Consumer Track

Consumer Case Law Update from the Court's Perspective

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Law v. Siegel: The Holding and its Implications

The Honorable Dennis R. Dow and Lori Locke
United States Bankruptcy Court, Western District Missouri

Law v. Siegel, ___ U.S. ___, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014).

ISSUE:

Can a trustee surcharge a debtor's homestead exemption for fees incurred in litigation to prove fraudulent conduct?

FACTS:

- Chapter 7 Debtor claimed homestead exemption and that property had second lien which would have left no equity for estate
- Second lien was made up and Trustee spent $500K in litigation to prove
- Trustee sold home and sought to surcharge Debtor's $75K exemption with the costs of avoiding the fraudulent lien
- Bankr. Ct. allowed surcharge
- Affirmed by BAP and 9th Cir.
- Supreme Court overturned

SUPREME COURT ANALYSIS:

- Bankr. Ct. has statutory (§105(a)) and inherent powers but it may not contravene specific statutory provisions

- §105(a) does not allow the Bankr. Ct. to override explicit mandates of other sections of the Bankr. Code, only to carry out provisions of the Code
- Inherent sanctioning powers likewise are subordinate to valid statutory directives and prohibitions.
- In Siegel, case posed clear conflict between statutory language of §522(k), which states that exempt property is not liable for administrative expense except costs incurred in allowing debtor to avoid transfer of exempt property, and the Bankr. Ct's desire to punish a wrongdoer.
- Court stated §522 does not give courts discretion to grant or withhold exemptions based on whatever considerations they deem appropriate. Rather, the statute exhaustively specifies the criteria that will render property exempt.
- The language "may exempt" vests discretion in the debtor, not the court.
- Court distinguished Marrama, which found debtor could only convert to Chapter 13 if he was eligible to be a debtor, by finding that court basically just combined separate hearings that ultimately would have led to dismissal of the case.
- Finally, the Court noted there were other avenues available to Trustee under the Code and Rules to recover administrative expenses.
- Court stated its decision did not remove Bankr. Courts' authority to sanction debtor misconduct and noted §727 allows denial of discharge; Rule 9011 authorizes sanctions for bad-faith litigation conduct which may include "an order directing payment… of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."
- Also, state exemptions statute upon which the exemption is based may authorize court an equitable remedy.

HOLDING:

Bankruptcy Court may not surcharge a debtor's homestead exemption under its equitable powers in contravention of explicit statutory provisions.

How *Law v. Siegel* is Being Applied

Amended Exemption Claim- Future Annuity Payments

***In re Pipkins*, 2014 WL 2756552 (Bankr. N.D. Cal. June 17, 2014).**

- Debtors did not claim interest in structured settlement payments from an annuity exempt until more than one year after the petition date.

- **Prior to exemption claim, Debtors attempted to sell the interest in annuity without notifying Trustee.**
- **Trustee found out and obtained an offer to purchase that would go to estate.**
- **Debtors then claimed settlement payments exempt for first time.**
- **Trustee objected because tardy claim asserted in bad faith.**
- **Court held, based on Law v. Siegel that it could not prevent amendment of an exemption on equitable grounds if the exemption satisfies statutory requisites.**
- **Court noted in a footnote that it can still exclude evidence not timely with its orders and to extent such evidence essential to determination of entitlement to exemption, debtor may not be able to establish validity of claimed exemption.**

Amended Homestead Exemption

***In re Gutierrez*, 2014 WL 2712503 (Bankr. E.D. Cal. June 12, 2014).**

- **Debtors attempted to amend homestead exemption to frustrate sale by Trustee after undervaluing property on original schedules.**
- **Bankr. Ct. originally denied debtors' request based on bad faith and prejudice and ruled in favor of Trustee.**
- **After Siegel, court vacated original rulings and granted Debtors' motion to amend exemption**
- **Rule 1009 provides a schedule may be amended as a matter of course at any time before case closed but long accepted by courts not absolute if in bad faith or prejudice to creditors**
- **Not expressly mentioned in statute but used §105(a)**
- **Based on language in Siegel, court found bad faith and prejudice are not statutorily created exceptions to the exemption scheme and established case law which allows a court to disallow an amended claim of exemption based on bad faith and prejudice is no longer valid.**
- **Siegel did leave open possibility that state law may offer some independent basis to disallow an otherwise appropriate exemption that was created under state law but not applicable in this case.**

Motion to Rescind Waiver of Homestead Exemption

***In re Bodeker*, 2014 WL 2615714 (Bankr. D. Mont. June 11, 2014).**

- **Debtor moved to rescind waiver of homestead exemption because entered into to avoid surcharge of property which is no longer allowed under Siegel**
- **Trustee objected that waiver was entered into on advice of counsel and motion to rescind was untimely**
- **Based on Siegel, which now controls, court granted Debtor's motion to rescind waiver of exemption.**
- **However, court did deny Debtor's motion to rescind waiver of discharge finding Siegel did not support that issue and his dishonesty permits court to deny request.**

