UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: James Lee Humes, Jr., Yvonne Marie Humes, Debtors.	Bankruptcy Case No. 11-39684 EEB Chapter 13

ORDER DENYING APPROVAL OF STIPULATION TO CURE PLAN DEFAULTS and ORDER OF CONVERSION TO A CHAPTER 7 PROCEEDING

THIS MATTER comes before the Court on an unopposed Motion to Approve Stipulation (the "Stipulation"), filed by Douglas Kiel, the chapter 13 trustee (the "Trustee"), which seeks to allow the Debtors to cure a substantial plan default seven months after the end of their sixty-month plan. No less than three Bankruptcy Code provisions, 11 U.S.C. §§ 1322(d), 1325(b)(4), and 1329(c), prohibit a plan exceeding five years in length.[1] Nevertheless, some courts have opined that the bankruptcy court has the discretion to allow a debtor to cure plan defaults "within a reasonable period of time" following the end of a five-year plan period. The Trustee and the Debtors have made excellent arguments urging this Court to exercise its discretion in favor of approving the Stipulation, but despite these arguments the Court denies its approval.

I. BACKGROUND

The Debtors filed a chapter 13 petition with an initial plan on December 28, 2011. At that time, both were employed, earning a joint gross income exceeding $10,000 per month. They committed to pay $918 per month to the Trustee over a five-year term. The Court confirmed this plan on August 1, 2012. However, in May 2013, Mr. Humes lost his job. On March 7, 2014, they submitted a modified plan (the "Plan"), which the Court also approved. This Plan only required the Debtors to pay $10 per month for the remaining thirty-six months, but it added the following provision:

> Debtor is currently unemployed and looking for employment. Within 30 days of him beginning a new job Amended Schedules I & J will be prepared and filed. An amended plan will also be prepared and filed utilizing the new household income within the same 30 day period.

March 7, 2014 Plan, § G (the "Section G Requirement").

The Debtors made all the payments required by the Plan. However, they admit they failed to inform the Trustee and to modify the Plan when Mr. Humes found new employment. In

[1] All references to "section" or "§" shall refer to Title 11, United States Code, unless expressly stated otherwise

late 2013, Mr. Humes informed his bankruptcy attorney that he had found a new job. Unfortunately, his attorney did not remember the Plan's Section G Requirement. He failed to advise them of the need to file a modified plan.

After the Debtors completed the final payment, the Trustee reviewed the Plan, remembered the Section G Requirement, and requested copies of the Debtors' tax returns. Once the Debtors submitted them, the Trustee realized that Mr. Humes had secured new employment. He then filed his Motion to Dismiss. The parties reached a settlement shortly thereafter. The Stipulation requires the Debtors to pay an additional $17,000, which approximates the amount they would have paid during the plan term if they had timely modified the Plan to reflect Mr. Humes' new income.

Without awaiting court approval of the Stipulation, the Debtors paid $17,000 to the Trustee over a five-month period, ending in August 2017. If approved, the Stipulation would allow the Debtors to make their final plan payment seven months after the end of the sixty-month term of the Plan. The Trustee is holding these funds, pending the outcome of this decision.

II. DISCUSSION

A. The Five-Year Plan Term Limit

The length of time a debtor must make plan payments is set forth in both § 1322 and § 1325. Section 1325(b)(4) sets the floor and § 1322(d) sets the ceiling. Together these two statutes require a below-median income debtor to make payments for no less than three years and no more than five years. The above-median income debtor must make payments for no more than five years and no less than five years or, put more simply, for exactly five years.[2] The Debtors in this case are above-median income debtors.

Although the Code is clear about the required and permitted lengths of a plan, it is less clear as to when the plan's term begins and ends. Identifying these triggering dates may, in some cases, reveal that the debtor has more time than anticipated to complete his plan obligations. If only the Code had specified that a plan's term begins on the petition date, this inquiry would be simple. Alas, it does not and courts do not agree on the starting date for the applicable commitment period. *See Christensen v. Black (In re Black)*, 292 B.R. 693, 701 (10th Cir. BAP 2003) (describing split of authority but declining to decide the issue).

