

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:
Dawn L. Luedtke,
Debtor.

Chapter 13
Case No. 02-35082-svk

MEMORANDUM DECISION AND ORDER

Dawn Luedtke (the “Debtor”) filed this Chapter 13 case on November 20, 2002. At issue here is a secured automobile loan from the University of Wisconsin - Oshkosh Credit Union (“Credit Union”), and the Credit Union’s reporting of the payments on that loan to credit reporting agencies. On the petition date, the loan balance was over \$10,000, but using the “cramdown” feature available in Chapter 13, the Debtor’s plan bifurcated the claim into a secured claim of \$6,250 plus interest for a total of \$8,433, and an unsecured claim for the balance. The Debtor’s confirmed Chapter 13 plan provides for monthly payments to the Trustee over five years, with the Credit Union’s secured claim paid in full, and the unsecured balance of the claim is to be paid pro rata with other unsecured creditors. The Debtor’s plan calls for regular monthly payments and a balloon payment to pay off all obligations within 60 months of confirmation. The plan was confirmed on May 20, 2003.

The Debtor has since been paying the Credit Union’s secured claim through her plan. On May 13, 2008, the Debtor filed a Motion to require the Credit Union to accurately reflect post-petition plan payments as current on the Debtor’s credit report and for sanctions pursuant to 11 U.S.C. § 105. According to the Motion, the Credit Union is reporting information to Credit Reporting Agencies (“CRAs”) based on the original amount of the Credit Union’s loan to the Debtor. As such, a copy of the Debtor’s May 2008 credit report shows that the amount owed to the Credit Union (\$4,080) is much higher than the balance owed on the secured claim (\$1,293 per the Trustee’s report for the same period), and also reflects that all of the Debtor’s payments in the last 48 months have been 120 days late, even though the Debtor has apparently timely made all required plan payments. The Debtor is seeking to refinance her mortgage to fund the balloon payment, and claims that she is unable to complete the refinancing due in large part to the incorrect information on her credit report. Although she requested correction of the report, the Credit Union refused to do so. Apparently the Debtor has not reported the allegedly inaccurate information to the CRAs. The Debtor argues that under § 1327 of the Bankruptcy Code, the Credit Union must report the loan as modified by her Chapter 13 plan and should report as current payments the Debtor makes on the loan under her plan.

The Credit Union disputes that its actions are contrary to the Debtor’s Chapter 13 plan, and claims that it is properly reporting to CRAs. If the Debtor does have a remedy, the Credit Union asserts, it would be for a violation of the Fair Credit Reporting Act, not the Bankruptcy Code.

The Debtor bases her argument on 11 U.S.C. § 1327(a), which states: “The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.”

The Debtor’s Chapter 13 plan sets forth the payments she is required to make to the Chapter 13 Trustee, the duration of those payments, and the manner in which the Trustee must distribute those funds. Among the plan’s provisions is the amount and manner the Debtor will pay to the Trustee on the Credit Union’s secured claim. According to § 1327(a), confirmation of the plan binds the Debtor and each of the Debtor’s creditors. The effect is that the Debtor must make the payments as set forth in the plan, and each creditor must accept the amount and terms specified in the plan in satisfaction of its claim. Neither the language of the Debtor’s confirmed plan, nor the statutory requirements directly address how a creditor must report the Debtor’s obligations to a CRA.

Very few decisions address the issues created when creditors report to CRAs during the pendency of a Chapter 13 case. In *In re Sommersdorf*, 139 B.R. 700 (Bankr. S.D. Ohio 1991), a creditor’s refusal to remove a negative notation from a co-debtor’s credit report was found to be a violation of the co-debtor stay of § 1301, when the debtors’ plan provided for 100% payment of the creditor’s claim. The creditor argued that federal banking audit requirements require a bank to charge off amounts more than four months in arrears, but the court noted a distinction between a bank’s internal accounting procedure and the affirmative act of placing a notation on an obligor’s credit report. Although § 1327(a) was not expressly mentioned in *Sommersdorf*, the court sanctioned the creditor for reporting that the debt was charged off even though it was being paid in full, required the creditor to pay the debtors’ attorneys’ fees, and set a hearing on the co-debtor’s damages.

