed "[t]he Code
22 does not prohibit a plan that is less than 36 months in duration
23 in the absence of an objection by the trustee or a creditor 'to
24 the confirmation of a plan.'" Id. at 437 citing § 1325(b)(1).
25 By holding that § 1325(b) did not apply because no one objected
26 to the plan or the modified plan, we left unresolved the
27 applicability of § 1325(b) where an objection to the modified
28 plan has been made.

1 McDonald v. Burgie (In re Burgie), 239 B.R. 406 (9th Cir.
2 BAP 1999): Although § 1329 makes no reference to § 1325(b), the
3 disposable income test might, nevertheless, apply in the context
4 of a plan modification under § 1329. In this case, we noted the
5 exclusion of § 1325(b) from § 1329, but because the basis of the
6 trustee's objection was unclear, we assumed - without deciding -
7 that the disposable income test did apply to the modification
8 motion. Id. at 409. Further, we indicated that we adopted the
9 assumption because the parties and the bankruptcy court had made
10 the assumption and the issue was not presented on appeal. Id.

11 In re Sounakhene, 249 B.R. 801 (Bankr. S.D. Cal. 2000):
12 Section 1325(b) is not incorporated into § 1329 based upon a
13 plain meaning interpretation of the statute. Prior to the
14 expiration of their 37-month plan, the debtors refinanced their
15 home and made a single lump sum payment to the trustee equal to
16 the aggregate amount of their disposable income over the life of
17 the plan. Id. at 803. The trustee moved to modify the plan to
18 require that payments be made for 36 months. Id. The bankruptcy
19 court denied the motion as time-barred on the ground that the
20 plan was complete when the trustee received the amount required
21 under the plan. Id. at 804.

22 In analyzing the plain language of the statute, the court
23 declined to read § 1325(b) into § 1329. Id. at 805. Rather than
24 applying the disposable income test, the court determined that
25 the better approach would be to utilize the analysis underlying
26 the disposable income test in exercising the court's judgment and
27 discretion. Id. citing In re Than, 215 B.R. at 436; see also, In
28 re Powers, 202 B.R. at 622 ("the only limits on modification are

1 those set forth in the language of the Code itself, coupled with
2 the bankruptcy judge's discretion and good judgment in reviewing
3 the motion to modify").

4 Furthermore, the court held, even if § 1325(b)(1)(B) did
5 apply, nothing therein prohibits a lump sum payment where no
6 prepayment discount is sought. 249 B.R. at 805, citing In re
7 Martin, 232 B.R. 29, 37 (Bankr. D. Mass. 1999). The court
8 described its approach as allowing the court discretion to
9 consider important components of the disposable income test,
10 while upholding the statute's plain language. 249 B.R. at 805.

11 2. Other cases analyzing the interplay between
12 §§ 1329 and 1325(b).

13 a. The disposable income test of § 1325(b) does
14 not apply to plan modification under § 1329.

15 Casper v. McCullough (In re Casper), 154 B.R. 243 (N.D. Ill.
16 1993): When a debtor completes payments under the plan which
17 satisfy his or her percentage obligation to each class of
18 creditors, the bankruptcy court must discharge the debts. As a
19 result of priority claims being allowed in amounts significantly
20 less than scheduled, the debtors were able to complete their 60-
21 month plan in 24 months, paying ten percent to unsecured
22 creditors as the plan required. Id. at 245-46. The court
23 granted the trustee's motion to modify the plan to increase the
24 dividend to unsecured creditors to eighty percent and maintain
25 the 60-month term. Id. On appeal, the district court reversed,
26 holding in part that § 1325(b)(1)(B) only requires debtors to
27 commit the amount representing their projected disposable income
28 over three years to the plan and does not prohibit the payment of
such amount in less than the proscribed term of the plan. Id.

1 In re Phelps, 149 B.R. 534 (Bankr. N.D. Ill. 1993): "The
2 substance of a plan looks to the nature of the debtor's
3 obligation to the debtor's creditors, not to the number of
4 payments proposed." Id. at 537. The confirmed plan provided for
5 payment of secured claims in full and a distribution of 10% on
6 account of unsecured claims in monthly plan payments of \$282 over
7 43 months. Id. at 535. Because the amount of filed unsecured
8 claims was well below the scheduled debt, it took only 37 months
9 to complete the plan. Id. The trustee sought to modify the plan
10 to require the debtor to continue making payments for the full 43
11 months. Id. at 536. The court held that the debtor need not
12 specify both the length of payments and the percentage to be paid
13 to unsecured creditors; specification of one or the other was
14 sufficient. Id. at 537.

