



1 United States District Court for the Southern District of  
2 California. These are core proceedings under 28 U.S.C.  
3 § 157(b)(2)(A), (O).  
4

5 Hill

6 The Hills filed their Chapter 13 petition on January 16,  
7 2002, through their current attorney of record. On the same  
8 date, they filed their proposed plan, providing for monthly  
9 payments of \$675 and a 100% dividend to unsecured creditors.  
10 Their Schedules tell an important part of the story because they  
11 owned their home free of all liens except a small property tax  
12 obligation of \$541. They valued their home at \$165,000. They  
13 also declared \$27,772.62 in general unsecured debt, plus \$2,780  
14 in the unsecured portion of their vehicle debt. Their income was  
15 from a Civil Service pension and a nominal sum from Social  
16 Security, with a combined total of \$2,034 per month.

17 At the meeting of creditors, the debtors signed a  
18 modification of their plan to add 10% interest for the unsecured  
19 creditors, undoubtedly because of the amount of non-exempt equity  
20 in their home. Subsequently, their plan, as modified, was  
21 confirmed on April 24, 2002.

22 The difficulty in this case has arisen because at the time  
23 of confirmation the claims bar date had not passed. The total  
24 claims ultimately received exceeded the claims listed on the  
25 Schedules. Had those amounts been known at time of confirmation,

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1 the plan would not have been feasible, and therefore not  
2 confirmable. But, it was confirmed.

3 On July 25, 2002 the Chapter 13 Trustee sent debtors and  
4 their attorney a "Notice of Claims Filed and Intention to Pay  
5 Claims". That form showed that several claims listed in the  
6 Schedules had not been filed, and the claims that had been filed  
7 totaled \$46,444.91, not including attorneys' fees or the  
8 trustee's administrative costs, and was roughly \$16,000 more than  
9 scheduled. Debtors did nothing thereafter to seek to amend their  
10 plan to bring it to completion within 60 months. The only way  
11 they could have done so, however, would have been to increase the  
12 monthly plan payment. They could not reduce the percentage paid  
13 to unsecureds because of the non-exempt equity in their home.  
14 They could not increase their plan payment, either, because their  
15 only income was fixed, they were already in their 70's, and had  
16 no realistic way of supplementing their income.

17 On May 5, 2005 the Chapter 13 Trustee sent the debtors and  
18 their attorney notice that their case was projected to exceed  
19 the five year time limit by approximately another five years,  
20 that they should review their case with their attorney, and  
21 that if their case was not "paid in full by the five year date",  
22 the trustee would seek dismissal. On August 24, 2006 the  
23 trustee sent an almost identical notice, although the projected  
24 date of completion had been shortened by almost a year, to  
25 August 24, 2011, still over four years in excess of the five year  
26 period.

1 Finally, on May 22, 2007 the Chapter 13 Trustee moved to  
2 dismiss, asserting:

3 [C]ause exists in that it has been over 5  
4 years since case was filed and debtor's plan  
5 provides that debtors will pay sufficient  
6 funds to the trustee on or before five years  
7 from commencement of this case to fully  
8 complete the plan.

9 Mr. Hill opposes the trustee's motion to dismiss. He notes  
10 that his wife died in 2006, he is now 77, and still lives on his  
11 Civil Service pension without other income. The house remains  
12 unencumbered and he now values it at \$450,000. He has explored a  
13 home equity line of credit and a reverse mortgage, but does not  
14 feel those are viable options. Of course, one difficulty with  
15 borrowing against the equity in the home is the necessity of  
16 repaying the loan. Mr. Hill has no additional income from which  
17 to do so.

18 It appears that Mr. Hill has consistently made payments to  
19 the trustee and is substantially current after more than 60  
20 months. He asks that he be allowed to continue to make payments  
21 at the current rate until the plan is paid off. He asserts  
22 without any contradiction that the problem derives from having  
23 innocently underestimated certain creditor claims. The trustee  
24 says it will take approximately 53 more months to complete the  
25 plan, and Mr. Hill does not disagree.

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1 Mrs. Garcia, like Mr. Hill, asks to continue at the current  
2 rate of payment until she completes the plan. The trustee  
3 calculates that would require an additional 33 months, not  
4 including attorneys' fees. It appears Mrs. Garcia has no way to  
5 increase her income so that she could increase her payments. Her  
6 only real asset is the house, but she has no income to pay any  
7 debt service if she borrows against the equity in it.

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9 Discussion

10 At the time both plans were confirmed 11 U.S.C. § 1322(c)  
11 required that a plan provide for all payments to be made within  
12 36 months or, for cause, within 60 months. A number of courts  
13 have examined whether that requirement is a basis for dismissal,  
14 in addition to a requirement for confirmation. In this Court's  
15 view, the better reasoned cases hold that § 1322(c) is an element  
16 for confirmation, and that a separate statute, § 1307 governs  
17 dismissals. Nowhere in § 1307 is it specified that failure to  
18 complete a confirmed plan in 60 months is, in itself, a ground  
19 for dismissal. See In re Henry, 343 B.R. 190 (Bankr. N.D. Ill.  
20 2006); In re Brown, 296 B.R. 20 (Bankr. N.D. CA 2003); In re  
21 Harter, 279 B.R. 284 (Bankr. S.D. CA 2002); In re Black, 78 B.R.  
22 840 (Bankr. S.D. Ohio 1987). The trustee has not argued  
23 otherwise.