Two schools of thought have emerged, which are more fully described below: the due date of the first payment post-confirmation or the due date of the first payment prior to confirmation. If this Court were to follow the former interpretation, then the Debtors' cure under the Stipulation might have occurred within their applicable commitment period, eliminating the need to exercise discretion to extend the time for performance. The Stipulation allowed the Debtors to complete their plan payments by August 2017. If their plan's term did not begin until

[2] Of course, if the debtor pays all claims in full, then he or she may propose a shorter plan length. 11 U.S.C. § 1325(b)(4)(B).

they made a plan payment after their August 1, 2012 confirmation date, then they may have completed plan payments within the five-year period.

In determining the starting date of the applicable commitment period, the Court begins with the language of the Code itself. The Code tells us when the plan must be filed and when plan payments must begin. Most chapter 13 debtors file a plan on the same day they file their bankruptcy petition. If not, then the debtor must file the plan within fourteen days after the petition date. *See* Fed. R. Bankr. P. 3015(b). Pursuant to § 1326, a debtor must commence making payments under the plan "not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier." 11 U.S.C. § 1326(a)(1). "Because it is hard to imagine a circumstance in which a plan would be filed before the order for relief, which is normally the petition, . . . this amendment effectively requires payments to commence within 30 days after the petition or conversion to chapter 13." *See* 8 *Collier on Bankruptcy* ¶ 1326.02[1] ((Richard Levin & Henry J. Sommer eds., 16th ed. 2017)).[3]

The start of plan payments does not coincide with the plan confirmation process. The bankruptcy court must hold the initial confirmation hearing no later than forty-five days after the date of the meeting of creditors. 11 U.S.C. § 1324(b). The meeting of creditors must be held no earlier than twenty-one days and no more than forty days after the petition date. Fed. R. Bankr. Rule 2003(a). It is usually held approximately thirty days after the petition. Taken together, this means the initial confirmation hearing occurs around Day 75 of the case, while the first plan payment must be made by Day 30.

Moreover, it is more common than not that the chapter 13 trustee and creditors will lodge objections to the debtor's initial plan. Then the initial hearing becomes more of a status conference at which the debtor declares whether he will amend the plan to resolve the objections or requests the scheduling of an evidentiary hearing. Typically, the debtor will amend several times before arriving at a consensual plan. Thus, there may be several months and several plan payments before confirmation occurs. That is what occurred in this case. The Debtors filed their initial plan on December 28, 2011, but the Court did not confirm a plan in this case until August 1, 2012.

Some courts hold that the beginning of the plan's term is the first date a plan payment comes due *after* confirmation. *West v. Costen*, 826 F.2d 1376, 1378 (4th Cir. 1987); *In re Morris*, 2014 WL 3818947, at *2-3 (Bankr. E.D.N.C. July 31, 2014). These courts rely on the wording of § 1329(c):

> A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original *confirmed plan* was due,

[3] Prior to passage of BAPCPA, § 1326(a) required a debtor to commence payment within thirty days of filing the plan. The change in language to include the "whichever is earlier" phrase appears to be a case of bad draftsmanship. *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, § 401.1[2] (4th ed. 2007) (describing the new language as "nonsense" because a chapter 13 debtor would never file a plan prior to the petition date).

> 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.

11 U.S.C. § 1329(c) (emphasis added). According to the Fourth Circuit, because this section refers to the due date for payments under the "confirmed plan," the five-year period only begins to run at confirmation. *Costen*, 826 F.2d at 1378.

Other courts hold that the five-year period runs from the date specified in the plan for the first plan payment. *See Baxter v. Evans (In re Evans)*, 183 B.R. 331, 332-33 (Bankr. S.D. Ga. 1995); *Profit v. Savage (In re Profit)*, 283 B.R. 567, 575 (9th Cir. BAP 2002); *In re Ramsey*, 507 B.R. 736, 739 n.11 (Bankr. D. Kan. 2014). To allow the payment period to run from the confirmation date, these courts reason, would allow an end run around the five-year limitation in § 1322 because a debtor could intentionally delay confirmation, thereby creating a longer period of plan payments. *See In re Evans*, 183 B.R. at 333. More importantly, starting the five-year clock at confirmation would impose an additional burden on debtors by requiring them to make pre-confirmation payments under § 1326, but then not counting those payments toward the sixty-month obligation. *Id.* Thus, "the most logical point from which to begin counting the repayment period is at the time the debtor is first required to make payments under § 1326(a)(1)." *Id.*

