

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION**

**IN RE:**

Carla Renee Duncan  
Larry Allan Duncan, II

Debtor(s)

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Case No. 01-81741-C13

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**ORDER**

THIS MATTER came on for hearing before the undersigned Bankruptcy Judge in Durham, North Carolina upon the Motion for Relief from Automatic Stay and the Co-Debtor Stay filed by Volkswagen Credit, Inc. (hereinafter "VCI") in order to exercise its rights with respect to a 1996 Mazda Protege automobile. Appearing before the Court were William L. Yaeger on behalf of the Debtor, James Clark on behalf of VCI and Ben Lovell appeared on behalf of the Chapter 13 Trustee.

**FACTS**

1. The Debtor filed for relief pursuant to the provisions of Chapter 13 of Title 11, United States Code, on or about June 15, 2001. VCI filed a secured proof of claim indicating a valid perfected security interest in the 1996 Mazda Protege. The proof of claim was in the amount of \$7,885.44 and valued the vehicle at \$7,000.00.

2. The Debtor's Chapter 13 plan was confirmed by order of the court on August 27, 2001. Pursuant to the Plan, VCI is treated as a fully secured creditor which shall be paid in full, including contract interest under the Plan. The Confirmation Order also provides as follows:

The Trustee may release vehicles to the proper lienholders without notice to the

Debtor and without further orders of this Court if the Debtor falls behind as much as thirty (30) days in his payments to the Trustee. The Trustee shall notify the Debtor where and when to deliver said vehicles to the lienholders. The Debtor shall maintain collision insurance on any vehicle on which there is a lien. If said insurance is not maintained, the Debtor is ordered to store the vehicle as designated by the Trustee. The Trustee shall release the vehicle to the lienholder unless insurance has been obtained within thirty (30) days after storage.

3. It is undisputed that since the petition was filed, the Debtor has made the required payments to the Chapter 13 Trustee and the Chapter 13 Trustee has disbursed those funds pursuant to the confirmed plan. VCI filed a motion for relief from the automatic stay and attorney's fees in as much as the Debtor and the Co-Debtor have been unwilling or unable to provide proof of insurance on the vehicle as required by the Contract.

4. At the hearing, the Debtor presented evidence that the vehicle had at all times been properly insured and that VCI was listed as the loss payee under the policy. The Debtors admitted that they had failed to respond to requests to provide evidence of insurance. A request for evidence of insurance was made to their counsel by letter dated August 15, 2001 and when no response was received a second request was made by letter dated November 19, 2001. Again no response was made and VCI filed the motion for relief from stay on January 18, 2002.

#### ISSUE

VCI contends that they are entitled to attorney's fees and costs in filing this motion in as much as their loan documents provide that the Debtor must furnish satisfactory evidence of insurance and the failure to do so results in the right of the creditor to request attorney's fees.

#### DISCUSSION

The general rule in federal courts is that absent specific statutory authority or an enforceable contract, litigants pay their own attorney's fees. Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct.1612 (1975). Courts have held that a motion for relief

from the automatic stay pursuant to § 362(d) is an action on a federal statute to be decided according to federal law which does not provide for attorney's fees for such action. In re Johnson, 756 F.2d 738 (9<sup>th</sup> Cir. 1985). There are certain exceptions to the "American Rule" that each party must bear the costs of their own attorney. One such exception is that the bankruptcy code only allows oversecured creditors to seek attorney's fees under § 506(b) if the underlying agreement or contract provides for such fees. By its own admission, VCI is not an oversecured creditor nor does the Contract provide for the payment of attorney's fees in the event that the Debtor fails to furnish evidence of insurance. The Contract provides that "if the buyer fails to furnish satisfactory evidence thereof upon request, that in such event, buyer agrees to pay, as an additional part of the obligation hereunder, a charge equal to the amount of the premium for such insurance obtained by Creditor upon demand or in Creditors' sole discretion, in equal installments concurrently with the installment of the unpaid balance." Only if the buyer fails to procure and maintain insurance is the Creditor able to call the loan due and seek to collect on the debt. There has been no failure on the part of the Debtor to maintain insurance. Unless, there is a failure to maintain insurance resulting in a suit on collection of the debt, attorney's fees are not appropriate. There is no provision in the Contract which provides that the failure to satisfactorily furnish evidence of insurance triggers the right to legal fees. The failure to furnish evidence of insurance triggers the right of the creditor to force place insurance and charge the buyer for such costs.

The creditor has no provision for the payment of attorney's fees under the terms of its contract and the creditor is not an oversecured creditor under § 506(b); therefore, the creditor is not entitled to the recovery of attorney's fees and costs. In addition, the terms of the Confirmation Order provide for remedies available to the creditor in the event that there is a

lapse of insurance on the vehicle. The Confirmation Order provides that if the Debtor fails to maintain collision insurance on any vehicle on which there is a lien, the Debtor is ordered to store the vehicle. The Confirmation Order requires that the Debtor maintain insurance but does not require that the Debtor furnish evidence of insurance and does not provide for attorney's fees in the event that the Debtor fails to furnish evidence of insurance. Alternatively, the creditor may elect to force place insurance and file for an administrative claim. In bankruptcy proceedings that involve issues of bankruptcy law such as adequate protection, attorney's fees are not recoverable absent specific statutory authority or some type of egregious conduct that would justify the imposition of fees under § 105.

For the foregoing reasons, IT IS ORDERED, ADJUDGED AND DECREED that the request for attorney's fees and costs is hereby denied.

This the 2 day of April, 2002.

**CATHARINE R. CARRUTHERS**

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Catharine R. Carruthers  
United States Bankruptcy Judge