UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
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BARBARA J CAPLE	)	**CASE NO 05-50213**
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MEMORANDUM OPINION

THIS MATTER came on for hearing before the undersigned Bankruptcy Judge on the Motion by Debtor for Turnover of Vehicle and the Motion by Wells Fargo Financial Acceptance, Inc. ("Wells Fargo") for Relief From Stay as to a 2001 Kia Rio. Appearing before the Court was Ron A. Anderson on behalf of the Debtor, Pamela P. Keenan on behalf of Wells Fargo, and Kathryn L. Bringle, Chapter 13 Standing Trustee.

FACTS

The facts relied upon by the parties in support of their respective positions are a matter of record and are not in dispute. On or about December 29, 2000, the Debtor purchased a 2001 Kia Rio, VIN #KNADC123116024681 ("the Vehicle") pursuant to the terms of an installment sales contract of even date ("the Contract"). The Contract was subsequently assigned to Wells Fargo, and Wells Fargo is now the sole owner and holder of the Contract. Under the terms of the Contract, Wells Fargo has a senior security interest and first lien on the Vehicle that it duly perfected, as evidenced by the first lien in favor of Wells Fargo reflected on the Certificate of Title for the Vehicle. Prior to the petition date, the Debtor defaulted in making the payments to Wells Fargo called for under the Contract, and Wells Fargo peaceably repossessed the Vehicle pursuant to the terms of the Contract and applicable law. The Debtor commenced this case by

filing a petition under Chapter 13 of the Bankruptcy Code on January 25, 2005. The Debtor proposed a Chapter 13 Plan that called for a "crammed down" secured claim of $2,538.00 to be paid to Wells Fargo on the debt secured by the Vehicle. As of the petition date, the net payoff due and owing to Wells Fargo under the Contract was $7,524.91, plus interest accruing thereon at the rate of 16.24% per annum. As of the petition date, the current NADA retail and wholesale values of the Vehicle were $3,875.00 and $2,675.00 respectively.

Shortly after the filing of the petition, the Debtor filed a Motion for Turnover of the Vehicle. Wells Fargo has consented to a hearing on the Motion for Turnover and does not require that the Debtor commence an adversary proceeding. Wells Fargo has agreed to turnover the Vehicle if the Debtor furnishes adequate protection. Wells Fargo contends that in light of the Fourth Circuit's 2004 opinion regarding Chapter 13 turnovers, Tidewater Finance Co. v. Moffett (In re Moffett), 356 F.3d 518 (4th Cir. 2004), it is not required to return the Vehicle to the Debtor until such time as the Debtor provides adequate protection in the form of a proposed Chapter 13 plan that requires the Debtor to pay Wells Fargo all amounts due under the Contract as a secured claim, as well as the reasonable expenses incurred by Wells Fargo in connection with the pre-petition repossession of the Vehicle.

ISSUE OF LAW

Does the Fourth Circuit's decision in In re Moffett require the Debtor to pay Wells Fargo the entire remaining balance due under the Contract in order to adequately protect Wells Fargo's interest in the Vehicle and therefore trigger Wells Fargo's obligation to turnover the Vehicle to the Debtor following a pre-petition repossession of same?

ANALYSIS

It is well settled that state law defines the nature and extent of property interests. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed 2d 136 (1979). However, whether an interest in property is included as § 541 property under the Bankruptcy Code is a matter of federal law. In the matter before the court, North Carolina law regarding the repossession and disposition of secured collateral and the parties' relative rights thereto is governed by the Revised Uniform Commercial Code ("UCC") Article 9, as adopted in N.C. Gen. Stat. § 25-9-101, et seq. Under this statute, if a secured creditor peacefully repossesses a vehicle, the debtor retains the right to "redeem" the collateral at any time prior to the lienholder disposing of the collateral or entering into a contract for the disposition of the collateral pursuant to N.C. Gen. Stat. § 25-9-610.[1] In order to redeem the collateral under the North Carolina statute, the debtor must tender "fulfillment of all obligations secured by the collateral" and the " reasonable expenses and attorneys fees described in N.C. Gen Stat. § 25-9-615(a)(1)."