15 Plan completion, the court reasoned, occurs when the debtor
16 has paid the percentage owed to each class of creditors as
17 provided for in the plan. Id. citing In re Chancellor, 78 B.R.
18 529, 530 (Bankr. N.D. Ill. 1987). Therefore, the duration of a
19 plan can be changed, either formally by modification or
20 informally by completing payments sufficient to pay the required
21 percentage early because of a reduction in the allowed unsecured
22 claims as compared to scheduled debt. Id. at 537-38. By
23 contrast, the percentage to be paid unsecured claims, once fixed
24 by the order confirming the plan, can only be changed by plan
25 amendment. Id. at 538.

26 While Phelps did not address the particular issue of
27 § 1325(b)'s disposable income test and the mandatory minimum of
28 36 months, its reasoning is instructive in that it interprets

1 "completion of payments" as it is used in § 1329(a), i.e.,
2 focusing on payment of the required percentage owed rather than
3 on the duration of the plan.

4 In re Easley, 205 B.R. 334 (Bankr. M.D. Fla. 1996): Nothing
5 in § 1329 prohibits a debtor from paying off his plan early.
6 Several months after confirmation of his 60-month plan, the
7 debtor moved to pay the entire amount due under the plan from a
8 loan received from his parents. Id. at 334-35. The trustee
9 argued that any loan proceeds should be used to increase payments
10 under the plan. Id. at 335.

11 The court sided with the debtor, determining (without
12 specifically discussing § 1325(b)(1)(B)) that nothing in § 1329
13 prohibited the debtor from borrowing money to pay his existing
14 creditors early. The court further reasoned that "he merely is
15 substituting one set of creditors, his parents, for his former
16 set of creditors addressed in the Plan. To the extent the loan
17 proceeds from his parents became property of the estate, so would
18 the corresponding liability." Id. at 335. The court also noted
19 that creditors would receive a substantial benefit under the
20 modified plan because they would receive their funds sooner,
21 without risking future defaults by the debtor. Id. at 336.

22 Forbes v. Forbes (In re Forbes), 215 B.R. 183 (8th Cir. BAP
23 1997): Congress clearly omitted § 1325(b) when drafting the
24 requirements for post-confirmation plan modification. Three
25 years into his chapter 13 plan, the debtor received settlement
26 proceeds which would enable him to reduce the plan term from 60
27 to 40 months. Id. at 185-86. The trustee and a creditor
28 objected to the proposed modification on the ground that the

1 settlement constituted a windfall, enabling debtor to pay all of
2 his creditors in full. Id. at 186. The court overruled the
3 objections and approved the modified plan. The issue on appeal
4 was whether the court erred by failing to consider the settlement
5 funds as disposable income under the § 1325(b) in deciding to
6 modify the plan.

7 The panel held that though case law is unsettled on the
8 issue, Congress did not include § 1325(b) in the requirements for
9 post-confirmation plans and the court would not read it
10 otherwise. Id. at 191. The panel noted that its conclusion is
11 supported by the absurd result which would have obtained had the
12 disposable income test been applied under the following facts:

13 Application of the disposable income test at
14 confirmation of a modified plan is at least confusing
15 and may render many postconfirmation modifications
16 impossible altogether. . . . Counting the three-year
17 period in the disposable income test from the date the
18 first payment is due under the *modified* plan would
19 preclude approval of modification of a plan that is
20 already more than two years old. Section 1329(c)
21 clearly states that the court may not approve a
modified plan that calls for payments after five years
after the first payment was due under the original
confirmed plan. . . . Mathematically, no proposed
modified plan can satisfy both the disposable income
test in § 1325(b) and the five-year limitation in
§ 1329(c) if the proposed modification is filed after
two years after the commencement of payments under the
original plan.

22 Id. at 192 quoting KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, vol. 2,
23 § 6.45 at 6-136 to 137. Thus, the panel concluded, there is only
24 one plan from which the disposable income test's three years run;
25 it is not a factor to be considered by a court approving post-
26 confirmation modifications. Id. at 192.