Avoid Judgment Liens Impairing Homestead Exemption

***In re Mitchell*, 2014 WL 1725819 (Bankr. N.D. Ohio April 30, 2014).**

- **Debtor seeks to fully avoid judgment liens of creditors impairing homestead exemption**
- **Creditor request court surcharge or deny exemption based on bad conduct prior to and during bankruptcy case.**
- **Court finds even if debtor's misconduct was deliberate scheme to frustrate trustee and creditors, Siegel commands court allow exemption unless state law provides otherwise which it does not.**
- **Also must allow debtor to amend schedules at any time under Siegel.**

Recharacterization of Claims

***In re Alternate Fuels, Inc.*, 507 B.R. 324 (B.A.P. 10th Cir. March 18, 2014).**

- **Trustee sought to recharacterize claims filed by debtor's insiders**
- **Insiders contend Siegel prohibits recharacterization because §502 doesn't give Bankr. Courts discretion to grant or withhold claims based on whatever considerations they deem appropriate**
- **Court found Siegel decision doesn't deal with recharacterization at all and it is not implicit, and clearly not explicit, that Siegel abrogated a bankruptcy court's ability to recharacterize an alleged loan.**
- **Additionaly, recharacterization is permitted under state law.**

Dismiss Chapter 13 With Prejudice

***In re Criscuolo*, 2014 WL 1910078 (Bankr. E.D. Va. May 13, 2014)**

- **Trustee moved to dismiss debtor's Chapter 13 case with prejudice for bad faith in concealing income**
- **Debtor moved to dismiss voluntarily**
- **Court finds there is a bad faith exception to debtor's §1307(b) absolute right of dismissal.**
- **Court finds Siegel not so expansive as to eviscerate such and there is nothing in §1307(b) that prohibits dismissal on terms including proscription on re-filing for defined period of time.**

Modification of Chapter 13 Plans

The Honorable Dennis R. Dow
United States Bankruptcy Court, Western District of Missouri

Modification of Chapter 13 Plans

I. Procedure for Modification

A. Notice, Objection and Hearing

The Code contains few requirements regarding the procedure for modifications specifying only that the plan as modified becomes the plan unless it is disapproved after notice and a hearing. ' 1329(b)(2).

Most of the procedural requirements applicable to plan modification are in Rule

3015(g). Among other things, it specifies that the request must identify the proponent and be filed along with the proposed modification. That rule and Rule 2002(a)(5) require 21 days notice of the objection deadline and hearing date be given to the debtor, trustee and creditors. The notice must include the proposed modification or a summary thereof.

Objections are to be filed and served on the debtor and the trustee and transmitted to the United States Trustee. Any objection is treated as a contested matter under Rule 9014.

B. Standing B Who may propose modification of a Chapter 13 plan?

Section 1329(a) specifies that the plan may be modified after confirmation upon request of the debtor, the trustee or the holder of an allowed unsecured claim. The statutory language suggests and the courts have confirmed that a secured creditor cannot move for modification of a confirmed Chapter 13 plan. *In re Stewart*, 247 B.R. 515, 520 (Bankr. M.D. Fla. 2000); *In re Rosenthal*, 233 B.R. 815, 818 & n. 1 (Bankr. C.D. Ill. 1999).

C. Timing B When may a confirmed plan be modified?

1. Generally. Section 1329(a) specifies that a confirmed plan may be modified any time after confirmation but before completion of payments under the plan.

2. Determining whether payments are complete requires an interpretation of the plan and may not always be clear. *See, e.g., In re McKinney*, 191 B.R. 866 (Bankr. D. Or. 1996). In that case, the trustee filed a motion to modify a plan which provided only for payment of priority claims with no distribution to general unsecured creditors. An inaccurate projection of the amount of priority claims led to an internal inconsistency in the plan with regard to the debtor=s obligation to make payments. The court held that the debtor had not completed payments even though priority claims had been paid because the plan had an implied term of three years and the less than projected amount of priority claims justified modification of the plan to increase the percentage dividend to unsecured creditors.

3. The courts disagree as to when payments may be completed under the plan. One group of courts holds that completion of payments occurs when the debtor tenders to the trustee amounts sufficient to pay the obligations imposed by the plan. *See, e.g., Casper v. McCullough (In re Casper)*, 154 B.R. 243 (N.D. Ill. 1993) (tender of 10% payment due within 24 months satisfied requirement; once debtor pays trustee, funds are vested in creditors); *In re Jacobs*, 263 B.R. 39, 44 (Bankr. N.D.N.Y. 2001) (trustee=s motion time barred because debtors completed payments; tender of payments to trustee, not certification of completion, is requirement); *In re Sounakhene*, 249 B.R. 801, 804 (Bankr. S.D. Cal. 2000) (lump sum payment tendered to trustee cut

off ability to modify); *In re Phelps*, 149 B.R. 534, 537-539 (Bankr. N.D. Ill. 1993) (complete on tender of payments to trustee).

4. Another group of courts holds that a motion to modify may be made any time before tender by the trustee to the creditors of funds paid by the debtor sufficient to complete payment of claims in accordance with the terms of the plan.