Wells Fargo contends that inasmuch as it repossessed the Vehicle prior to the bankruptcy filing, the Debtor must redeem the Vehicle by proposing a Chapter 13 plan that provides that Wells Fargo will be paid in full for all amounts due under the Contract. All parties agree that if the vehicle had not been repossessed preptition, the Debtor could propose a plan whereby Wells Fargo would have a secured claim for the fair market value of the Vehicle and an unsecured claim for the balance of the monies owed.[2] Wells Fargo contends that Moffett makes clear that

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[1]If the debtor consents, the secured party may also accept the collateral in full or partial satisfaction of the debtors' obligation under N.C.Gen Stat. § 25-9-622.

[2] Pursuant to 11 U.S.C. § 506(a) "an allowed claim of a creditor secured by a lien on property in which the estate has an interest.....is a secured claim to the extent of the value of

applicable state law requirements for effecting redemption control, notwithstanding any bankruptcy filing by the debtor. For the reasons stated herein, the Court disagrees with the interpretation of Moffett as advanced by Wells Fargo.

The facts in Moffett are similar to those presented in this case. In Moffett, the debtor's vehicle had been lawfully repossessed for failure to make payments due under an installment contract. After the vehicle was repossessed, the debtor ("Moffett") filed a petition for relief under Chapter 13 and demanded return of the vehicle. The creditor, Tidewater, filed a motion for relief from stay, "claiming that its repossession of the automobile stripped Moffett and the bankruptcy estate of any interest in the vehicle except bare legal title and an intangible right to redemption." In re Moffett, 356 F.3d at 520. Moffett proposed a Chapter 13 Plan whereby Tidewater would be paid in full under the contract; however, Tidewater would not receive a lump sum payment but would be paid over the life of the plan.

The Fourth Circuit first addressed the nature of Moffett's property interests in the repossessed vehicle. The court recognized that when a bankruptcy case is filed, an "estate" is created and the estate is comprised of all legal or equitable interest of the debtor in property and that the scope of the estate is broad and includes all kinds of property, tangible or intangible, causes of action and all other forms of property. 11 U.S.C. § 541. While the Bankruptcy Code determines what is or is not estate property, it is state law that "determines the nature and existence of a debtor's rights." In re Moffett, 356 F.3d at 521 (citing Butner v. United States, 440 U.S. 48, 54-55, 99 S.Ct. 914 (1979) and Universal Coops., Inc., v. FCX, Inc. (In re FCX, Inc.) 853 F.3d.1149, 1153 (4th Cir 1988)). In Butner, the Supreme Court found that "[p]roperty

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such creditor's interest in the estate's interest in such property."

interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." Butner v. United States, 440 U.S. at 55, 99 S.Ct. at 918.

Therefore, as the starting point in Moffett, the Fourth Circuit examined the Uniform Commercial Code as adopted by Virginia. The court noted that § 8.9A-623(c)(2) of Virginia's UCC granted Moffett the right to redeem the vehicle at any time before Tidewater disposed of it and that the debtor was entitled to at least ten days notice prior to any disposition of the vehicle. In re Moffett, 356 F.3d at 522. The court noted that Moffett was entitled to actual notice of the right of redemption and to any surplus funds generated from the sale and that these rights continued until the vehicle was sold or Tidewater accepted the collateral under § 8.9A-620 of the UCC.[3] After analyzing the various interests of the debtor, the court held that "[t]hese *interests*, and particularly the statutory right of redemption, are unquestionably 'legal or equitable interests' of Moffett's that are included within her bankruptcy estate." Id. (emphasis added). The court noted that this issue had previously been addressed by the Supreme Court in United States v. Whiting Pools, Inc., in which the Court expressly found that interests in repossessed property that could have been exercised by the debtor, such as the right to notice and the surplus from a sale, are part of the estate by virtue of § 541(a)(1). United States v. Whiting Pools, Inc., 462 U.S. 198, 207 n. 15, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983).