27 In re Smith, 237 B.R. 621 (Bankr. E.D. Tex. 1999) aff'd 252
28 B.R. 107 (E.D. Tex. 2000): Where a monetary gift from the

1 debtor's family allowed her to prepay her remaining plan
2 installments with one lump sum payment, she was entitled to an
3 immediate discharge because "completion of all payments"
4 statutorily entitled her to discharge.

5 The debtor's 56-month plan was confirmed over the objection
6 of a creditor. 237 B.R. at 623. After making her 26th payment,
7 the debtor paid the trustee the total amount due under the
8 remainder of the plan. Id. The trustee, in turn, distributed it
9 to creditors and filed a "Notice of Plan Completion and Order
10 Setting Discharge." Id. The objecting creditor complained that
11 the debtor was not entitled to a discharge because she had failed
12 to submit all of her disposable income for a minimum of 36 months
13 as required under § 1325(b)(1). Id.

14 The court overruled the objection and held that the
15 creditor's reliance on § 1325(b)(1) was misplaced because that
16 section applies only to plan confirmations and arguably, because
17 of a split in authority, to requests for modification. Id. at
18 625 n.5 citing In re Forbes, 215 B.R. at 190-92. Since there was
19 no request for modification involved in this case, the court
20 declined to express an opinion on the § 1325(b)(1) issue. Id. at
21 625 n.5.

22 The court questioned the practice of some courts in treating
23 a debtor's motion to make an early payout as an implied motion to
24 modify a confirmed plan, rather than characterizing the proposed
25 payment as simply a single prepayment of all amounts due and
26 owing under a confirmed plan. Id. at 625 n.8; accord Matter of
27 Casper, 154 B.R. 243, 246 (N.D. Ill. 1993). "Thus, without
28 providing advance notice to any party, a Chapter 13 debtor may

1 tender all the payments due and owing under a confirmed plan on
2 an accelerated basis and thereby create an entitlement to a
3 discharge." Id. at 626, citing In re Bergolla, 232 B.R. 515
4 (Bankr. S.D. Fla. 1999) (overruling trustee's objection to
5 discharge and demand for modification of plan when, after making
6 four payments toward a sixty-month plan, debtors satisfied
7 without notice all payments required to be made in the chapter 13
8 plan); In re Martin, 232 B.R. at 37 ("I find nothing in the
9 statute which prohibits prepayment where no prepayment discount
10 is sought.").

11 The court further held that a debtor becomes statutorily
12 entitled to discharge, under § 1328(a), the moment all of the
13 payments prescribed in the confirmed plan are made, "whether
14 received by the trustee singularly over a series of months, or
15 received in an aggregate amount in one prepayment." 237 B.R. at
16 626.

17 Massachusetts Housing Finance Agency v. Evora, 255 B.R. 336
18 (D. Mass. 2000): A motion that seeks to alter the substance of
19 the plan by changing the amount paid to unsecured creditors is
20 treated as a modification, while a motion to alter the number of
21 payments made would not necessarily be so treated. Thirteen
22 months after plan confirmation, the debtors moved for approval of
23 a refinance loan, proposing to pay the trustee a one-time lump
24 sum payment in full satisfaction of their obligations under the
25 plan. Id. at 339. The debtors' sole creditor objected that
26 granting the motion would allow them to "manipulate the Code to
27 modify a mortgage, receive a 'super discharge' and then pocket
28 thousands of dollars on a refinance of a debt simply because the

1 property values have increased.” Id. The bankruptcy court
2 overruled the objection and the creditor appealed.

3 On appeal, the district court held (without specifically
4 discussing § 1325(b)(1)(B)) that because § 1329 is permissive and
5 the motion did not purport to alter the confirmed plan, the
6 motion was not necessarily an implicit modification of the plan.
7 Id. at 343. The court commented further that though the
8 decisions involving one-time lump sum payments are conflicting,
9 they can be reconciled by focusing not on the number of payments
10 to be made (i.e., duration of the plan) but on the amount to be
11 paid to unsecured creditors. Id. at 342. Since both the debtors
12 and the creditor were bound by the amount of allowed secured
13 claims set forth in the plan, and since the motion did not
14 violate the Code or purport to alter the confirmed plan to the
15 detriment of the creditor, the court affirmed the bankruptcy
16 court’s ruling allowing the one-time lump sum early payment. Id.
17 at 342-43.

