

Post-Confirmation modified plan
Section 1329
Surrender of motor vehicle

Cynthia Odlin, Case No. 07-62298

9/22/2010 FRA

Unpublished

Debtor's confirmed chapter 13 plan provided for the retention of her motor vehicle and payment to Capital Financial, the Creditor which financed the purchase, of periodic payments sufficient to pay off the secured claim of \$11,735 over the life of the Plan. Approximately 2 1/2 years into the Plan, Debtor filed a modified plan which provided for the surrender of the motor vehicle in full satisfaction of Capital Financial's secured claim. Capital Financial objected.

The Court reviewed two lines of cases involving this situation. One line simply holds that a return of the vehicle is not an allowable modification. A second line of cases would allow the modification if the statutory requirements of § 1325(a) are complied with, as required by Code § 1329, including that the plan has been proposed in good faith. The court would have the discretion to deny confirmation if the debtor had acted in other than good faith with respect to the collateral.

In the present situation, evidence was presented which indicated that the debtor had allowed her insurance to lapse and that sufficient damage had been inflicted on the vehicle to reduce the value to approximately \$500. The court held that while a secured creditor may be in a position to protect its interest in collateral by insisting on adequate protection payments, it cannot be held responsible for the uncompensated destruction of its collateral. Because good faith was lacking in this case, confirmation of the modified plan was denied.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No. 07-62298-fra13
CYNTHIA LEE ODLIN,)
) Debtor.) MEMORANDUM OPINION
_____)

Debtor filed an amended post-confirmation chapter 13 plan, proposing to surrender a vehicle securing a claim by Capital Financial Services, LLC (hereinafter "Capital Financial") and discontinuing payments on Capital Financial's secured claim. For the reasons that follow, I find that the amended chapter 13 plan was not proposed in good faith and the plan as filed cannot be confirmed.

I. FACTS

Debtor purchased a 2005 Pontiac from Butler Automotive. The purchase was financed by Capital Financial, which acquired the note and security interest from Butler.

Debtor filed her chapter 13 petition for relief on August 13, 2007. Her original plan proposed to pay \$6,000 to Capital Financial, with interest at 9% per annum, at the rate of \$100/month for 24 months, and

1 \$200/month thereafter for the duration of the plan. The order confirming
2 the plan amended the amount to be paid to \$11,735, and provided for
3 payments of \$100 per month for 24 months, and \$400 per month thereafter.
4 On March 19, 2008, Debtor proposed a post-confirmation modification of
5 the plan which sought to modify the treatment of Capital Financial's
6 claim by providing for equal monthly payments of \$180 per month. Capital
7 Financial objected, asserting that \$180 per month was insufficient to
8 satisfy its claim. The dispute was settled and a stipulated order was
9 submitted providing for \$100 per month payments, increasing to "all
10 available funds after attorney fees paid."

11 On April 29, 2010, Debtor filed yet another post-confirmation
12 amended plan, proposing to surrender the 2005 Pontiac Sunfire to Capital
13 Financial in full satisfaction of the creditor's secured claim. Capital
14 Financial has objected to confirmation of the April 29 amended plan.

15 At the hearing on August 10, Capital Financial presented
16 evidence that the vehicle had, since it was acquired by the Debtor,
17 suffered significant damage over much of its exterior. The interior was
18 described as "trashed." Of particular concern was the fact that the
19 car's digital dashboard was not functional, making it impossible to
20 ascertain the car's mileage. In the view of the creditor's witness, the
21 vehicle would not bring more than \$500 if repossessed and sold. There
22 was also evidence that the Debtor had allowed the insurance required by
23 the contract to lapse. No evidence was presented explaining what caused
24 the damage.

25 After testimony was closed at the August 10 hearing, the
26 parties presented their arguments. Capital Financial raised the issue of

1 good faith, which was objected to by Debtor's counsel on the ground that
2 it had not been raised prior to the hearing. Debtor was given two weeks
3 to brief the issue of good faith and any additional issues and Capital
4 Financial was given one week to file a response.

5 II. DISCUSSION

6 Modification of a chapter 13 plan of reorganization after
7 confirmation is governed by 11 U.S.C. § 1329¹, which provides in relevant
8 part:

9 (a) At any time after confirmation of the plan but
10 before completion of payments under such plan, the
11 plan may be modified, upon request of the debtor, the
12 trustee, or the holder of an allowed unsecured claim,
13 to -

14 (1) increase or reduce the amount of payments on
15 claims of a particular class provided for by the
16 plan;

17 (2) extend or reduce the time for such payments;
18 (3) alter the amount of the distribution to a
19 creditor whose claim is provided for by the plan
20 to the extent necessary to take account of any
21 payment of such claim other than under the plan;
22 * * *

23 (b) (1) Sections 1322(a), 1322(b), and 1323(c) of
24 this title and the requirements of section
25 1325(a) of this title apply to any modification
26 under subsection (a) of this section.