Having concluded that Moffett's right to redeem the repossessed vehicle was a part of the

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[3] Pursuant to § 8.9A-620, a creditor may accept the collateral in satisfaction of the debt with the consent of the debtor.

bankruptcy estate, the Fourth Circuit held that the property was subject to the automatic stay of § 362 and the turnover provisions of § 542 of the Bankruptcy Code. The court then turned to the issue of adequate protection. The Virginia UCC grants the debtor the right to redeem collateral by paying the full obligation secured by the collateral, as well as reasonable expenses from repossession and holding the collateral. In Moffett, Tidewater demanded payment of the entire amount prior to turning over the vehicle as required by the Virginia UCC, while the Debtor proposed a plan to pay Tidewater in full, with interest, in monthly installments over the life of the plan.

The court held that the Debtor was entitled to utilize the protections and provisions provided in the Bankruptcy Code "to restructure the timing of her payments in order to facilitate the exercise of her right of redemption." In re Moffett, 356 F.3d at 523. The court relied on § 1322(b)(2) which provides that a plan may:

> modify the right of holder of secured claim, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

11 U.S.C. § 1322(b)(2). The Court held that the payment over time allowed Moffett the ability to exercise her right of redemption and provided Tidewater with adequate protection. In re Moffett, 356 F.3d at 523.

The Fourth Circuit further explained that if Moffett retained ownership of the repossessed vehicle under Virginia law, then the vehicle would automatically become part of her estate and "there would be no need for her to exercise her right of redemption in order to bring the vehicle within the estate." In re Moffett, 356 F.3d at 524. Because the debtor was proposing to exercise her right of redemption, the court found that there was no need to resolve the issue of who holds

legal ownership of the repossessed vehicle under Virginia law. Therefore, the court expressly left open the question of whether Moffett still owned the vehicle. Nevertheless, the court made clear that "if Moffett retained ownership of the repossessed vehicle under Virginia law, then ... there would be *no need* for [the debtor] to exercise her right of redemption in order to bring the vehicle within the estate." Id.

It is under the guidelines set by Moffett that this court must examine the case before it. Based on Moffett the following questions must be answered: (1) Under the North Carolina Uniform Commercial Code, has Caple retained ownership in the Vehicle? and (2) If Caple has retained ownership of the Vehicle, what adequate protection must be provided to Wells Fargo under the Chapter 13 Plan in exchange for turnover of the Vehicle? or (3) If Caple has not retained ownership in the vehicle and has *only* the statutory right of redemption, what adequate protection must be provided to Wells Fargo under the Chapter 13 Plan?

THE DEBTOR RETAINED AN OWNERSHIP INTEREST IN THE VEHICLE

Whether Caple retained an ownership interest in the vehicle after Wells Fargo took possession is a question of North Carolina law. The North Carolina Uniform Commercial Code ("UCC") governs the property interests of debtors and secured parties in goods covered by a security agreement. The North Carolina Uniform Commercial Code defines the term "debtor" as "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor." N.C. Gen. Stat. § 25-9-102(a)(28). The North Carolina Uniform Commercial Code allows the debtor a variety of rights with regard to collateral that has been repossessed. First, the debtor may redeem the collateral by paying the full amount owed under the contract. N.C. Gen. Stat. § 25-9-623. This right may be exercised

by the debtor prior to repossession (N.C. Gen. Stat. § 25-9-607); prior to the disposal of the collateral (N.C. Gen. Stat. § 25-9-610); or prior to the acceptance of the collateral as full or partial satisfaction of the debt (N.C. Gen. Stat. § 25-9-622). The debtor has the right to all surplus proceeds resulting from the disposal of the collateral. N.C. Gen. Stat. § 25-9-615. Additionally, the debtor can agree that the collateral be accepted as full satisfaction of the debt. N.C. Gen. Stat. § 25-9-620. All of these provisions regarding a debtor's rights suggest that ownership of the collateral is not transferred to the secured party by virtue of the simple act of repossession.

