

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

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IN RE:

FREDERICK EUGENE CURRIN and  
SHIRLEY R. CURRIN,

BK #89-12130-WHB  
Chapter 13

Debtors.

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**SUPPLEMENTAL  
MEMORANDUM OPINION AND ORDER ON MOTION  
OF TOYOTA CREDIT TO DISMISS OR  
FOR RELIEF FROM THE AUTOMATIC STAY**

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The scenario presented in this Chapter 13 case is a common one. The debtors obtained a stay of all payments, except for the ongoing home mortgage, for three months, during which time Toyota Motor Credit Corporation ("TMCC") was not paid on its debt secured by an automobile. TMCC therefore fell approximately five months behind in receiving its payments through the Chapter 13 plan. At the hearing on TMCC's motion on April 10, 1991, TMCC was informed by the Chapter 13 Trustee that a payment had been disbursed to Toyota Credit the day before, that the debtor was now on payroll deduction, and that \$268.38 was on hand which could be paid to TMCC if the Court so ordered. The Court did direct, on April 10, 1991, that the Chapter 13 Trustee make a disbursement to TMCC of the \$268.38 on hand to partially cure TMCC's arrearage. An order was entered on May 14, 1991, reserving for supplemental order the issues addressed herein.

The specific issue raised by TMCC is whether it is proper for the Chapter 13 Trustee to continue to pay the ongoing home mortgage payment when there is insufficient money being paid by the debtor to pay all secured creditors. The Court assumes that TMCC is addressing those situations where there is no stay of payments ordered by the Court, except for ongoing home mortgages. In those situations where the Court has

ordered a stay of all payments except for the ongoing mortgage, such an order should have been entered only after notice to all affected creditors of the debtor's motion for a stay. Upon the filing and noticing of such a motion by the debtor for a stay, all affected creditors have an opportunity to object to the stay and to be heard. If the Court, after opportunity for hearing, orders a stay of all payments except for the ongoing mortgage payment, the creditors affected thereby have no cause to complain as to the procedure.

On the other hand, TMCC is addressing the situation where the debtor, for whatever reasons, is not making sufficient payments to the Chapter 13 Trustee to make all plan payments and the Trustee, for administrative reasons, chooses to pay the ongoing home mortgage payment because sufficient monies are being paid for that purpose but the Chapter 13 Trustee at the same time lacks sufficient funds to pay all plan payments, including those payments to other secured creditors. The failure of a debtor to make sufficient plan payments is more likely to occur in those cases where the debtor is paying the plan payments as opposed to having the plan payments deducted from the debtor's payroll.

This Court addressed an aspect of the issue presented here in its opinion In re Lynch, 109 B.R. 792 (Bankr. W.D. Tenn. 1989). In Lynch, the Court had before it specifically the question of whether a Chapter 13 debtor would be permitted to modify a confirmed plan without filing a motion for modification, which motion would be noticed to all scheduled creditors, and the Court addressed the provisions of 11 U.S.C. §1329. The Court concluded in Lynch that a debtor may be permitted to modify a confirmed plan but only in strict compliance with §1329. 109 B.R. at 795.

Such strict compliance would include a requirement that a Chapter 13 debtor file a proper motion for modification, which motion "must be noticed to all scheduled creditors or at the very least, all creditors holding allowed claims in the confirmed Chapter 13 plan." Id. The Court went on to hold that the debtor would not be permitted to accomplish "a de facto modification without complying with the requirements of §1329." Id. And, the Court stated that it would not "permit a modification of a confirmed plan based merely upon a consensual agreement between the debtor and [a] mortgagee." Id.

The Court further addressed in Lynch the problem facing many debtors who had not only home mortgages but other secured creditors, which creditors may hold security in depreciable assets such as automobiles, and the Court observed that debtors "must make a choice based upon the economies and realities of individual situations as to whether the debtors are financially able to maintain ongoing mortgage payments in order to retain their principal residences and at the same time retain other secured properties." Id. at 796.

Finally, the Court in Lynch pointed out that "modification of a confirmed plan should require a showing of changed circumstances rather than be granted routinely on the mere request of a debtor or other authorized party." Id.

After considering the problem presented in the current case, as presented by TMCC, the Court has concluded that its Lynch holding substantially covers this situation. A Chapter 13 debtor, in a confirmed plan, should not be able to accomplish a de facto modification of the confirmed plan by submitting less than full plan payments to the Chapter 13 Trustee from which the Chapter 13 Trustee pays only the ongoing home mortgage payments while lacking sufficient monies to pay the other ongoing secured debts. While §1322(b)(2) certainly protects home mortgages from being modified and §1322(b)(5) requires that ongoing mortgage payments be maintained "while the case is pending," those Congressional protections for home mortgagees do not excuse the debtor from making a full plan payment, as ordered by the Court in a confirmation order. If the debtor is unable to make a full plan payment, as the confirmed plan requires, the debtor has the burden of moving the Court for either a full or partial stay of plan payments. The debtor should not be entitled to rely upon the protection in the Code given to home mortgagees to the detriment of other creditors in the confirmed plan. The injustice of a de facto modification is highlighted when the debtor makes an insufficient plan payment so that creditors holding security in depreciable assets, such as automobiles, are not paid. The debtor in that situation may continue to use, and possibly abuse, the depreciable asset, while failing to make sufficient payments to the Chapter 13 Trustee to pay for the use of that asset.

As the Court observed in Lynch, the debtor has the responsibility of making an economic choice of whether the debtor can afford to keep both the debtor's home and the debtor's other assets secured by lenders such as TMCC.

In order to prevent a debtor from accomplishing a de facto stay, without a court order, or a de facto modification of a confirmed plan, without a court order, the Court will require debtors, when they are unable to make sufficient ongoing plan payments to satisfy the plan requirements, to file a motion for a temporary stay, either partial or full, or to move for a post-confirmation modification, or for other appropriate relief. Further, in the event the debtor fails to timely move for relief, when the Chapter 13 Trustee receives insufficient funds to pay the confirmed plan obligations, the Chapter 13 Trustee may move the Court for appropriate relief.<sup>1</sup> Of course, any creditor which does not receive a plan payment may move the Court for appropriate relief, and the creditor has a vested interest in monitoring plan payments. The motions filed by either the debtor, the Chapter 13 Trustee, or a creditor should be noticed to all affected creditors, and this procedure assures that the debtor's failure to fund the confirmed Chapter 13 plan is brought to the Court's and the creditors' attention. The Court will not require the Chapter 13 Trustee to withhold payments on home mortgages, pending motions being filed, since the debtor and affected creditors have it within their power to know that full plan payments are not being made or received and to bring that fact to the attention of the Court by motion.

**SO ORDERED** this 30<sup>th</sup> day of May, 1991.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

cc:

E. Franklin Childress, Jr.

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<sup>1</sup> The Court understands that the administrative practice of the Chapter 13 Trustee is to file such motions, including motions to dismiss, after plan payments are missed.

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