IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

IN RE: LARRY A. WALKER **CASE NO. 4:03-bk-17741E**
CHAPTER 13

ORDER OVERRULING OBJECTION TO CONFIRMATION

On October 7, 2003, the Court heard an Objection to Confirmation of Plan filed by Arkansas Employees Federal Credit Union (the "**Credit Union**"). Arnold Goodman appeared on behalf of the Debtor, who was also present. Wade Hodge appeared on behalf of the Credit Union. Jeffrey Ellis appeared on behalf of the standing Chapter 13 Trustee, Joyce Bradley Babin. Following oral argument and testimony by the Debtor and creditor's representative, Donna Cates, the parties rested, and the Court took the matter under advisement along with one evidentiary objection.

The issue presented in this case is whether the Credit Union has a secured claim in Debtor's Chapter 13 bankruptcy even though the collateral securing the Credit Union's loan to Debtor was missing at the time Debtor filed bankruptcy. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L), and the Court has jurisdiction to enter a final judgment in this case.

Debtor filed his petition under Chapter 13 of the Bankruptcy Code and his proposed Chapter 13 plan on June 30, 2003. Debtor listed the Credit Union as an unsecured creditor with respect to unspecified loan and credit card accounts in the amount of $20,000.00. Testimony provided at trial established that Debtor had a Visa credit card account with the Credit Union which was cross-collateralized with the other loans.[1] Testimony and documents provided at trial also established that the Debtor borrowed money

[1]In the Credit Union's Objection to Confirmation of Chapter 13 Plan, the Credit Union asserted that the Debtor owed $368.75 and $3,657.28 on two separate credit card accounts. It is unclear from the testimony at trial whether Debtor had one or two Visa accounts.

directly from the Credit Union, and the debt was secured by three used vehicles: a 1994 Dodge van, a 1994 Plymouth van, and a 1993 Dodge van (the "**Van Loan**").[2] The parties do not dispute that the vans are now missing and unavailable for repossession.[3]

Pertinent to this decision are the facts surrounding the Credit Union's missing collateral (*i.e.*, the three vans). On behalf of the Credit Union, Ms. Cates testified that the vans were not available for repossession. Testimony by both parties revealed that one van may have been repossessed by another creditor prior to the filing of this bankruptcy. The Credit Union established that another creditor had a perfected security interest in that van (the '94 Dodge van) at the time Debtor took out the Van Loan (which listed the '94 Dodge van as collateral despite Debtor's promise in the loan papers that no other entity had any interest in the property offered as collateral). Debtor also testified that one of the vans may have been repossessed but he was not sure which one or if it was one of the three vans securing the Credit Union's note. The Debtor claimed that he would surrender all three vans if he had them, but he did not know what had happened to the vans. He explained that he and his wife operated a business transporting children to medical appointments which utilized between eight and 13 vans. Debtor testified that his wife was

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[2]With respect to the Van Loan, the Credit Union submitted a "Cumulative Account History" showing the principal owed on the Van Loan as $13,327.14, with costs of $150.00 and new interest of $1,488.09, for a total of $14,965.83. Although the Debtor objected to this evidence, the Debtor listed the total debt owed the Credit Union on the Van Loan and credit cards as $20,000.00, and the amounts submitted by the Credit Union on these debts total $18,991.86.

[3]Debtor's bankruptcy schedules also list the Credit Union as a secured creditor with respect to two pieces of collateral: a 1994 Lexus LS 400 and a 1998 Toyota Avalon. It is undisputed that these vehicles were repossessed prior to this bankruptcy, and testimony at trial revealed that the vehicles were sold for less than the amount owed on them. These cars are not pertinent to the issue presented for decision.

responsible for managing the daily operations of the business. He testified that the drivers of the vans had total control over them, but were supposed to get permission before using the vans for personal purposes. He testified that he later learned the drivers abandoned the vans in question on the side of the road because they broke down, and when he went to retrieve them, they were gone. Ms. Cates testified that the Credit Union had paid $3,627.00 in insurance premiums on the vans because the Debtor failed to maintain insurance on them, and that the Credit Union filed claims with the vans' insurer once they realized the vans were lost, but those claims were denied.

At trial, both the Debtor and Credit Union submitted evidence regarding the value of the vans. The Credit Union introduced Kelley Blue Book retail values obtained from an internet site; the Debtor objected on the grounds that such evidence constituted hearsay, and the Court took the Debtor's objection under advisement. For reasons discussed below, the Court finds that the vans have no value in the Debtor's estate, and therefore finds the Debtor's evidentiary objection to be moot.

