IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re **Craig M. Blansett and** **Jennifer R. Blansett,** Debtors.	Bankruptcy Case Number 00-21397 Chapter 13

ORDER ON DEBTORS' AMENDED MOTION TO MODIFY PLAN AND REQUEST FOR PAYMENT OF ATTORNEYS FEES

Jory L. Trease, Johnson & Trease, Salt Lake City, Utah for the Debtors.

Thomas D. Neeleman, St. George, Utah for the Debtors.

Scott T. Blotter, Salt Lake City, Utah for the Chapter 13 Trustee.

The issue before the Court is the Debtors' motion to modify their confirmed Chapter 13 plan of reorganization by surrendering collateral securing a claim provided for in the plan to the secured creditor in full satisfaction of its claim. A hearing was held on the matter on December 9, 2002 at which Jory L. Trease appeared representing the Debtors and Scott T. Blotter appeared representing the Chapter 13 Trustee. At the hearing's conclusion, the Court took the matter under advisement in order to issue a written opinion determining whether the Bankruptcy Code allows modification of a confirmed plan by surrendering collateral previously being treated in the plan as a secured claim. This memorandum decision follows.

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FACTS

On September 14, 2000, the Court entered an order confirming the Debtors' Chapter 13 Plan of Reorganization by Consent ("Plan"). The Plan provides that the claim of secured creditor Associates Capital shall be paid as a secured claim in the amount of $6,000 at 9% interest. Associates Capital did not file a proof of claim, but the Debtors independently provided for the claim in their plan. The collateral securing the Associates Capital claim is a 1989 Ford pickup.

Over two years later, on November 7, 2002, the Debtors filed an amended motion seeking to surrender the 1989 Ford to Associates Capital in full satisfaction of the claim and to modify the Plan accordingly. The Debtors argue that they are no longer in need of the vehicle and, therefore, should be allowed to surrender it and halt payments from the Chapter 13 Trustee to Associates Capital. At the hearing held on the motion on December 9, 2003, the Debtors argued that it is equitable to allow them to surrender the vehicle and that the Bankruptcy Code and case law do not prohibit such modification, particularly where the creditor has not filed a proof of claim. The Chapter 13 Trustee also argued that the modification should be allowed because the creditor did not file a proof of claim and therefore the value of the collateral had not been adjudicated preventing principles of res judicata from applying and because the creditor was given notice of the proceeding but chose not to participate. Upon review of the pleadings and argument, and upon an independent review of applicable law, the Court disagrees and declines to grant the motion.[1]

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[1] The Court is aware that creditors have certain duties and obligations to protect their own interests. See e.g., Andersen v. UNIPAC-NEBHELP (In re Andersen), 179 F.3d 1253, 1257 (10th Cir. 1999) ("A creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests."). However, the Court also has an obligation to make rulings in accordance with the Bankruptcy Code, particularly when an issue is repeatedly raised and relief sought that the Court concludes is not provided for in the code.

DISCUSSION

A. Jurisdiction

The Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (L) and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

B. Analysis

In making its ruling, the Court begins by looking at the confirmed plan and the terms contained therein and the effect of the confirmed plan on subsequent behavior by debtors or creditors. 11 U.S.C. § 1327(a)[2] states:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

This language indicates that upon confirmation, a plan becomes a new contract between the debtor and creditors, and its terms must be treated as if they were contract provisions and binding upon the parties. This conclusion is supported by case law. The Tenth Circuit Court of Appeals (the "Tenth Circuit") stated that "'[u]pon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan.'" Andersen v. UNIPAC-NEBHELP (In re Andersen), 179 F.3d 1253, 1258 (10th Cir. 1999) (citation omitted). The Tenth Circuit further elaborated that

> The purpose of section 1327(a) is the same as the purpose served by the general doctrine of res judicata. There must be finality to a confirmation order so that all parties may rely upon it without concern that actions which they may thereafter

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[2] All future references to the United States Code are to Title 11 unless otherwise noted.

take could be upset because of a later change or revocation of the order.

