

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:)	
)	Chapter 13 Case
CASTERDALE JONES)	
CLARA H. JONES)	Number <u>99-43196</u>
)	
<i>Debtors</i>)	

**MEMORANDUM AND ORDER
ON MOTION TO RETAIN INSURANCE PROCEEDS**

On February 2, 2004, Debtors filed this Motion to Retain Insurance Proceeds. On February 19, 2004, Wells Fargo Financial Acceptance, f/k/a Fidelity Financial, f/k/a TCF Financial Services (“Creditor”) filed its response, and this Court held a hearing on the matter on March 23, 2004. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157.

FINDINGS OF FACT

Debtors filed their Chapter 13 petition on November 15, 1999. Creditor filed a claim in the case in the amount of \$11,832.53, secured by a Certificate of Title to Debtors’ 1995 Pontiac Grand Prix. In their proposed plan, Debtors valued the vehicle at \$6,200.00. Creditor objected to the plan on the basis that the vehicle had a retail value of \$9,025.00. As evidenced by the Trustee’s Motion to Confirm the Plan, Creditor’s objection was resolved by assigning a value of \$8,225.00 to the secured claim. The remaining \$3,607.53 of Creditor’s claim was deemed unsecured. Debtors’ plan was confirmed on March 28, 2000. Debtors made payments under the plan, and Creditor received distributions from the Trustee, substantially reducing the balance owed on the secured claim.

On or about November 25, 2003, Debtors were involved in an automobile accident and the vehicle was destroyed. Debtors are insured with Travelers Insurance Company (“Travelers”), and the parties agree that Creditor was the named loss payee on the policy covering the vehicle. The insurance policy was not admitted into evidence and is not before the Court. After the accident, Travelers informed Creditor that \$3,520.30 was payable under the policy. On December 23, 2003, the Chapter 13 Trustee authorized Travelers to pay the insurance funds directly to Creditor on the condition that any excess funds be returned to the Trustee.

On or about January 19, 2004, Travelers sent \$3,520.30 to Creditor. Creditor applied the money as follows: \$442.14 to pay off the remaining balance of Creditor’s secured claim, \$2,926.57 to pay off the balance of Creditor’s unsecured claim, and the remaining \$151.59 was submitted to the Trustee.

In their Motion to Retain Insurance Proceeds, Debtors assert that Creditor’s secured claim was paid in full under the plan; therefore, Creditor is not entitled to the insurance payment to the extent that it exceeds Creditor’s secured balance. Debtor relies exclusively on Ford Motor Credit Co. v. Stevens (In re Stevens), 130 F.3d 1027 (11th Cir. 1997). In response, Creditor relies on this Court’s decision in Norman Pontiac Buick GMC, Inc. v. Brown (In re Steverson), Ch. 13 Case No. 92-20609, slip op. (Bankr. S.D. Ga. Apr. 12, 1994)(Davis, J.). Creditor argues that in addition to its security interest in the vehicle and its proceeds, its status as the loss payee under the insurance policy provides it a separate contractual remedy under which it can retain the insurance benefits up to the full amount of its claim.

CONCLUSIONS OF LAW

In order to determine the proper distribution of the insurance money, the Court must determine if the insurance money is property of the estate. When property of the estate is destroyed and insurance is available to compensate for the loss, the terms of the policy dictate whether the insurance payout is property of the estate. In re Connie Hasty, Ch. 13 Case No. 99-41596, slip op. (Bankr. S.D. Ga. Feb. 25, 2000)(Davis, J.). See Stevens, 130 F.3d at 1030 (“In order to determine the parties’ respective rights with regard to the insurance proceeds . . . , one must consider the nature and type of the insurance policy involved”). For example, if the policy grants a creditor title to the proceeds, via a loss payable or similar clause, then the debtor’s estate has no interest in the proceeds until the obligation to the creditor is fully extinguished. See Beasley v. Agricredit Acceptance Corp., 224 Ga. App. 372, 374, 480 S.E. 2d 257, 260 (1997). However, “[i]f the policy makes the proceeds jointly payable, or if it is silent, or if the policy terms are not admitted into evidence, even when the creditor’s security agreement extends to proceeds, the creditor does not hold absolute title. In that set of circumstances the debtor has the right to use the property, i.e., the proceeds.” Hasty, slip op. at 2. Because the insurance policy at issue in Hasty was not made part of the record, the Court was unable to determine whether the secured creditor had a separate contract right to the insurance money from the destroyed collateral, and the Court held that the secured creditor had only an Article 9 security interest in the proceeds. For that reason, the proceeds remained property of the estate.

