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11 U.S.C. § 1325(a)(5)(B)(ii)

11 U.S.C. § 1325(a)(5)(C)

11 U.S.C. § 506

Hanging Paragraph of 11 U.S.C. § 1325(a)(5)

Creditor objected to Debtors' proposed Chapter 13 plan which provided for surrender of Creditor's collateral in full satisfaction of its claim. The claim at issue was secured by a purchase money interest in a motor vehicle acquired by the debtors for their personal use within 910 days of the bankruptcy filing. As such, the claim was subject to the anti-cramdown provision of the "hanging paragraph" added to the Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This paragraph prohibits a chapter 13 debtor from using section 506, which allows bifurcation of claims into secured and unsecured components, to cram down the value of collateral for chapter 13 plan purposes if the collateral is of a kind described in the paragraph.

The debtors argued that because the anti-cram down provision of the hanging paragraph eliminates § 506 from any application to § 1325(a)(5), there can no longer be a deficiency claim following surrender of a creditor's collateral under § 1325(a)(5)(C) because that claim is treated as fully secured, regardless of any lesser amount the creditor might receive on liquidation of the collateral.

The court agreed, rejecting the creditor's argument that the hanging paragraph was not intended to prevent a creditor from asserting an unsecured claim for a deficiency following liquidation of surrendered collateral. It noted that under § 1325(a)(5) a debtor could either elect to retain collateral securing a debt and pay that debt through his chapter 13 plan or surrender the collateral. It further noted that the plain language of the hanging paragraph provides that § 506 is inapplicable "for purposes of paragraph (5)" without distinguishing between plans under which the debtor elects to retain collateral and those in which the debtor elects to surrender collateral. Consequently, the court concluded that the hanging paragraph applied regardless of whether the debtor intended to retain or surrender collateral.

Below is an Opinion of the Court.

  
TRISH M. BROWN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re )  
MICHAEL EVAN POOL and ) Case No. 306-30965-tmb13  
JUANDA MARIE POOL, )  
Debtors. ) MEMORANDUM OPINION

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This matter came before the court on September 7, 2006, for a hearing on confirmation of the Debtors' proposed 2nd Amended Chapter 13 Plan Dated July 31, 2006 ("Plan"). All objections to confirmation had been resolved except the objection raised by Fred Meyer Employees Credit Union (hereinafter "Fred Meyer"). The Debtors were represented by Michael O'Brien. Fred Meyer was represented by Michelle Bertolino.

This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. §§ 151 and 157(b)(2)(B) and (L). This memorandum opinion constitutes the court's findings of facts and conclusions of law in accordance with Fed. R. Bankr. P. 7052. For the reasons set forth herein, Fred Meyer's objection is overruled.

FACTS

The facts are undisputed. The debtors filed their chapter 13 bankruptcy petition on April 18, 2006,

1 after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005  
2 (“BAPCPA”). Within 910 days of the filing of the petition, debtors purchased two vehicles: a 2004 Ford  
3 truck (“Ford”) and a 2005 Mercury Mariner Sport (“Mercury”). The Ford and the Mercury were pledged to  
4 Fred Meyer and its liens were perfected. The Plan provided that debtors will retain the Ford and pay the full  
5 amount of the claim secured by that vehicle with interest at the contract rate of 4.25%. The Plan also  
6 provides for surrender of the Mercury to Fred Meyer. It further provides that Fred Meyer’s claim with  
7 respect to the Mercury “is a fully secured claim attached to a motor vehicle incurred within the 910 days  
8 preceding the date of the petition. Fred Meyer EFCU shall be entitled to recovery of the vehicle upon  
9 surrender but shall NOT be entitled to file a deficiency claim in this case.” (emphasis in original).

10 Fred Meyer did not object to the plan treatment for the Ford, but did object to the plan treatment for  
11 the Mercury. Fred Meyer contended under the Bankruptcy Code, as amended by BAPCPA, it should be  
12 allowed to amend its secured claim to an unsecured claim for any deficiency balance after sale of the  
13 Mercury.

#### 14 ISSUE

15 The only issue before the court is whether 11 U.S.C. § 1325(a)(5) allows the Debtors to surrender the  
16 Mercury in full satisfaction of their debt to Fred Meyer or whether Fred Meyer is entitled to assert any  
17 unsecured deficiency claim after its collateral is surrendered and liquidated in a commercially reasonable  
18 manner.

#### 19 DISCUSSION

20 Sections 1325(a)(5)(B)(ii) and (C) of the Bankruptcy Code provide in pertinent part:

21 “(a) Except as provided in subsection (b), the court shall confirm a plan if—

22 . . . .

23 (5) with respect to each allowed secured claim provided for by the plan—

24 . . . .

25 (B)(I) the plan provides that—

26 . . . .

1 (ii) the value, as of the effective date of the plan, of property to be distributed under  
2 the plan on account of such claim is not less than the allowed amount of such claim . .

3 ..

4 . . . or

5 (C) the debtor surrenders the property securing such claim to such holder . . .”

6 Prior to the enactment of BAPCPA, the Bankruptcy Code allowed a debtor to “cram down” the amount of  
7 the secured claim to the value of the collateral and pay the remainder as a general unsecured claim.

8 Likewise, a creditor to whom collateral was surrendered under a confirmed plan retained an unsecured claim  
9 for any deficiency remaining after sale of its collateral.

10 BAPCPA amended the Bankruptcy Code with respect to this subsection to provide:

11 “For purposes of paragraph (5), section 506 shall not apply to a claim described in that  
12 paragraph if the creditor has a purchase money security interest securing the debt that is the  
13 subject of the claim, the debt was incurred within the 910-day preceding the date of the filing  
14 of the petition, and the collateral for that debt consists of a motor vehicle (as defined in  
15 section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that  
16 debt consists of any other thing of value, if the debt was incurred during the 1-year period  
17 preceding that filing.”

18 This amendment to the Bankruptcy Code was not numbered and has been commonly referred to as the  
19 “hanging paragraph” or the “anti-cramdown” paragraph.

20 A number of courts have addressed the issue of whether a creditor covered by the anti-cramdown  
21 provision of the hanging paragraph is entitled to a deficiency upon surrender and liquidation of its collateral.  
22 With one exception, all have concluded that such a creditor is not entitled to a deficiency upon surrender of  
23 its collateral.

24 The lead case on this issue is In re Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006). In Ezell, the  
25 debtors filed a plan which provided for surrender of a vehicle purchased by debtor Regina A. Ezell for her  
26 personal use within 910 days of the bankruptcy filing. The debtors’ proposed plan provided for surrender of  
the vehicle “in full satisfaction of debt owing.” Id. at 332. JP Morgan Chase Bank, N.A., the affected  
creditor, objected to confirmation on the grounds that the provision providing that it would have no  
deficiency claim following surrender of its collateral was inappropriate.

1 In support of their position the debtors argued that “because the Anti-Cramdown Paragraph  
2 eliminates Revised § 506 from any application to Revised § 1325(a)(5) . . . there can no longer be a  
3 deficiency claim following surrender of the collateral because Chase's claim is fully secured, notwithstanding  
4 any lesser amount that Chase might, in fact, realize upon its liquidation of the [vehicle] following surrender.”  
5 Id. at 335. For its part, Chase contended that “because the Anti-Cramdown Paragraph expressly provides  
6 that Revised § 506 does not apply to Revised § 1325(a)(5), its claim remains fully secured by the [vehicle]  
7 following its surrender, with the result being that any deficiency balance up to the amount of its \$24,942.07  
8 claim remains secured and must be treated as such in the Debtors' Plan.” Id. at 335. Allowed interveners,  
9 consisting of various lending institutions, contended that “the inapplicability of Revised § 506 under the  
10 Anti-Cramdown paragraph is irrelevant, as that statute never applied in cases involving surrender under Pre-  
11 BAPCPA § 1325(a)(5)(C). According to this argument, the Anti-Cramdown Paragraph changes nothing, and  
12 secured creditors to whom property is surrendered under Revised 1325(a)(5)(C) are still entitled to an  
13 unsecured deficiency claim following disposition of their collateral.” Id. at 335.

14 The court rejected the argument that § 506 did not apply to cases involving surrender of property  
15 prior to the enactment of BAPCPA. In doing so it stated:

16 “Section 506 is to be applied by bankruptcy courts when a party in interest objects, pursuant  
17 to § 502, to the value of a proof of secured claim filed by a creditor in the bankruptcy  
18 proceedings . . . . It is clear then that § 506 is designed to determine the value and amount of  
19 a creditor's secured claim when the creditor's claim is undersecured in relation to the property  
20 securing the debt. In order to achieve its given purpose, § 506(a) divides or bifurcates allowed  
21 claims into two parts: (1) a secured claim to the extent of the value of [the collateral]; and (2)  
22 an unsecured claim to the extent the value of [the collateral] is less than the amount of such  
23 allowed claim.