24 Does that mean a debtor can continue to pay under a plan  
25 almost indefinitely? Some courts have considered that a debtor  
26 may continue to perform for a "reasonable" period of time after

1 the 60 months. See In re Brown, supra (12 months); In re Harter,  
2 supra (2 months); In re Black, supra ("few months"). The  
3 "reasonable" time period may well be drawn from traditional  
4 contract law, which generally provides: "If no time is specified  
5 for the performance of an act required to be performed, a  
6 reasonable time is allowed." Cal. Civil Code § 1657.

7 The court in In re Black, supra, explained the thinking of  
8 Congress in adopting the 3 year - 5 year provision of § 1322(c).  
9 Borrowing from the House Judiciary Committee Report, it wrote:

10 [I]n certain areas of the country, inadequate  
11 supervision of debtors attempting to perform  
12 under wage earner plans have [sic] made them  
13 a way of life for certain debtors.  
14 Extensions on plans, new cases, and newly  
15 incurred debts put some debtors under court  
16 supervised repayment plans for seven to ten  
17 years. This has become the closest thing  
18 there is to involuntary servitude . . . .

19 78 B.R. at 841.

20 The Chapter 13 Trustee makes two arguments: 1) the amount of  
21 time necessary to complete the Hill and Garcia plans, calculated  
22 to take at least 53 and 33 more months, respectively, is not  
23 reasonable; and 2) each debtor agreed "to pay sufficient funds to  
24 the Trustee on or before five years from commencement of this  
25 case to fully complete this Plan." That statement appears in the  
26 first paragraph of each plan. The trustee argues that on the  
facts of these cases, because of the time it will take to  
complete each, there is a "material default by the debtor with  
respect to a term of a confirmed plan", which is an express  
ground for dismissal under 11 U.S.C. § 1307(c)(6).

1           It should be noted that the situation Mr. Hill and  
2 Mrs. Garcia find themselves in is not a product of "inadequate  
3 supervision", nor is it the product of any neglect or failure to  
4 make the required monthly payments to the trustee. If  
5 confirmation were held off pending the running of the claims bar  
6 date, neither plan would have been confirmable without drawing  
7 down on the equity in their homes which, because of their limited  
8 and fixed incomes probably would have required sale of the  
9 properties. But holding off confirmation significantly delays  
10 distributions to any creditors, and most courts do not wait past  
11 the claims bar date. See In re Brown, supra.

12           Section 1307(c) of Title 11, United States Code, provides in  
13 relevant part:

14                   (c) [O]n request of a party in interest  
15 or the United States trustee after notice and  
16 a hearing, the court may convert a case under  
17 this chapter to a case under Chapter 7 of  
18 this title, or may dismiss a case under this  
19 chapter, whichever is in the best interests  
20 of creditors and the estate, for cause,  
21 including -

                  . . . .

                  (6) material default by the debtor  
20 with respect to a term of a confirmed  
21 plan . . . .

22           As already noted, both debtors expressly agreed in the  
23 standard form plans they proposed "to pay sufficient funds to the  
24 Trustee on or before five years from commencement of this case to  
25 fully complete this Plan." The court finds and concludes that  
26 that is a term of each debtor's confirmed plan. When a debtor

1 needs 33 months, or 53 months to add on to performance over the  
2 preceding 60-plus months, the Court finds and concludes each is a  
3 material breach of a term of each debtor's confirmed plan.

4       The fact that the Court has found a material breach of a  
5 plan term does not compel conversion or dismissal under  
6 § 1307(c), however. Congress certainly could have written "shall  
7 convert or dismiss", but instead Congress wrote "may", which  
8 grants this Court discretion to decide whether to dismiss even in  
9 the face of a material breach. As already noted, Congress fixed  
10 the 3 year - 5 year provision of § 1322 as a protection for  
11 debtors, to provide them the proverbial fresh start within a  
12 reasonable period of time and to not subject them to "involuntary  
13 servitude" indefinitely. Here, it is the debtors asking to  
14 continue under their plans.

15       The Court has struggled the most with the fact that each  
16 debtor started their case with sufficient non-exempt equity to  
17 pay all their creditors, which is why their confirmed plans call  
18 for a 100% dividend plus 10% interest. In the intervening years,  
19 that non-exempt equity has grown significantly. If someone were  
20 to propose a viable way to use some of that equity to pay off  
21 these plans without forcing the sale of the homes - either now,  
22 or later under a reverse mortgage - the Court would be inclined  
23 to require the debtors to do so or suffer dismissal of their  
24 cases. But no one has proposed a way.

25       The facts are that each of these debtors has been  
26 consistently performing over the past 60-plus months on their

1 confirmed plans to pay unsecured creditors 100% plus 10%  
2 interest. No secured claims are being dragged out for vehicles  
3 because they were excluded from the plans and paid under their  
4 contracts. No real property arrearages are being dragged out  
5 either - the only item was \$541 Mr. Hill owed the County. Except  
6 for the Chapter 13 Trustee's Fees, all the payments go to the  
7 unsecured creditors (or for fees for debtors' attorneys). No  
8 unsecured creditor has been heard to complain about receiving  
9 100% plus 10% interest over the past five years.

10 Weighing all the circumstances, including the costs to  
11 debtors of dismissing and refiling (which may include accrued  
12 contract rates of interest in excess of 10%), recognizing that  
13 the automatic stay is not preventing any secured creditor from  
14 resorting to its collateral, the Court finds and concludes that  
15 it is in the best interests of both the creditors and each of the  
16 debtors to allow them to continue to perform under their  
17 confirmed plans.

18 The Court, therefore, exercises its discretion under the  
19 circumstances of these two cases to deny the Chapter 13 Trustee's  
20 motions to dismiss in each case, for the reasons set out above.

21 IT IS SO ORDERED.

22 DATED: AUG -7 2007

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24   
25 PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court