IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
RANDY COOVER,	)	CASE NO. BK96-81789
	)	
DEBTOR	)	CH. 13

MEMORANDUM

Hearing was held on February 10, 1997, on a Motion Requesting Modification of Plan. Appearances: Richard Register for the debtor, Robert Hillis for Fremont National Bank and Kathleen Laughlin as Chapter 13 Trustee. 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)(L).

Background

On November 12, 1996, Randy Coover's (the debtor) Chapter 13 plan of reorganization was confirmed by this court. The plan, among other things, proposed to pay the value of the secured claim of Fremont National Bank (the bank) plus a ten percent interest rate. The bank's claim was secured by a lien on a 1995 Ford Thunderbird automobile, and the parties stipulated that the bank's secured claim was in the amount of $12,500, (filing #25), with the balance owed to the bank being an unsecured claim.

The debtor filed a motion requesting a modification of the plan on December 11, 1996. In the motion, the debtor stated that he had been unable to make the plan payments, and that in order to make plan payments he proposed to surrender the automobile (which he had already done) and would treat any deficiency resulting after the sale of the vehicle as a general unsecured claim.

The bank resisted the proposed modification. It argued that the automobile would bring approximately $10,900, less than the $12,500 secured claim it was entitled to under the plan, and that the deficiency should be treated as either a secured claim or a priority (administrative) claim.

Decision

The debtor's motion to treat any deficiency owed to the bank as a general unsecured claim is overruled. A debtor may not reclassify a claim of a creditor through a plan modification pursuant to 11 U.S.C. § 1329. The debtor may, however, modify the plan reducing the amount of a creditor's secured claim by the value of collateral surrendered to the creditor pursuant to 11 U.S.C. § 1329(a)(3).

Discussion

The question presented in this case is whether a debtor may seek to modify a previously confirmed Chapter 13 plan by surrendering collateral securing a secured claim, applying the proceeds of a sale of the collateral to the secured claim, and reclassifying to unsecured claim status any deficiency resulting from the difference between the amount of the secured claim as provided for in the plan and the amount received by the sale of the collateral. In a prior decision, In re Roy, Neb. Bkr. 95:553 (Bankr. D. Neb. 1995), this court followed the majority line of reasoning and held that such a modification was impermissible. See, Sharpe v. Ford Motor Credit Co. (In re Sharpe), 122 B.R. 708 (E.D. Tenn. 1991); 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 Banks, 161 B.R. 375 (Bankr. S.D. Miss. 1993); In re Algee, 142 B.R. 576 (Bankr. D.D.C. 1992); In re Holt, 136 B.R. 260 (Bankr. D. Idaho 1992); In re Taylor, 99 B.R. 902 (Bankr. C.D. Ill. 1989); Kitchen v. Malmstrom Fed. Credit Union (In re Kitchen), 64 B.R. 452 (Bankr. D. Mont. 1986); In re Abercrombie, 39 B.R. 178 (Bankr. N.D. Ga. 1984). See also, In re Klus, 173 B.R. 51 (Bankr. D. Conn. 1994). But see, In re Anderson, 153 B.R. 527 (Bankr. M.D. Tenn. 1993); In re Rimmer, 143 B.R. 871 (Bankr. W.D. Tenn. 1992); Williams v. First Nat'l Bank (In re Williams), 108 B.R. 119 (N.D. Miss. 1989); In re Frost, 96 B.R. 804 (Bankr. S.D. Ohio 1989), aff'd 123 B.R. 254 (S.D. Ohio 1990); In re Jock, 95 B.R. 75 (Bankr. M.D. Tenn. 1989); In re Stone, 91 B.R. 423 (Bankr. N.D. Ohio 1988).

The courts that have decided that a proposed modification similar to the one in this case is impermissible generally do so for two different reasons. The first line of cases assert that principles of res judicata combined with 11 U.S.C. §

1327(a) prevent a relitigation of the status of a claim.[1] See, e.g., Butler, 174 B.R. at 46. The second line of cases find that reclassifying secured debt as unsecured debt is not permissible under § 1329(a). See, e.g., Holt, 136 B.R. at 261.

A determination in this case as to whether res judicata would bar the debtor from reclassifying the bank's claim is unnecessary, as such a proposed modification is not permissible under § 1329(a).

