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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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IN RE: CASE NO. 06-69445

Michael Lawrence Leaks,

Debtor. CHAPTER 13
JUDGE MASSEY
_____| |

ORDER DENYING CONFIRMATION OF PLAN

Debtor Michael Leaks in his Chapter 13 plan proposes to surrender a car in full satisfaction of the purchase money debt owed to Kia Motor Finance Company ("KMFC") secured by that car, even though the car is worth less than the amount of the debt. KMFC, which obtained stay relief, repossessed the car and sold it, objects to the plan because it does not provide for payment of the deficiency claim.

Section 1325(a)(5) of the Bankruptcy Code provides three alternatives that a plan may propose for dealing with a secured claim. If the proposed surrender of the car in satisfaction of the debt passes muster under that section, the Court may confirm the plan over KMFC's objection.

The Debtor bases his plan on his interpretation of the so-called hanging paragraph at the end of section 1325(a). The hanging paragraph, added as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), applies in cases filed on and after October 17, 2005. It provides that in determining whether a plan satisfies section 1325(a)(5), section 506 does not apply to a claim of a creditor holding a purchase money security interest in a motor vehicle acquired for the debtor's personal use within 910 days of the bankruptcy filing ("a 910-day car"). The effect of making section 506 inapplicable to a claim secured by a 910-day car

is that the claim of an undersecured creditor may not be bifurcated into a secured portion and an unsecured portion. The purpose of the provision is to require a debtor desiring to retain a 910-day car under section 1325(a)(5)(B) to distribute to the creditor property with a present value not less than the full amount of the claim and not (as under pre-BAPCPA law) just property having the value of the car. Thus, the hanging paragraph prevents a debtor desiring to retain the car from shifting to the creditor the loss attributable to the decline in the value of the car between the time of the purchase and the effective date of the Chapter 13 plan.

The Debtor contends that because KMFC's undersecured claim cannot be bifurcated into a secured claim equal to the value of the car and an unsecured claim for the balance of the debt, the hanging paragraph eliminates deficiency claims altogether with respect to 910-day cars. He asserts that it follows from the elimination of deficiency claims that he may surrender the car in full satisfaction of the debt. This argument fails for the reasons stated in *In re Particka*, 2006 WL 3350198 (Bankr. E.D. Mich. 2006), which will not be repeated here.

To the reasons set forth in *Particka*, this Court adds the following analysis. Section 1325(a) provides that a court "shall confirm" a plan satisfying the conditions set forth in that section. Section 1325(a)(5) provides three options for the treatment of an allowed secured claim: acceptance of the plan by the creditor, payment of the present value of claim or surrender of the collateral. A particular plan provision may satisfy one of these alternatives and thereby make the plan confirmable, even if it does not satisfy a different alternative.

The third alternative, surrender, entails turning over the car to the creditor – in effect abandoning the car. Specifying in the plan the effect of surrender of a car on the amount or nature of the claim is not necessary in order to surrender it. Section 1325(a)(5)(C) provides only for

surrender and not for surrender in satisfaction of the claim. If surrender of a car satisfied the claim, there would be, by definition, no need to mention satisfaction of the claim in the plan. The act of surrender neither values the collateral nor pays the claim. Surrender merely removes the property from the estate, thereby rendering the entire claim unsecured for bankruptcy purposes, notwithstanding that under state law, the holder of the claim retains a security interest in the collateral. Although by its terms the hanging paragraph applies to section 1325(a)(5)(C), that application has no consequences, any more than the hanging paragraph affects treatment that a secured creditor accepts under section 1325(a)(5)(A).

A Chapter 13 plan proposing to surrender a car in satisfaction of debt is, therefore, a plan to distribute property on account of the secured claim pursuant to section 1325(a)(5)(B) rather than a naked surrender under section 1325(a)(5)(C), notwithstanding the plan's use of the word "surrender." Under section 1325(a)(5)(B), a plan may be confirmed if it proposes to distribute on account of a secured claim, property having a value "not less than the allowed amount of the claim." Hence, if the Debtor had wanted to retain the 910-day car and had proposed to make periodic cash payments, the present value of those payments could not be less than the amount of KMFC's claim. 11 U.S.C. § 1325(a)(5)(B)(iii). If the Debtor owned a different automobile having a value not less than KMFC's claim, he could have proposed to distribute that property to satisfy KMFC's claim under section 1325(a)(5)(B)(ii). But if the other automobile were worth less than the amount of KMFC's claim, the plan would not be confirmable without KMFC's consent.

Instead of distributing a different automobile or periodic cash payments with a value equal to KMFC's claim, the Debtor proposes to distribute to KMFC the 910-day car in which KMFC

had a security interest as of the confirmation hearing. It is undisputed that the value of that car is less than the amount of debt owed to KMFC. For that reason, the Debtor may not distribute the car to eliminate the entire debt under paragraph (B).

The requirement that a debtor pay the present value of the claim to retain a 910-day car under section 1325(a)(5)(B), based on the hanging paragraph, does not compel as a matter of logic the conclusion that Congress intended to equate the value of the collateral to the amount of the debt. Rather, by preventing bifurcation of such a claim, Congress signaled that the present value of the claim had to be paid as the price of retention in spite of the lower value of the car. *Cf.* 11 U.S.C. § 1322(b)(2) (providing that a plan may not modify rights of a holder of a claim secured by the debtor's residence, thereby preventing a plan from reducing the amount of the secured claim to the value of the residence without the secured creditor's consent.). Enforcing section 1325(a)(5)(B) as written to require that any 910-day car distributed to pay the claim that it secures have a value not less than the amount of the claim is consistent with the policy of requiring full payment for retention. For these reasons, it is

ORDERED that confirmation of Debtor's plan is DENIED without prejudice to Debtor's prompt amendment of his plan.

Dated: December 21, 2006.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE