UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

JAMES & LEILANI ROSSOW — Case No. 91-13400 K

Debtor

INTRODUCTION

A creditor partially secured by a lien on a 1990 Pontiac Grand Am has objected to confirmation of the Debtors' Chapter 13 Plan on the grounds that although the Plan does propose to pay the creditor the present "value" of the vehicle over time, the value proposed to be paid is less than the full retail value of the car as a used vehicle.

At hearing at the Niagara Falls term of Court on February 20, 1992, the Court confirmed the Plan subject to amendment, if necessary, in accordance with the resolution of this dispute.

No testimony has been taken. The matter has been submitted on papers which include certain stipulated appraisal figures. (Although the creditor's brief purports to attach the appraisals, it does not.) The values reached for this vehicle are these: The debtor scheduled it at the estimated value of $7250.00; the Standing Chapter 13 Trustee valued it at $6825.00; the creditor's appraiser assigned an "actual Cash Value" of $8500.00; and the debtor's appraiser assigned a "Fair Market Value" of $8500.00 and a "Liquidation Value" of $7650.00.

BACKGROUND

Being a new Judge, I have asked the Standing Chapter 13 Trustee to describe the procedure used for valuation of autos in the thousands of Chapter 13 cases per year in which he serves. His response is attached. I have also asked the only active Bankruptcy Judge of the District who was on the Bench when this system was devised, Chief Bankruptcy Judge Beryl E. McGuire, to outline the understanding reached some 20 years ago in consultation with representatives of the auto finance industry and others, which gave rise to the system. His response is also attached.

The controversy herein appears to arise out of the fact that the 1990 Pontiac has been "appraised," by both the creditor and the debtor, at values higher than that derived in accordance with the procedure as outlined by the Chapter 13 Trustee's memo.

Although it is not entirely clear what the Court is being asked to rule on in this case,[1] I will characterize the matter as follows:

When the value of a car is to be based upon a published regional guide (whether the value is taken from the guide without appraisal, or whether there is an appraisal which employs guide value as a baseline), does 11 U.S.C. § 1325(a)(5)(B)(ii) command

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[1]It may be that I am asked to choose, without any foundation whatsoever, among (1) two stipulated appraised values ($8500 and $7500), and (2) one value ($6825) computed in the Trustee's normal manner, and (3) the $7250 value scheduled by the debtor.

use of published average "trade-in" or "wholesale" value, or does it command use of published average "retail" value, as the starting point?

So characterizing the issue before the Court, I hold that no evidence has been offered to establish that "trade-in" or "wholesale" values, after adjustment for mileage, optional equipment, condition, etc., (but without a subtractive for the cost of repossession and sale) should not be accorded treatment as prima facie evidence of the value commanded by 11 U.S.C. §1325(a)(5)(B)(ii).

ANALYSIS

The creditor's Brief states that "the parties have stipulated that the fair market value is $8,500.00 while the liquidation value is $7,650.00." Thus the brief suggests: "The proper standard of valuation becomes the issue presented to the Court."

If the parties have stipulated as to the "fair market value," then they have stipulated to permit appraisers to reach legal conclusions, and there is no issue before this Court now. I will, however, proceed to address my characterization of the papers before me, as enunciated above.

Appraised values are simply that -- "appraised values." I need no briefs or argument to conclude that "fair market value" is the appropriate "value" to use under §1325(a)(5)(B)(ii), but I

may not be bound by a stipulation that $8,500.00 becomes the "fair market value" merely because an appraiser so labels the appraisal without supporting explanation.

I am not convinced that NADA average trade-in value is not "fair market value" when referring to a typical automobile.

I am similarly not convinced that once one subtracts dealer profit and costs of value added by the dealer (such as new tires), from a "retail" price, one does not end up at what an appraiser might call "liquidation value," but what NADA or "Red Book" or similar guide might call "average trade-in" or "wholesale" value.

Hence, unless it is argued that the creditor is entitled to what a dealer would get for the car (including profit and the costs of value-added), it may be that "fair market value," "liquidation value," "trade-in value," "actual cash value" and "wholesale value" are all the same. I am offered no evidence upon which any findings could be made in this regard.

Moreover, even if I were to rule that the creditor is entitled to what it would cost the debtor to replace the vehicle, this would not mean "retail" value. If I were to suffer the repossession of, for example, a 1985 Mercury Cougar LS by the lender, it would likely have some infirmities, but could presumably be "wholesaled" for $2500 (the January 1992 NADA Guide "trade-in" value). At retail I would have to pay $3475 to "replace" it (according to NADA), but my "replacement" would likely have fewer

infirmities, would be cleaner, might have new tires and perhaps even a brief warranty or an option to buy a warranty. If I wanted to truly "replace" it, infirmity-by-infirmity, I would go to the auto auction and buy a true replacement, presumably for not much more than $2500.00.[2] The creditor who repossessed might "net" less than $2500.00.

Thus it may be that "replacement value" is also equivalent to "fair market value," "wholesale value," trade-in value," "actual cash value" or "liquidation value."

But this might not be true, as a factual matter. I am offered no evidence either way.

As a legal matter the creditor makes much of *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988), asserting that that case somehow changed the standard in its favor. The Ninth Circuit has rejected this notion.[3] I believe it has correctly done so. *Timbers* stands for the proposition that an undersecured creditor with a lien on real estate is not entitled to "adequate protection" of the use-value of the proceeds of its collateral, i.e. "interest" or "lost-

[2]It is true that a typical debtor in a case before this Court likely cannot borrow the cash needed to buy at auction. But surely a creditor cannot be entitled to a premium valuation of its collateral based upon the debtor's lack of wherewithal to replace it.

[3]*In re Mitchell*, ____F.2d ____, 1992 Westlaw 6510, 60 U.S.L.W. 2466, (Jan. 21, 1992).

opportunity costs." It seems rather incongruous to suggest that a case in which it is held that the Code does not protect the profits which an undersecured creditor might earn from wise investment of the cash of which it is being denied use, somehow also demands that an undersecured auto financer who is being denied possession of the vehicle is entitled to the opportunity to improve the vehicle or otherwise command the profit potential implicit in a "retail" valuation of an automobile.[4] Indeed it might be said (though I do not now hold) that *Timbers* raises question as to whether even a car financer who is a car dealer (and who therefore might very well have contemplated a future retail sale as part of the bargained-for exchange) would be entitled to such valuation.

CONCLUSION

The stipulated appraisals that have been offered, without explanation, to represent the appropriate value of the 1990 Pontiac Grand Am are not sufficient to overcome the prima facie evidence of value derived from making proper adjustments to the NADA "average trade-in" figure.

However, I am not certain that the debtor has not already

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[4] *In re Balbus*, 933 F.2d 246 (4th Cir. 1991) and *In re Bellamy* 122 B.R. 856 (Bkrtcy. D.Conn. 1991), cited by the creditor, stand for the proposition that hypothetical costs of sale are not to be deducted in valuing the undersecured creditor's claim, for certain purposes. As indicated above, the Trustee does not deduct the costs of repossession and sale from "Trade-in" value. Thus, his procedure accords with those cases.

stipulated to a higher figure in this case, as opposed to merely stipulating as to what the appraisers would testify if called.

I also do not know whether the decision of the parties to submit this matter on papers manifests an agreement not to offer further evidence in this dispute.

Consequently, this matter is placed back on the Court's calendar at Niagara Falls on March 19, 1992, at 10:30 a.m. for report.

SO ORDERED.

Dated: Buffalo, New York
March 5, 1992

/S/ MICHAEL J. KAPLAN

U.S.B.J.