The North Carolina Uniform Commercial Code's description of the secured party's interest in the collateral is also illustrative of the rights of the respective parties. The North Carolina UCC provides that, upon default, the secured party has several rights with regard to the collateral. First, the secured party may enforce their claim through any available judicial procedure. N.C. Gen. Stat. § 25-9-601. The secured party may repossess the property without judicial intervention provided that no breach of the peace occurs. N.C. Gen. Stat. § 25-9-609. The secured party may sell, lease, or license the property. N.C. Gen. Stat. § 25-9-610. Indeed, the secured party may purchase the collateral at a public or private sale. Id. If the secured party elects to conduct a public or private sale of the collateral, then the secured party must notify the debtor of such through service of a Notice of Disposition of Collateral. N.C. Gen. Stat. § 25-9-614. This notice must include a statement that the debtor can redeem the property at any point prior to sale. Id. While in possession of the collateral, the secured party has a duty to preserve and protect the collateral. N.C. Gen. Stat. § 25-9-207. The secured party may use the collateral only if the purpose is to preserve the collateral or its value. Id. These provisions regarding a

secured party's rights and duties also support a finding that ownership of the collateral is not transferred to the secured party simply upon repossession.

Further evidence that a debtor retains an ownership interest in repossessed collateral is found when examining the documentation required at the collateral's sale. When the sale of collateral has been conducted, the North Carolina Uniform Commercial Code requires the secured party to provide an authenticated statement of repossession and sale. N.C. Gen. Stat. § 25-9-619. The transfer statement must indicate that (1) the debtor has defaulted on the obligation to pay for specified collateral; (2) that the secured party has exercised its post default remedies with respect to the collateral; (3) that by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral. Id. As the official comments indicate, this section contemplates a transfer of record or legal title to a third party (the "transferee"), following a secured party's exercise of its right of disposition or acceptance of the collateral. Under the North Carolina UCC, the transferee purchasing collateral from a secured party acquires "all the rights of the debtor." Id. The transferee has certainly purchased more than the mere right to redeem. Through this process, the transferee has acquired the debtor's ownership interest in the vehicle. This ownership interest was transferred from the debtor to the transferee, not from the secured party to the transferee.

If a debtor loses his or her ownership interest upon repossession, then there would be no need for the secured party to pay any surplus proceeds to the debtor as required by § 25-9-615(d)(1). Similarly, if a debtor loses all ownership rights to the secured creditor upon repossession, there would be no need for a provision that allows the secured party to purchase the collateral. If the secured party owns the collateral upon repossession, why do they have a

duty to use reasonable care to preserve the collateral? If the secured party owns the repossessed collateral, why would the secured party need the debtor's consent in order to retain it in full satisfaction of the debt?

Lastly, the North Carolina UCC defines a debtor as a person having an interest, *other than a security interest,* or other lien in collateral. § 25-9-102(a)(28). This section expressly excludes a secured party from having an ownership interest.[4] Thus, the North Carolina UCC is clear that a secured party cannot be a debtor. Taken together, the provisions of the North Carolina UCC compel this court to determine that a debtor retains ownership of repossessed collateral until the secured party takes some further action to exercise its post default remedies.

Because this finding is based upon North Carolina law, this court recognizes that the laws of other states may compel a different conclusion. The Eleventh Circuit has held that under Florida law, repossessed vehicles are not property of the estate. In re Kalter, 292 F.3d 1350 (11th Cir. 2002). In Kalter, the Eleventh Circuit found that the Florida UCC is "notably silent on the issue of ownership providing this Court with no guidance as to who owned the Debtors' vehicles upon repossession." Id. at 1354. The debtor argued in Kalter that ownership remained with the debtor after repossession because Fla. Stat. § 659.504 provides that "when a secured party sells the collateral to a purchaser, 'all the debtor's rights therein' pass to the purchaser." Id. In rejecting the debtor's argument, the Eleventh Circuit noted that under the Florida UCC, the term

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[4] In Moffett, the Fourth Circuit cited In re Kalter. It is important to note that Kalter was decided under the Florida UCC. Kalter found that the language under the Florida UCC was insufficient to establish ownership of vehicles repossessed prepetition. The Florida UCC, unlike North Carolina, defines the term "debtor" as either the debtor or the creditor in possession of the collateral. 292 F.3d at 1354. The Kalter court then looked to the Florida Certificate of Title Statute to determine ownership and found the secured party to be the owner.

"debtor" does not necessarily refer to the true debtor, and may encompass either the debtor or the creditor in possession of the collateral. Id. at 1354-55. The court then turned to the Florida Motor Vehicle law for guidance, and finally concluded that ownership passes when the creditor repossesses the vehicle. The court held, therefore, that in Florida, a repossessed vehicle is not part of the bankruptcy estate. Id. at 1360.

