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**UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA**

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BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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3 **In Re MICHAEL STEVEN TORRES,**)
4 **SR., and EUSEVIA VICTORIA**)
5 **TORRES,**)
6 **Debtors.**)
7

Chapter 13 Proceedings

Case No. BK-04-09913 CGC

**UNDER ADVISEMENT DECISION RE:
CREDITOR KEYBANK'S OBJECTION
TO FIRST AMENDED CHAPTER 13
PLAN**

8 **I. Introduction**

9 Before this Court is Creditor Keybank USA, N.A.'s ("Creditor") Objection to Confirmation
10 of Debtors' First Amended Chapter 13 Plan. Creditor complains that the First Amended Plan treats
11 Creditor inequitably under the circumstances by treating it as unsecured. The Court sustains
12 Creditor's Objection for the reasons set forth below.

13 **II. Facts**

14 The facts are not disputed. Debtors are indebted to Creditor for the purchase of a 1998
15 Dodge Stratus Sedan ("Vehicle"), by which Creditor is secured. On June 7, 2004, Debtors filed for
16 Chapter 13 Bankruptcy. At the time of the filing, Debtors listed in their Schedule J a monthly
17 expense of \$114 for auto insurance, which was required under the terms of the security agreement.
18 Debtors filed their first Chapter 13 Plan on June 18, 2004. The Plan provided for Creditor to receive
19 \$2,400.00 and 3% interest. Creditor objected and sought adequate protection. The Court sustained
20 the objection and ordered Debtors to make monthly payments of \$68.45 to Creditor.

21 On October 17, 2004, the vehicle was stolen.

22 Subsequently, Debtors filed their First Amended Chapter 13 Plan in which Debtors stated
23 they were "surrendering [their] interest in a 1998 Dodge Stratus to Keybank USA. As such, Key
24 Bank USA shall be treated and paid as an unsecured claim and any deficiency balance remaining
25 shall be discharged." Creditor objected, saying while normally it would not object to having its
26 collateral surrendered, in this case the Vehicle could not actually be physically surrendered because
27 it had been stolen and its whereabouts unknown. Therefore, it argues, Debtors cannot surrender the
28 Vehicle under 11 U.S.C. section 1325, treat it as unsecured, and discharge the amount remaining

1 owed.

2 In addition to the fact the Vehicle has disappeared, Debtors revealed at the August 3, 2005,
3 hearing that they had let the vehicle's insurance lapse post-petition because maintaining it had
4 become "impracticable," meaning there was no insurance in place at the time the Vehicle was stolen.
5 Further, Debtors never notified Creditor of this lapse in coverage.

6 **III. Analysis**

7 The issue is whether Debtors can "surrender" a piece of property they do not have and treat
8 the secured Creditor as unsecured under the Plan. Debtors maintain that physical surrender of the
9 collateral is not required to satisfy their debt. They base this assertion on case law from other
10 jurisdictions analyzing 11 U.S.C. § 1325 (a)(5)(C), which states, "Except as provided in subsection
11 (b), the court shall confirm a plan if . . . with respect to each allowed secured claim provided for by
12 the plan . . . the debtor surrenders the property securing such claim to such holder." *See In re*
13 *Gabor*, 155 B.R. 391, 394 (Bankr. N.D. Va. 1993) (allowing debtor to surrender his interest in
14 collateral and treat creditor as unsecured where "automobile was transferred involuntarily and
15 [debtor] cannot obtain possession of it" because his ex-wife had taken off with it); *In re Gilsinn*, 224
16 B.R. 710 (Bankr. E.D. Mo. 1997) (allowing debtor to surrender his interest in collateral and treat
17 creditor as unsecured under the plan where automobile disappeared). The Court disagrees and finds
18 these cases distinguishable.

19 The common thread in *Gabor* and *Gilsinn* was that the debtor was without blame in the
20 disappearance of the creditor's collateral, a factor both courts considered. In *Gilsinn*, for example,
21 the court specifically stated that it "distinguishes this case from those where debtors have hidden
22 estate assets, been less than forthright with the court or failed to offer their best efforts to locate
23 missing collateral." *Gilsinn*, 224 B.R. at 713. Further, in *Gabor*, the court noted that "to the extent
24 debtor may file a claim with his insurer and receive insurance proceeds, [the creditor's] security
25 interest may attach to those proceeds." *Gabor*, 155 at 394.

26 That is not the case here. While no one blames Debtors for the theft of the Vehicle, Debtors
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1 are responsible for not keeping in place insurance on the Vehicle and for not notifying the Creditor
2 of its lapse, which would have allowed Creditor an opportunity to insure the Vehicle itself. In a case
3 more akin to the one here, the court refused to allow the debtors to surrender their interest in a
4 snowmobile they had voluntarily transferred without first obtaining permission from the secured
5 creditor. *See In re Case*, 2000 WL 33716963 (Bankr. D. Idaho 2000). The court ultimately held it
6 would be inequitable to treat the creditor as unsecured in light of the fact that the debtors' "handling
7 of the transaction coupled with a failure to disclose it . . . left [the creditor] without effective means
8 of protecting its interests in its collateral." The court further noted that

9 [b]y its analysis, the Court does not imply that a Chapter 13 plan can never be
10 confirmed where a debtor proposes to surrender collateral to a secured creditor that
11 has, prior to bankruptcy, been converted or transferred. Nor does the Court hold that
12 a surrender must under all facts be accompanied by the actual transfer of physical
possession of the property to the creditor. Whether the proposed treatment of the
secured creditor's claim in a plan amounts to an effective "surrender" for purposes
of Section 1325(a)(5)(c) must be measured against the facts of each case.

13 *Id.*

14 Debtors are ultimately responsible for the Creditor's loss of its security. The insurance lapse
15 was not accidental: Debtors made a choice to let insurance lapse. Debtors never notified the
16 Creditor of the lapse, such that the Creditor could have provided coverage itself. Thus, like the
17 debtors in *Case*, Debtors must bear the burden for leaving Creditor without effective means of
18 protecting its interests in the vehicle.¹

19 **IV. Conclusion**

20 For the foregoing reasons, the Court sustains Creditor's objection to Confirmation of
21 Debtors' First Amended Plan as it pertains to the Creditor's treatment as an unsecured claim because

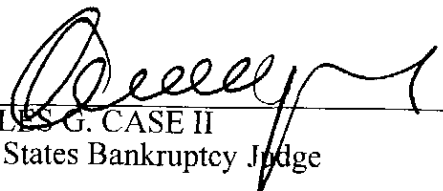
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23 ¹The Court notes a contrary holding from the Western District of Missouri in *In re Elliott*, 64 B.R.
24 429 (Bankr. W.D. Mo. 1986), where the court allowed the debtor to surrender his interest in the
25 secured creditor's collateral and treat the creditor as unsecured under the plan where debtor failed
26 to keep the contractually required insurance on the collateral. Not only is this case not binding on
27 this Court, but the Court finds it unpersuasive. Without much analysis, the court simply stated,
"failure to insure may be a breach of the contract. However, it does not affect the value of the
estate's interest in the missing rings or alter the secured/unsecured allocation of Hurst's claim." *Id.*
at 431.

1 it would be inequitable to hold otherwise.

2 So ordered.

3 DATED: Sept 20, 2005

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CHARLES G. CASE II
United States Bankruptcy Judge

COPY of the foregoing mailed and/or via facsimile
this 21st day of September, 2005 to:

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