10-13-06

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 05-73817
Gus Tyrone Newton,	CHAPTER 13
Debtor.	JUDGE MASSEY

ORDER DISAPPROVING PROPOSED MODIFICATION OF PLAN

Debtor filed a modification of the confirmed plan in this case but used the wrong format and added a provision not permitted under section 1329 of the Bankruptcy Code. For these reasons the proposed modification is disapproved.

The Court confirmed the Debtor's plan in an order entered on October 5, 2005. That plan proposed to pay secured claims in full. One of Debtor's creditors is Citifinancial Auto Corp., which filed a proof of a secured claim for $16,169.28. The confirmed plan stated in paragraph 5(d):

> D. ATTN: Citifinancial A SECURED CLAIM, OTHER THAN A MORTGAGE ARREARAGE CLAIM, SHALL RECEIVE INTEREST AT THE RATE OF PRIME AS SET BY THE FEDERAL RESERVE BANK, WASHINGTON, D.C., ON THE 1ST WORKING DAY OF THE MONTH IN WHICH THE CASE IS FILED PLUS 2% ON THE VALUE OF THE COLLATERAL SECURING THE CLAIM.

Had this plan provision been brought to the Court's attention, the Court would not have confirmed the plan. The plan must state the interest rate and may not refer to some extraneous source such as a publication of a bank. The Court doubts that the Federal Reserve Bank,

Washington, D.C. sets a prime rate of interest; the Board of Governors of the Federal Reserve System, however, publishes average rates of various sources. In other words, the plan provision refers to a source of information that does not exist. The proper way to state an interest rate in a plan is in the simplest way possible, for example, 10.2% or 12.5%.

On December 15, 2005, the Court published forms related to preconfirmation amendments and postconfirmation modifications of Chapter 13 plans. For some reason, these forms have not been put on the page containing approved forms. This oversight should be corrected shortly. But the forms are still available in the What's New section of the Court's home page under the link "all Announcements." (Page down to the December 12, 2005 announcement.) A post-confirmation modification should contain only the language to be added, changed and/or deleted. What Debtor did here was to use the form of preconfirmation amendment to a plan, which makes it impossible to know what is being modified without comparing the confirmed plan to the proposed modification. The effect is to deprive creditors of proper notice of the change.

In this instance, Debtor left in paragraph 5.d. quoted above, making it appear that whatever the interest rate being paid to Citifinancial Auto would continue to be paid. But this is not so. The only change in the confirmed plan that the Court found is in paragraph 9 in which this sentence was added:

> **DEBTOR SURRENDERES** (SIC)**ALL RIGHTS AND INTEREST IN THE 2000 FORD WINDSTAR TO CITIFINANCIAL.**

In other words, the plan would now apparently be not to pay interest, much less principal.

A modification of a confirmed plan in a Chapter 13 case is governed by section 1329(a) of the Bankruptcy Code, which provides in relevant part:

> (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--
>
> (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;
>
> (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[.]
>
> . . .

A debtor with a confirmed plan does not need to modify the plan to turn over collateral to a secured creditor. If Debtor wants to sell the vehicle, he can make a motion to do so. He is likely to get a better price than the creditor would. Similarly, he can ask that the stay be modified so that Citifinancial could take the vehicle, if it wanted it. He could drive the car to Citifinancial and leave it, but nothing in the Bankruptcy Code or the Uniform Commercial Code would require the creditor to sell the collateral. What a debtor cannot do is force a creditor to sell its collateral. In short, it is too late to surrender the collateral. Surrendering collateral is done prior to confirmation.

It seems likely that what Mr. Newton is trying to do is change the nature of Citifinancial's claim from secured to unsecured, although the Court notes that the plan provides that unsecured creditors will receive full payment. A confirmed plan, however, cannot be modified to surrender collateral with a view to changing the claim from secured to unsecured. Nothing in section 1329 remotely suggests that a plan may be modified to state that the debtor is surrendering collateral. For that reason alone, the modification cannot be approved.

> The language of § 1329(a)(1) is clear and unambiguous. A confirmed plan may be modified to "increase or reduce the amount of payments on claims of a particular class provided for by the Plan." The statute does not permit individualized treatment of class members or the reclassification of a single creditor from a secured to an unsecured status.

In re Sharpe, 122 B.R. 708, 710 (E.D. Tenn. 1991). In *Sharpe*, the proposed modification sought to surrender a vehicle, which the District Court held was not permitted under section 1329 as a means to reclassify the claim as unsecured. *Cf., In re Smith*, 207 B.R. 26 (Bankr. N.D. Ga. 1997).

As of the date of confirmation, Citifinancial's claim was fully secured. No one objected to its claim. Under the plan as confirmed, it is entitled to receive the present value of that claim. If the car is sold, whether by Debtor or creditor, and the proceeds are received by Citifinancial, Debtor would be entitled to a credit against the amount of the claim as of the date of the payoff, but the balance of the claim, even though unsecured in a conventional sense, would remain secured under the plan. The treatment of the claim cannot be altered because section 1329 does not permit such a modification. It permits changes in the amount of the payments, but even there, the plan must ultimately provide for payment in full of a claim secured by a vehicle.

In short, the plan is a deal and a deal is a deal.

For these reasons, it is

ORDERED that Debtor's proposed modification of the confirmed plan in this case is DENIED.

Dated: October 12, 2006.

James E. Massey

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE