UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
DUANE ULIBARRI,
Debtor. No. 7-08-12268 SA

ORDER NOT DISAPPROVING REAFFIRMATION AGREEMENT

The proposed reaffirmation agreement between Debtor and Primus Automotive Financial Services (Creditor) came before the Court for a review pursuant to §524(m) of the Bankruptcy Code.[1] Doc 9. Based upon a review of the agreement and Debtor's schedules (doc 1), the Court has determined that it will not disapprove the agreement.

The form written agreement has been fully and accurately completed before being submitted to the Court.[2]

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[1] Debtor's Counsel signed Part C of the reaffirmation agreement, which constitutes evidence that Debtor was "represented by an attorney during the course of negotiating an agreement under [§524(c)]", in consequence of which the Court is not called upon to determine whether the reaffirmation agreement is in the best interest of the debtor. §524(c)(6)(A)(ii). Nevertheless, the Court notes that with the collateral value so substantially exceeding the amount of the debt, according to both Debtor and Creditor, there is no danger that in the event of non-payment and a resulting repossession of the collateral by Creditor, there would be any deficiency judgment against the Debtor.

[2] The Court considers that reaffirmation agreements (reaffirming otherwise dischargeable claims) exist largely to benefit creditors, since the agreements in effect convert non-recourse debt back into recourse debt. Section 524(f) explicitly permits a debtor to voluntarily repay a debt and nothing prevents a creditor from permitting a debtor to continue to possess and use the collateral until it is paid off. In consequence, the Court considers that it is the creditor's burden to assure that a reaffirmation agreement submitted to the Court is fully and accurately completed in accordance with §524 and Rule 4008,
(continued...)

The agreement provides for reaffirmation of $2,535.09 as of August 8, 2008 at 4.9% interest. The collateral is a 2004 Mazda 3, with an approximate retail value of $10,100. A loan to collateral value ratio of this size should mean that there would be no possibility of a deficiency judgment in the event of a repossession for nonpayment. The Court assumes that the collateral is in good working order, based on Debtor's Schedule B/25 entries which appear to contrast this vehicle with two other vehicles of the Debtor which are listed as "not running", and because the Court assumes that Counsel would not have approved the reaffirmation agreement if the collateral was not in reasonably good operating condition.[3]

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[2](...continued)
F.R.B.P. This burden is further justified by the fact that it is almost always the case that creditors, who deal with reaffirmations on a daily basis, have the requisite expertise and resources to ensure that reaffirmation agreements are correctly filled out, even if that means the creditor must return an agreement to a debtor for correction (such as Part D) before filing it with the Court. In consequence, this Court frequently disapproves or refuses to approve agreements which fail to meet the requirements of the statute or the rule. E.g., In re Neatherlin, No. 08-10465, United States Bankruptcy Court, District of New Mexico (doc 17), entered April 24, 2008. On the other hand, the Court will usually approve an agreement which provides a substantial benefit to the debtor, such as a significantly lower principal balance and interest rate which is as good as or better than debtor might be able to negotiate in the market postpetition, even if the formal requirements of the statute and rule have not been met.

[3] This is one of the questions which the Court routinely asks debtors in the course of reaffirmation hearings. In one instance, when the debtor in a case stated that her mechanic had
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The agreement correctly records on the first page that there is a presumption of undue hardship. Debtor's counsel has signed Part C but, quite reasonably, not checked either box, presumably because while it is clear that there is a presumption of undue hardship, Counsel is not sure that Debtor can make the payments. Debtor represents in Part D that he has monthly net income of $1,339 and monthly expenses of $1,626, "leaving $0 [sic] to make the required payments on this reaffirmed debt." (Obviously the correct resulting figure is negative $287, which would match exactly the figures from Schedules I and J ($1,339.05 - $1,626 = <$286.95>).) Debtor adds as an explanation the following:

> Debtor lives with mother in paid-for home, shares living expenses and can adjust expense down as needed. Small balance remaining and monthly payment is better than he can get on a replacement vehicle. 4.9% interest rate.

Technically this explanation does not identify additional sources of funds to make the payments, as required by §524(m), suggesting that the Court should conduct a hearing to disapprove the agreement. But, as illustrated above in note 2, the Court retains discretion to approve or not disapprove an agreement which materially benefits the debtor. In this case, not only

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[3](...continued)
told her that the lifters ("a cam or other device used for lifting an engine valve" -- Webster's Third New International Dictionary Unabridged 1307) in her vehicle would be going out within sometime between a few months and a couple of years, the Court refused to approve the reaffirmation agreement.

would there be no deficiency judgment against Debtor if he ceases making payments (because of Debtor's considerable equity in the vehicle), but there is the added benefit that he need not consider that he might need to be in the market for another vehicle.[4] For many debtors, already stressed by budgets that are too tight, perhaps a divorce or separation or job loss or medical crisis that has triggered the bankruptcy filing, coupled with the daily stresses of caring for children or other family members, helping with homework, preparing meals, etc., not having to spend the considerable time and energy to find another suitable vehicle and negotiate a price and financing makes it worthwhile to retain the debtor's current vehicle.[5]

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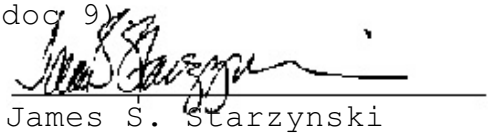
[4] In making this statement, this Court is not suggesting in any way that if a court does not approve or if it disapproves a reaffirmation agreement, the creditor has the right, whether under federal or state law, to repossess the vehicle (assuming the debtor has continued to make payments, keep the vehicle insured, etc.). See In re Husain, 364 B.R. 211 (Bankr. E.D. Va. 2007) and In re Baker, 390 B.R. 524 (Bankr. D. Del. 2008), appeal docketed U.S. District Court June 20, 2008; contra, In re Milby, 389 B.R. 466 (Bankr. W.D. Va. 2008) (bankruptcy court had no jurisdiction to declare compliance with statutory reaffirmation obligations, and alternatively finding that the debtor did not enter into the reaffirmation agreement in good faith when the debtor's only purpose was to satisfy the statutory requirements necessary to preclude the operation of §§521(a)(6) and 362(h)).

[5] Of course, a contractual obligation a debtor enters into postpetition will not be subject to the chapter 7 discharge, so that, practically speaking, a reaffirmed vehicle purchase agreement would be little different than such a postpetition vehicle contract.

For the foregoing reasons, the Court declines to disapprove the proposed reaffirmation agreement between Debtor and Primus Automotive Financial Services (doc 9).



James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: August 29, 2008

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