18 Pancurak v. Winnecour (In re Pancurak), 316 B.R. 173 (Bankr.
19 W.D. Penn. 2004): Where the trustee does not object to plan
20 confirmation, and the debtor paid the amounts and percentages due
21 under the plan, § 1325(b)(1)(B) does not preclude early plan
22 completion and discharge. The debtor made 31 plan payments and
23 then made one lump-sum payment, intending to pay off the plan.
24 The debtor thereafter filed a motion to compel the trustee to
25 issue a discharge pursuant to § 1328(a). Id. at 174. The
26 trustee objected on the ground that under § 1325(b)(1)(B), the
27 debtor must remain in bankruptcy for a minimum of 36 months or
28 pay a 100% dividend to unsecured creditors. Id. at 175. Citing

1 Than, the court held that because the trustee did not object to
2 the confirmation of the plan, and because the debtor satisfied
3 the plan both as to the amount and as to the estimated percentage
4 distribution to unsecured creditors, the debtor was not precluded
5 by § 1325(b) (1) (B) from completing his plan early and receiving a
6 discharge. Id. at 176.

7 In re Golek, 308 B.R. 332 (Bankr. N.D. Ill. 2004): Section
8 1325(b) is not incorporated by reference into § 1325(a).

9 Approximately 20 months into the debtor's plan, the court heard
10 and granted his motion to sell real estate and directed him to
11 deposit proceeds from the sale with the trustee in an amount
12 sufficient to pay off the plan. Id. at 334. The debtor then
13 moved for the entry of order of discharge to which the trustee
14 objected, on the ground that debtor was proposing to terminate
15 his plan before its 36 month term had expired. Id.

16 The court treated the debtor's motion as a post-confirmation
17 motion to modify his plan under § 1329 and declined to read
18 § 1325(b)'s disposable income test into § 1329, rejecting the
19 trustee's argument that § 1325(b) is incorporated by reference
20 into § 1325(a). Id. at 337. The court commented,

21 When Congress wants to say something, it knows how to
22 say it, and in this instance, Congress did not say it.
23 Indeed, section 1329(b)(1) goes out of its way to
24 include *both* sections 1322(a) and 1322(b) in its list
25 of restrictions. While section 1325(a) is expressly
26 listed, however, section 1325(b) is not. It is unclear
27 why Congress would expressly include both subsections
28 of section 1322, but simply state section 1325(a), if
it in fact meant to include both sections 1325(a) and
1325(b). If this was a mere omission by Congress, then
it is for Congress, not this court, to fix this
omission.

Id. Citing In re Sounakhene, among other cases, the court

1 adopted the plain meaning approach and refused to apply the
2 disposable income test to post-confirmation plan modifications.

3 Id.

4 b. Cases favoring application of § 1325(b) to
5 plan modification under § 1329.

6 In re McCray, 172 B.R. 154 (Bankr. S.D. Ga. 1994): In a
7 slightly different twist, the court here determined that
8 § 1325(b) applies to § 1329 modifications, but only in
9 extraordinary circumstances. "Unless there are substantial,
10 unanticipated changes in the debtor's ability to pay under a plan
11 already confirmed, the rights of the debtor and his creditors are
12 settled at the date of confirmation, and ought not to be
13 disturbed in modification proceedings relating to disposable
14 income." 172 B.R. at 158 quoting In re Woodhouse, 119 B.R. 819,
15 820 (Bankr. M.D. Ala. 1990). Stated otherwise, the court
16 concluded that "[i]ssues of disposable income are therefore
17 precluded [on res judicata grounds] from being raised unless the
18 court should find the circumstances 'extraordinary.'" Id.

19 In re Guentert, 206 B.R. 958 (Bankr. W.D. Mo. 1997):
20 Section 1325(b) applies to post-confirmation modifications.
21 Sixteen months after confirmation of her 45% plan, the debtor
22 sought authority to pay the remaining balance on her plan from
23 life insurance proceeds and to obtain an early discharge. Id. at
24 960. The trustee urged the court to require payment of 100% to
25 unsecured creditors. Id. Holding that § 1325(b) applies to
26 post-confirmation modifications, the court concluded that it
27 lacked authority under the Code to reduce the plan term to 23
28 months without payment of all claims in full. Id. at 961.

