UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF | ) | |
| | ) | |
| ERNEST ROY, | ) | CASE NO. BK94-81348 |
| | ) | |
| DEBTOR | ) | CH. 13 |

MEMORANDUM

Hearing was held on October 23, 1995, on a motion to modify Chapter 13 plan after confirmation. Appearances: John Turco, Attorney for debtor; Rodney Halstead, Attorney for objector L.A. Auto Sales, Inc. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(E), and (K).

BACKGROUND

On June 3, 1994, L.A. Auto Sales, Inc. (creditor) sold a used car to Ernest W. Roy (debtor), in a credit transaction. Debtor gave a promissory note in the amount of $1,699, plus eighteen percent (18%) interest, which was secured by the automobile. On August 26, 1994, the debtor filed a Chapter 13 Petition. The plan listed the automobile as having a fair market value of $1,600. In the plan, the secured debt was listed as $1,444, plus interest to be paid at a rate of ten percent (10%) per year, for a total payment on the secured claim of $1,858.59. The creditor consented to this plan on January 9, 1995, and the plan was confirmed.

After confirmation, the automobile had mechanical problems, and the debtor could not afford to pay for the repairs. The debtor has filed an amended plan which proposes to surrender the unrepaired vehicle to the creditor in full satisfaction of its secured claim. The amendment to the plan further proposed that if the secured claim is not totally satisfied by the sale of the surrendered vehicle, the remaining deficiency should be treated as an unsecured claim. The original plan and the amended plan provide minimal payments on unsecured claims.

The creditor objected to the amended plan claiming that once a plan has been confirmed the debtor does not have the right to

reduce a creditor's secured claim to an unsecured claim even if the collateral has declined in value.

CASE LAW

"The law is well settled that a confirmation order is res judicata as to all issues decided or which could have been decided at the hearing on confirmation." In re Ross 162 B.R. 785, 789 (Bankr. N.D. Ill. 1993) (citing 11 U.S.C. § 1327(a); In re Szostek, 886 F.2d 1405 (3rd Cir. 1989)). The court in Ross stated that a Chapter 13 plan constitutes a contract between the debtor and the creditor. Id.

In essence, 11 U.S.C. § 1327(a), which provides that an order confirming a Chapter 13 plan binds both the creditor and the debtor, serves the same purpose as the doctrine of res judicata which is to provide finality to a confirmation order that the parties may rely upon. 5 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, ¶ 1327.01, at 1327-2 (15th ed. 1995); In re Eason, 178 B.R. 908, 912 (Bankr. M.D.Ga. 1994). This binding effect is premised on the notion that the bankruptcy court already addressed specific issues at the confirmation hearing and in the order confirming the plan, and there has to be some finality to the litigation concerning a plan. Piedmont Trust Bank v. Linkous (In Re Linkous) 141 B.R. 890, 898 (W.D. Va. 1992).

The creditor has argued that because the court has already addressed the issue of the amount of the secured claim, the doctrine of res judicata and the statutory requirement in Section 1327 that both creditors and the debtor are bound by the plan preclude the debtor from reclassifying the secured claim to that of an unsecured claim. Although this argument has merit, courts have recognized that the original confirmation order binds the parties only if the plan is not modified pursuant to 11 U.S.C. § 1329. In re Emly, 153 B.R. 57, 58 (Bankr. D. Idaho 1993) (citations omitted, see n. 2). As a result, the debtor has a statutory right to attempt to modify the confirmed plan.

The real issue is whether 11 U.S.C. § 1329 permits a debtor, after a plan has been confirmed, to surrender secured property to the secured party, and after the property has been sold, reclassify the deficiency as an unsecured claim. The majority of courts to discuss this issue have concluded that the debtor may not reclassify surrendered collateral as unsecured debt through a plan modification.

In the case of In Re Banks, 161 B.R. 375 (Bankr. S.D. Miss. 1993), a plan was confirmed and the creditor, Mercury, had a secured claim allowed in the amount of $1,125 with a vehicle as

security. Later, the car had mechanical problems, and the cost to repair it would have been $1,500. The debtor filed a motion to surrender the vehicle and apply the proceeds of the sale to the secured part of the claim and treat any deficiency as unsecured. Id. at 375.

The court found Section 1329(a)(1) to mean that a debtor may not increase or reduce the amount of individual claims. Banks, 161 B.R. at 378. In addition, the court stated that since the valuation of the secured claim was adjudicated by the order of confirmation, the amount of the secured claim is res judicata, and the secured creditor should not suffer a decline in the amount it is to be paid simply because of post-confirmation collateral depreciation. Id.

In Sharpe v. Ford Motor Credit Company (In Re Sharpe) 122 B.R. 708 (E.D. Tenn. 1991), the district court reversed a decision by the bankruptcy court and did not allow the debtor to return the car to the creditor and reclassify the secured claim as unsecured. The court held that the plain meaning of Section 1329 "does not permit individualized treatment of class members or the reclassification of a single creditor from a secured to an unsecured status." Id. at 710.

Several other courts are in accord with Banks and Sharpe. In Re Abercrombie 39 B.R. 178 (Bankr. N.D. Ga. 1984); In Re Johnson 25 B.R. 178 (Bankr. N.D. Ga. 1932); In re Holt, 136 B.R. 260 (Bankr. D. Idaho 1992); contra In re Jock, 95 B.R. 75 (Bankr M.D. Tenn. 1989); In Re Rimmer, 143 B.R. 871 (Bankr. W.D. Tenn.).

## DECISION

Debtor may not change an allowed secured claim into an unsecured claim as a result of a decline in value of the collateral.

## DISCUSSION

There is no clear statutory authority to permit the result the debtor wants. It seems, considering the equities, unfair to permit a debtor to decide, at confirmation, to keep the vehicle and agree to pay the creditor the value of the vehicle over the life of the plan, and then permit the debtor to change his mind if the value of the vehicle declines during the plan payment period. There is nothing in the Code which would permit the opposite situation to occur. If the value of the collateral increased after the allowed secured claim was determined, the creditor would not be permitted to receive the higher amount.

The Code permits post-confirmation modification to effect certain types of change as described in Section 1329(a). Courts that have decided Section 1329(a) should not be interpreted to mean that the allowed secured claim is a moving number that may vary depending upon the debtor's circumstances, have balanced the limited statutory authority to modify a plan with the element of fairness to a creditor that has no control over its collateral. The determination of an allowed secured claim and the confirmation of a plan should give the creditor a comfort level that litigation of the claims issue is completed.

Conclusion

The motion is denied to the extent it provides for treating the deficiency arising from the sale of the collateral as an unsecured claim.

Separate journal entry to be filed.

DATED: November 9, 1995

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
TURCO, JOHN T. 384-1109

Copies mailed by the Court to:
Rodney Halstead, 260 Regency Parkway, #200, Omaha, NE 68114
Kathleen Laughlin, Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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| DEBTOR(S) | ) | |
| | ) | CH. 13 |
| | ) | Filing No. |
| Plaintiff(s) | ) | |
| vs. | ) | JOURNAL ENTRY |
| | ) | |
| | ) | |
| | ) | DATE: November 9, 1995 |
| Defendant(s) | ) | HEARING DATE: October 23, 1995 |

Before a United States Bankruptcy Judge for the District of Nebraska regarding a motion to modify Chapter 13 plan after confirmation.

APPEARANCES

John Turco, Attorney for debtor
Rodney Halstead, Attorney for L.A. Auto Sales, Inc.

IT IS ORDERED:

The motion is denied to the extent it provides for treating the deficiency arising from the sale of the collateral as an unsecured claim. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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