

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

**In re: John E. Garver and
Melissa F. Garver
Debtors.**

Bankruptcy Case No. 01 B 71333

Chapter 13

**MEMORANDUM OPINION AND ORDER FINDING THAT
MODIFICATIONS PURSUANT TO 11 U.S.C. § 1329 MUST
MEET THE REQUIREMENTS OF § 1325(b)**

This matter comes before the Court on the Motion to Dismiss or Modify Plan brought by Lydia S. Meyer, the standing chapter 13 trustee (the "Trustee"). John E. and Melissa F. Garver, the debtors (the "Debtors"), are represented by William Balsley. The issue presented is whether the Trustee, pursuant to section 1329, may seek a retroactive modification based upon an increase in disposable income.

NATURE OF CASE

The Joint Stipulation of Facts establishes that Mrs. Garver was unemployed at the time the petition was filed. (Docket #39.) The plan was confirmed June 11, 2001, although a corrected order was entered on July 30, 2001. (Docket #18.) The Trustee sent a letter to the Debtors dated March 11, 2003, requesting they provide her with copies of their tax returns on or before May 1. The Trustee filed a motion to dismiss for failure to provide the returns and set it for hearing on September 5, 2003. The Debtors then tendered the tax returns on September 4th. Based on the tax return, the Debtors' average gross income for 2002 was \$5,021 per month. At the time of filing, their gross monthly income totaled only \$3,080. The Trustee seeks an increase in plan payments of \$2,000 per month, retroactively to January 1, 2002.

The Trustee seeks to increase the plan payments pursuant to the language in the

confirmation order which provides, in part:

the debtors shall file with the trustee a copy of his/her/their 2002 complete tax return on or before May 15, 2003 . . . ; that the confirmation herein shall not bar the trustee from seeking modification of the plan if it appears that additional disposable income is available to fund the chapter 13 plan.” (Docket #18).

The Debtors respond that the increased income does not now exist. In addition, if the Trustee is allowed to retroactively increase the plan payments, they request a hearing to determine whether in fact there was an increase in disposable income in that both income and expenses must be considered.

DISCUSSION

The Seventh Circuit previously held that modifications pursuant to § 1329 need not meet a threshold requirement. “[A]ccording to the terms of § 1329, the debtor, the trustee or an unsecured creditor has an absolute right to request modification of the plan between confirmation of the plan and completion of the plan payments.” *In re Witkowski*, 16 F.3d 739, 742 (7th Cir. 1994). “[N]either § 1329 nor the doctrine of res judicata impose any threshold change in circumstances standard.” *Id.* at 743. The Court went on to explain:

Modifications are only allowed in three limited circumstances to: (1) increase or reduce the amount of the payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor 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. A modified plan is also only available if §§ 1322(a), 1325(a) and 1323(c) of the bankruptcy code are met.

Id. at 745.

Section 1329 further provides: “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.” 11 U.S.C. § 1329(b)(1).

There is a split of authority as to whether a modification pursuant to § 1329 must meet the disposable income test set forth in § 1325(b). The Eighth Circuit Bankruptcy Appellate Panel held that § 1325(b) did not apply to § 1329 modifications. *In re Forbes*, 215 B.R. 183 (8th Cir. B.A.P. 1997). First, the Court noted that arguments that § 1329 modifications are subject to the disposable income test “are made largely based upon its facial omission from Section 1329(b)(1).” *Id.* at 191. Additionally, the enumeration of specific code sections in § 1329(b)(1) would be “rendered mostly redundant if all of Chapter 13 becomes applicable at postconfirmation modification” *Id.* (quoting 2 Keith M. Lundin, CHAPTER 13 BANKRUPTCY, § 6.45 (2nd ed. 1994)) (internal quotations omitted). The Court went on to quote Lundin’s treatise extensively. Part of that excerpt included the following:

Application of the disposable income test at confirmation of a modified plan is at least confusing and may render many post-confirmation modifications impossible altogether [C]ounting the three-year period in the disposable income test from the date the first payment is due under the *modified* plan would preclude approval of modification of a plan that is already more than two years old”

Id. at 192 (alterations in original).

The Court also outlined the arguments in support of including the disposable income test as a requirement to § 1329. “Proponents argue that Section 1325(b) is implicated by either Section 1325(a)’s preface, “[e]xcept as provided in subsection (b)” or by Section 1325(a)(1)’s blanket application of the chapter provisions, which provides that “the plan complies with the provisions of this chapter.” *In re Forbes*, 215 B.R. at 191. The Court also referred to and quoted in footnotes both the Norton and Collier treatises which state that the failure to include § 1325(b) must have been a legislative oversight.