1 In re Martin, 232 B.R. 29 (Bankr. D. Mass. 1999): Section
2 1325(b) applies but does not necessarily preclude the debtor from
3 paying off his plan in less than 36 months where no prepayment
4 discount is sought. In this case, the confirmed plan provided
5 for 36 payments of \$272 with a 10% dividend to unsecured
6 creditors and, further, that the "final percentage may be
7 increased up to 100% in accordance with rule 3002(c)." Id. at
8 31-32. Less than 24 months later, the court granted the debtors'
9 motion use the proceeds of a refinance loan to pay off the
10 remaining 10% dividend to creditors. The trustee objected that
11 absent 100% payment of the claims, the debtors would be required
12 under § 1325(b) to continue making payments for the full 36
13 months. Declining to follow Forbes, the court adopted the
14 following analysis from the Lundin Treatise:

15 Though there is no illuminating legislative history,
16 the language of §§ 1329 and 1325 favors the
17 interpretation that the disposable income test applies
18 at confirmation of a modified plan.

19 Policy arguments favor application of the disposable
20 income test at confirmation of a modified plan. . . .
21 Applying the projected disposable income test at
22 confirmation of a modified plan would go a long way to
23 eliminating the "danger" that a Chapter 13 debtor would
24 experience a significant improvement in financial
25 condition after confirmation of the original plan and
26 not share that good fortune with prepetition creditors.

27 The logic of the projected disposable income test does
28 not support its application at modification of a
29 confirmed plan . . . If the projected disposable income
30 test is applied again and again, each time the trustee
31 or the holder of an allowed unsecured claim moves for
32 modification of a plan after confirmation, then the
33 concept of "projected" is meaningless . . .

34 This conundrum only serves to emphasize that the
35 interaction of the disposable income test in § 1325(b)
36 and the modification of plans under § 1329 was not well
37 conceived. The 1984 amendments enabling the Chapter 13
38 trustee and allowed unsecured claim holders to seek

1 postconfirmation modification have exacerbated these
2 problems of statutory construction. It is unlikely
3 that the drafters of § 1329(b) intended to preclude
4 modification of all plans that have survived two years
after the first payment was due under the original plan
and in which unsecured claim holders cannot be paid in
full in less than three years.

5 Id. at 36-37 quoting 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, § 6.46
6 (2nd ed. 1994).

7 The court found the arguments excluding the application of
8 the disposable income test were not as strong as those to include
9 it. Id. at 37. However, in applying § 1325(b), the court did
10 not interpret the language to mean that a debtor could not prepay
11 a plan in fewer than 36 months. More specifically, the court
12 found nothing in the statute prohibiting prepayment where no
13 prepayment discount is sought. Id. "A lump sum payment in the
14 aggregate amount of the Debtors' disposable income during the
15 three years of the Plan is simply an anticipatory satisfaction of
16 the obligations under the Plan and is permissible." Id.

17 Ultimately, the court denied debtors' motion to modify their
18 plan because, by not filing updated schedules I and J, they could
19 not demonstrate under § 1325(b) that they were paying creditors
20 the equivalent of their disposable income during the life of the
21 plan. Id. at 38.

22 Even though Martin's holding (§ 1325(b) applies to § 1329)
23 is contrary to that in Sounakhene, the outcomes are the same. In
24 both cases, the courts determined that debtors were entitled to
25 prepayment of their plans upon refinancing of their homes and
26 considered the debtors' disposable income in determining whether
27 to allow the plan modification. The operative difference is that
28 in Martin, the court applied the § 1325(b) disposable income test

1 as a dispositive requirement, while in Sounakhene, the court
2 considered the disposable income as a component of the debtors'
3 overall financial condition in exercising its discretion under
4 § 1329.

5 In re Fields, 269 B.R. 177 (Bankr. S.D. Ohio 2001): Without
6 deciding the issue, the court commented that "it appears that
7 courts within the Sixth Circuit are to apply § 1325(b) within the
8 context of a *debtor's* motion to modify." Id. at 180. However,
9 the court continued, it is unclear whether § 1325(b) would apply
10 if it is the trustee or a creditor seeking the modification. Id.
11 citing Freeman v. Schulman (In re Freeman), 86 F.3d 478, 481-82
12 (6th Cir. 1996) (applying § 1325(b) to debtor's motion for
13 modification).

14 Relying on Than and Sounakhene, the court determined that it
15 was not necessary to decide whether the disposable income test
16 applies "because the express language of § 1329(a) permits such a
17 modification without the need to incorporate § 1325(b)." 269
18 B.R. at 180 citing In re Than, 215 B.R. at 436-338 (court to
19 consider debtor's increased income among other factors); In re
20 Sounakhene, 249 B.R. at 805 (court has discretion to consider
21 important components of disposable income test).

