



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 14, 2016**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**DONALD WILLIAM NORTH AND
HARRIET MINNIE NORTH,**

CASE NO. 14-02487-NPO

DEBTORS.

CHAPTER 13

**ORDER GRANTING IN PART AND DENYING
IN PART MOTION TO LIFT THE AUTOMATIC STAY**

This matter came before the Court for hearing on March 14, 2016 (the "Hearing"), on the Motion to Lift the Automatic Stay (the "Motion") (Dkt. 103) filed by Ford Motor Credit Company LLC ("Ford"), and the Trustee's Response to Motion to Lift Stay (the "Response") (Dkt. 106) filed by J.C. Bell, the chapter 13 trustee (the "Trustee"), in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Olivia Spencer ("Spencer") appeared on behalf of Ford, Douglas Engell ("Engell") appeared on behalf of the debtors, Donald William North ("Donald North") and Harriet Minnie North (together with Donald North, the "Debtors"), and Samuel J. Duncan ("Duncan") appeared on behalf of the Trustee. After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Notice of the Motion and the Response was proper under the circumstances.

Facts

On August 6, 2014, the Debtors filed a joint chapter 13 petition for relief (Dkt. 1) and a chapter 13 plan (the “Plan”) (Dkt. 2). The Plan lists Ford as the holder of a claim in the amount of \$23,146.00 secured by a 2011 Ford Escape (the “Escape”). (Plan at 2). The Escape is not a “910” vehicle,¹ and because its value is less than the amount owed, the Debtors invoked the “cram-down” option pursuant to 11 U.S.C. § 506(a)(1)². *See* 11 U.S.C. § 1322(b)(2). Over the course of the sixty (60)-month Plan, the Debtors proposed to pay Ford the value of the Escape, \$14,827.00, at a five percent (5%) annual interest rate for its secured claim, and to treat the balance of \$8,319.00 as an unsecured claim. (*Id.*). The Plan provided that the Debtors would pay the unsecured creditors twelve percent (12%) of the \$45,507.00 debt. (*Id.*).

Ford filed a proof of claim in the amount of \$23,168.56, and valued the secured portion at \$16,475.00. (Claim No. 9-1). The Debtors objected to the claim in the Objection to Secured Claims and Other Relief (the “Objection”) (Dkt. 45) and maintained that the amounts proposed in the Plan were appropriate. (Obj. at 1). In the Response to Objection to Secured Claim and for Other Relief (the “Response to Objection”) (Dkt. 48), Ford stated that it “does not object to the

¹ The so-called “hanging paragraph” that immediately follows 11 U.S.C. § 1325(a)(9) precludes bifurcation of a secured claim if: (a) the creditor has a purchase money security interest securing the debt that is the subject of the claim; (b) the debt was incurred within 910 days prior to filing the petition; and (c) the collateral is a motor vehicle (d) acquired for the debtor’s personal use. 11 U.S.C. § 1325(a).

² All code sections refer to the Bankruptcy Code in title 11 of the U.S. Code unless stated otherwise.

amount proposed to be paid to it by Debtors; however, [Ford] should retain its lien until the Debtor[s] receive[] a discharge.” (Resp. to Obj. at 1). The parties reached an agreement and the Order on Objection to Secured Claim, and Order Amending Plan (the “Order on Objection”) (Dkt. 78) was entered on December 11, 2014, requiring the Debtors to pay Ford according to the terms of the Plan. (Order on Obj. at 1). The Order on Objection further provided that Ford would retain the lien until the Debtors receive a discharge. (*Id.*). On March 2, 2015, the Plan was confirmed in the Order Confirming the Debtor’s Plan, Awarding a Fee to the Debtor’s Attorney and Related Orders (the “Confirmation Order”) (Dkt. 93).

On February 18, 2016, Ford filed the Motion requesting that this Court grant relief from the stay as to the Escape, including any insurance proceeds, because the Debtors had been involved in an automobile accident that resulted in the “total loss” of the Escape. (Mot. at 1). Ford attached as an exhibit to the Motion a copy of the Mississippi Vehicle Retail Installment Contract (the “Contract”) (Dkt. 103 at 3) between Ford and Donald North, and a copy of the Certificate of Title (Dkt. 103 at 5) listing Donald North as the owner and Ford as the lienholder. Ford did not attach to the Motion a copy of the insurance policy that covered the Escape (the “Collision Policy”). According to the Contract dated May 16, 2011, Donald North financed the Escape for \$32,994.94 at an annual interest rate of 5.9%. (Contract at 1). Included in the financed amount is \$699.00 for Guaranteed Automobile Protection (“GAP”) insurance provided by CNA National (the “GAP Policy”). (*Id.*). The Contract contains the following language under the heading “Security Interest”:

You give the Creditor a security interest in:

1. The vehicle and all parts or other goods put on the vehicle;
2. All money or goods received for the vehicle; and
3. All insurance premiums and service contracts financed for you.