II. Substantive Requirements for Modification

A. Threshold Requirement B Change of Circumstances?

1. Although not specified in the statute, some courts have imposed a threshold requirement for modification that there be a change in circumstances. *In re Rimmer*, 143 B.R. 871 (Bankr. W.D. Tenn. 1992); *In re Walker*, 114 B.R. 847 (Bankr. N.D.N.Y. 1990), *In re Lynch*, 109 B.R. 792 (Bankr. W.D. Tenn. 1989). To this, some courts add the requirement that the change must be substantial. *In re Gronski*, 86 B.R. 428 (Bankr. E.D. Pa. 1988). Most of the cases adopting the change in circumstances requirement also add that the change must be unanticipated. *Arnold v. Weast (In re Arnold)*, 869 F.2d 240 (4th Cir. 1989); *In re Fitak*, 121 B.R. 224 (S.D. Ohio 1990); *In re Ireland*, 366 B.R. 27 (Bankr. W.D. Ark. 2007); *In re Jacobs*, 263 B.R. 39 (Bankr. N.D.N.Y. 2001); *In re Furgeson*, 263 B.R. 28 (Bankr. N.D.N.Y. 2001); *In re Dunlap*, 215 B.R. 867 (Bankr. E.D. Ark. 1997); *Collier v. Valley Federal Savings Bank (In re Collier)*, 198 B.R. 816 (Bankr. N.D. Ala. 1996); *In re Guernsey*, 189 B.R. 477 (Bankr. D. Minn. 1995); *In re Nelson*, 189 B.R. 748 (Bankr. D. Minn. 1995); *In re Solis*, 172 B.R. 530 (Bankr. S.D.N.Y. 1994); *In re Butler*, 174 B.R. 44 (Bankr. M.D.N.C. 1994). These courts reason that imposition of the requirement is necessary in order to preserve the res judicata effect of plan confirmation as well as honor the provisions of ' 1327(a) on the binding effect of confirmation as to the debtor and creditors. At least one court has suggested that the standard might be different depending upon whether the proponent of the modification is the debtor or the trustee or the holder of an allowed unsecured claim. *Gronski*, 86 B.R. at 432 (power of debtor to request post-confirmation amendments to the Chapter 13 plan is much broader than that of creditor).

2. A number of other courts have rejected the requirement that any change of circumstances need be shown, though they take into consideration whether and to what extent there has been a change of circumstances. *In re Mattson*, 468 B.R. 361 (9th Cir. B.A.P. 2012); *In re Meza*, 467 F.3d 874 (5th Cir. 2006); *Barbosa v. Solomon (In re Barbosa)*, 235 F.3d 31 (1st Cir. 2000); *In re Witkowski*, 16 F.3d 739 (7th Cir. 1994); *Ledford v. Brown (In re Brown)*, 219 B.R. 191 (6th Cir. B.A.P. 1998); *Max Recovery, Inc. v. Than (In re Than)*, 215 B.R. 430 (9th Cir. B.A.P. 1997); *Powers v. Savage (In re Powers)*, 202 B.R. 618 (9th Cir. B.A.P. 1996); *In re Brown*, 463 B.R. 134 (Bankr. S.D. Ind. 2011); *In re Ward*, 348 B.R. 545 (Bankr. D. Idaho 2005); *In re Thomas*, 291 B.R. 189 (Bankr. M.D. Ala. 2003); *In re Fields*, 269 B.R. 177 (Bankr. S.D. Ohio 2001); *In re Townley*, 256 B.R. 697 (Bankr. D.N.J. 2000); *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000); *In re Studer*, 237 B.R. 189 (Bankr. M.D. Fla. 1998); *In re Powers*, 140 B.R. 476 (Bankr. N.D. Ill. 1992); *In re Meeks*, 237 B.R. 856 (Bankr. M.D. Fla. 1999).

3. What constitutes a change of circumstance sufficient to justify modification of the plan is driven by the facts and a question on which the courts have disagreed. Among the circumstances the courts have considered are: *Arnold v. Weast (In re Arnold)*, 869 F.2d 240 (4th Cir. 1989) (increase in income); *Powers v. Savage (In re Powers)*, 202 B.R. 618 (9th Cir. B.A.P. 1996) (same); *In re Fitak*, 121 B.R. 224 (S.D. Ohio 1990) (withdrawal of retirement funds constituted change in circumstances; appreciation of property did not); *In re Drew*, 325 B.R. 765 (Bankr. N.D. Ill. 2005) (mortgage refinance by debtors); *In re Murphy*, 327 B.R. 760 (Bankr. E.D. Va. 2005 (same); *In re Jacobs*, 263 B.R. 39 (Bankr. N.D.N.Y. 2001) (appreciation in real property is not unanticipated change in circumstances); *In re Furgeson*, 263 B.R. 28 (Bankr. N.D.N.Y. 2001) (recovery of damages for violation of automatic stay is change in circumstances); *In re Nott*, 269 B.R. 250 (Bankr. M.D. Fla. 2000) (receipt of inheritance); *In re Studer*, 237 B.R. 189 (Bankr. M.D. Fla. 1998) (receipt of proceeds of undisclosed personal injury action); *Collier v. Valley Federal Savings Bank (In re Collier)*, 198 B.R. 816 (Bankr. N.D. Ala. 1996) (receipt of insurance proceeds from destruction of rental property); *In re Solis*, 172 B.R. 530 (Bankr. S.D.N.Y. 1994) (post-confirmation sale of medical practice); *In re Butler*, 174 B.R. 44 (Bankr. M.D.N.C. 1994) (destruction of vehicle); *In re Bostwick*, 127 B.R. 419 (Bankr. N.D. Ill. 1991) (objections to claims and failure of certain creditors to file claims).