22 **B. ANALYSIS**

23 Section 1329(b) expressly applies certain specific Code
24 sections to plan modifications but does not apply § 1325(b).
25 Period. The incorporation of § 1325(a) is not, as has been posed
26 by some courts, the functional equivalent of an indirect
27 incorporation of § 1325(b). Under § 1329(b), only the
28 "requirements of Section 1325(a)" apply to modifications under

1 § 1329(a). § 1329(b). As previously noted, § 1325(a) requires
2 that "except as provided in [1325]b, the court shall confirm a
3 plan if" Thus, the 1325(a) confirmation requirements
4 incorporated into § 1329(b) exclude the provisions of § 1325(b).

5 Simply put, the plain language of § 1329(b) does not mandate
6 satisfaction of the disposable income test of 1325(b)(1)(B) with
7 respect to modified plans. Had Congress intended to impose such
8 a requirement, it could have easily done so by making the
9 appropriate incorporating reference. If the absence of the
10 reference to § 1325(b) was indeed an oversight, it is the
11 province of the legislature, and not the judiciary, to make the
12 correction. See Lamie v. United States Trustee, 540 U.S. 526,
13 542 (2004) (In determining that debtors' chapter 7 attorneys
14 cannot be paid from the estate due to the exclusion of such
15 professionals from § 330, the Supreme Court explained that "[i]f
16 Congress enacted into law something different from what it
17 intended, then it should amend the statute to conform to its
18 intent. 'It is beyond our province to rescue Congress from its
19 drafting errors, and to provide for what we might think ... is
20 the preferred result.'" quoting United States v. Granderson, 511
21 U.S. 39, 68 (1994) (concurring opinion)).

22 In our view, the approach adopted by the court in Sounakhene
23 is the most sound in that it permits a married analysis that is
24 consistent with both the plain language and the spirit of §§ 1329
25 and 1325. Under this approach, important components of the
26 disposable income test are employed as part of a more general
27 analysis of the total circumstances militating in favor of or
28 against the approval of modification, without requiring tortured

1 and illogical statutory interpretations (where the outcome
2 differs depending upon which party is seeking the modification,
3 whether a certain party has objected, or whether "extraordinary
4 circumstances" exist, etc.). In re Sounakhene, 249 B.R. at 805
5 citing Than, 215 B.R. at 436; Powers, 202 B.R. at 623
6 (recognizing the debtor's changed income and expenses are
7 factored into the bankruptcy court's good judgment and
8 discretion).

9 In determining whether to authorize a modification that
10 reduces a plan term to less than 36 months without full payment
11 of allowed claims, the bankruptcy court should carefully consider
12 whether the modification has been proposed in good faith. See
13 § 1325(a)(3). Such a determination necessarily requires an
14 assessment of a debtor's overall financial condition including,
15 without limitation, the debtor's current disposable income, the
16 likelihood that the debtor's disposable income will significantly
17 increase due to increased income or decreased expenses over the
18 remaining term of the original plan, the proximity of time
19 between confirmation of the original plan and the filing of the
20 modification motion, and the risk of default over the remaining
21 term of the plan versus the certainty of immediate payment to
22 creditors.

23 The trustee's attempt to distinguish this case from
24 Sounakhene based upon the identity of the party seeking plan
25 modification is unpersuasive. The distinction is not at all
26 relevant to the statutory requirements of § 1329. Under § 1329,
27 a debtor, trustee or creditor all have an absolute right to seek
28 modification of a confirmed plan.

1 We agree with the court's holding in Sounakhene and conclude
2 that the disposable income test of § 1325(b) is not implicated
3 under a strict reading of § 1329 (except, as we have earlier
4 noted, as a factor in determining the good faith of the plan
5 modification). Therefore, the bankruptcy court may approve a
6 debtor's modification to his plan so as to complete it in fewer
7 than 36 months without having to pay unsecured claims in full.
8 Because we find nothing in the Code prohibiting Debtor here from
9 so modifying his chapter 13 plan, we must next address the issue
10 of whether the Northern District's mandatory model plan
11 impermissibly abridges substantive debtors' rights.

12 II. Does LBR 1007-1 impermissibly abridge debtor's rights by
13 mandating use of a Model plan which includes Chapter 13
14 payment requirements not found in the Code?