Id. at 1259 (quoting 5 Collier on Bankruptcy ¶ 1327.01 [1] (15th ed.1996)). This Court is convinced that the Debtors' motion must be viewed within this general policy – that the confirmed plan is res judicata upon subsequent actions by debtors or creditors.

Notwithstanding the policy espoused in § 1327(a), however, the Bankruptcy Code recognizes that certain circumstances may arise that warrant modification to the confirmed plan. Section 1329(a) specifically allows plan modification:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to–
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> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
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> (2) extend or reduce the time for such payments; or
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> (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.

This Court must make a determination whether the Debtors' proposed modification fits within the framework of § 1329(a), or whether the policy that a confirmed plan is res judicata under § 1327(a) governs, requiring denial of the Debtors' request. The Debtors are not specifically asking to increase or reduce the amount of payments on claims (§ 1329(a)(1)) or to change the timing of payments (§ 1329(a)(2)) or to modify the amount of distribution to a creditor in order to account for payments other than plan payments (§ 1329(a)(2)). The Debtors simply seek to surrender collateral securing a claim currently being paid as a secured claim through the plan in order to have those secured payments stopped. The Debtors' motion does not expressly fit within any of the categories of § 1329(a) and, therefore, the Court must look to case law for support for the Debtors' request.

Courts are split as to whether the language of § 1329(a) allows the type of modification the Debtors propose. Because there is no clear precedent from the Tenth Circuit, the Court believes an analysis of both lines of cases is helpful.

The only circuit court to consider this issue is the Sixth Circuit Court of Appeals (the "Sixth Circuit") in the case of Chrysler Financial Corporation v. Nolan (In re Nolan), 232 F.3d 528 (6th Cir. 2000). The Sixth Circuit held, as a matter of law, that a debtor may not modify a confirmed plan by surrendering collateral to a creditor, having the creditor sell the collateral and having any deficiency treated as an unsecured claim. The court rejected a line of cases allowing such modification for five reasons. First, the court found that the express language of § 1329(a) does not allow alteration or reclassifications of claims, but only allows modifications of plan payments. Second, any modification would violate § 1325(a)(5)(B), "which mandates that a secured claim is fixed in amount and status and must be paid in full once it has been allowed." Id. at 533. Third, the proposed modification is contrary to § 1327(a) which provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor." To allow otherwise, the court opined, debtors could simply modify claims when it appeared that the value of secured collateral no longer justified full payment. The court was concerned that this would allow a "double cram down" because typically, a creditor's secured claim is initially reduced in the plan to the value of the collateral prior to confirmation and a surrender sometime after the plan is confirmed, and the collateral's value further reduced, would create this double debt reduction. Id. at 534. Fourth, because the language of § 1329 allows only the debtor, the trustee and unsecured creditors to seek modification, allowing the debtor to surrender collateral after it has decreased in value is inequitable to secured creditors who are not permitted to seek modification upon collateral's

increase in value. Finally, the Sixth Circuit concluded that the express language of § 1329 specifically allows modifications to payments, not to claims.

Since the Nolan decision, bankruptcy courts continue to disagree regarding modification of confirmed plans by surrendering collateral. Several courts disagree with Nolan outright arguing that § 1329 expressly allows this type of modification. See e.g., In re Hernandez, 282 B.R. 200, 207 (Bankr. S.D. Tex. 2002) (reading §§ 1325 and 1329 together to determine that if a proposed modification meets the requirements of § 1325, then the "requirements for modification are met: Bankruptcy Code § 1329(b)(1)"); In re Knappen, 281 B.R. 714, 717 (Bankr. D.N.M. 2002) ("Since each secured claim is generally treated as a separate class, reducing to nothing the amount of payments on [the creditor's] secured claim fits within the language of the statute. In this respect, Nolan misconstrues the language and intent of the statute.") (citations omitted); In re Zeider, 263 B.R. 114, 118 (Bankr. D. Ariz. 2001) ("[M]odification is also permitted by the express terms [of] § 1329(a)(3) because it simply alters the distribution to [the creditor] to the extent necessary to take account of the satisfaction of its secured claim by payment other than under the plan, i.e., by surrender of the collateral and application of § 506(a)."); In re Townley, 256 B.R. 697, 699 (Bankr. D.N.J. 2000) (adopting reasoning of line of cases "which construe Code section 1329(a)(1) to permit post-confirmation modification of secured claims is correct as a matter of statutory construction").