Most cases in this area construe the discharge injunction, rather than the confirmation order, and involve a creditor’s failure to remove pre-petition information rather than making an affirmative report, as in this case. For example, in *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478 (Bankr. S.D.N.Y. 2007), the debtors sued Chase Bank for failing to update information that it supplied to CRAs before the debtors’ Chapter 7 cases. The debtors claimed that Chase’s willful presentation of inaccurate information showing that the debt was still enforceable after the discharge damaged the debtors’ ability to obtain new credit and was an attempt to collect a discharged debt in violation of § 524(a) of the Bankruptcy Code. *See also Norman v. Applied Card Sys. (In re Norman)*, 2006 Bankr. LEXIS 2576 (Bankr. M.D. Ala. Sept. 29, 2006) in which the court was “troubled” by numerous published cases suggesting that some creditors are systematically reporting discharged debts as past due “in an effort to diminish the value of a discharge in bankruptcy.” Other courts have held that a creditor’s isolated act of reporting the status of an account to a CRA cannot constitute an act to collect a debt prohibited by the discharge injunction, without some other overt action taken by the creditor. *See Mahoney v. Washington Mut. Inc. (In re Mahoney)*, 368 B.R. 579 (Bankr. W.D. Texas 2007); *Irby v. Fashion Bug (In re Irby)*, 337 B.R. 293, 296 (Bankr. N.D. Ohio 2005); *Vogt v. Dynamic Recovery Services (In re Vogt)*, 257 B.R. 65, 70 (Bankr. D. Colo. 2000).

Recently in *In re Dendy*, 2008 Bankr. LEXIS 1845 (Bankr. D.S.C. May 5, 2008), the court addressed the debtors' allegation that a secured creditor violated a Chapter 13 confirmation order. The debtors' Chapter 13 plan avoided a second mortgage because the amount of the first mortgage exceeded the value of the property. The second mortgage holder was given proper notice of the debtors' motion to value the mortgage at \$0.00 and failed to object, and the plan was confirmed with no payments to be made on the second mortgage. The debtors completed the payments under the plan and received a discharge. When they tried to refinance their first mortgage, the debtors discovered that the second mortgage was still of record, and that the second mortgage holder had reported a past due amount of over \$30,000 on the debtors' credit report. They filed a motion to hold the creditor in contempt for failing to release the mortgage, and at the hearing on the motion argued that the notation on their credit report was a "slander of their credit." The court noted that, "[u]nder this Court's statutory contempt powers, it may award an aggrieved debtor legal and equitable relief pursuant to 11 U.S.C. § 105(a) for violations of a confirmation order or discharge injunction." Discussing the similarities between violations of the discharge injunction and the confirmation order, the *Dendy* court explained:

As the discharge injunction prohibits an act to collect a discharged debt from a debtor, the confirmation order prohibits any attempt to enforce a void mortgage lien against the creditor's former collateral. *See In re Jones*, 2007 Bankr. LEXIS 2984, 2007 WL 2480494, *2 (Bankr. E.D. La. Aug. 29, 2007) (holding "[a]n order of confirmation defines the rights of the debtor and interested parties to payment post-confirmation. The provisions of a confirmed plan bind the debtor and each creditor to its terms. The creditor is not entitled to collect or enforce its claims except as provided by the plan and the confirmation order"). A violation of the confirmation order is an act of contempt, which, like the discharge injunction, may be remedied by this Court's authority under 11 U.S.C. § 105(a).

2008 Bankr. LEXIS 1845 at *17-18 (citations omitted).

The court in *Dendy* recognized that the plan language permissibly avoided the pre-petition mortgage, but noted that the plan did not expressly require the creditor to remove the void mortgage from the plan records. "Without a specific command in the plan for . . . the holder to remove the mortgage lien from the county's records, the Court cannot find that these parties have committed an act of contempt." *Id.* at *22. With respect to the adverse credit reporting, the court noted that the report was made before the discharge injunction "and was not combined with other post-discharge injunction collection efforts, such as refusal to correct the credit report." *Id.* at *24-25. Moreover, the debtors were not without a remedy, because the Fair Credit Reporting Act allows debtors to dispute inaccurate information. Acknowledging that in the appropriate case, creditors could be sanctioned for failing to remove an avoided mortgage from the land records or for providing inaccurate information to a CRA, the court in *Dendy* nevertheless declined to impose sanctions on the creditor.