15 District and bankruptcy courts have been delegated authority
16 to adopt local rules prescribing the conduct of business but the
17 rules must be consistent with the Bankruptcy Code and the Federal
18 Rules of Bankruptcy Procedure. Bersher Invs. v. Imperial Sav.
19 Ass'n. (In re Bersher Invs.), 95 B.R. 126, 129 (9th Cir. BAP
20 1988) ("Bankruptcy Rule 9029 allows for the making of local
21 bankruptcy rules so long as they are not 'inconsistent' with the
22 more general Bankruptcy Rules.").⁶ A local rule may dictate

23 ⁶ Rule 9029(a) Local Bankruptcy Rules

24 (1) Each district court acting by a majority of its
25 district judges may make and amend rules governing
26 practice and procedure in all cases and proceedings
27 within the district court's bankruptcy jurisdiction
28 which are consistent with - but not duplicative of -
Acts of Congress and these rules and which do not
prohibit or limit the use of the Official Forms. Rule

(continued...)

1 "practice or procedure but may not enlarge, abridge or modify any
2 substantive right." Rivermeadows Assocs., Ltd. v. Falcey (In re
3 Rivermeadows Assocs., Ltd.), 205 B.R. 264, 269 (10th Cir. BAP
4 1997).

5 In Steinacher v. Rojas (In re Steinacher), 283 B.R. 768 (9th
6 Cir. BAP 2002), we addressed the validity of a local rule
7 requiring chapter 13 debtors with prior bankruptcy cases to cure
8 certain pre-petition mortgage defaults as a condition of
9 confirmation (the "Six Month Rule"). Id. at 770. The debtors
10 there failed to comply with the local rule and the trustee orally
11 requested a dismissal. Id. The debtors opposed the dismissal,
12 arguing that the Six Month Rule interfered with their substantive
13 right under the Code to cure any default in their plan. Id. at
14 771. The court observed that the debtors had violated the rule
15 and dismissed the case. Id.

16 On appeal, we applied a three-part test, previously
17 articulated in Garner v. Shier (In re Garner), 246 B.R. 617, 624
18 (9th Cir. BAP 2000), for determining the validity of a local
19 rule: (1) whether it is consistent with Acts of Congress and the
20 Federal Rules of Bankruptcy Procedure; (2) whether it is more
21 than merely duplicative of such statutes and rules; and (3)

22 ⁶(...continued)

23 83 F.R.Civ.P. governs the procedure for making local
24 rules. A district court may authorize the bankruptcy
25 judges of the district, subject to any limitation or
26 condition it may prescribe and the requirements of 83
27 F.R.Civ.P., to make and amend rules of practice and
28 procedure which are consistent with - but not
duplicative of - Acts of Congress and these rules and
which do not prohibit or limit the use of the Official
Forms. Local rules shall conform to any uniform
numbering system prescribed by the Judicial Conference
of the United States.

1 whether it prohibits or limits the use of Official Forms. 283
2 B.R. at 772-73.

3 We concluded that the Six Month Rule, which limited the
4 ability of certain chapter 13 debtors to cure pre-petition
5 defaults through their plans, conflicted with § 1322 which allows
6 a debtor to include in his or her plan a provision proposing to
7 waive "any" defaults within a reasonable time. Id. at 773. We
8 observed that while the local rule reflected an understandable
9 attempt to redress abuses caused by repetitive filings, such
10 abuses could not be prevented by imposing a general pre-petition
11 cure requirement which exceeds that contemplated by the Code.
12 Id. at 774. Because the Six Month Rule was inconsistent with the
13 Code, we held it invalid under Rule 9029(a). Id.

14 In this case, the trustee argues that Steinacher is
15 inapplicable because § 1325(b)(1)(B) is consistent with the
16 language in the model plan. Not surprisingly, Debtor contends
17 otherwise, that is, that LBR 1007-1 is inconsistent with § 1329
18 because it mandates use of the model plan which contains a
19 provision abridging Debtor's rights under § 1329.

20 We agree with Debtor. As discussed at length above, the
21 Code allows a debtor to modify a chapter 13 plan so as to
22 conclude it in fewer than 36 months, without payment of all
23 claims in full. A local rule prohibiting Debtor from doing what
24 he is entitled to do under the Code is inconsistent with an Act
25 of Congress and is, therefore, invalid under Rule 9029(a).