4. Effect of BAPCPA

a. The courts considering the question have determined that BAPCPA does not change the fact that a plan may still be modified by debtors who have experienced reduction in income. *In re Hill*, 386 B.R. 670 (Bankr. S.D. Ohio 2008) (BAPCPA amendments do not change ability to modify pursuant to ' 1329; '1325(b) does not apply to modification; debtors could not modify plan to substitute actual income and expenses for means test data); *In re Kearney*, 439 B.R. 694 (Bankr. E.D. Wis. 2010) (decrease in take home pay warranted modification in plan; ' 1325(b) not applicable); *In re Savage*, 426 B.R. 320 (Bankr. D. Minn. 2010) (some form of cause necessary to justify modification; while debtors justified reduction of payments, change in income did not justify reduction in term of plan); *In re King*, 439 B.R. 129 (Bankr. S.D. Ill. 2010) (while decrease in income may warrant modification, plan must still comply with ' 1325(b)); amendment must be made in good faith); *In re McCully*, 398 B.R. 590 (Bankr. N.D. Ohio 2008) (reduction in income warranted modification; ' 1325(b) not applicable to ' 1329).

b. Is the "applicable commitment period" requirement in §1325(b) applicable to plan modifications?

In re Clevenger, 430 B.R. 539 (Bankr. W.D. Mo. 2009) (yes, above median debtors cannot manipulate applicable commitment period requirement by reducing payments; §1325 applicable to modifications); *In re Ewers*, 366 B.R. 139 (Bankr. D. Nev. 2007) (no, applicable commitment period requirement in §1325(b)(1)(B) inapplicable to plan modification).

c. May debtors prepay amounts to be distributed under plan and obtain early discharge without modification of plan?

In re Fridley, 380 B.R. 538 (9th Cir. B.A.P. 2007) (no; debtor desiring to prepay Chapter 13 plan and obtain early discharge must follow §1329 modification procedures).

d. Under what circumstances may the trustee seek plan modification?

In re York, 415 B.R. 377 (Bankr. W.D. Wis. 2009) (trustee may not move for a modification immediately subsequent to confirmation on grounds debtors have income in excess of means test calculation); *In re Justice*, 418 B.R. 342 (Bankr. W.D. Mo. 2009) (post-confirmation discovery by trustee of debtors= surrender of residence was changed circumstances warranting modification to comply with applicable commitment period).

B. Provisions Applicable to Plan Modification

1. Generally

Section 1329(b)(1) specifies that ‘‘ 1322(a), 1322(b) and 1323(c) and all of the requirements of ‘ 1325(a) apply to any modification of a confirmed Chapter 13 plan.

a. Section 1322(a) contains a list of provisions which a plan must contain including submission of income, provision for the payment of priority claims and classification of claims.

b. Section 1322(b) specifies certain provisions which a plan may contain, including designation and treatment of unsecured claims, modification of the rights of secured claims (with reservations), curing defaults, providing for post-petition claims, assumption and rejection of executory contracts, payment of claims from property of the estate or of the debtor, vesting of property of the estate on confirmation, provision for interest accruing after the date of the filing of the petition on certain unsecured claims and other provisions.

c. Section 1325(a) incorporates the basic requirements for plan confirmation, including that the plan comply with the provisions of Chapter 13 and other applicable provisions of title 11, payment of required fees, proposal in good faith, the best interest of creditors test or liquidation analysis, appropriate treatment of secured claims, feasibility, that the filing of the petition was in good faith, payment of domestic support obligations and the filing of all applicable tax returns.

2. Best Interest Test

As noted above, one of the tests applicable to modification is the provision in ‘ 1325(a)(4) that creditors receive at least as much as they would receive if the debtor were liquidated under Chapter 7 of the Bankruptcy Code as of the effective date of the plan. While it is clear this provision is applicable, there has been a difference of opinion as to as of what date it should be applied.

a. One group of cases holds that the temporal focus for purposes of doing the liquidation analysis is the date of the modified plan. *In re Barbosa*, 236 B.R. 540 (Bankr. D. Mass. 1999), aff=d on other grounds, 243 B.R. 562 (D. Mass. 2000), aff=d, 235 F.3d 31 (1st Cir. 2000); *In re Stinson*, 302 B.R. 828 (Bankr. D. Md. 2003); *In re Jefferson*, 299 B.R. 468 (Bankr. S.D. Ohio 2003); *In re Morgan*, 299 B.R. 118 (Bankr. D. Md. 2003); *In re Nott*, 269 B.R. 250 (Bankr. M.D. Fla. 2000); *In re Martin*, 232 B.R. 29 (Bankr. D. Mass. 1999). This appears to be the majority view and is supported by the legislative history.

b. Others have held that the appropriate time for judging whether the liquidation test is satisfied is the date of the original plan. *See, e.g., Forbes v. Forbes (In re Forbes)*, 215 B.R. 183 (8th Cir. B.A.P. 1997). The B.A.P. apparently felt that it was bound by the expression in *Hollytex Carpet Mills v. Tedford*, 691 F.2d 392 (8th Cir. 1982) to the effect that the "effective date of the plan" refers to the date of the plan as originally confirmed.