(Contract at 2). Under the heading “Vehicle Insurance,” the Contract further stipulates, *inter alia*, that “[y]ou must name Creditor as the loss payee under the insurance policy” and “[i]f the damage to the vehicle is considered a total loss, you must use the insurance proceeds to pay what you owe the Creditor.” (*Id.*).

On February 19, 2016, the Trustee filed the Response requesting that all insurance proceeds be paid to the Trustee and then distributed to Ford to satisfy the unpaid balance of the secured claim. (Resp. at 1). If any additional funds remain after payment of the secured portion of Ford’s claim and if the Debtors fail to file a motion within thirty (30) days “to specify how any excess. . . are to be used”, the Trustee asked permission to modify the Plan to increase the amount paid to unsecured creditors. (*Id.* at 2). According to the Trustee, the Debtors have made payments to Ford under the Plan, reducing the balance on the secured claim to \$11,719.20 plus five percent (5%) interest. (*Id.*).

At the Hearing, Spencer stated that Ford would be receiving the insurance proceeds directly from the insurer, but because of a computer system failure, she did not know the precise amount. She requested that Ford keep the insurance proceeds from both the Collision Policy and GAP Policy, and apply them to the claim as determined under the original contract, rather than as provided for in the Plan. Duncan, however, contended that all proceeds should be paid to the Trustee and then distributed to Ford to pay the balance of the secured claim under the Plan. In the event that there are excess proceeds after payment of the secured claim, Duncan requested that they be applied to the general unsecured claims unless the Debtor files a motion within thirty (30) days asking that they be used for another purpose. As to what that other purpose might be, Engell stated that the Debtors would like to use any remaining funds to purchase a replacement vehicle. Neither the Collision Policy nor the GAP Policy was admitted into evidence, and,

therefore, it is not clear if Ford is named as the sole loss payee or if Ford and Donald North are named as co-payees. The Court allowed the parties fourteen (14) days in which to supplement the record with the amount of the insurance proceeds.

On March 24, 2016, Ford filed a letter brief (the “Ford Brief”) (Dkt. 109) in support of its Motion. Along with setting forth arguments for retaining all of the proceeds, Spencer stated that Ford still had not received the insurance check from the Collision Policy, but it “will be in the amount of \$13,544.00, less the deductible of \$500.00, leaving a net payment of \$13,044.00.” (Ford Br. at 1). The Ford Brief also defined GAP insurance to be an optional insurance that “pay the difference between the balance of a lease or loan due on a vehicle and what your insurance company pays if the car is considered a covered total loss.” (Ford Br. at 3). Any proceeds flowing from the GAP Policy will not be known until the collision insurance proceeds are paid to Ford. (*Id.*). Ford contends that the GAP proceeds “would have never gone to the debtor—they would always have gone direct to the lienholder.” (*Id.*).

The Trustee filed the Trustee’s Supplement to Response to Motion to Lift Stay (the “Trustee’s Supplement”) (Dkt. 111) on March 27, 2016. According to the Trustee’s Supplement, the Trustee made a demand to Safeway Insurance (“Safeway”), Donald North’s collision insurance provider, to tender all insurance proceeds on December 3, 2015. (Trustee’s Supp. at 1). According to the Trustee, Safeway has not responded to any demand by the Trustee or requests for information by Engell. (*Id.* at 1-2). Also according to the Trustee, the GAP Policy insurer has not responded to Engell’s requests. (*Id.* at 2). The Trustee argued that because Ford does not have “a perfected security interest in the insurance proceeds” or “an assignment of insurance proceeds,” Ford, as a loss payee, should only recover the amount of insurance proceeds to provide for its secured claim. (Trustee’s Supp. at 4).

Discussion

The parties do not dispute that Ford is eventually entitled to the insurance proceeds to the extent of the balance of its secured interest in the Escape. The issue before the Court is whether Ford is entitled to any of the excess insurance proceeds flowing from the insurance policies to the extent of its unsecured claim. To determine who is entitled to the proceeds, the Court must establish whether the proceeds are property of the estate. The bankruptcy estate is broadly defined to include “all legal or equitable interests of the debtor in property,” and specifically includes “proceeds, product, offspring, rents, or profits of or from property of the estate. . . .” 11 U.S.C. § 541(a)(1) & (6). The automatic stay acts as a shield against any “act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3). As a general rule, courts conclude that an insurance policy and the insured property are both property of the estate; however, the proceeds from that policy may not necessarily constitute property of the estate because a third party may be named as the beneficiary of the policy. *Ford Motor Credit Co. v. Stevens (In re Stevens)*, 130 F.3d 1027, 1029 (11th Cir. 1997); *see also* KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY, 4th ed. § 47.6, ¶ 3, <http://www.ch13online.com>.