Unfortunately for these Debtors, this Court agrees with the reasoning of the latter camp. Debtors should not have to make more than sixty payments because the confirmation process does not dovetail with the payment requirements. Nor is this interpretation at odds with § 1329(c)'s reference to payments under a "confirmed plan." Section 1329(c) must be read in context. Section 1329 as a whole sets forth the requirements and permitted types of plan modifications but it only applies to post-confirmation modifications. Section 1323 governs pre-confirmation plan modifications. Thus, when § 1329(c) refers to a confirmed plan, it is doing so because any modification under this statute is by definition a modification of a confirmed plan. Subsection (c) prohibits a modification that would cause the plan's length to exceed five years. It describes the start of the plan's term by reference to "the first payment under the *original* confirmed plan." 11 U.S.C. § 1329(c) (emphasis added). It is harkening back to that first payment date.

Likewise, § 1325(b)(1)(B) ties the starting date to the first payment date. This statute describes the amount that a debtor must pay his unsecured creditors if either the trustee or an unsecured creditor objects to the plan. The minimum amount the debtor must pay is "all of the debtor's projected disposable income to be received in the applicable commitment period." 11 U.S.C. § 1325(b)(1)(B). It then describes the start of the applicable commitment period with these words: "beginning on the date that the first payment is due under the plan . . . ." *Id.* In this statute, there is no reference to a "confirmed plan" but there is a consistent reference to that first payment date.

Section 1326(a)(1) specifies that this date must be no later than thirty days after the order for relief or filing of a plan, whichever is earlier. It is not tied to the confirmation date in anyway. Section 1329(c), which governs modification of a plan *after confirmation*, is necessarily dealing with a confirmed plan, but § 1325(b)(1)(B) is expressly describing the start of the applicable commitment period as the "date that the first payment is due under the plan." U.S.C. § 1325(b)(1)(B). The date specified by the plan is controlling as long as that date meets the requirements of § 1326(a)(1)(A). If the petition date is on March 1, then the first payment date must be no later than March 31. If the plan specifies March 20 as the first payment date, then March 20 will begin the applicable commitment period.

It would seem to be a simple matter then to calculate the end of a plan's term. If the plan is a five-year plan and it began on January 27, 2012, then it should end on January 26, 2017. Surprisingly, however, trustees and secured lenders often disagree as to the ending date. This dispute arises because the due date for the regular postpetition secured debt payments may differ from the due date for the debtor's payments to the trustee. Debtors have at least two kinds of payment obligations under their plans. They make payments toward their prepetition obligations. Their prepetition obligations are usually two-fold in nature, comprised of a payment to the unsecured debts owed and a payment to cure any prepetition default on secured debts. Whether the payment represents an unsecured or secured debt payment, the Court refers to them collectively as the "Prepetition Debt Payments." In addition to these, debtors must continue to make ongoing payments due on their secured debts on a postpetition basis (the "Postpetition Payments").

If the plan commits to make sixty Prepetition Debt Payments beginning on January 27, 2012 and on the twenty-seventh day of the month thereafter, then the last payment will be due on December 27, 2016. However, if the Postpetition Payments on the debtor's secured debts are due on a different day of the month, then there may be an additional secured debt payment that falls due before the end of the five-year period. For example, if the debtor is required to make his mortgage payment by the first day of the month, then the January 1, 2017 mortgage payment will still be required to fulfill the plan's obligations because it falls within the five-year period of the plan (ending on January 26, 2017), despite the fact that the debtor completed his Prepetition Debt Payments on December 27, 2016.

In this case, Debtors filed the initial version of their plan on the petition date—December 28, 2011. This version of the plan, which was ultimately not confirmed, was required to, but did not specify the first payment due date. After several amendments, the Debtors confirmed a plan that specified an initial payment date of January 28, 2012. This date is thirty-one days after the petition date, rather than the thirty days specified by § 1326(a)(1). This means that, despite what is listed in the plan, the Debtors actually had to start their plan payments no later than January 27, 2012 and, therefore, their five-year plan ended on January 26, 2017. All required plan payments, toward both their prepetition and postpetition debts, had to be completed no later than January 26, 2017.

