

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:07-bk-06333-ABB
Chapter 13

ROBERT S. PAINTER,

Debtor.

ORDER

This matter came before the Court on the Second Amended Chapter 13 Plan (Doc. No. 38) ("Plan") filed by Robert S. Painter, the Debtor herein ("Debtor"), and the Objection to Confirmation (Doc. No. 24) ("Objection") filed by US Bank, a creditor herein. The confirmation hearing was held on June 11, 2008 at which Laurie K. Weatherford, the Chapter 13 Trustee, and counsel for US Bank appeared. US Bank was directed to file a post-hearing brief within fourteen days of the hearing and the Debtor was granted an opportunity to respond. A post-hearing brief was submitted by US Bank (Doc. No. 51) to which the Debtor did not respond.

US Bank's Objection to Confirmation

The Debtor filed this case on December 7, 2007 ("Petition Date"). He purchased a new 2006 Jeep Wrangler ("Vehicle") on July 14, 2006, which purchase date was within 910 days of the Petition Date. The Retail Installment Sale Contract executed by the Debtor sets forth the Vehicle's primary use is "personal, family or household."

US Bank financed the purchase and holds a purchase money security interest in the Vehicle. The Debtor valued the Vehicle at \$20,000.00 in Schedule B. US Bank filed a proof of claim (Claim No. 2) asserting a secured claim of \$29,092.03.¹ The Debtor did not file an objection to or seek to modify Claim No. 2.

US Bank filed a motion seeking relief from the automatic stay of 11 U.S.C. Section 362 and the Debtor consented (Doc. No. 28) to stay relief with the proviso that no *in personam* relief

¹ US Bank also filed an unsecured claim, Claim No. 5, for \$17,297.57 relating to a credit card account.

be sought against the Debtor while he is in bankruptcy "except to the extent of filing an unsecured deficiency proof of claim" by US Bank. A stay relief Order was entered (Doc. No. 32) permitting US Bank to obtain *in rem* relief against the Vehicle and no *in personam* relief against the Debtor. The Debtor surrendered the Vehicle.

The Debtor filed his Second Amended Plan ("Plan") which provides the surrender of the Vehicle fully satisfies Claim No. 2. US Bank asserts in its Objection it is entitled to an unsecured deficiency claim in the event of surrender of the Vehicle and, to the extent the Plan precludes such a deficiency claim, it violates Sections 1325(a)(1) and 1325(a)(5) of the Bankruptcy Code.

US Bank filed unsecured Claim No. 7 for \$13,162.85 stating such amount represents the "estimated unsecured deficiency" relating to the Vehicle pursuant to 11 U.S.C. Section 502(c). It reserved the right to amend Claim No. 7 "to set forth the actual deficiency amount once determined."

Section 1325 of the Bankruptcy Code sets forth the standards for confirmation of a Chapter 13 plan. Subsection 1325(a)(5) addresses allowed secured claims and provides for two alternative methods for treatment of a creditor holding an allowed secured claim who has not accepted the plan. A debtor may either retain and pay for the collateral or surrender the collateral securing the claim. 11 U.S.C. §§ 1325(a)(5)(B), (a)(5)(C) (2005).

The Bankruptcy Abuse and Consumer Protection Act of 2005 amended Section 1325 by adding a new, unnumbered "hanging" paragraph following Section 1325(a)(9) which provides:

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.

11 U.S.C. § 1325(a)(*) (2005).

Section 506(a) sets forth an “allowed claim of a creditor secured by a lien on property in which the estate has an interest” can be bifurcated into secured and unsecured amounts, with the secured portion equaling the present value of the collateral and an unsecured portion equaling the debt in excess of the collateral’s value. 11 U.S.C. § 506(a).

The Eleventh Circuit Court of Appeals recently held a debtor’s surrender of a 910-vehicle constitutes does not constitute full satisfaction of the secured creditor’s debt and the creditor may pursue a deficiency claim. Barrett v. DaimlerChrysler Fin. Serv. Am. LLC v. Barrett (In re Barrett), __ F.3d __, 2008 WL 4378739, at *7 (11th Cir. Sept. 29, 2008). “The deficiency claim is to be governed by the parties’ contract and applicable state law, and will depend on whether the contract and state law provide for recourse.” Id.

The Vehicle constituted property of the estate on the Petition Date pursuant to 11 U.S.C. Sections 541(a) and 1306(a). US Bank, pursuant to 11 U.S.C. Sections 502(a) and 506(a)(1), held an allowed secured claim, Claim No. 2, by virtue of its purchase money security interest in the Vehicle. The Debtor surrendered the Vehicle pursuant to Section 1325(a)(5)(C). US Bank’s secured claim was not fully satisfied by the surrender of the Vehicle pursuant to In re Barrett. The Debtor has not fulfilled the requirements of Section 1325(a)(5) with respect to US Bank’s secured claim by surrendering the Vehicle.

US Bank’s Objection is due to be sustained.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that US Bank’s Objection (Doc. No. 24) is hereby **SUSTAINED**; and it is further

ORDERED, ADJUDGED and DECREED that US Bank’s Claim No. 2 is hereby **DISALLOWED**; and it is further

ORDERED, ADJUDGED and DECREED that US Bank, within twenty-one (21) days of the entry of this Order, shall file and serve on the Debtor a proof of claim amending Claim No. 7 to reflect any actual deficiency claim it may hold and the Debtor shall file and serve on US Bank, within fourteen (14) days of the filing of such claim, any objection thereto.

Dated this 7th day of October, 2008.

/s/Arthur B. Briskman

ARTHUR B. BRISKMAN
United States Bankruptcy Judge