The inquiry concerning whether a proposed modification can be confirmed begins with a determination of whether the proposed modification fits within the ambit of § 1329(a). If the proposed modification is not one of the types permitted by § 1329(a)(1)-(3), further inquiry would be unnecessary, as the proposed modification could not be confirmed. On the other hand, if the proposed modification was of a type contemplated by § 1329(a)(1)-(3), a determination as to whether res judicata, or some threshold requirement, nevertheless prevented the desired modification might then be necessary.[2]

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[1] There is a split of authority among the Circuit Courts as to whether res judicata applies to modifications of Chapter 13 plans pursuant to § 1329(a). The Fourth Circuit has held that res judicata bars the modification of a plan absent unanticipated, substantial changes in the debtor's financial situation. Arnold v. Weast (In re Arnold), 869 F.2d 240 (4th Cir. 1989). In In re Witkowski, 16 F.3d 739, 745 (7th Cir. 1994), the Seventh Circuit stated that "Congress . . . provided a mechanism to change the binding effect of § 1327 when it passed § 1329 to allow for modifications" and suggested that "Congress did not intend the common law doctrine of res judicata to apply to § 1329 modifications." For a general discussion of res judicata in modification proceedings, see Harry L. Deffebach, Comment, Postconfirmation Modification of Chapter 13 Plans: A Sheep in Wolf's Clothing, 9 BANKR. DEV. J. 153 (1992).

[2] A determination as to the effect of res judicata might not be necessary in any case. For example, if the debtor proposed to reduce plan payments to unsecured creditors by a certain percentage, the proposed modification would fit within § 1329(a)(1). Some bankruptcy courts would nevertheless prohibit the modification on res judicata grounds absent some

Therefore, the first issue to consider in this case is whether the reclassification of secured debt to unsecured debt is a type of modification contemplated by § 1329(a). That section provides:

> 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 --
>
> > (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> >
> > (2) extend or reduce the time for such payments; or
> >
> > (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.

11 U.S.C. § 1329(a).

At least two courts have found authority for the type of modification sought here by the debtor in § 1329(a)(1). Rimmer, 143 B.R. at 875; Jock, 95 B.R. at 76. However, there is nothing in that subsection which describes the type of modification sought in this case. While the ultimate relief sought by the debtor is to "reduce the amount of payments on [a] claim[] of a particular class provided for by the plan,"

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change in financial circumstances. See, e.g., In re Bereolos, 126 B.R. 313 (Bankr. N.D. Ind. 1990). (Such a decision is, in effect, the imposition of a threshold requirement to modify a bankruptcy plan. See, Witkowski, 16 F.3d at 742-43; Deffebach, 9 BANKR. DEV. J. at 158-162.) However, other courts have held that there is no threshold requirement, see, e.g., In re Perkins, 111 B.R. 671 (Bankr. M.D. Tenn. 1990), and the Seventh Circuit specifically held that res judicata does not impose one. Witkowski, 16 F.3d at 742. The Eighth Circuit has not addressed the issue, and such a determination is not necessary in this case.

the means by which the debtor seeks to accomplish this, reclassifying an allowed secured claim to an allowed unsecured claim, is not provided for by § 1329(a)(1).

The court in In re Stone, 91 B.R. at 425, found authority for the type of modification sought here by the debtor in § 1329(a)(3). However, it does not appear that there is any specific authority in that subsection which provides for the type of modification sought in this case.

The Code only provides for the post confirmation distribution to a creditor to be altered in one way: "to take account of any payment of such claim other than under the plan." 11 U.S.C. § 1329(a)(3). The surrendering of collateral to a secured creditor in a case in which the debtor has kept such collateral pursuant to the plan is the equivalent of a "payment of such claim other than under the plan." The debtor may, after surrender, seek to modify the plan to reduce the distribution to that creditor by the value of the surrendered collateral. Although the debtor may reduce the distribution on that particular claim to reflect the application of the value of the surrendered collateral, the debtor may not then reclassify any resulting deficiency as an unsecured claim. There is nothing in § 1329(a)(3) which permits such reclassification.

Conclusion

The debtor in this case may not reclassify the allowed secured claim of the bank to an allowed unsecured status. However, to the extent that the debtor seeks to reduce the amount of the secured claim of the bank by the amount realized by the bank at the sale of the surrendered vehicle, the debtor may do so pursuant to § 1329(a)(3). Any deficiency owed to the bank remains an allowed secured claim, payable pursuant to the original plan.

Separate journal entry to be filed.

DATED: February 26, 1997

BY THE COURT:

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

Copies faxed by the Court to:
HILLIS, ROBERT 402-721-6198

Copies mailed by the Court to:
Richard Register, Attorney
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.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	
RANDY COOVER,)	CASE NO. BK96-81789
DEBTOR(S))	CH. 3
)	Filing No. 34, 41, 42
Plaintiff(s))	
vs.)	JOURNAL ENTRY
)	DATE: February 26, 1997
Defendant(s))	HEARING DATE: February 10, 1997

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion Requesting Modification of Plan by Debtor; Resistance by Fremont National Bank and Resistance by Trustee.

APPEARANCES

Richard Register, Attorney for debtor
Robert Hillis, Attorney for Fremont National Bank
Kathleen Laughlin, Chapter 13 Trustee

IT IS ORDERED:

The motion to reclassify the allowed secured claim of the Fremont National Bank to an allowed unsecured claim is denied. See memorandum entered this date.

BY THE COURT:

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

Copies faxed by the Court to:
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