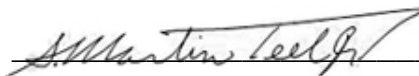


The document below is hereby signed. Dated:
September 26, 2008.




S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re)
)
ARTHUR J. HOROWITZ,) Case No. 08-00211
) (Chapter 13)
Debtor.)

MEMORANDUM DECISION AND INTERIM ORDER RE CLAIM OF GMAC

This addresses the debtor's objection to the proof of claim of GMAC. Although a proof of claim is entitled to a presumption of prima facie correctness, the attachments to GMAC's proof of claim, together with the court record, establish that the debtor owes far less than the amount claimed.

I

The claim acknowledges that the debtor was current on his lease payments when the case was filed. In addition, the lease agreement provided that the debtor could end the lease at anytime. The debtor opted to surrender the vehicle prepetition. A consent order granting relief from the automatic stay to permit GMAC to sell the automobile was entered on May 21, 2008.

The proof of claim of GMAC recites that \$19,061.68 is the balance of postpetition lease payments owed by the debtor,

calculated over the remaining life of the lease. The proof of claim then states that including a lease buyout option, the total amount owed is \$34,280.21. It indicates that the \$34,280.21 figure "includes the purchase option at the end of the lease, plus remaining lease payments and any unpaid or accrued charges, minus any unearned lease charges and any sales tax associated with remaining unpaid monthly lease payments." But the debtor opted to surrender the car, and the amounts attributable to the lease buyout option are not applicable.

The lease agreement provided:

37. WHAT YOU OWE AT EARLY END. In general, unless gap protection applies, you will owe us any unpaid monthly payments. We will give you a credit for any unearned rent charge and a credit if we sell the vehicle for more than residual value. We will use the actuarial method to figure the unearned rent charge. (You may ask us for a written explanation of the actuarial method.) We will treat the rent charge for each monthly period as fully earned on the period's first day. We will treat each monthly payment that you made as if we received it on its due date.

The lease's "gap protection" provisions dealt with what was to occur if the vehicle was destroyed (became total loss), and thus

have no applicability here.¹ In determining the surplus over the residual value, the debtor could have opted to obtain an appraisal (meeting certain standards) as to the **wholesale value** of the vehicle, but the debtor does not allege that he obtained such an appraisal. In the absence of such an appraisal, the surplus would be determined by the amount received on a sale of the vehicle at wholesale.

I read the proof of claim itself as establishing that the debtor is entitled to two types of credits.

A. Credit For Excess Over Residual Value Obtained on Sale of Vehicle

The residual value (the estimated value of the vehicle at the originally scheduled end of the lease) was set by the lease at \$19,390.25. The agreed value at the commencement of the lease on November 4, 2006, was \$35,749.00, which is \$16,358.75 more than the residual value. That \$35,749.00 figure is likely a retail value, not a wholesale value. A sale of the vehicle

¹ The lease agreement repeats what is owed at an early end (on the facts of this case) by stating that if the vehicle is not a total loss (which it was not in this case), the debtor would owe at an early end the result of:

	The base monthly payment times the number of payments not yet due,
[minus]	Any unearned rent charge, figured by the actuarial method,
[minus]	Any surplus [over the residual value] on the vehicle sale,
[plus]	If there is no surplus, any Early Excess Mileage and Wear Charge . . . plus any tax.

sometime after May 21, 2008, at wholesale (more than a year and a half after the lease was entered into) might or might not yield a surplus over the residual value of \$19,390.25. GMAC has failed to respond to the objection to claim and to state what amount was realized on a sale of the vehicle, and I address that failure in part II, below.

B. Other Credits

The proof of claim necessarily establishes that there were other credits to which the debtor was entitled. As already noted, the remaining monthly payments on the lease total \$19,061.68, and GMAC calculated a total claim owed of \$34,280.21, which included the cost of the debtor's purchasing the vehicle at the end of the lease. The proof of claim should have been for \$14,889.96, the total claim of \$34,280.21 with the \$19,390.25 purchase-at-end-of-lease amount eliminated as a component of the claim.² In other words, GMAC must have included \$4,171.72 in net credits in its proof of claim to apply against the \$19,061.68 in

² That \$14,889.96 figure can also be derived in the following way. The difference between the \$19,061.68 in monthly payments and the total claim of \$34,280.21 is \$15,218.53. Under the lease, \$19,390.25 was the required amount to be paid to purchase the vehicle at the end of the lease. Accordingly, the sum of the remaining monthly payments of \$19,061.68 and the \$19,390.25 purchase price at the end of the lease total \$38,451.93. That is \$4,171.72 less than the total claim amount of \$34,280.21. Accordingly, GMAC's proof of claim must include \$4,171.72 in credits to which the debtor was entitled. It follows that the correct amount of the proof of claim should have been \$19,061.68 less a credit of \$4,171.72, for a net amount owed of \$14,889.96.

unpaid monthly lease payments.