26 At the hearing on the Motion, the bankruptcy court ruled
27 that Debtor had waived the right to object to the requirements of
28 the model plan after having already confirmed a plan containing

1 the complained of provision. This reasoning is not persuasive.
2 As Judge Jaroslovsky recently commented in a case before this
3 panel involving the import of local rules in the plan
4 confirmation process, a court-mandated form cannot cross over the
5 line from "facilitating Chapter 13 administration to dictating
6 Chapter 13 terms." Cohen v. Tran (In re Tran), 309 B.R. 330, 339
7 (9th Cir. BAP 2004) (concurring opinion).⁷ In his concurrence,
8 Judge Jaroslovsky rejected the trustee's argument that the debtor
9 there could have sought a variance from the terms of the
10 mandatory plan stating that

11 given the practical realities of plan confirmation [the
12 debtor] had little choice except to adopt the dictated
13 language of the mandatory plan even though under the
14 Bankruptcy Code he had a right to [do so].

15 Id.

16 Similarly, in this case, it does not seem reasonable to
17 expect Debtor to challenge the legality of a provision in the
18 court-mandated form at the time of plan confirmation, given the
19 practical realities of the process. Accordingly, we find that
20 Debtor did not waive the right to seek to modify provisions of
21 his plan which were inconsistent with the model plan, but
22 otherwise allowable under the Code.

23 CONCLUSION

24 Based on the foregoing, we REVERSE and REMAND with

25 ⁷ Hon. Alan Jaroslovsky, Bankruptcy Judge for the Northern
26 District of California, participated in the decision by
27 designation. The model plan at issue in Tran was mandated by the
28 local rules of the Bankruptcy Court of the Central District of
California. The provisions of that model plan analyzed by Judge
Jaroslovsky involve issues unrelated to those addressed in this
case.

1 instructions to the bankruptcy court to enter an order either
2 granting or denying Debtor's motion to modify on grounds that are
3 consistent with this ruling.

4
5 BRANDT, Bankruptcy Judge, dissenting:

6 I respectfully dissent: as observed by the bankruptcy
7 judge, debtor never challenged the model plan. Transcript,
8 28 May 2004, at 9:4. All four of debtor's plans presumably
9 contained the language now objected to (only the third amended
10 plan is in the record before us). Neither party to this appeal
11 has briefed the implications of that failure, and we should not
12 answer questions not squarely presented in a procedurally correct
13 fashion, particularly when, as here, neither party has addressed
14 the issue in the bankruptcy court or on appeal.

15 Debtor does not just propose to pay off the plan, which
16 requires payment in full of all claims if within the first 36
17 months, but to do two things: first, amend the plan to delete
18 that requirement, and then to pay a lesser amount (assuming the
19 total claims exceed the "pot" - the record before us does not
20 disclose the total). And proposes to do so without notice to
21 creditors, which Rule 3015(g), Fed. R. Bankr. P., requires for
22 post-confirmation modifications:

23 A request to modify a plan . . . shall be filed
24 together with the proposed modification. The clerk, or
25 some other person as the court may direct, shall give
26 the debtor, the trustee, and all creditors not less
27 than 20 days notice by mail of the time fixed for
28 filing objections and, if an objection is filed, the
hearing to consider the proposed modification, unless
the court orders otherwise with respect to creditors
who are not affected by the proposed
modification. . . .

1 Most local bankruptcy rules put the burden of giving notice on
2 the proponent of the modification; that is likely the case in the
3 Northern District of California, but we have no briefing on that
4 point, either.

5 The certificate of service, of which we may take judicial
6 notice, indicates service only on the trustee. Counsel's
7 representation that the notice had been served on all creditors,
8 quoted in footnote 3 above, is not convincing: she does not say
9 that she sent the notice to them, there's no indication she even
10 checked her file, and she contradicts the sworn statement of her
11 paralegal in the proof of service filed 11 May 2004. The lack of
12 notice to creditors precludes treatment of the motion as a
13 modification to the confirmed plan, and raises questions of due
14 process. See In re Bagby, 218 B.R. 878, 884-886 (Bankr. W.D.
15 Tenn. 1998) (modification of a confirmed plan requires notice to
16 all creditors informing them of the effects of the proposed
17 modification on their claims and of the procedure for objection
18 to the modification). See also 3 KEITH M. LUNDIN, CHAPTER 13
19 BANKRUPTCY, 3d ed. ¶ 253.1 (2000 & Supp. 2004).

20 I would affirm.

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