Other courts approve this type of modification but take an approach distinguishing the Nolan opinion. In the case of In re Miller, No. 99-81339, 2002 WL 31115656, at *4 (Bankr. M.D.N.C. Apr. 19, 2002), the court stated that "modifying a plan in order to reclassify a secured claim does not fall within the scope of § 1329(a) standing alone, however, a claim may be

reconsidered pursuant to Section § [sic] 502(j) for cause." Section 502(j) states that "[a] claim that has been allowed or disallowed may be reconsidered for cause."[3] If the code allows claims to be reconsidered, then, courts reason, a confirmed plan providing for payment of secured claims must be modifiable in order to accommodate the reconsidered claim. Of course, cause must first be shown under this theory and "cause" is not defined by the Bankruptcy Code. The Miller court theorized that "cause" could be determined from the cause standard set forth in Federal Rule of Civil Procedure 60(b). Id. at *5. In addition, the court found that once cause is found, that "in order to accomplish both the modification of the plan and the reclassification of [the] claim, the Debtors' circumstances must satisfy both the good faith requirement of § 1329 and the equitable requirement of § 502(j)." Id. Essentially, the court determined that if a debtor proposes to modify a confirmed plan by surrendering collateral treated as a secured claim in the plan, then the secured creditor must either have received the full value of its collateral at the time of the proposed modification or have received a lesser amount but be given an administrative expense claim for the difference because of the failure of adequate protection initially. In the Miller case, the court allowed the debtor to return the collateral, but because it had depreciated significantly more than anticipated, the creditor was given an administrative expense claim for the difference between what it had been previously paid through the plan on its secured claim and the amount of depreciation.

Similarly to the Miller court, the court in In re Adams, 264 B.R. 901 (Bankr. N.D. Ill. 2001), also found that such a proposed plan modification is not permitted by § 1329. However,

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[3] Section 505(j) reads: "A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case."

in the Adams case, the court found that a modification may be accomplished through a combination of §§ 502(b) and 506(a). Section 502(b) permits objections to the allowance of filed claims in a case. In addition, § 506(a) allows secured claims to be bifurcated and treated as secured to the extent of the collateral's value and unsecured for the remaining portion of the claim, as is typical in the treatment of many secured claims in Chapter 13 plans. Read together, the Adams court concluded that if a creditor fails to file a proof of claim prior to confirmation, then a debtor may object to that claim and bifurcate it according to account for any payments and surrender of the secured collateral. See id. at 906. Interestingly, however, the creditor in the Adams case failed to file a proof of claim and the debtor's confirmed plan only provided that "secured creditors were to be paid '100% of allowed claims.'" Id. at 907. The court also stated that "[i]f the Debtors' Plan here had fixed or determined the value of collateral, confirmation would have had a collateral estoppel effect." Id. This language appears to indicate that regardless of the collateral's value post-confirmation, or a debtor's change in circumstances, a confirmed plan could not be modified if the confirmed plan fixed the collateral's value and specifically treated the claim.