Id. at n.10.

Another Court, in discussing the *Forbes* decision, went on to further quote the Lundin treatise, which set forth policy reasons for the application of § 1325(b), including the “danger” that a debtor’s disposable income would significantly increase without any benefit to the creditors, and concluded that it was “unlikely that the drafters of 1329(b) intended to preclude modification of all plans that have survived two years after the first payment was due under the original plan” *In re Martin*, 232 B.R. 29, 36-37 (Bankr. D. Mass. 1999) (quoting 2 Keith M. Lundin, CHAPTER 13 BANKRUPTCY, § 6.46 (2nd ed. 1994)). Still other cases have held that the disposable income test should apply only when necessary to prevent the abuse of the bankruptcy process. *See In re Martin*, 232 B.R. at 37 (citing cases).

This Court declines to follow the Eighth Circuit and finds that § 1325(b) applies to § 1329 modifications. First, this Court finds that § 1325(b) is incorporated into § 1329 both by the requirement enumerated in § 1325(a)(1) that plans comply with the provisions of the Code and the specific reference in § 1325(a) to subsection b. In addition, this Court would concur with the conclusion, as stated in the Norton and Collier treatises, that the omission of § 1325(b) was merely a legislative oversight. However, even if this Court followed the Eighth Circuit, the outcome would not be affected in the case at hand. The Debtors agreed to provide the Trustee with copies of their tax returns and also agreed that confirmation would not bar the Trustee from seeking to modify the plan if it appeared that additional disposable income was available to fund the plan. Thus, the Debtors agreed that confirmation would not bar the Trustee from seeking a modification of the plan based solely upon an increase in disposable income.

This Court finds that the disposable income test, as outlined in § 1325(b), is an additional requirement for plan modification pursuant to § 1329.

The Court now turns to the Trustee's request to retroactively increase the plan payments based upon an increase of past disposable income. The confirmation order required the Debtors to provide their tax returns to the Trustee's office on or before the 15th of May of each year. It further provided that confirmation did not bar the Trustee from seeking a modification based if it appeared the disposable income had increased.

This language, in addition to the case law outlined above, preserves the Trustee's right to seek a § 1329 modification of the plan based solely on an increase in disposable income. The Trustee would have discovered the increased income on May 15th, but for the Debtors' delay in producing the tax return. This Court finds that under ordinary circumstances, where a debtor fully cooperates with the Trustee and complies with his/her obligations as outlined under the Code and in the confirmation order, he/she should not be saddled with the additional burden of setting aside income which exceeds that contained in his/her schedules. To do so would place a burden on a debtor which is not required by either the Code or the confirmation order. In such an instance, the Trustee can file a motion to modify the plan based upon an increase in disposable income. However, It would be from the date of the presentation of that motion that a debtor would be required to increase the plan payments, if in fact, this Court found an increase in disposable income.

Here, the Debtors do have the duty to comply with the requirement to provide the Trustee with copies of their tax return by the 15th of May of each year. By failing to do so, the Debtors failed to cooperate with the Trustee, and their inaction could be

interpreted as an attempt to conceal increased income. By so doing, the Debtors put themselves at risk that the Trustee would file a motion to modify their plan and seek an increase in plan payments retroactively. This Court finds that the Trustee may seek to retroactively increase plan payments based upon a past increase in disposable income. However, the Trustee may only do so from the date she would have discovered the increase in disposable income had the Debtors complied with their obligations pursuant to the confirmation order. Therefore, this Court finds that the Trustee in these cases may move to modify the plan retroactively to May 15th of 2003. A hearing will be necessary to determine the actual increase, if any, in disposable income from that time forward.

CONCLUSION

This Court finds that a modification pursuant to § 1329 must comply with § 1325(b). In addition, the Trustee may seek a modification of a confirmed plan retroactively to: 1) the time the motion to modify is presented to the Court, or 2) the time the Trustee would have discovered an increase in disposable income but for a debtor's delay in cooperating with the Trustee.

THEREFORE, IT IS ORDERED that the Trustee's Motion to Dismiss or Modify Plan must be set for hearing to determine whether the Debtors' disposable income actually increased.

IT IS FURTHER ORDERED that this matter shall be set for status on February 27, 2004, at 9:30 a.m. to schedule an evidentiary hearing.

Dated: February 20, 2004

MANUEL BARBOSA
Bankruptcy Judge