

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

JOSEPH A. PETRO and
CATHY L. PETRO

Case No. 90-13864 K

Debtors

In this Chapter 13 case, the creditor holding a security interest in the debtor's car has sought to repossess the car because the debtors had not been making Plan payments in the full amount. Therefore, payments from the Chapter 13 Trustee to the secured creditor upon the secured portion of the claim were not being paid as provided for in the Plan. The Plan calls for the debtors to pay \$94 per week to the Chapter 13 Trustee. From July 31, 1991 to October 24, 1991, the debtors made only partial payments, typically \$30 or \$60 per week. The section 362(d) motion was filed on October 28, 1991, but on November 12, 1991, the debtors paid \$200 and they made ten \$94 payments from November 21, 1991 to January 23, 1992 (the last date of the payment record before the Court). As of January 28, 1992 they were \$1761 "short" in scheduled payments under their Plan, but were making appropriate regular payments.

This motion, filed on October 28, 1991, has been the subject of a number of adjournments, and one prior written decision. It is likely that had the debtors' payment record been as commendable before the motion was filed as it has been since, there would be no motion before the Court now (and no added \$60

filing fee expense to the creditor).

The motion properly raises the question of the effect of Plan arrearages upon a secured creditor's rights. It provides the Court with an opportunity to emphasize that so long as regular Plan payments either have resumed or will resume, a secured creditor is not harmed by a temporary lapse and an ongoing "shortage." This is because in this District the unpaid balance of the secured portion of an undersecured claim continually accrues 9% to reflect the "present value" required by 11 U.S.C. § 1325(a)(5)(B)(ii).

Thus a delay in completing a Plan does not adversely affect a secured claim (so long as the Plan is eventually completed): the total amount ultimately paid will rise in accordance with the delay.

If plan payments are being regularly made, a past lapse does not require that a § 362(d) motion be sustained. A motion to convert or dismiss may lie where cause exists under § 1307(c), such as where "shortages" render completion of the Plan within five years impossible.

Motion denied.

Dated: Buffalo, New York
February 11, 1992

/S/ MICHAEL J. KAPLAN
U.S.B.J.