24 Pre-BAPCPA § 1325(a)(5), as does Revised § 1325(a)(5), dictated the treatment to be  
25 accorded an allowed secured claim if the debtor was to obtain confirmation of the Chapter 13  
26 plan. Although Pre-BAPCPA § 1325(a)(5)(B) and Pre-BAPCPA § 1325(a)(5)(C) provided  
different remedies and were mutually exclusive, both relied upon Pre-BAPCPA § 506(a) to  
bifurcate a creditor's claim into its allowed secured and allowed unsecured components.” Id.  
at 338. (citations omitted)

The court went on to state:

“The argument that Pre-BAPCPA § 506(a) had no application to surrender under  
Pre-BAPCPA § 1325(a)(5)(C) is misplaced. Valuation of a creditor's allowed secured claim  
under Pre-BAPCPA § 506(a) was ‘determined in light of the purpose of the valuation and of

1 the proposed disposition or use of such property . . . ’ 11 U.S.C. § 506(a) (2004). Upon  
2 surrender under Pre-BAPCPA § 1325(a)(5)(C), liquidation value was clearly the yardstick by  
3 which the allowed secured claim was determined, while, for cramdown purposes under  
4 Pre-BAPCPA § 1325(a)(5)(B), replacement value was the criteria.” Id. at 339-340.

5 With respect to BAPCPA the court stated that:

6 “The Anti-Cramdown Paragraph serves to eliminate Revised § 506 from the allowed  
7 secured/unsecured claim bifurcation treatment otherwise mandated by Revised § 506 with  
8 regard to those claims secured by "a motor vehicle" and "any other thing of value" falling  
9 within its provisions. In other words, when the creditor files its claim as secured, the  
10 Anti-Cramdown Paragraph precludes the use of Revised § 506(a) to reduce or bifurcate that  
11 claim into secured and unsecured components. Unless the amount of the claim is subject to  
12 reduction for reasons other than collateral value, the creditor's allowed secured claim is fixed  
13 at the amount at which the claim is filed. Accordingly, under Revised § 1325(a)(5), a creditor  
14 holding a secured claim falling within the scope of the Anti-Cramdown Paragraph is fully  
15 secured for the amount of its claim, which is, in actuality, the debt owed. If the property is to  
16 be retained pursuant to Revised § 1325(a)(5)(B), the debtor must treat the entire claim as  
17 secured, and unless the creditor agrees to other treatment, must propose a plan that will pay  
18 the full amount of the claim as secured over the life of the plan. It only stands to reason that  
19 the same analysis is true when applied to surrender under Revised § 1325(a)(5)(C) --the  
20 creditor is fully secured, and surrender therefore satisfies the creditor's allowed secured claim  
21 in full.” Id. at 340.

22 The Ezell court then looked to the legislative history of the anti-cram-down provision and found that  
23 it consisted only of “statements of Congressional intent, which basically mirror the statutory language” and  
24 provided “no further clarification.” Id. at 341. Consequently, it concluded that it had “no choice but to  
25 interpret the Anti-Cramdown Paragraph as written, i.e., that it applies to both Revised § 1325(a)(5)(B) and  
26 (C).”

27 The Ezell court further noted that:

28 “were the court to find that a secured creditor whose collateral has been surrendered under  
29 Revised § 1325(a)(5)(C) is entitled to file either a secured or unsecured deficiency claim, the  
30 method of determining the amount of the allowed deficiency claim would be demonstrably at  
31 odds with Revised § 506(a), which, as applied to Chapter 13 consumer debtors, directs that  
32 for purposes of valuing personal property securing an allowed claim, the value ‘shall be  
33 determined based on the replacement value of such property as of the date of the filing of the  
34 petition without deduction for costs of sale or marketing’ and, to the extent the property was  
35 ‘acquired for personal, family, or household purposes, replacement value shall mean the price  
36 a retail merchant would charge for property of that kind considering the age and condition of  
37 the property at the time value is determined.’ This method . . . cannot apply if the property is  
38 surrendered under Revised § 1325(a)(5)(C) and thereafter liquidated by the creditor in  
39 accordance with applicable state law.” Id. at 341-42 (citation omitted)