3. Disposable Income Test B Applicable or Not?

Section 1325(b) requires the debtor to commit all projected disposable income for the applicable commitment period to the payment of unsecured creditors but is invoked only upon objection by the trustee or the holder of an allowed unsecured claim. Because of the language of ' 1329(b)(1) with regard to the provisions incorporated into the modification analysis, there is a split of authority on the question of whether the disposable income test imposed by ' 1325(b) applies on modification.

a. The majority rule appears to be that the disposable income test is applicable to a modified Chapter 13 plan. *In re King*, 439 B.R. 129 (Bankr. S.D. Ill. 2010) (above median debtor must pay unsecured creditor in full or propose 60 month term in modified plan); *In re Keller*, 329 B.R. 697 (Bankr. E.D. Cal. 2005) (questioning rationale of *Sunahara); In re Martin*, 232 B.R. 29 (Bankr. D. Mass. 1999); *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997); *In re Baker*, 194 B.R. 881 (Bankr. S.D. Cal. 1996); *In re Powers*, 140 B.R. 476 (Bankr. N.D. Ill. 1992); *In re Cormier*, 478 B.R. 88 (Bankr. D. Mass. 2012). These courts hold that the test is applicable because although ' 1325(b) is not specifically among the listed sections made applicable to modification by ' 1329(b)(1), it is nonetheless included by a cross reference in ' 1325(a) and because it is one of the other applicable Aprovisions of this chapter@ incorporated by ' 1325(a)(1).

b. By its terms, the test only applies upon objection by the trustee or the holder of an allowed unsecured claim. It would therefore apparently be inapplicable to a modification proposed by one of those parties and opposed by the debtor. The minority view is that the test is generally inapplicable. *In re McCollum*, 363 B.R. 789 (E.D. La. 2007); *In re Mattson*, 468 B.R. 361 (9th Cir. B.A.P. 2012); *In re Grutsch*, 453 B.R. 420 (Bankr. D. Kan. 2011) (projected disposable income requirement inapplicable to modification of previously confirmed plan); *In re White*, 411 B.R. 268 (Bankr. W.D.N.C. 2008) (disposable income requirement does not apply in connection with plan modification reducing term of plan to less than 60 months based on substantial and unanticipated change of circumstances); *Sunahara v. Burchard (In re Sunahara)*, 326 B.R. 768 (9th Cir. B.A.P. 2005); *In re Ireland*, 366 B.R. 27 (Bankr. W.D. Ark. 2007); *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000); *In re Anderson*, 153 B.R. 527 (Bankr. M.D. Tenn. 1993); *In re Barnes*, 506 B.R. 777 (Bankr E.D. Wis. 2014); *In re Pasley*, 507 B.R. 312 (Bankr. E.D. Cal. 2014); *In re Powers*, 507 B.R. 262 (Bankr. C.D. Ill. 2014*); In re Swain,* 509 B.R. 22 (Bankr. E.D.Va. 2014). Among the courts that have taken this position is the Eighth Circuit Bankruptcy Appellate Panel in *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183 (8th Cir. B.A.P. 1997), a position it appears to have reaffirmed, at least in dicta, in *Babin v. Wilson (In re Wilson)*, 383 B.R. 729, 734 (8th Cir. B.A.P. 2008). The courts adopting this view point out that ' 1325(b) is not among the sections listed for incorporation in ' 1329(b)(1) and that the assumption that ' 1325(b) is incorporated by reference as one of the Aother applicable provisions of this title@ renders the other specific references surplusage. The case for the argument that ' 1325(b) is not applicable to modification was made stronger by amendments to the Bankruptcy Code made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In that act, Congress made significant changes to ' 1325(b) and also modified ' 1329 to include specific references to parts of ' 1325(b), but still did not include a general reference to ' 1325(b) as applicable to modifications. *See Ireland*, 366 B.R. at 32.

c. Implications B If ' 1325(b) is not applicable when the court considers confirmation of an amended plan, then the applicable commitment period, arguably requiring the debtor to make payments and remain in Chapter 13 for a particular number of months, as well as the requirement that the debtor commit all projected disposable income and that it be measured by the definition in that section, are not applicable.

In those jurisdictions in which ' 1325(b) is applicable to a modified plan, the ability to modify based on change in circumstances, particularly income or expenses, may be constrained by the court=s view of the concept of projected disposable income.

4. Plan Length

   a. Section 1329(c) provides that while the court may approve modification of a Chapter 13 plan, it may not approve a modification which would provide for payments over a period that expires after the applicable commitment period specified in ' 1325(b)(1)(B) after Athe time that the first payment under the original confirmed plan was due.@ This language with regard to plan length differs slightly from the formulation contained in ' 1322(d) and has given rise to a difference of opinion among the courts as to the appropriate starting date for calculation of the maximum time limitation.

   b. The courts have adopted at least two different positions with respect to the period when the time limitation calculation for payments under a modified plan is to begin.

(1) Some courts take the position that the starting date runs from the first payment made after confirmation of the original proposed plan. *West v. Costen*, 826 F.2d 1376 (4th Cir. 1987); *In re Eves*, 67 B.R. 964 (Bankr. N.D. Ohio 1986).