The facts in the Eleventh Circuit Stevens decision are similar to those before the Court today. The secured creditor’s rights were modified in the Chapter 13 plan, and after confirmation, the collateral was destroyed. The secured creditor collected from the insurance

company the full amount due under the security agreement which was in excess of the amount it was entitled to under the confirmed plan. The Stevens court determined that the insurance proceeds acted as a substitute for the insured collateral and belonged to the bankruptcy estate. Stevens, 130 F.3d at 1029-30. Because the proceeds were estate property, the distribution of the proceeds was governed by the terms of the confirmed plan. Id. at 1029. The court held that the creditor “is bound by the terms of its allowed claim and is therefore limited to recovering from the insurance proceeds the amount of its debt as determined under the Chapter 13 plan.” Id. at 1030. As such, the court required the creditor to return to the Trustee any proceeds in excess of the amount it would have received under the plan.

Creditor argues that the holding in Stevens is limited to the determination of whether the proper interest rate on a creditor’s claim is the contract rate or the confirmed plan rate. Although that was the specific determination the court made, on its face, the language of Stevens encompasses more than just a determination of the appropriate interest rate. In addition, the rule established in Stevens has been applied in situations similar to the one at bar. *See In re Witherspoon*, 281 B.R. 321 (Bankr. S.D. Ala. 2001).

Creditor, relying on this Court’s decision in Steverson, asserts that as named loss payee, it has a separate contractual right to the insurance money, unaffected by the holding in Stevens. Creditor did not introduce the insurance policy into evidence or make it part of the record. Without the policy, the Court cannot determine if Creditor has an independent, original contract right to the money in addition to its Uniform Commercial Code Article 9 rights. *See Hasty*, slip op. at 2.

At minimum, because Creditor failed to introduce the insurance policy, its argument must fail.¹ Creditor has only proven that it holds a security interest in the proceeds; therefore, Article 9 governs and the insurance payout constitutes proceeds of the collateral.

Since the proceeds are deemed to be property of the estate, the distribution of the proceeds is limited by the terms of the confirmed plan. Stevens, 130 F.3d at 130. Under the plan, Creditor had a secured claim in the amount of \$8,225.00 and an unsecured claim in the amount of \$3,607.53. Creditor is entitled to recover from the proceeds the unpaid balance, if any, of the secured claim; however, the unsecured claim will be paid the same dividend as the other unsecured claims in the case.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Wells Fargo Financial Acceptance, f/k/a Fidelity Financial, f/k/a TCF Financial Services, refund to the Trustee the amount of the insurance proceeds that exceed the unpaid balance of its secured claim at the time of distribution. If the Trustee has no objection to the Debtors' claimed exemption, then the

¹ The Steverson decision was cited to the Eleventh Circuit in Stevens. See Brief for Appellant at 10, Ford Motor Credit v. Stevens, 130 F.3d 1027 (11th Cir. 1997)(No. 96-9390). However, the Eleventh Circuit opinion did not separately address the Appellant's argument that Georgia law provides the loss payee an original, separate contract right against the insurance company. Under state law, the loss payee has an original contract right, which is not governed solely by Article 9. Thus, the insurance payout would not constitute "proceeds." Rick Taylor Timber Co. v. Orix Credit Alliance, Inc. (In re Rick Taylor Timber Co.), Adversary Proceeding No. 92-5038, Ch. 11 Case No. 92-50324, 1993 WL 13003868, at * 7 (Bankr. S.D. Ga. June 14, 1993)(Davis, J.) If the payout does not constitute "proceeds," then it does not necessarily need to be distributed in accordance with the terms of the Chapter 13 plan. See First Fid. Bank v. McAteer, 985 F.2d 114, 118 (3rd Cir. 1993)("While it is true that the bankruptcy court's confirmation of the plan binds the debtor and all creditors vis-a-vis the debtor, it does not follow that a discharge in bankruptcy alters the right of a creditor to collect from third parties."). In Stevens, the Eleventh Circuit reached a contrary conclusion without discussing the state law rights recognized in Steverson and Rick Taylor Timber, thus its conclusions are inchoate. Even if I assume that the Eleventh Circuit might view the loss payee's rights differently if the matter came before it again, the evidentiary gap in this case moots any independent loss payee claim.

Trustee should forward the money to the Debtors. If the funds are not exempt, then they should be distributed under the plan and the dividend to the unsecured creditors will be increased.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of June, 2004.