UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHARLENE JOHNSON Case No. 92-14114 K

Debtor

MEMORANDUM OF DECISION

At the confirmation hearing in this case, the Court ruled that the Debtor is not entitled under 11 U.S.C. § 1325(a)(5)(B) to have her car valued at only $2577 (and to have the secured claim of General Motors Acceptance Corporation to be allowed in that amount only) where the "book" value of the car is $4525 and the difference ($1948) is the amount of property damage for which the Debtor received insurance proceeds that she devoted to uses other than repair of the collateral.

The Debtor's counsel accepted the Court's offer to put its reasoning in writing. Hence this memorandum.

The Court's ruling flows from its interpretation of 11 U.S.C. § 1322(b)(2)-(6), 11 U.S.C. § 1325(a)(5), and from equity. Certainly if the Debtor were surrendering this vehicle in accordance with § 1325(a)(5)(C), the deficiency (including the amount represented by the diverted insurance proceeds) would be merely an unsecured claim.

But the Debtor has chosen to retain the car and to modify the rights of the creditor. Having so elected, the right to modify the rights of the creditor is not unrestrained. Equity commands

that to "modify" General Motors Acceptance Corporation's rights does not mean that she may enjoy the benefits of the vehicle but extinguish all of the contractual burdens other than the lien itself and the promise to pay the full amount of the value of the car and a percentage of the remainder.

This Court has on countless occasions affirmed that maintaining insurance against loss or destruction of a car may be an indispensable element of "adequate protection" under 11 U.S.C. § 361 and 362(d). It has also routinely held that if risks to the collateral are properly brought to the Court's attention at the time of confirmation, the secured creditor is entitled to the same protections under a Plan as it would be entitled to if the Court were denying a § 362(d) motion on a showing of adequate protection.

Requiring maintenance of property insurance is no protection at all if the Debtor is free to disregard the duty to apply loss proceeds to the repair of the collateral.

Here the Debtor has spent the money, and consequently the creditor has already lost the opportunity to have the proceeds applied to restoring the value of its collateral. Further the Debtor has elected to keep the car, but not to apply other income or assets to restoring its value. Finally, she has chosen to limit her commitment to her plan to 36 months. That is one benefit too many.

If she wants to keep the car and not to restore its value, then she must commit to a longer plan in order to pay the

$4525 value of the car without reduction for the property damage for which she has already "enjoyed" compensation.

Even still, the creditor is at greater risk now than if she repaired the car, for all the creditor is getting is her promise to repay the higher amount; if she defaults on her plan and the car is repossessed, the creditor has simply lost what it would have had if the car had been repaired.

No further modification is equitable.

SO ORDERED.

Dated: Buffalo, New York
January 14, 1993

U.S.B.J.