This analysis was rejected by the court in the case of In re Barclay, 276 B.R. 276, 282 (Bankr. N.D. Ala. 2001). The Barclay court agreed with Nolan in stating that "[n]othing in § 1329(a) allows a debtor to revisit the status of a secured claim." Id. at 281. The court concluded that any modification to a confirmed plan must be limited to those three circumstances specifically set forth in the statute. The court went on to state that

> Although § 502(j) and Fed. R. Bankr.P. 3008 allow for the reconsideration of the allowance of claims, they do not provide for the reconsideration of the classification (status) of those claims. In the absence of specific statutory

> authority to revisit § 506(a) in § 1329, this Court must find that § 1325(a)(5)(B) and § 1327 prevent such reconsideration.

Id. at 282 (citations omitted). The court concluded that such a reconsideration would allow a "double cram down" and may not be permitted. Id. However, the court found a way to allow the proposed surrender of the collateral securing the claim by treating the surrender as a payment. The court ultimately held that "while § 1329(a) allows for the modification of a confirmed plan by surrender, *as a payment on a claim*, the statute does not allow the debtor to alter the allowed amount of the secured claim or to reclassify such claim as an unsecured claim." Id. (emphasis added). In that case, the court determined that after the collateral is surrendered and sold, the sale amount is applied to the secured claim but any remaining deficiency must still be paid as a secured claim as per the confirmed plan. See id. at 283-84 ("Leaving the secured status unchanged but only increasing the payment to account for the one-time surrender would seem to be the only permissible post confirmation modification by surrender.") The court recognized that this left the debtors paying a secured claim secured by no collateral, but determined that the secured status was fixed at confirmation and may not be altered.

Finally, the Court analyzed post-Nolan cases that follow and support Nolan and disallow surrendering of collateral post-confirmation. These cases include In re Adkins, 281 B.R. 905 (Bankr. E.D. Mich. 2002); In re Cameron, 274 B.R. 457 (Bankr. N.D. Tex. 2002); In re Coffman, 271 B.R. 492 (Bankr. N.D. Tex. 2002); and In re Smith, 259 B.R. 323 (Bankr. S.D. Ill. 2001). In each of these cases, the court specifically rejected any proposed reclassification or modification of secured claims provided for in confirmed plans. In the Adkins case, that court specifically followed Nolan and denied modification despite the creditor's attempts to seek relief from stay to

repossess the collateral. Adkins, 281 B.R. at 909. The court opined that the creditor may get relief from stay to repossess the collateral but any deficiency must still be paid as a secured claim.

The Smith case also concluded such a proposed modification is not permissible because the express language of § 1329 does not allow such a modification. This despite the debtor's arguments that the court could exercise its discretion and weigh the equities of the case and the debtor's good faith in making this request. In the Smith case, the debtor's confirmed plan provided that the creditor was fully secured and would be paid the entire balance of the claim as a secured claim through the plan. The debtor's husband then died and the debtor proposed surrender. The court stated that "[n]o amount of discretion can remedy a proposed modification that is outside the express limits of the statute." Smith, 259 B.R. at 327. In addition, the court noted that any evaluation of the debtor's good faith was superfluous because good faith only comes into play if the proposed modification first fits into one of the three acceptable circumstances outlined in § 1329(a). See id.[4]

Finally, the two Northern District of Texas cases, Cameron and Coffman, clearly reject any post-confirmation plan modification that changes the status of the claims. Explaining that absent a statutory exception a confirmed plan is binding upon the debtor and creditors under § 1327(a), the Coffman court, Judge Robert L. Jones, noted that § 1329(a) "does not expressly permit a modification that reclassifies or changes the nature of a claim." Coffman, 271 B.R. at 496. Coffman also rejected the analysis that § 502(j) allows such a modification because § 502(j)

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[4] It is not entirely clear from the opinion, but it appears that the ultimate result in the Smith case is that the debtor surrendered the collateral but was required to bay the balance as a secured claim as provided by the confirmed plan.

addresses only allowance of claims, not reclassification of previously allowed claims. See id. at 497. In the Coffman case, the creditor specifically objected to the surrender of the collateral, not just to a reclassification of deficiency balance as the other cases previously discussed. The court denied the proposed modification to the plan and thereby denied the surrender.

