



The relief described hereinbelow is SO ORDERED.

Signed October 10, 2008.

A handwritten signature in black ink that reads "Robert D. Berger".

ROBERT D. BERGER
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**HEATHER DAWN MCCLAY,
Debtor.**

**Case No. 07-20106
Chapter 13**

ORDER SUSTAINING OBJECTION TO CHAPTER 13 PLAN

Ford Motor Credit Company ("FMCC") objects to confirmation based on the plan's treatment of its 910-car claim.¹ This matter constitutes a core proceeding² over which this Court has jurisdiction.³ Based on the parties' stipulation of facts and arguments of counsel, the Court sustains FMCC's Objection to Confirmation.

Factual Background

Debtor purchased a 2005 Mercury Monterey for her personal use during the 910 days preceding her January 22, 2007, bankruptcy filing. At the time of filing, the contract balance was \$22,807.62. Debtor scheduled \$18,000.00 as the vehicle's value.

¹ Doc. No. 25.

² 28 U.S.C. § 157(b)(2)(L).

³ 28 U.S.C. § 1334.

Debtor's plan proposes to pay FMCC the contract balance as of the petition date, but the plan does not provide for postpetition interest. The plan also provides Debtor may, at her option, surrender the vehicle post-confirmation in full satisfaction of FMCC's claim. FMCC objects to the plan pursuant to the last sentence of 11 U.S.C. § 1325(a) commonly referred to as the hanging paragraph⁴ and argues Debtor must pay the contract balance plus postpetition interest. FMCC further argues that upon surrender of its collateral, 11 U.S.C. § 1325(a)(5)(C) requires the sale proceeds be applied as a payment toward the contract debt under state law with any remaining deficiency being an allowed unsecured claim. Debtor responds that FMCC's claim may not be valued into secured and unsecured components; thus, surrender of the collateral under §1325(a)(5)(C) satisfies the claim in full.

Discussion

Pursuant to *Jones*, FMCC is entitled to postpetition interest.⁵ Pursuant to *Ballard*, the Debtor must provide for any deficiency if the vehicle is surrendered.⁶ Since Debtor's plan does not provide for either, the plan cannot be confirmed.

Further, Debtor's proposed plan seeks both to retain the collateral at confirmation and reserve a unilateral right to surrender the collateral post-confirmation without a motion to modify. Debtor offers no authority to maintain the threshold option throughout the plan either to retain and pay for the vehicle or surrender the vehicle. Debtor may not preemptively obtain §1329 plan modification approval at her initial §1324 confirmation hearing. If a debtor needs to

⁴ The last sentence of § 1325(a) reads: "For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing."

⁵ *In re Jones*, 530 F.3d 1284 (10th Cir. 2008).

⁶ *In re Ballard*, 526 F.3d 634 (10th Cir. 2008).

deviate from a confirmed plan, the Code and Rules require the debtor to file a request to modify a plan pursuant to §1329.⁷ Section 1329 permits a debtor to propose a modified plan after confirmation. However, approval under §1329 is often predicated upon an unanticipated, substantial change in circumstance affecting the debtor's ability to pay and the debtor's good faith in proposing the modification.⁸ Regardless, to include in effect a future modification in the initial plan asks the Court to preemptively approve the Debtor's post-confirmation modification of her plan. Such a maneuver bypasses the proper motion and notice procedure required by the Code and relieves the Debtor from her burden to obtain the modification.

In this case, Debtor offers no explanation as to why she may want to keep the vehicle for an undisclosed period of time and then surrender it to FMCC. Debtor does not suggest a time line as to when or if this contingency might occur. In fact, the Debtor may not even invoke the option to surrender the vehicle. Under these circumstances, the matter is not a justiciable controversy.⁹

Conclusion

FMCC's Objection to Confirmation is SUSTAINED. The Debtor shall have 20 days to file an amended plan in conformity with this Order.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS

⁷ Fed. R. Bankr. P. 3015(g).

⁸ See, e.g., *In re Knappen*, 281 B.R. 714, 716 (Bankr. D.N.M. 2002); *In re Belcher*, 369 B.R. 465, 467-68 (Bankr. E.D. Ark. 2007); *In re Lane*, 374 B.R. 830 (Bankr. D. Kan. 2007); *In re Arnold*, 869 F.2d 240, 241 (4th Cir. 1989); *In re Murphy*, 474 F.3d 143 (4th Cir. 2007); *In re Welch*, slip op., 1998 WL 773999 (6th Cir. 1998); but see *Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000) (substantial and unanticipated change not required).

⁹ See, e.g., *In re Quick*, 360 B.R. 722, 727, n.8 (Bankr. N.D. Okla. 2007) (questioning the ripeness of the surrender in full satisfaction issue when the record did not reflect a deficiency yet existed).