In a case addressing whether the proceeds from a well-control insurance policy were property of the bankruptcy estate, the Fifth Circuit Court of Appeals recognized the uncertainty of whether proceeds are property of the estate and instructed courts to ask a determinative question: “whether, in the absence of the bankruptcy proceeding, the proceeds of the policy would belong to debtor when the insurer pays a claim.” *Unsecured Creditors Disbursement Comm. v. Antill Pipeline Constr. Co., Inc. (In re Equinox Oil Co., Inc.)*, 300 F.3d 614, 618 (5th Cir. 2002). In a prior opinion addressing this same question, the Fifth Circuit concluded that

“[w]hen a payment by the insurer cannot inure to the debtor’s pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate.” *Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 56 (5th Cir. 1993). Accordingly, the Court must analyze the nature and language of the insurance policy to ascertain if the debtor has an interest in the proceeds. *In re Equinox Oil Co., Inc.* 300 F.3d at 618; *see also* Margaret A. Mahoney & Sylvia Williams, *Insurance Issues in Bankruptcy, Including D&O Insurance and What Happens to Proceeds in Commercial and Consumer Cases*, AM. BANKR. INST. 425 (July 2005).

I. Collision Policy

The first insurance policy at issue in the Bankruptcy Case is the Collision Policy on the Escape. While the Fifth Circuit has not decided this specific issue, it stated in *In re Edgeworth* that proceeds of casualty, collision, life, and fire insurance “if made payable to the debtor rather than a third party such as a creditor, are property of the estate and may inure to all bankruptcy creditors.” *In re Edgeworth*, 993 F.2d at 56. The Fifth Circuit reaffirmed this principle in *In re Equinox*, holding that proceeds are “property of the estate rather than awarded to a creditor holding a lien on the property, in the absence of a ‘loss payable’ rider or other contractual modifications.” *In re Equinox Oil Co., Inc.*, 300 F.3d at 619. Here, there is a loss payee. Because the Contract required that Donald North name Ford as a loss payee, because Ford stated that it will receive the insurance proceeds from the insurer, and because the Debtors have not disputed this fact, it is assumed that Ford is listed as the sole loss payee on the Collision Policy.

In order to analyze the Contract outside of the Bankruptcy Case as *In re Equinox* requires, the Court must look to state law principles. *Butner v. United States*, 440 U.S. 48, 55 (1979). The Mississippi Supreme Court has held that “the general rule of law in insurance cases is that, under a simple ‘loss payable’ or ‘open-mortgage clause’ in an insurance policy payable to

the mortgagee ‘as his interest may appear,’ the mortgagee is only entitled to receive the amount due him on his mortgage out of the funds recovered by or due to the insured.” *Hartford Fire Ins. Co. v. Associates Capital Corp.*, 313 So. 2d 404, 407 (Miss. 1975). In other words, under a general loss payable clause, a creditor is not the *per se* owner of the proceeds, but a party holding an interest in them. The creditor may only recoup that interest in the property, and any excess proceeds are granted to the insured. STEVEN PITT ET AL., 4 COUCH ON INSURANCE § 65:22 (3d ed. 2015); *see also Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851, 856 (5th Cir. 1979) (holding that “subsequent partial or full extinguishment of the debt giving rise to the insurable interest will reduce the loss-payee’s interest in the proceeds to the extent the debt has been satisfied.”). Therefore, as the sole loss payee, Ford is entitled to the insurance proceeds in the amount determined to be its interest in the Escape. The Debtors do not have an interest in that portion of the proceeds, and thus, they are not property of the bankruptcy estate. As the Court will explain below, however, the Debtors do possess an interest in the proceeds that exceed Ford’s secured claim, which renders the excess proceeds property of the bankruptcy estate.

A review of relevant case law in which the creditor is the sole loss payee or co-loss payee reveals that the majority of courts similarly hold that the creditor is contractually entitled to the proceeds at least to the extent of the secured claim. *E.g., In re Stevens*, 130 F.3d at 1030 (holding that “Ford 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.”); *In re Suter*, 181 B.R. 116, 120 (Bankr. N.D. Ala. 1994) (holding that “AmSouth’s lien on the insured vehicle has been extinguished to the extent that it secures any amount that exceeds \$2,395.71.”); *In re Feher*, 202 B.R. 966, 972 (Bankr. S.D. Ill. 1996) (finding that

“Ford’s interest in the insurance proceeds is limited to the amount of its ‘crammed down’ claim. . . .”); *In re McDonald*, 12-50495-KMS, slip op. at 1-2 (Bankr. S.D. Miss. Nov. 25, 2014) (holding that “the creditor is limited to recovering the amount of debt, as determined under the Confirmed Plan, from insurance proceeds arising from the above vehicle being totaled”); see also KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY, 4th ed. § 238.1, ¶ 2, <http://www.ch13online.com>. Courts that limit the recovery to the amount of the secured claim rely on § 1327, which stipulates that “the provisions of a confirmed plan bind the debtor and each creditor . . . whether or not such creditor has objected to, has accepted, or has rejected the plan.” 11 U.S.C. § 1327(a).

