Consumer Point

By Michelle H. Bass

A Fresh Start with Flexibility

Consumers Can Modify the Treatment of a Secured Claim in a Confirmed Plan to Surrender Collateral Under § 1329

Michelle H. Bass
Wolfson Bolton PLLC
Troy, Mich.

Michelle Bass is a senior attorney with Wolfson Bolton PLLC in Troy, Mich., and head of the firm's Consumer Bankruptcy Practice Group. She is also co-chair for the Michigan Network of the International Women's Insolvency and Restructuring Confederation.

Five years is a long time. For many consumer bankruptcy debtors, committing to a five-year reorganization plan is a challenge. "What if I move, get married or lose my job?," are frequent questions clients may ask prior to executing a petition, schedule, statement and plan. The decision to retain a secured vehicle or home, while at the same time committing to making up to 60 months of plan payments, can be daunting.

Congress acknowledged this difficulty that honest-but-unfortunate debtors face as they attempt to plan for the next five years of their life on a fixed budget. Section 1329 of the Bankruptcy Code serves as the all-important "peace-of-mind" factor, providing the ground rules for a debtor, trustee or holder of an allowed unsecured claim to seek modification of a plan after confirmation.

Although this section does not spell out a specific formula for changing the treatment of a secured claim to an unsecured claim by surrendering collateral, the language of § 1329 has been interpreted to permit this very act. A thorough analysis of this Code section demonstrates that the value of a secured creditor's claim is more than adequately provided for based on other statutory requirements at the time of confirmation. The flexibility accorded to § 1329 by courts across the nation has no doubt contributed to the success of many plans that would have otherwise ended in dismissal. It follows that the equitable principle of allowing consumer debtors to have a "post-confirmation change of heart" is rightfully upheld by a majority of bankruptcy courts, giving debtors the freedom to alter the treatment and classification of secured claims at any time prior to the completion of their plan payments.

In the chapter 13 context, the most commonly filed post-confirmation modification involves the surrender of a car or house and the resulting treatment of that creditor's claim. The authority of § 1329(a) establishes the threshold requirement for applications to modify a confirmed plan. Any proposed modified plan must (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 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. Critics argue that this language does little to alleviate the debtor from making full payments on a secured obligation. How, then, does this language actually translate to the surrender of collateral and the reclassification of a claim mid-plan?

The majority of courts that have dealt with this issue have looked beyond the plain meaning of the statute. At first blush, this language appears to be silent as to a modification that wholly changes the qualification of a creditor. On its face, § 1329 only provides for modifications that increase or reduce the amount of payments on a claim, or enlarge or reduce the time for making payments to a particular class of claims. However, the phrase "particular claims," as used in § 1329(a)(1), is synonymous with the phrase "allowed secured claims" by virtue of secured creditors being a class of claims unto themselves.[1] Thus, where each secured claim is considered to be its own "unique" class in a chapter 13 plan, the proposed increase or reduction in payments on that claim will constitute a permissible modification.

Practically speaking, § 1329(a)(1) might be read to allow for a proposed reduction in payments on a secured car loan. For example, a plan modification under § 1329(a)(1) might propose for the secured creditor to go from receiving full equal monthly installments to receiving no payments whatsoever. Under § 1329(a)(1), any modification to alter payments made to a creditor in a particular class is a valid modification of the treatment of that class. Changing the classification of a secured auto lender to an unsecured creditor might therefore be accomplished, notwithstanding the additional requirements under § 1329(b) and (c).

Likewise, § 1329(a)(3) provides that distributions to a creditor treated under a plan might be modified to account for payments made *outside* the plan. Courts that allow for debtors to change the treatment of a secured creditor have ruled that the act of "surrendering collateral" constitutes a form of payment other than under the plan.[2] Section 1329(a)(3) provides a mechanism to alter a secured claim and its treatment in light of any non-plan payment made on the claim (*i.e.*, the surrender

1 *In re Fayson*, 573 B.R. 531, 535.
2 *Id.* at 535.

continued on page 60