II

The debtor's objection to GMAC's proof of claim recites that:

As of this date GMAC has not advised the Court regarding the status of its claim--whether or not it has disposed of the vehicle or if a deficiency balance is claimed. Their claim #6 was filed 4/11/08 which requests full payment of the outstanding debt totaling \$34,280.21 without deduction for proceeds received from sale or transfer of the automobile. According to the NADA book the vehicle has a present retail value of \$24,525.00.

The debtor appears to contend that the proof of claim should be reduced by the entire amount of the sale proceeds received. But the lease agreement provided for a credit in the amount of the excess over the residual value of the vehicle, not for a credit for the full amount of the sale proceeds. Moreover, the lease provided for the vehicle to be sold at wholesale. Accordingly, the debtor's reliance upon NADA retail values is misplaced. Finally, even if GMAC sold the vehicle **at wholesale** for \$24,525.00 (which would be unlikely because that is the NADA **retail value figure**), the resulting surplus over the \$19,390.25 residual value would come to only \$5,134.75. That credit would not eliminate the \$14,889.96 otherwise owed: it would reduce the claim to \$9,755.21.

Nevertheless, the debtor's objection raises a forceful point: GMAC has failed to report what amount was received on a

sale of the vehicle by GMAC. As already noted, a properly documented proof of claim is prima facie correct. But the debtor--and the trustee and the court--are entitled to be advised by a creditor of any postpetition event that results in a reduction of the proof of claim. A creditor is not entitled to keep other parties in the dark regarding a sale that may have resulted in a reduction of the amount owed on its claim. It cannot hide behind a wall of unresponsiveness and expect to avoid the debtor's obtaining the benefit of a reduction of the amount of the claim.

On the other hand, the debtor has not shown that the vehicle likely could be sold **at wholesale** for an amount exceeding the residual value of \$19,390.25, and GMAC has not been warned that it must report what was received on a sale of the vehicle lest its proof of claim be reduced for failure to make a report. Accordingly, at this juncture it would be inappropriate to reduce the claim. The court will direct GMAC to file a report regarding what the vehicle fetched on sale (which may be made by filing an amended proof of claim making such a report so that an attorney need not file a report on GMAC's behalf), and direct that if no such report is filed, the debtor shall be entitled to obtain a reduction in the amount of the claim based on the most favorable evidence of wholesale value as of May 21, 2008, that the debtor

can produce.³

III

In light of the foregoing, it is

ORDERED that the proof of claim of GMAC is disallowed to the extent that it exceeds \$14,889.96. It is further

ORDERED that the proof of claim of GMAC will be reduced further to take account of any surplus over the \$19,390.25 residual value of the vehicle realized by a sale (or estimated to be received on a sale at wholesale if GMAC fails to file a report as to the amount received on a sale of the vehicle). It is further

ORDERED that by October 15, 2008, GMAC shall file a report regarding the amount received on a sale of the vehicle (and the report may be made by filing an amended proof of claim, or may be made via an attorney's filing a report). It is further

ORDERED that if GMAC fails to file a report, the court will estimate the amount received on a sale (and the resulting surplus over the \$19,390.25 residual value of the vehicle) by permitting the debtor by October 22, 2008, to file a copy of a NADA or similar report (or other evidence) setting forth the wholesale

³ NADA value or Kelly value or some similar valuation source could be utilized by the debtor. In the absence of a report by GMAC as to the amount actually received on a sale, the debtor is entitled to use whichever reporting service regarding wholesale value reports the highest wholesale value.

value of the vehicle on or after May 21, 2008.

[Signed and dated above.]

Copies to: Debtor; Debtor's attorney; Chapter 13 Trustee; Stephen A. Hecker, Esq. (counsel for GMAC on its motion for relief from the automatic stay); and:

GMAC

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