(2) Another group of courts concludes that the limitation period begins from the first payment due under the plan prior to confirmation pursuant to ' 1326(a)(1). *In re Musselman*, 341 B.R. 652 (Bankr. N.D. Ind. 2005) (calculated from due date of first payment under plan, not date payment made); *Baxter v. Evans (In re Evans)*, 183 B.R. 331 (Bankr. S.D. Ga. 1995).

III. Types of Modifications

A. Generally

1. Section 1329(a) specifies that the plan may be modified only in certain specified ways including: (1) to increase or reduce the amount of payments on claims of a particular class; (2) to extend or reduce the time for such payments; (3) to alter the amount of distribution to take into account a payment made other than under the plan; and (4) to reduce the amount to be paid under the plan by the amount expended by the debtor to purchase health insurance (subject to specific requirements of reasonable necessity and documentation), a provision added by BAPCPA. Some courts have held that given this statutory specification of permitted modifications, no other changes to confirmed Chapter 13 plans are allowable. *GMAC v. Smith (In re Smith)*, 259 B.R. 323 (Bankr. S.D. Ill. 2001); *GMAC v. Judkins (In re Judkins)*, 151 B.R. 553 (Bankr. D. Colo. 1993).

B. Increase in Amount of Payments or Term of Plan

1. Courts have been presented with a myriad of reasons for increasing either the amount of payments made to a class under the plan or the term of proposed repayment. Among them are: an increase in the debtor=s post-confirmation income, *Arnold v. Weast (In re Arnold)*, 869 F.2d 240 (4th Cir. 1989); reduction of the debtor=s post-confirmation expenses, *In re Gronski*, 86 B.R. 428 (Bankr. E.D. Pa. 1988); a failure of creditors to file claims or successful objections to claims, *In re Witkowski*, 16 F.3d 739 (7th Cir. 1994); *In re Burns*, 216 B.R. 945 (Bankr. S.D. Cal. 1998); *In re Bostwick*, 127 B.R. 419 (Bankr. N.D. Ill. 1991); *contra, In re Woodhouse*, 119 B.R. 819 (Bankr. M.D. Ala. 1990); debtor=s receipt of an award of damages for violation of the automatic stay, *In re Furgeson*, 263 B.R. 28 (Bankr. N.D.N.Y. 2001); receipt of an inheritance, *In re Nott*, 269 B.R. 250 (Bankr. M.D. Fla. 2000); *In re Euerle,* 70 B.R. 72 (Bankr. D.N.H. 1987); receipt of proceeds from insurance coverage after destruction of property, *In re Thomas*, 291 B.R. 189 (Bankr. M.D. Ala. 2003); *Collier v. Valley Federal Savings Bank (In re Collier)*, 198 B.R. 816 (Bankr. N.D. Ala. 1996); receipt of proceeds of life insurance, *In re Florida*, 268 B.R. 875 (Bankr. M.D. Fla. 2001); post-confirmation sale of property, *Barbosa v. Solomon*, 235 F.3d 31 (1st Cir. 2000); sale of medical practice, *In re Solis*, 172 B.R. 530 (Bankr. S.D.N.Y. 1994); *In re Powers*, 140 B.R. 476 (Bankr. N.D. Ill. 1992); winning the lottery, *In re Koonce*, 54 B.R. 643 (Bankr. D.S.C. 1985).

2. A modification proposing an increase in the plan payments may fail on feasibility grounds if predicated on something other than an increase in debtor=s income and the debtor=s income does not permit the proposed payments to be made. *See, e.g., In re Perkins*, 111 B.R. 671 (Bankr. M.D. Tenn. 1990).

C. Reduction in Amount of Payments or Term of Plan

1. Many and varied are the justifications offered and accepted by the courts for reduction in the amount of payments or in the term of the Chapter 13 plan: *Powers v. Savage (In re Powers)*, 202 B.R. 618 (9th Cir. B.A.P. 1996) (refinancing of property permitting early payoff of plan); *In re Frost*, 123 B.R. 254 (S.D. Ohio 1990) (assertion of new claim and reduction in value of residence); *In re Ireland*, 366 B.R. 27 (Bankr. W.D. Ark. 2007) (reduction in income); *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000) (early payoff by refinance of residence); *In re Martin*, 232 B.R. 29 (Bankr. D. Mass. 1999) (same; modification justified, but court denied motion due to insufficient information); *In re Baker*, 194 B.R. 881 (Bankr. S.D. Cal. 1996) (death of co-debtor); *In re Holley*, 138 B.R. 201 (Bankr. S.D. Ohio 1992) (loss of income); *In re Walker*, 114 B.R. 847 (Bankr. N.D.N.Y. 1990) (post-confirmation marriage with additional spousal child support obligations); *In re Boyer*, 505 B.R. 833 (Bankr. N.D. Ill. 2014)(amount of unsecured claims that were filed was significantly less than anticipated); *In re Howell*, 2007 WL 4124476 (Bankr. W.D. La. Nov. 19, 2007) (§1329(a)(2) permitting plan amendments to reduce time for making payments trumps requirement of §1325(b)(4); amendment must be made in good faith); *In re McCollum*, 348 B.R. 377 (Bankr. E.D. La. 2006) (the pre-payment of debtor's plan through a lump-sum distribution was in the best interests of creditors, was proposed in good faith, and did not violate the provisions of ' 1329).