In another Eleventh Circuit case, In re Lewis, 137 F.3d 1280 (11th Cir. 1998), the court held that the debtor's right to redeem a repossessed vehicle, while property of the bankruptcy estate, was insufficient under Alabama law to bring the car itself into the estate. Id. at 1284-85. Alabama follows the common law of conversion under which all property interests pass to the creditor at the time of repossession *except for* the debtor's right of redemption. Therefore, in Lewis, the Eleventh Circuit applied Alabama law and found that a vehicle repossessed prior to the debtor filing bankruptcy is not included in the bankruptcy estate. Id.

The Eleventh Circuit itself has recognized that its holdings in In re Kalter and In re Lewis are limited to Florida and Alabama. In In re Rozier, the Eleventh Circuit applied Georgia law to the question of whether a vehicle repossessed prepetition is property of the bankrtupcy estate. Under Georgia law, legal title and right of redemption remained with a Chapter 13 debtor even after the secured creditor has lawfully repossessed the vehicle securing its claim prepetition. Therefore, the court held that a repossessed vehicle is property of the estate pursuant to § 541 and protected by the automatic stay. In re Rozier, 376 F.3d 1323 (11th Cir. 2004).

Other courts that have examined the ownership issue have concluded that the vehicle is property of the estate. In re Rozier, 376 F.3d 1323 (following answer to a certified question to the Supreme Court of Georgia, Motors Acceptance Corp. v. Rozier, 597 S.E.2d 367 (Ga. 2004),

the Eleventh Circuit held that where, under Georgia law, legal title and right of redemption remained with Chapter 13 debtor even after secured creditor had lawfully repossessed motor vehicle securing its claim prepetition, a motor vehicle was included in "property of the estate" and was protected by automatic stay); In re Mitchell, 316 B.R. 891 (S. D. Tex. 2004) (finding that vehicle became property of the estate after debtor filed bankruptcy petition despite the fact that the creditor repossessed it prepetition); In re Estis 311 B.R. 592 (Bankr. D. Kan. 2004) (holding that redemptive rights that Chapter 13 debtor still possessed in motor vehicle securing creditor's claim, after creditor had repossessed motor vehicle and applied for "repossession title" prepetition, were sufficient to bring vehicle into "property of the estate."); In re Sanders, 291 B.R. 97, 101 (Bankr. E.D. Mich. 2003) ("repossession is merely a device to collect on the creditor's claim, and that therefore repossession does not transfer ownership to the creditor"); In re Robinson, 285 B.R. 732, 737 (Bankr. W.D. Okla.2002) (finding that under Oklahoma law, secured creditor has right to dispose of seized collateral, but if collateral is seized prepetition, secured creditor does not have an ownership right that permits retention of the collateral after debtor files bankruptcy petition); In re Clelland, 268 B.R. 539 (Bankr. E.D. Ark. 2001) (under Texas law, secured creditor's exercise of right of repossession did not effect transfer of title to vehicle securing creditor's claim; rather, for title to vehicle to pass following repossession, sale had to take place); In re Sharon, 234 B. R. 676 (B.A.P. 6th Cir. 1999) ("the right to possession of Debtor's car was property of the Chapter 13 estate from the moment of petition notwithstanding prepetition repossession by secured creditor).

This court finds that based upon the North Carolina Uniform Commercial Code, Caple is

the owner of the vehicle under North Carolina law.[5] The court adopts the reasoning of Sanders that "[u]ntil a creditor disposes of the property, the debtor remains the legal and equitable owner, subject only to the creditor's debt collection remedies, which are suspended by 11 U.S.C. § 362(a) when a bankruptcy petition is filed." In re Sanders, 291. B.R. at 101. The debtor's estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11. U.S.C. § 541. Because the transfer of possession of the vehicle is not a transfer of ownership of the vehicle, the vehicle is property of the bankruptcy estate.