In this case, the confirmation order clearly reduced the Credit Union's secured claim and allowed the Debtor to make payments on that claim through the Chapter 13 plan. Yet in May 2008, the Credit Union reported the balance of the original amount of the claim to the CRAs, and has continued to report that the Debtor's account is greater than 120 days delinquent. Unlike in

Dendy, the Debtor requested that the Credit Union correct the report to show the true balance of the account and to reflect that the payments are not 120 days late, but the Credit Union refused. The Credit Union argues without citation to any authority that it is entitled to report the status of the original loan, even though the amount and payment requirements on that original loan have been changed by a court order. The Credit Union cites a Utah Bar Journal article for the proposition that the credit industry does not recognize a confirmed Chapter 13 Plan as a contract novation. Paul Toscano, *Reflections on Poverty, Bankruptcy, and Heresy*, 18 Utah Bar J. 20, 22-23 (2005). However, that article contains no citation to any precedent suggesting that this practice is appropriate. In reviewing the Debtor's May 2008 credit report, the Court notes that none of the other creditors affected by the bankruptcy are reporting that the Debtor is past due based on the terms of their original loans with the Debtor. Either the creditors are not reporting at all to the CRAs, are reporting the accounts as closed, or are reporting the accounts as "OK". Accordingly, the Utah Bar Journal's premise is undermined in this case, as the Credit Union is apparently the only creditor which has failed to alter its reporting to reflect the Debtor's bankruptcy.

The Credit Union states that it reported the Debtor's payment history as it did for two reasons: "to be accurate and to place credit decisions on a better-informed basis." However, it is not accurate to state that the balance on the Debtor's debt was \$4,080 when it was actually \$1,293, and it is not clear how creditors will be better informed when they see in one part of the report that the Debtor filed Chapter 13 bankruptcy and in another that the Debtor is 120 past due for 48 months with the Credit Union. In the Court's experience, it is common for debtors to utilize Chapter 13 to try to establish a track record of payments in order to refinance, obtain more favorable loan terms and rehabilitate their credit when they emerge from bankruptcy. Allowing creditors like the Credit Union to report the original amount of the loan and that the plan payments are excessively late based on the original loan terms undermines this effort, and is contrary to the spirit and purpose of Chapter 13, which is to allow debtors to reorganize and pay their creditors over time under a court supervised plan. Moreover, if the Debtor here were able to secure the refinancing, the unsecured claims presumably would receive a dividend (the Trustee's report indicates that this is a 100% plan), and it is unclear why the Credit Union would not want to facilitate that result by either reporting that the Debtor's payments are "OK" under the Chapter 13 plan or not reporting at all, as other creditors apparently have done.

The Credit Union's reliance on cases holding that there is no violation of the discharge injunction when a creditor fails to update credit information is misplaced. Those cases often turn on the distinction between the debtor's personal liability for the debt and the existence of the debt itself. *See, e.g., Irby, supra*. Moreover, a number of cases construe a deliberate refusal to correct information as a violation of the discharge injunction. *See McKenzie-Gilyard v. HSBC Bank Nev., N.A.*, 2008 U.S. Dist. LEXIS 50262 (E.D.N.Y. June 30, 2008) (reconciling *In re Torres, supra*, and *Bruno v. First USA Bank, N.A. (In re Bruno)*, 356 B.R. 89 (Bankr. W.D.N.Y. 2006). This case involves the affirmative action of a creditor bound by a Chapter 13 plan in reporting the original amount of the loan as due when the loan has been reduced by the confirmation order and reporting delinquencies that ignore the fact that the Credit Union has received plan payments from the Trustee every month. The Credit Union's affirmative actions here are distinguishable from the Chapter 7 cases in which a creditor fails to update a report to include the debtor's discharge.