The Stipulation that the Trustee and the Debtors have asked this Court to approve allowed the Debtors to make four monthly payments of $500, beginning "April 2017" and a final payment of $15,000 "in August 2017." Thus, given this Court's ruling on the start of the applicable commitment period, the Stipulation allowed the Debtors to make their final plan payments more than seven months after the end of the five-year period.

B. May the Court Exercise its Discretion to Allow the Debtors to Complete Plan Payments Beyond the Five Years?

The Bankruptcy Code is very explicit that chapter 13 plans may not extend beyond a five-year term. Nevertheless, does the bankruptcy court have discretion to grant the debtor a reasonable grace period to cure an arrearage in plan payments beyond the five years? Again, two schools of thought exist. In a recent case, *In re Klaas*, 858 F.3d 820 (3d Cir. 2017), the Third Circuit concluded that a bankruptcy court has the necessary discretion. In *Klaas*, the debtors made all of the required payments in their sixty-month plan, but sixty-one months after the start of the plan the trustee moved to dismiss the case, arguing the debtors needed to pay an additional $1,123 to complete their plan obligations. This shortfall was apparently due to a change in trustee fees charged during the plan period, of which the debtors were unaware. The debtors cured the arrearage sixteen days later. Despite the prompt cure, one of the debtors' creditors piggybacked on the trustee's dismissal motion, arguing that the cure payment was impermissible. The bankruptcy court declined to dismiss the case and later granted a completion discharge.

In affirming the bankruptcy court, the Third Circuit acknowledged the five-year term limitations set forth in § 1322 and § 1329, but reasoned that those sections only deal with a debtor's request to confirm or modify a plan—issues not presented in the appeal. Instead, the court focused on § 1307, which governs dismissal and conversion. The Court noted that this section does not specifically mention the restrictions on term length and gives a bankruptcy court wide discretion in determining whether to dismiss a chapter 13 case where there has been a material default. Similarly, the Court analyzed § 1328, which directs a court to issue a discharge if the debtor has completed "all payments under the plan," without an express requirement that the payments be made within five years. The *Klaas* court refused to interpret the phrase "all payments under the plan" to mean "all *timely* payments under the plan," because even a late payment would still be made "under" or pursuant to the authority conferred by the plan. The *Klaas* court also rejected the creditor's argument that the debtors were really seeking to informally modify their plan in contravention of § 1329(c), reasoning that the debtors' cure payment did not modify the commitments of their plan but instead allowed them to "complete the payments owed under their confirmed plan." *Id.* at 831. In other words, the cure payments "would not be payments 'provided for' by a modified plan; rather, they would be payments made to cure a default, *i.e.*, payments made because the debtors did not make the payments 'provided for' by the plan in the first place." *Id.* at 831 (citing *Germeraad v. Powers*, 826 F.3d 962, 968 (7th Cir. 2016)).

Other courts have refused to allow a debtor to make payments past the end of the five-year plan term, deeming the end of the term to be a "drop dead date." *See Christensen v. Black (In re Black)*, 292 B.R. 693, 699-700 (10th Cir. BAP 2003); *In re Grant*, 428 B.R. 504, 507-08 (Bankr. N.D. Ill. 2010); *In re Goude*, 201 B.R. 275, 277 (Bankr. D. Or. 1996). In *In re Grant*, 428 B.R. 504 (Bankr. N.D. Ill. 2010), the debtor confirmed a five-year plan, in which she committed to pay unsecured creditors in full. The debtor made timely payments but in lesser amounts than the plan required, thereby making the 100% payoff impossible. The chapter 13 trustee moved to dismiss, arguing the debtor had notice during the plan term that her plan was unfeasible yet failed to request a modification. The debtor objected to dismissal, asking the court to give her another twelve months to complete her plan payments. The bankruptcy court found that the debtor was in material default and dismissed the case.

The *Grant* court acknowledged that other courts have exercised their discretion to allow cure payments based on consideration of various factors, but rejected that reasoning because the text of § 1307 does not list any such factors and because allowing late payments "could effectively permit a Chapter 13 plan to extend many years beyond its stated term." *Id.* at 507. This result, the court concluded, "seems absurd and not within the scope of what Congress intended in the current paradigm of Chapter 13." *Id.* The court relied on the explicit five-year limit contained in § 1322(d), reasoning that if a debtor cannot confirm a plan if it exceeds five years, then a debtor cannot be allowed to make plan payments beyond that five-year period. The court pointed to the legislative history behind plan term limitation, in which legislators sought to "protect debtors from involuntary servitude" and concluded that, if Congress wants to permit longer chapter 13 plans in the future, it could do so through legislation.