Ford argues in the Ford Brief that it is not only entitled to the proceeds to provide for the secured claim, but also to the excess proceeds to be applied toward its unsecured claim because it “took an assignment of the insurance proceeds.” (Ford Br. at 2). Ford primarily cites *In re Bailey*, a Mississippi bankruptcy case, as precedent for its legal argument. In that case, the bankruptcy court held that all of the insurance proceeds, including those in excess of the secured claim, should be distributed to the creditor because a “contractual modification” so required. *In re Bailey*, 314 B.R. 103, 106-07 (Bankr. N.D. Miss. 2004). Though similar facts are present, that case is distinguishable from the facts at hand because the contract in *In re Bailey* provided that “[b]uyer hereby assigns to seller and its assigns all monies payable under the property insurance required or purchased herein. . . .” *Id.* at 106. In contrast, the Contract before this Court did not assign Ford the proceeds, but stipulated that Ford be named as the loss payee. Indeed, the paragraph in the Contract relied on by Ford does not mention the term “assignment.” (Ford Br. at 2). The creditor in *In re Bailey* was assigned the proceeds in total, whereas Ford’s right to the

proceeds is subject to its determined interest. As a loss payee, Ford may only recover proceeds in the amount of its interest in the collateral.

This Court agrees with those courts that hold that the secured creditor's interest in the proceeds is only so much as its interest in the collateral itself, and that interest in the collateral is defined by the confirmed chapter 13 plan. Ford is bound by the \$14,827.00 valuation set forth in the Order on Objection and the Confirmation Order, and may only recover the remaining balance on its secured claim. Specifically, Ford is entitled to the proceeds only in the amount of \$11,719.20 plus five percent (5%) interest. Because the insurance proceeds in the total amount of \$13,044.00 are in excess of the balance of Ford's secured claim, Donald North, as the insured, is entitled to the remaining proceeds. STEVEN PITT ET AL., 4 COUCH ON INSURANCE § 65:22 (3d ed. 2015). Accordingly, under *In re Equinox* and *In re Edgeworth*, the excess proceeds are property of the bankruptcy estate. This Court therefore concludes that Ford must turn over to the Trustee all proceeds exceeding its secured claim as determined in the Confirmation Order.

II. GAP Policy

In the event that a vehicle is deemed a "covered total loss," GAP insurance pays the difference between the amount still owed to the creditor, less the amount of proceeds flowing from the underlying collision policy. *In re Hayes*, 376 B.R. 655, 659, 684 n.1 (Bankr. M.D. Tenn. 2007). As discussed above, because the collision insurance proceeds exceed the amount of Ford's secured claim, there is no outstanding balance owed to Ford under the Plan. Therefore, GAP proceeds should not be dispersed to Ford in the Bankruptcy Case. In the event that CNA National does pay any GAP proceeds to Ford in this case, Ford should turn the proceeds over to the Trustee.

Conclusion

For the foregoing reasons, the Court finds that the Motion should be granted as to the Escape and the collision insurance proceeds in the amount of the balance of Ford's secured claim, or \$11,719.20 plus five percent (5%) interest. The Court further finds that the Motion should be denied as to the portion of insurance proceeds in excess of Ford's secured claim and that Ford should turn over all excess insurance proceeds to the Trustee. Finally, the Court finds that the Plan should be modified to account for the increase in the amount paid to unsecured creditors unless the Debtors file a motion, within thirty (30) days of this Order, asking that they be used for another purpose. .

IT IS, THEREFORE, ORDERED that the Motion is hereby granted to the extent of the Escape and the collision proceeds in the amount of the balance of Ford's secured claim.

IT IS FURTHER ORDERED that the Motion is hereby denied to the extent of the portion of insurance proceeds in excess of Ford's secured claim and that Ford should turn over all excess insurance proceeds to the Trustee.

IT IS FURTHER ORDERED that the Plan is modified to account for the increase in the amount paid to unsecured creditors unless the Debtors file a motion, within thirty (30) days of this Order, asking that they be used for another purpose.

IT IS FURTHER ORDERED that the fourteen (14)-day stay in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.

##END OF ORDER##