The Credit Union objects to its treatment as an unsecured creditor in Debtor's plan with respect to the Van Loans and the credit card account(s). It seeks a determination that it is secured to the extent of the value of the collateral (the vans) plus its reasonable attorney fees and the cost of the insurance premiums incurred to insure the vans. In this case, the Credit Union has no collateral to secure its claims, and therefore has only an unsecured claim. It is undisputed that the three vans are gone, one most likely having been repossessed by another creditor, and the other two lost. If the collateral had been lost after confirmation of the Debtor's plan, the issue would be more difficult;[4] however, where collateral is lost pre-

[4]*See, e.g., In re Nolan,* 232 F.3d 528 (6th Cir. 2000); *In re Miller,* 2002 WL 31115656 (Bankr. M.D.N.C. 2002); *In re Knappen,* 281 B.R. 714 (Bankr. N.M. 2002); *In re Weeams,* 1999

confirmation, it is well settled that the creditor has only an unsecured claim even if it continues to have a security interest in the missing collateral under state law. *See Magna Bank v. Gilsinn*, 224 B.R. 710 (Bankr. E.D. Mo. 1997); *In re Gabor*, 155 B.R. 391 (Bankr. N.D. West Virginia 1993); *In re Elliot*, 64 B.R. 429 (Bankr. W.D. Mo. 1986). *See also In re Walton*, 243 B.R. 793 (Bankr. M.D. Ala. 1999); *In re Alexander*, 225 B.R. 665 (Bankr. E.D. Ark. 1998). The rationale for treating a secured creditor with no collateral as an unsecured creditor in bankruptcy is two-fold. First, as the *Elliot* court explained, "By definition, 'secured claim requires availability of collateral to secure the creditor's right to payment." 64 B.R. at 430. Second, even if a secured creditor with no collateral were classified as a secured creditor, it would still have a fully unsecured claim under 11 U.S.C. § 506(a) which provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

In this case, it is undisputed that the vans are missing and neither the Debtor nor the Credit Union has access to them; accordingly, the Court finds that the vans have no value in Debtor's estate. Because the estate's interest in the missing vans is zero, the secured portion of the Credit Union's claim is zero and the balance of its claim is unsecured under § 506(a). Additionally, because there is no collateral to secure the Credit Union's claims, it is irrelevant that the credit cards were cross-collateralized. The credit card debt is unsecured as well.

Although several cases reaching the same conclusion with similar facts indicate that outcomes may

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WL 1579575 (Bankr. E.D. Ark. 1999); *In re Smith*, 207 B.R. 26 (Bankr. N.D. Ga. 1997); *In re Dunlap*, 215 B.R. 867 (Bankr. E.D. Ark. 1997); *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).

differ where the debtor is guilty of fraud or other culpable behavior,[5] no such evidence was presented in this case. Specifically, the only evidence introduced regarding the Debtor's efforts to retrieve the vans was his testimony that he went to get the vans and they were gone. At worst, the Debtor appeared to be negligent in protecting the Credit Union's collateral. Arguments were made by Credit Union's counsel that might support other causes of action concerning the Debtor's loss of collateral, but the objection to confirmation cannot be sustained under these facts.

For the reasons explained herein, it is hereby

ORDERED that the Credit Union's objection to being treated as an unsecured creditor in Debtor's plan is **OVERRULED**.

IT IS SO ORDERED.

Audrey R. Evans

HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE: October 31, 2003

cc: Mr. Arnold Goodman, attorney for Debtor
Mr. Wade Hodge, attorney for the Credit Union

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[5] *See In re Gilsinn*, 224 B.R. at 713 ("Finally, the Court distinguishes this case from those where debtors have hidden estate assets, been less than forthright with the court or failed to offer their best efforts to locate missing collateral."); *In re Alexander*, 225 B.R. at 667 ("Further, any evidence of bad faith or fraud on the part of the debtor may result in a different result."). However, these cases do not indicate how the result would be different (i.*e.*, whether the debt could be classified as secured or some other cause of action may provide creditor relief). Other reported cases indicate that the Debtor's culpability cannot alter the status of an otherwise unsecured claim. S*ee In re Garrison*, 95 B.R. 461 (Bankr. E.D. Ky. 1988) (debt is unsecured even though debtor sold collateral to a pawn shop prior to filing bankruptcy); *In re Byrd*, 92 B.R. 238 (Bankr. N.D. Ohio 1988) (debt is unsecured even though debtor gave away some of creditor's collateral) ("[t]his Court does not find the reasoning in *Elliot* to be dependent on the Debtor's voluntariness in surrendering the collateral and, therefore, reaches the same decision as the Court did in *Elliot*.").

Ms. Joyce Bradley Babin, Chapter 13 Trustee
U.S. Trustee