Adopting a position on this issue in Colorado has broad implications for many chapter 13 cases beyond the factual context of the present case. This question commonly arises in cases where the debtor has missed Postpetition Payments on a mortgage during the plan. In Colorado, debtors are permitted to make their Postpetition Payments directly to their lenders instead of passing that monthly payment through the Trustee's office. In other states, courts have adopted a "conduit mortgage system," where the debtor pays the mortgage payment to the trustee, who in turn passes it to the lender, after charging the debtor a fee for the trustee's service. In a conduit district, the trustee will know immediately if the debtor misses a mortgage payment. In a direct payment district like Colorado, neither the trustee nor the court will be aware of the mortgage payment default, unless and until the lender brings it to the court's attention.

There has been a disturbing trend over several years in Colorado of debtors not making their direct mortgage payments for one, two, three, or even the entire five years of their plan. Yet the lender takes no action during the life of the plan to request dismissal due to the plan default or to seek relief from stay to foreclose. Only at the very end of the plan, when the trustee issues a Notice of Final Cure under Bankruptcy Rule 3002.1, does the lender inform others of the debtor's non-payment. This is a pervasive, not an isolated, problem in this district. Once the default is exposed, the debtor usually offers a lump sum cure payment from an alternative source of funding or a "stipulation" for a new installment payment plan to cure the defaults. Thus, this Court must consider whether to adopt a discretionary or a "hard line" approach with the mortgage context in mind as well.

In doing so, the Court does not find the overall reasoning of the *Klaas* decision persuasive. The Court accepts its first premise that § 1307's use of permissive language ("may" dismiss or convert as opposed to "shall") gives bankruptcy courts greater flexibility in choosing what remedies to invoke or conditions to impose whenever "cause" for dismissal or conversion has been established. In exercising discretion, however, courts must not exceed other explicit statutory limits. *See Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258, 1263 (10th Cir. 2008) (holding bankruptcy courts cannot exercise their equitable powers in a manner that contravenes or disregards the plain language of the Code). In this sense, the Bankruptcy Code is like a coloring book. The Court may color its pictures in any number of different ways but it must still color within the lines.

The Bankruptcy Code recognizes that circumstances may change, thereby making a confirmed plan unfeasible or otherwise disadvantageous for either the debtor or the creditors. It accounts for this and builds in flexibility through § 1329's provision for post-confirmation modification. But this statute is not completely flexible. It does not allow modification to take place after the completion of payments. 11 U.S.C. § 1329(a). Thus, the trustee or a creditor cannot request an increase in payments or a longer plan term after the debtor makes the last payment due under the existing plan. And it does not allow a modification to extend the length of the plan beyond five years. 11 U.S.C. § 1329(c).

Thus, § 1329 reinforces the five-year limitation by forbidding a debtor from doing through modification what it could not do at plan confirmation. The Third Circuit in *Klaas* attempts to sidestep this language by characterizing a cure payment as a debtor just catching up on existing plan payments rather than modifying the plan's term. *In re Klaas*, 858 F.3d 820, 831 (3d Cir. 2017) ("Debtors in this situation . . . are not seeking to modify their commitments and create a new plan, but instead to complete the payments owed under their confirmed plan."). Again, this Court respectfully disagrees. The plain terms of § 1329 state that one of ways a plan may be modified is to "extend or reduce the time for . . . payments [provided for by the plan]." 11 U.S.C. § 1329(a)(2). Thus, extending the time for making payments is explicitly defined by the Code to be a plan modification controlled by § 1329.