(2) The plan as modified becomes the plan
unless, after notice and a hearing, such
modification is disapproved.
* * *

27 Section 1322 governs the contents of a plan and provides
28 mandatory requirements in subsection (a) and allowable discretionary
29 actions in subsection (b). Section 1325(a) provides requirements for
30 confirmation of a plan of reorganization and at subsection (a)(3)

31 ¹ Hereinafter, reference to § or Code § shall refer to the
32 Bankruptcy Code, 11 U.S.C. §§ 101 to 1532, unless otherwise specified.

1 requires that "the plan has been proposed in good faith and not by any
2 means forbidden by law."

3 There are two lines of cases dealing with the issue of plan
4 modification which provides for post-confirmation surrender of collateral
5 and replacement of the formerly secured claim with a possible unsecured
6 deficiency claim. One line of cases is exemplified by Chrysler Financial
7 Corp. v. Nolan, 232 F.3d 528 (6th Cir. 2000). That court held that: (1)
8 § 1329(a) does not expressly allow the debtor to alter, reduce, or
9 reclassify a previously allowed secured claim; (2) the proposed
10 modification would violate § 1325(a)(5)(B), which mandates that a secured
11 claim is fixed and must be paid in full once it is allowed; (3) the
12 proposed modification would contravene § 1327(a)[providing for the
13 binding effect of a plan] by giving the debtor the option of shifting the
14 burden of depreciation to the secured creditor; and (4) if such an
15 interpretation were approved, it would put the secured creditor in the
16 inequitable position where it could not propose a modification if its
17 collateral appreciated, but debtor could reclassify or revalue the claim
18 if the collateral depreciated. See also, In re Holt, 136 B.R. 260
19 (Bankr. D. Idaho 1992)(return of vehicle not an allowed modification)

20 Another line of cases holds that a plan may be modified to
21 provide for surrender in full satisfaction of a secured claim. See Bank
22 One NA v. Leuellen, 322 B.R. 648 (S.D.Ind. 2005)(modification allowed if
23 the statutory requirements of § 1325(a) are complied with); In re Ward,
24 348 B.R. 545 (Bankr. D. Idaho 2005)(modification allowable). Debtor
25 argues that the Court should adopt this second line of cases, and
26 especially the reasoning in In re Berendt, Case 07-35054-elp13 (Bankr.

1 D.Or. 9/22/08), an unpublished letter opinion originating within this
2 district. The Berendt decision is well-reasoned and cites the Bank One
3 NA v. Leuellen opinion, cited above, as particularly persuasive. The
4 Bankruptcy Court held in Berendt that there was no impediment to
5 modification of a confirmed chapter 13 plan to provide for surrender of
6 collateral in full satisfaction of a secured claim. The Court agreed
7 with those courts which hold that the "creditor's interests are protected
8 at initial confirmation by the requirement of adequate protection and at
9 modification by the bankruptcy court's discretion to deny confirmation if
10 the debtors have acted in other than good faith with regard to the
11 collateral."

12 "In the Ninth Circuit, good faith requires an analysis of the
13 totality of the circumstances and an inquiry into whether debtors have
14 misrepresented facts, unfairly manipulated the Code, or otherwise made
15 their proposals in an inequitable manner." In re Ward 348 B.R. at 551
16 (citing Goeb v. Heid (In re Goeb), 675 F.2d 1386 (9th Cir. 1982)). The
17 circumstances of this case with respect to Capital Financial's collateral
18 require a finding that the modified plan was not proposed in good faith.

19 At the time the initial Plan was confirmed, Capital Financial
20 acquiesced to the Plan as amended in the Order Confirming Plan (entered
21 November 13, 2007): a secured claim in the amount of \$11,735, post-
22 confirmation interest at 9%, and monthly payments of \$100 for the first
23 24 months and \$400 per month thereafter (payment later amended to \$100
24 and increasing to all available funds after payment of attorney fees).
25 Approximately 2 ½ years later, after allowing the vehicle to suffer
26 sufficient damage to reduce its wholesale value to \$500 and allowing her

1 insurance to lapse, Debtor proposes to surrender the vehicle to the
2 creditor in full satisfaction of creditor's secured claim. To the extent
3 that a creditor can be said to be responsible at initial confirmation for
4 the protection of its interest in the collateral by insisting on
5 sufficient adequate protection payments, a creditor is not, and should
6 not be, responsible for uncompensated destruction of its collateral
7 beyond that which could be expected and planned for at initial
8 confirmation.

9 III. CONCLUSION

10 A post-confirmation modified plan filed under § 1329 must
11 comply with the requirements of § 1325(a), including subsection (a)(3)
12 which requires that the plan be proposed in good faith. Under the
13 totality of the circumstances described herein, the Court finds that the
14 modified plan was not proposed in good faith and confirmation of the
15 modified plan must be denied. The Court will enter an order to that
16 effect.

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20 FRANK R. ALLEY, III
21 Bankruptcy Judge
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