2. In a variety of other situations courts have denied such requests *In re Santiago Santiago*, 319 B.R. 65 (Bankr. D. Puerto Rico 2004) (proposal to decrease payments after four-month arrearage unsupported by show of change of circumstances, and not proposed in good faith; court suggests debtors should use hardship discharge provision); *In re Martin*, 232 B.R. 29 (Bankr. D. Mass. 1999) (debtors not allowed to modify Apot plan@ to reduce amount paid simply because of failure of certain creditors to file claims); *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997) (debtors= proposal to pay lump sum payment from insurance proceeds on death of husband not in good faith; plan lasted only 23 months and paid only 45% of unsecured claims); *In re Powers*, 140 B.R. 476 (Bankr. N.D. Ill. 1992) (denies amendment to reduce term when unsecured creditors will not be paid in full).

   The courts have been particularly suspicious of modifications to reduce the payment obligation to the amount of payments already made. *See, e.g., In re Guernsey*, 189 B.R. 477 (Bankr. D. Minn. 1995) (denies reduction to amount paid; suggests debtor should seek hardship discharge). Courts have also denied modifications when the court felt that the change in circumstances was a result of a voluntary decision by the debtor. *See, e.g., In re Nelson*, 189 B.R. 748 (Bankr. D. Minn. 1995).

3. Payments cannot be reduced to a point at which the payout to unsecured creditors would not satisfy the liquidation test of ' 1325(a)(4). In addition, as noted above, reduction in payments may be problematic in jurisdictions in which the disposable income test is applicable to modification.

D. Surrender of Collateral B One of the most thoroughly litigated and controversial of potential amendments to confirmed Chapter 13 plans is a proposal by a debtor whose plan previously provided for the retention and payment of a secured claim to surrender the collateral in complete satisfaction of the secured claim while classifying the balance of the claim as unsecured.

1. The leading case denying such modifications is *Chrysler Financial Corporation v. Nolan (In re Nolan)*, 232 F.3d 528 (6th Cir. 2000), in which the court characterized the amendment as constituting the reclassification of a secured claim, which the court concluded was not a permitted modification pursuant to ' 1329. Many other courts have adopted the same approach for a variety of reasons. *Sharpe v. Ford Motor Credit Company (In re Sharpe)*, 122 B.R. 708 (E.D. Tenn. 1991); *In re Belcher*, 369 B.R. 465 (Bankr. E.D. Ark. 2007); *In re Adkins*, 281 B.R. 905 (Bankr. E.D. Mich. 2002), aff=d 425 F.3d 296 (6th Cir. 2005); *In re Brown*, 463 B.R. 134 (Bankr. S.D. Ind. 2011); *In re Turnbull*, 350 B.R. 429 (Bankr. N.D. Ill. 2006); *In re Cameron*, 274 B.R. 457 (Bankr. N.D. Tex. 2002); *In re Coffman*, 271 B.R. 492 (Bankr. N.D. Tex. 2002); *In re Barclay*, 276 B.R. 276 (Bankr. N.D. Ala. 2001); *In re Jackson*, 280 B.R. 703 (Bankr. S.D. Ala. 2001); *In re Smith*, 259 B.R. 323 (Bankr. S.D. Ill. 2001); *In re Goos*, 253 B.R. 416 (Bankr. W.D. Mich. 2000); *In re Meeks*, 237 B.R. 856 (Bankr. M.D. Fla. 1999); *In re Coleman*, 231 B.R. 397 (Bankr. S.D. Ga. 1999); *In re Dunlap*, 215 B.R. 867 (Bankr. E.D. Ark. 1997); *In re Holt*, 136 B.R. 260 (Bankr. D. Idaho 1992); *In re Conley,* 504 B.R. 661 (Bankr. D. Colo. 2014). Even those courts which do not permit surrender and reclassification of the claim may allow the debtor to reamortize the balance of the claim being treated as secured. *See In re Goos*, 253 B.R. at 421.

Although the specific basis for the holdings varies, for the most part, these courts deny confirmation of plans involving surrender of collateral with full satisfaction of the creditor=s secured claim on the basis that the Code does not permit modification of the amount of secured claims but only a reduction in the amount to be paid on claims and does not permit Areclassification@ of claims from secured to unsecured status. Many of these courts also express concerns about what they believe to be unfair shifting of the burden of depreciation of the collateral during the period of time payments have been made. *See, e.g., In re Kurtz*, 502 B.R. 238 (Bankr. D. Colo. 2013)(surrender of residence to mortgage holder).