When faced with another attempt to disguise a plan modification that exceeded five years, the Tenth Circuit Bankruptcy Appellate Panel sent a clear message that the practice was impermissible. In *Christensen v. Black (In re Black)*, 292 B.R. 693 (10th Cir. BAP 2003), the court described a practice then prevalent in the Utah bankruptcy courts that allowed a debtor in default of plan payments to propose a modification that treated all prior plan payments as a "lump sum" initial payment, constituting only one month of a plan, and then allowing the debtor to propose a modification for up to another fifty-nine months. In other words, if the debtor defaulted in Month 30, then the first thirty payments would be counted as one payment and only one month in a sixty-month plan. In denouncing this practice, the appellate court stated:

> The legislative history of the Bankruptcy Code indicates that Congress was unhappy with practices that had developed in certain parts of the country under Chapter 13's predecessor that had resulted in debtors remaining under court-supervised repayment plans for seven to ten years, which Congress characterized as being close to ***indentured servitude***. Clearly, these concerns inspired the plan-duration limits Congress included in §§ 1329 and 1322. . . . Indeed, were this lump-sum-contribution fiction a permissible construction of Chapter 13's provisions, we see nothing that would preclude applying it again and again, keeping debtors in Chapter 13 indefinitely. The Utah bankruptcy courts have exceeded their authority by following this practice.

Id. at 700 (referring to H.R. Rep. No. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6077) (emphasis added).

The *Klaas* court characterized this same legislative history regarding "indentured servitude" as an indication that the five-year limitation was meant to serve as a "shield" for debtors rather than a "sword" for creditors. *In re Klaas,* 858 F.3d at 830. In fact, that may have been Congress' intent. On the other hand, if the five-year limitation was one that could be waived by the debtor, then one would expect the language in § 1322 that states that a plan "may not provide for payments over a period that is longer than 5 years" to have qualifying language, such as "without the consent of the debtor" or words to that effect. 11 U.S.C. § 1322(d).

This Court is not unsympathetic to the facts presented to the *Klaas* court. The debtors found themselves in default at the end of the plan through no fault of their own. They had not been informed that the trustee had raised the fees and the amount involved was relatively modest. Moreover, they had the immediate willingness and ability to pay the added fee. This Court would have addressed this circumstance in a different way. Section 1329(a) does not allow any party to seek to modify the plan's requirements after the completion of the plan payments. It appears that the *Klaas* trustee was attempting to violate this provision by adding in a fee after the end of the plan. Similarly, Fed. R. Bankr. P. Rule 3002.1 prevents the mortgage lender from imposing added fees or changes in payment amounts without giving the debtor timely notice of the change. Thus, there are other ways to prevent a "gothcha" at the end of the plan.

The Trustee argues that Rule 3002.1's process of confirming that plan payments have cured the mortgage is significant to the analysis. This rule requires the trustee to issue a Notice of Final Cure at the end of the plan term, inviting the mortgage creditor to dispute the cure. The Trustee suggests this timing implies that a debtor should have a reasonable period of time to cure any arrearage that this process uncovers. This argument reads too much into the rule. The main purpose behind Rule 3002.1 is to force mortgage lenders to give timely notice to a debtor of any postpetition changes in their mortgage payment. The process had previously been problematic because mortgage holders would frequently fail to inform a debtor of significant postpetition payment changes and charges until after discharge, thereby leaving a significant arrearage even though the debtor had diligently made all plan payments. *See In re Carr*, 468 B.R. 806, 807 (Bankr. E.D. Va. 2012) (discussing reasons behind the rule). The rule allows chapter 13 debtors to obtain what amounts to essentially a "comfort order" verifying that they are now current on their mortgage obligations. If a mortgage lender fails to provide notices as required by the Rule, the lender will be barred from presenting evidence to the bankruptcy court about any arrearage, thereby allowing entry of a comfort order for the debtor despite the undisclosed arrearage.

There is nothing in Rule 3002.1 that authorizes a debtor to make a cure payment after the plan term has ended. Nor could it. The Federal Rules of Bankruptcy Procedure are not the equivalent of statutory law. *In re Asay*, 364 B.R. 423, 426 (Bankr. D.N.M. 2007). Pursuant to 28 U.S.C. § 2075, which implements the Bankruptcy Rules, those Rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2075. Thus, Rule 3002.1 cannot override any of the substantive provisions provided in the Bankruptcy Code and "any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code." *United States v. Towers (In re P. A. Trading Co.)*, 33 F.3d 1064, 1066 (9th Cir. 1994). This Court will not read Rule 3002.1 to contradict the prohibitions in §§ 1322, 1325, and 1329 against plan payments extending beyond five years.[4]

This Court is sympathetic to the difficulties debtors face in trying to live on the stringent budget imposed by their plans for sixty months. According to a recent survey, "only about one-

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[4] Even if it did, this rule would not help the Debtors in this case because it applies only to claims secured by a lien on the debtors' home and there has been no suggestion that Debtors defaulted on their mortgage payments during the plan term.

third of consumers who enter chapter 13 complete their repayment plans and therefore receive a discharge of remaining unsecured debts." Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 Minn. L. Rev. 1031, 1032 (2017).