Judge Barbara J. Houser supported the result in the Cameron case but arrived at her conclusions with a different analysis. Judge Houser determined that the code gives a Chapter 13 debtor three alternatives under § 1325(a)(5) to satisfy a secured claim through a plan. The debtor may negotiate claim treatment with the creditor, the debtor may provide that the creditor retains its lien but receives payments under the plan equal to the allowed secured claim or the debtor may surrender the collateral. Cameron, 274 B.R. at 460. The court concluded that once a debtor chooses one of the payment options, § 1329(a) permits only modifications to those payments options and "[n]owhere in section 1329(a) is the debtor given the right to go back and elect a different method by which to satisfy an allowed secured claim" such as through surrender. Id. at 461. The court specifically denied the modification thereby denying the surrender.

This Court is persuaded by the Nolan line of cases. Congress specifically provided that a confirmed plan may be modified as set forth in § 1329(a). The express language of § 1329(a) specifically deals with modifications to payment provisions or to change amounts distributed to creditors, but only to "the extent necessary *to take account of any payment* of such claim other than under the plan." § 1329(a)(3) (emphasis added). Nowhere in § 1329 are claims permitted to be modified through reclassification. In addition, a surrender of the collateral cannot be considered a payment. This request is simply not permitted by the Bankruptcy Code.

The Chapter 13 Trustee argues that despite this express language, that the creditor failed

to participate in the plan by filing a proof of claim and, therefore, the confirmed plan is not res judicata as to the treatment of the claim. Essentially, the Trustee is making the same arguments as those courts that rely on § 502(b) or § 502(j) in permitting modification. As noted above, the terms of a confirmed plan are binding on debtors and creditors "whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). The Debtors' plan dated August 1, 2000, specifically treats Associates Capital as a secured claim for $6,000, secured by a 1989 Ford Pickup, to be paid at 9% interest through the plan. The Debtors, having elected to treat the claim as a secured claim, regardless of the creditor failing to file a proof of claim, are bound by the terms of the confirmed plan and may not now modify the claim treatment entirely by surrendering the truck because they are "no longer in need of the vehicle." (Debtors' Motion at ¶ 1).[5]

The Court is aware that debtors may seek dismissal of their case and refile in order to accomplish the surrender of the collateral in full or partial satisfaction of secured claims. This is certainly an option available to debtors and suggests that perhaps judicial efficiency would be better served if the modification were simply allowed. However, as one court stated, "the Court is not empowered to approve the debtor's proposed modification merely because it would serve the cause of judicial efficiency. Section 1329(a), as written, simply does not afford the relief the debtor seeks." Smith, 259 B.R. at 327; see also Barclay, 276 B.R. at 285 ("If the debtors chose to dismiss and refile in order to reclassify a secured claim as an unsecured claim at the second

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[5] As the Coffman court noted, even if § 502(j) permitted a reclassification of claims in a confirmed plan, that cause must be shown. See Coffman, 271 B.R. at 497. While "cause" is not defined in the Bankruptcy Code, the Court concludes that no longer needing the vehicle is not sufficient cause to reconsider and disallow a claim under § 502(j).

confirmation hearing, they face challenges based upon good faith and potential relief from the automatic stay. Additionally, the potential for 'serial filer' status is present.").

CONCLUSION

The Court concludes that the Debtors' motion must be denied. Section 1329(a) does not permit the type of modification sought by the Debtors. Accordingly, it is hereby

ORDERED that the Motion to Modify Confirmed Plan is denied.

DATED this 13th day of February, 2003.

Judge William T. Thurman
United States Bankruptcy Court

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I, the undersigned, hereby certify that I served a true and correct copy of the foregoing **ORDER ON DEBTORS' AMENDED MOTION TO MODIFY PLAN AND REQUEST FOR PAYMENT OF ATTORNEYS FEES** by mailing the same, postage prepaid, to the following, on the 30th day of February, 2003.

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