2. An increasing number of courts have rejected *Nolan* and permit debtors to surrender collateral in full satisfaction of the secured claim with the balance remaining after disposition to be paid as un unsecured claim pursuant to the plan, assuming the debtors have not been guilty of any wrongful conduct such as abuse of the collateral or failure to properly insure it. *Bank One, NA v. Leuellen*, 322 B.R. 648 (S.D. Ind. 2005); *In re Boykin,* 428 B.R. 662 (Bankr. D.S.C. 2009) (permits surrender); *In re Davis*, 404 B.R. 183 (Bankr. S.D. Tex. 2009) (may not surrender if inequitable but may reclassify claim as unsecured); *In re Lane*, 374 B.R. 830 (Bankr. D. Kan. 2007) (vehicle destroyed by fire; creditor received payment of insurance proceeds); *In re Ward*, 348 B.R. 545 (Bankr. D. Idaho 2005)(proposed modification permissible, but motion denied due to insufficient information); *In re Mason*, 315 B.R. 759 (Bankr. N.D. Cal. 2004) (may modify absent any allegation debtor failed to maintain collateral or otherwise engaged in inequitable conduct); *In re Hernandez*, 282 B.R. 200 (Bankr. S.D. Tex. 2002); *In re Knappen*, 281 B.R. 714 (Bankr. D.N.M. 2002); *In re Townley*, 256 B.R. 697 (Bankr. D.N.J. 2000); *In re Day*, 247 B.R. 898 (Bankr. M.D. Ga. 2000) (debtor may modify plan absent any showing of bad faith); *In re Anderson*, 153 B.R. 527 (Bankr. M.D. Tenn. 1993), *abrogated by Chrysler Financial Corporation v. Nolan (In re Nolan)*, 232 F.3d 528 (6th Cir. 2000); *In re Rimmer*, 143 B.R. 871 (Bankr. W.D. Tenn. 1992)(same); *In re Jock*, 95 B.R. 75 (Bankr. M.D. Tenn. 1989)(same); *In re Stone*, 91 B.R. 423 (Bankr. N.D. Ohio 1988). Even those courts which permit this kind of modification will disallow it on good faith grounds if the debtor has failed to insure the collateral. *In re Butler*, 174 B.R. 44 (Bankr. M.D.N.C. 1994); *In re Cooper*, 167 B.R. 889 (Bankr. E.D. Ark. 1994); *In re Tucker*, 500 B.R. 457 (Bankr. N.D. Miss. 2013).

These courts conclude that the modification is allowed by the Code in that it is an attempt to modify the plan to take into consideration distributions made to the creditor other than under the plan (as a result of repossession and disposition of the collateral) and that it can be characterized not as a reclassification of the claim or a modification of the amount of the claim but as a reduction to zero of the amount to be paid to the class of claims consisting of this one secured creditor. With regard to the argument about depreciation, these courts note that it is up to the secured creditor to insure that the plan as originally confirmed offers a payment stream roughly equivalent to the anticipated depreciation in the value of the collateral or the life of the plan. After BAPCPA, this appears to be a requirement. These courts also point out that it is at least anomalous if not impossible to have a secured claim with respect to which there is no collateral.

3. Even if surrender of the collateral and treatment of the balance of the claim as unsecured cannot be accomplished pursuant to ' 1329, many courts have held that it may be accomplished pursuant to ' 502(j) which authorizes reconsideration of the allowance of claims based on the equities of the case. A number of courts have used that section to permit the debtor to reconsider the allowance and treatment of claims originally allowed as secured, after default and repossession. *See, e.g., In re Lane*, 374 B.R. 830 (Bankr. D. Kan. 2007); *In re Zieder*, 263 B.R. 114 (Bankr. D. Ariz. 2001); *In re Johnson*, 247 B.R. 904 (Bankr. S.D. Ga. 1999); *contra, In re Coffman*, 271 B.R. 492 (Bankr. N.D. Tex. 2002).

4. A small number of courts which permit the modification to treat the balance of the claim after disposition of the collateral as unsecured allow an administrative expense claim to the creditor for the difference between the liquidation value of the collateral at the time of plan confirmation and the liquidation value of the collateral at plan modification. *In re Johnson*, 247 B.R. 904 (Bankr. S.D. Ga. 1999); *contra, In re Zieder*, 263 B.R. 114 (Bankr. D. Ariz. 2001).

5. Other courts have held that the debtor may modify a plan to provide for surrender of a vehicle in full satisfaction of a secured claim BUT conditioned on the debtor making up payments that had been suspended or were in default. *In re Hutchison*, 449 B.R. 403 (Bankr. W.D. Mo. 2011) (Judge Dow).

6. Effect of BAPCPA

a. At least one court which had previously held that the debtor may not modify a plan in such a way has held that nothing in BAPCPA changes the result. *See In re Belcher*, 369 B.R. 465 (Bankr. E.D. Ark. 2007) (debtor may not modify plan to surrender vehicle in full satisfaction of debt after accident resulting in partial payment of secured claim by insurance proceeds; BAPCPA does not change result of prior law on this issue). *See In re Dunlap*, 215 B.R. 867 (Bankr. E.D. Ark. 1997).

b. Another court has held that the debtor may modify the plan in this way notwithstanding the anti-bifurcation language of the hanging paragraph in §1325. *In re Lane*, 374 B.R. 830 (Bankr. D. Kan. 2007).

c. Some options which the debtor might choose in these circumstances may be foreclosed by another amendment to '1325(a)(5)(B)(i) effectuated by BAPCPA to the effect that the plan must provide that the holder of the claim retain the lien securing the claim until the debt is paid in accordance with non-bankruptcy law, or a discharge is granted under ' 1328.