> Debtors with young children . . . have a reduced likelihood of bankruptcy debt relief. And the more dependent children the person has, the less likely bankruptcy will work to right the family financially. We link these findings to the expense instability and income volatility that are associated with young children. Similarly, we find a correlation between medical insurance coverage and success in bankruptcy, probably due to its role in buffering expenses that can derail repaying creditors. . . . Outcomes for debtors without an attorney are particularly grim as they face a likely probability of discharge well below ten percent. . . . Finally, homeownership is a key factor in determining success. The less affordable someone's housing is, given his or her income, the less likely he or she is to succeed in chapter 13. . . . This finding calls into question the efficacy of chapter 13 as a home-saving device.

Id. at 1036-1037 (footnotes omitted).

Given the difficulties that chapter 13 debtors face, perhaps they should be afforded greater flexibility in completing their plan payments. On the other hand, longer plan periods would mean greater delay in paying creditors. Non-priority unsecured creditors usually only receive a payment in the final few months of the plan after all other creditors have been paid in full. Should these creditors have to wait ten years to receive a payment? Congress should be the one to balance these competing concerns, not judges. Thus, in the absence of a legislative change or a binding Tenth Circuit precedent to the contrary, this Court holds that it does not have the discretion to allow a debtor to make plan payments beyond five years.

C. Application of the *Klaas* Factors Would Not Lead to a Different Result

In the alternative, even if this Court were to follow the *Klaas* decision, it would not reach a different result in this case. The *Klaas* court offered a list of non-exclusive factors a court should consider in deciding whether to allow a post-term grace period to cure a plan default:

> (1) whether the debtor substantially complied with the plan, including the debtor's diligence in making prior payments; (2) the feasibility of completing the plan if permitted, including the length of time needed and amount of arrearage due; (3) whether allowing a cure would prejudice any creditors; (4) whether the debtor's conduct is excusable or culpable, taking into account the cause of the shortfall and the timeliness of notice to the debtor; and (5) the availability and relative equities of other remedies, including conversion and hardship discharge.

In re Klaas, 858 F.3d 820, 832 (3d Cir. 2017).

In this case, Debtors have already made the proposed cure payments. However, the length of time they needed to make the payments was not a brief period of time, such as the sixteen days in *Klaas*. Here it took the Debtors an additional seven months. On the other hand, no creditor has objected to the Stipulation and the $17,000 payment would obviously benefit unsecured creditors.

Most importantly to this Court, the Debtors have not substantially complied with their Modified Plan because they failed for three years to modify it, as promised, to account for a significant increase in income. In one sense, the Debtors are not directly culpable for this failure because they timely informed their attorney of Mr. Humes' new job. It was their attorney who failed to act appropriately on that information. Nevertheless, clients must be held accountable for the acts and omissions of their attorney. *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."). Debtors and their counsel had more than sufficient time to modify the plan and avoid this outcome. To allow a late cure of such a significant default would send a message to other debtors that they are free to ignore plan requirements when it suits them and then cure the default after the plan term ends if discovered by the trustee or some other party.

Finally, the last factor weighs against allowing a cure. The Debtors have another remedy available to them in the form of conversion to chapter 7, which will permit them to achieve a discharge. Indeed, the Debtors have requested that, in the event the Court does not approve the Stipulation, that they be allowed to convert their case to chapter 7. On balance, this Court finds that applying the *Klaas* factors would not favor granting a cure period.

III. CONCLUSION

For these reasons, the Motion to Approve Stipulation is DENIED. Any request for the entry of a chapter 13 completion discharge is DENIED. This case is hereby CONVERTED to a chapter 7 proceeding.

DATED this 23rd day of January, 2018.

BY THE COURT:

Elizabeth E. Brown

Elizabeth E. Brown, Bankruptcy Judge