40 See, also, In re Payne, 2006 WL 2289371 (Bankr. S.D. Ohio 2006), (“[t]he plain meaning of this

1 statute, [applying the anti-cramdown provision of the hanging paragraph to both § 1325(a)(5)(B) and  
2 §1325(a)(5)(C)] cannot be overcome by silence in the legislative history.”); In re Long, 2006 WL 2090246  
3 (Bankr. E.D. Tenn. 2006) (“the court finds that the Anti-Cramdown Paragraph, as mandated by its terms,  
4 applies equally to both Revised § 1325(a)(5)(B) and Revised § 1325(a)(5)(C).” ); In re Brown, 346 B.R. 868,  
5 874 (Bankr. N.D. Fla 2006) (“[s]ince the language of the Hanging Paragraph is unambiguous, the Court must  
6 apply it as written unless doing so would yield a result that is either demonstrably at odds with congressional  
7 intent or absurd. Applying the Hanging Paragraph as written yields no such result.”); In re Sparks, 346 B.R.  
8 767, 773 (Bankr. S.D. Ohio 2006) (“[f]rom a practical standpoint, this application of § 1325(a)(5) requires  
9 the creditor to forego the opportunity to take advantage of the provisions of § 506 should it liquidate the  
10 collateral for less than the amount it is due, just as it requires the debtor to do so should the debtor decide to  
11 retain the vehicle. While this may appear to be inconsistent with the overall goals of BAPCPA to provide  
12 greater protection to creditors, the Court is not prepared to say this is an absurd result in light of the sparse  
13 guidance from Congress.”); and In re Osborn, 2006 WL 2457933 (Bankr. W.D. Mo. 2006) (“the plain  
14 language of § 1325(a)(5) and the hanging paragraph mandate that, as a matter of law, a secured creditor of  
15 the kind described in the hanging paragraph has a secured claim for the full amount due as of the date of the  
16 filing of the petition, regardless of whether the debtor intends to retain the collateral or surrender it. That  
17 being the case, these creditors are not entitled to a deficiency claim if the collateral is surrendered under  
18 § 1325(a)(5)(C).”)

19 As noted, there is one case in which the court held that the hanging paragraph did not apply to  
20 § 1325(a)(5)(C). In In re Duke, 345 B.R. 806 (Bankr. W.D. Ky. 2006) the court concluded that the language  
21 of the hanging paragraph was ambiguous. It then looked to the legislative history of the provision and  
22 concluded that “[t]he only clear intent discerned from the legislative history on the hanging paragraph is that  
23 Congress intended to provide more protection to creditors with purchase money security interests.” Id. at  
24 809. It noted that:

25 “While the changes associated with BAPCPA have been considered by many commentators  
26 and parties-in-interest to be sweeping and dramatic, the passage of an anti-deficiency is far  
beyond what a plain reading of the statute permits. Absent clear legislative intent on the face

1 of the statute, the surrender of a vehicle meeting the requirements of the ‘hanging paragraph’  
2 does not result in a full satisfaction of the Creditors’ claims, leaving to them whatever state  
3 law remedies are available to them, including pursuit of a deficiency as an unsecured claim  
during the Chapter 13 proceeding.” Id. at 809.

4 With due respect I disagree with the Duke court. I find that the language of the hanging paragraph is  
5 clear and unambiguous. As such, there is no reason to resort to review of the legislative history of the  
6 paragraph to discern its meaning. The anti-cramdown provisions of the hanging paragraph clearly state that  
7 “for purposes of paragraph (5), section 506 shall not apply . . . .” to certain creditors. Had Congress intended  
8 that the section 506 continue to apply to § 1325(a)(5)(C) it could have so stated. It did not. Consequently, I  
9 agree with the Ezell court that the hanging paragraph applies to both Revised § 1325(a)(5)(B) and (C) and,  
10 therefore, the Debtors may surrender the Mercury in full satisfaction of the debt to Fred Meyer.

11 An order confirming plan was entered by the court on September 25, 2006.

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13 cc: Michael D. O’Brien  
14 Michelle Bertolino  
15 Brian D. Lynch  
16 U.S. Trustee  
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