As the legal owner of the vehicle, the Debtor is entitled to seek the turnover of the property as provided in 11 U.S.C. § 542. Section 542(a) requires anyone holding property of the estate on the date of the filing of the petition to deliver it to the trustee. The reach of § 542 extends to property of the debtor repossessed by a secured creditor prepetition. U.S. v. Whiting Pools, Inc., 462 U.S. 198, 206, 103 S.Ct. 2309, 2314 (1983). In Whiting Pools, Supreme Court ruled that the Internal Revenue Service had to turn property that was properly repossessed prepetition over to the debtor. The Court found that § 542(a) grants a bankruptcy estate a possessory interest in certain property of the debtor, including repossessed property, that is not held by the debtor at the time of the filing of bankruptcy petition. Id. The Court found, while a debtor is entitled to turnover of such property, the secured creditor's possession of its collateral is replaced with the right for adequate protection. Id. at 207, 103 S.Ct. 2315. The Fourth Circuit ruling in Moffett is entirely consistent with Whiting Pools because the Fourth Circuit found that

[5] In transactions involving the sale or financing of motor vehicles in which the right of the parties in the sale or financing transaction are in question, the Uniform Commercial Code is controlling in North Carolina. American Clipper Corp. v. Howerton, 311 N.C 151, 316 S.E.2d 186 (1984).

if Moffett retained ownership of the repossessed vehicle under Virginia law, then the vehicle would automatically become part of her estate. In re Moffett, 356 F.3d at 524 (citing U.S. v. Whiting Pools, Inc., 462 U.S. at 205-206, 103 S.Ct.at 2314). In this case, because Caple retained ownership of the repossessed vehicle under North Carolina law, the vehicle automatically became part of the estate. Caple is entitled to turnover of the property pursuant to 11 U.S.C § 542; however, turnover will only be required if Caple grants the Wells Fargo adequate protection.

ADEQUATE PROTECTION

The Debtor filed a motion for turnover pursuant to § 542. Wells Fargo has declined to return the vehicle until such time as the Debtor provided adequate protection in the form of a proposed Chapter 13 plan in which the Debtor pays Wells Fargo all amounts due under the Contract, including reasonable expenses incurred by Wells Fargo in connection with the prepetition repossession. Wells Fargo contends that payment of the $7,542.91 balance due under the Contract plus the $325.00 in expenses incurred in the prepetition repossession and the contract rate of interest at 16.24% is required to provide Wells Fargo adequate protection. Wells Fargo concedes that a lump sum payment is not required as Moffett allowed the debtor to redeem her vehicle over the life of the plan.[6]

Having determined that the vehicle is § 541 property and that the debtor has more than the interest of a statutory right of redemption, the court must analyze what plan treatment would

[6]State law does not allow for redemption over time. Moffett held that the Bankruptcy Code entitles a debtor to restructure the timing of her payments in order to facilitate the exercise of her right of redemption under § 1332(b)(2).

afford Wells Fargo with adequate protection such as to defeat its request from relief from stay under § 362. 11 U.S.C. § 361 provides that when adequate protection is required under § 362, it may be provided by three non exclusive means: (1) periodic cash payments, (2) replacement liens or (3) other methods that grant the secured party the indubitable equivalent of such parties interest in such property. Periodic cash payments are particularly appropriate where the property in question, such as an automobile, will depreciate. The majority of courts,[7] including this court, require that a creditor be provided with adequate protection prior to requiring turnover under § 542(a). In re Moffett 356 F.3d 518; In re Empire for Him, Inc., 1 F 3d. 1156 (11th Cir. 1993); In re Patterson, 263 B.R. 82 (Bankr. E.D. Pa. 2001); In re Nash, 228 B.R. 669 (Bankr. N.D. Ill. 1999); In re Spears, 223 B.R. 159 (Bankr. N.D. Ill 1998); In re Massey, 210 B.R. 693, 696 (Bankr. D. Md. 1997); In re Pluta, 200 B.R. 740 (Bankr. D. Mass 1996); In re Washington, 137 B.R. 748 (Bankr. E.D. Ark. 1992).

In this case, in order to provide adequate protection to the creditor, Caple must propose a plan in which Wells Fargo is being paid the value of the collateral. In order for the plan to meet the confirmation standard of § 1325(a)(5), the plan must provide that with respect to each allowed secured claimant that the holder of such claim retain a lien securing such claim; and the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim. 11 U.S.C. § 1325(a)(5).