Arguably, the Debtor should have followed the steps in the Fair Credit Reporting Act (the “Act”) to address this problem. Title 15 U.S.C. § 1681s-2(a) imposes upon furnishers of credit a duty to provide accurate information. The section states: "A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A). In addition, the Act imposes a duty to correct and update information:

A person who - (A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and (B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

15 U.S.C. § 1681s-2(a)(2). However, liability for any violations does not result until a CRA reports an inaccuracy and the furnisher fails to correct the error. *See, e.g., Davis v. Farm Bureau Bank*, 2008 U.S. Dist. LEXIS 52241 (W.D. Tex. Apr. 30, 2008). Under the Act, if a consumer notifies a CRA of the dispute concerning information reported on the credit report, the agency must conduct a “reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file . . . before the end of the 30-day period.” 15 U.S.C. § 1681i(a)(1). Although it appears that the Debtor could proceed under the Fair Credit Reporting Act, the Debtor may also seek to hold the Credit Union in contempt for failure to comply with the confirmation order. The Debtor’s failure to notify the CRAs of the inaccurate information provided by the Credit Union may impact the amount of the Debtor’s damages, but does not prevent the Debtor from enforcing the confirmation order. *See Norman v. Applied Card Sys. (In re Norman)*, 2006 Bankr. LEXIS 2576 (Bankr. M.D. Ala. Sept. 29, 2006) (refusing to dismiss complaint for violation of discharge injunction where debtor had not notified CRA of dispute).

The Credit Union points out that the Debtor had a copy of her credit report for two years showing that the Credit Union was reporting the payments as 120 days past due, but waited until the eve of the end of her plan to bring this Motion. Moreover, the Credit Union correctly notes that neither the plan nor the order confirming the plan expressly requires the creditors to report plan payments to CRAs. In a plan which depends on a balloon payment at the end in order to satisfy the claims, such a provision would be wise. On the other hand, the confirmation order should not have to tell a creditor whose claim has been reduced or payment stream altered to report the correct amount and payment history to the CRAs; the creditor is bound by the confirmed plan to the new provisions, and if the creditor is going to report at all, the creditor should report the pendency of the bankruptcy or the history of the payments under the plan.

Based on the reasoning of *Dendy*, *Sommersdorf*, and *Torres*, the Court concludes that the Credit Union did violate the confirmation order by its affirmative reports to CRAs. Just as a

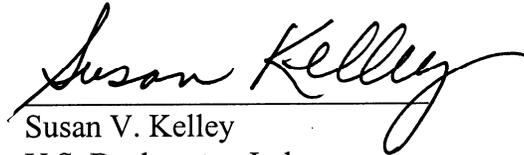
creditor can violate the discharge injunction for deliberately refusing to submit accurate information, the confirmation order prevents those same actions during the course of the Chapter 13 case. *See McKenzie-Gilyard*, 2008 U.S. Dist. LEXIS 50262. When the Credit Union reports that the Debtor owes amounts according to the original loan, those reports are not accurate, and violate the confirmation order. *See Dendy*, 2008 Bankr. LEXIS 1845 at *17-18.

Given all the facts and circumstances, including the Credit Union's apparent good faith belief that it was properly reporting this debt, the remedy is for the Credit Union to cause the CRAs to remove the disputed information. If the Credit Union is going to report on this debt and the receipt and timeliness of payments (and the Court is not suggesting that this is required), then the claim as altered by the confirmed plan, rather than the original loan agreement, should form the basis for the report. If the Credit Union fails to cause the removal of the disputed information from the Debtor's credit report within 60 days of the date of this Order, the Debtor can renew her motion and seek additional sanctions. The Debtor's deadline for completing her plan is hereby extended until 120 days from the date of this Order to provide her with time to refinance her mortgage following the removal of the disputed information from her credit report.

IT IS SO ORDERED

Dated: July 31, 2008

By the Court:

A handwritten signature in cursive script that reads "Susan V. Kelley". The signature is written in black ink and is positioned above a horizontal line.

Susan V. Kelley
U.S. Bankruptcy Judge