The amount of the secured claim is determined by Section 506(a), which provides that

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[7] Some courts require turnover without evidence of adequate protection. See e.g., In re Zaber, 223 B.R. 102 (Bankr. N.D. Texas 1998); In re Brooks, 207 B.R. 738 (Bankr. N.D. Fla 1997).

the value of the secured claim "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a). The value of the collateral retained is determined based on replacement value; that is, the price a willing buyer and a willing seller would pay to obtain property of a like age and condition. Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879 (1997). Therefore in order to provide Wells Fargo with adequate protection, the court must determine the value of secured claim under § 506.

Taken together, §§ 506(b) and 1325 (a) allow a debtor to propose a Chapter 13 Plan to pay the creditor the value of the vehicle with interest over the life of the plan.[8] The secured creditor retains a lien on the property and the debtor is required to pay the lienholder the value of the collateral in installments over the life of the plan. The creditor is entitled to interest to be paid at the market rate with some level of risk added to the market rate. Till v. SCS Credit Corp., 541 U.S. 465, 124 S.Ct. 1951 (2004).[9] The balance of the creditors' claim is treated as a general unsecured claim.[10] This concept is typically referred to as "claim splitting" and is one of the

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[8] In order to take advantage of § 1325(a)(5)(B) the property securing the debt must be property of the estate. Section 506(a) deals with allowed claims stating that the claim is secured to the extent the creditor has a *lien on property of the estate.* If the property that secures the debt, is not property of the estate, then the creditor cannot have an allowed secured claim. In Moffett, the court found that the debtors had the right to utilize § 1322(b)(2) which permits "the debtor to modify the rights of holder of secured claims." In re Moffett, 356 F.3d at 522. Simply put, the court could not have applied § 1322(b)(2) unless the vehicle was property of the estate.

[9] In the Middle District of NC the interest rate has been presumptively set at prime plus 2%. The value of vehicles has been presumptively set at 90% of NADA retail. All parties reserve the right to challenge the use of these presumptive rates.

[10] An example of this is where a creditor has a lien against a vehicle and the vehicle is worth $8,000.00 and the debt is $10,000, then the Chapter 13 Debtor is required to pay the creditor on its secured claim of $8,000.00 with interest, but the balance of the claim, $2,000 is treated as a general unsecured claim.

advantages given to those debtors who elect to file a Chapter 13 as opposed to a Chapter 7 proceeding. Claim splitting is not available in a Chapter 7 proceeding. Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773 (1992).

Therefore in order to provide Wells Fargo with the adequate protection required for turnover under § 542, the Debtor must propose a plan whereby Wells Fargo has a secured claim for the value of the collateral, (preliminarily determined to be $3,487.50), and the balance of its claim, including fees and expenses incurred in the repossession of the Vehicle, will be treated as a general unsecured claim.

Based on the forgoing, the court concludes the Debtor is the owner of the vehicle and the vehicle is § 541 property and that because the vehicle is § 541 property, the Debtor is entitled to turnover of the vehicle under § 542 . The Debtor may only utilize the turnover provisions of § 542 if she provides Wells Fargo with adequate protection as determined under §§ 506(b), 1322 and 1325 of the Bankruptcy Code. Wells Fargo is not entitled to be paid its contract amount and contract interest rate, but will be paid an allowed secured claim to the extent of the value of the collateral with interest as provided under the Till decision. The balance of the Wells Fargo claim will be treated as a general unsecured claim in the Chapter 13 proceeding.

A separate order will be entered in accordance with this Memorandum Opinion.

This the 4 day of April 2005.

Catharine R. Carruthers
United States Bankruptcy Judge

ENTERED

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U.S. BANKRUPTCY COURT
MDNC - JL

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
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BARBARA J CAPLE	)	**CASE NO 05-50213**
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ORDER GRANTING MOTION FOR TURNOVER AND DENYING MOTION FOR RELIEF FROM STAY

Pursuant to the Memorandum Opinion filed contemporaneously herewith, IT IS ORDERED, ADJUDGED, AND DECREED that the Debtor's Motion for Turnover is GRANTED. It is FURTHER ORDERED that the Motion by Wells Fargo Financial Acceptance, Inc. for Relief from Stay as to a 2001 Kia Rio is DENIED.

This the 4 day of April 2005.

Catharine R. Carruthers
United States Bankruptcy Judge