

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION**

**IN RE: CLYDE SMITH AND
RENEE SMITH**

Debtors.

**Case No. 3:15-bk-15181J
(Chapter 13)**

ORDER ON MOTION FOR RELIEF FROM STAY

Before the Court is the *Motion for Relief from Automatic Stay Filed by AmeriCredit Financial Services, Inc. dba GM Financial* (“**GM Financial**”) (the “**Motion**”) (Doc. No. 69), along with the *Response to Motion for Relief from Automatic Stay* (the “**Response**”) (Doc. No. 73) filed by Clyde and Renee Smith (the “**Debtors**”). The Motion seeks relief from stay of \$4,379.85 in insurance proceeds paid as a result of the Debtors’ 2010 Ford Escape being totaled in an accident.¹ The Debtors argue that, according to the confirmed Chapter 13 plan, the balance of GM Financial’s secured claim is only \$282.94, and GM Financial is not entitled to relief from stay to obtain the full amount of the insurance proceeds. A telephonic hearing was held on the Motion and Response on April 21, 2020.² Holly N. Knight appeared on behalf of GM Financial. Joe C. Barrett appeared on behalf of the Debtors. John Mallory, staff attorney for Chapter 13 Trustee Mark T. McCarty (the “**Trustee**”), was present and testified.

The parties submitted the Motion and Response on joint stipulations of facts and agreed exhibits (the “**Joint Stipulations**”) (Doc. No. 75). After hearing the parties’ arguments and the testimony of Mr. Mallory, the Court took the matter under advisement.

¹ The vehicle was totaled when the Debtors’ daughter accidentally drove through the front of the Department of Motor Vehicle’s office to obtain her driver’s license; she did not get her driver’s license that day.

² The Court was not conducting “in court” hearings on April 21, 2020, pursuant to the Administrative Order of the Court dated March 16, 2020, regarding the COVID-19 pandemic. The Administrative Order can be found at: <https://www.areb.uscourts.gov/sites/arb/files/Bankruptcy%20Court%20Administrative%20Order%20March%2016%202020.pdf>.

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). The following shall constitute the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to this contested matter by Federal Rules of Bankruptcy Procedure 4001 and 9014.

II. Facts

The stipulated facts and agreed exhibits are as follows:

1. GM Financial is a creditor of Debtor, Clyde Smith, by virtue of that certain Retail Installment Sale Contract Simple Finance Charge ("Contract") dated July 13, 2012, arising out of the purchase of a 2010 Ford Escape, VIN: 1FMCU0C74AKD47102 ("Vehicle"). GM Financial holds a validly perfected, first priority security interest in the Vehicle as noted on the Certificate of Title issued by the State of Arkansas. . . .

2. The Debtors filed this bankruptcy case on October 14, 2015.

3. On October 28, 2015, GM Financial filed a Proof of Claim in the amount of \$10,542.89, representing the balance of its lien on the Vehicle. . . .

4. The Debtors' Chapter 13 Plan provided for payment to GM Financial on the Vehicle in the amount of \$12,000.00 with a secured value of \$8,000.00 with 4.00% interest and monthly payments in the amount of \$148.00[.]

5. The Debtors' Chapter 13 Plan was confirmed on July 20, 2018.

6. On or about December 30, 2019, the Vehicle was totaled in an accident and there are insurance proceeds being held by Allstate Insurance in the amount of \$4,379.85.³

7. Pursuant to the terms of the Contract, a balance remains on GM Financial's lien in the amount of \$6,504.50.

³ Neither party disputes that the insurance proceeds are property of the estate.

8. Pursuant to the Chapter 13 Plan, the balance of GM Financial's secured claim is \$282.94 (\$281.06 principal plus \$1.88 in interest) and the balance of the unsecured claim is \$2,542.89.

9. As the lien holder on the Vehicle, GM Financial is entitled to the insurance proceeds to satisfy its lien on the Vehicle.

....

10. The parties stipulate to the authenticity and admissibility of the following Exhibits:

A. Exhibit A- Proof of Claim 3-1 filed on October 28, 2015; and

B. Exhibit B- Trustee's Ledger.

(Joint Stipulations at 1–2, Doc. No. 75).

The parties also agree that the underlying debt owed to GM Financial as determined under nonbankruptcy law has not been paid in full and the Debtors have not received their discharge.

The parties introduced a copy of the proof of claim filed by GM Financial. The proof of claim reflects the value of the Vehicle as \$10,900.00, which is \$2,900.00 more than the value assigned to the Vehicle in the Debtors' Chapter 13 plan to be paid over the life of the plan. GM Financial did not object to its plan treatment. The plan was confirmed by order of this Court entered on January 14, 2016. (Order, Doc. No. 29). The Debtors later modified their plan, which modified plan was confirmed by order of this Court entered on July 20, 2018. (Order, Doc. No. 66).⁴

⁴ The Court takes judicial notice of its own docket activity and its orders confirming the Debtors' plans. The Court also notes that the Debtors' modified plan did not alter the original treatment of GM Financial's claim.

A copy of the Contract between Mr. Smith and GM Financial⁵ was attached to GM Financial’s proof of claim. The Contract includes provisions regarding insurance coverage on the Vehicle providing, in part, “[Mr. Smith] agree[s] to have physical damage insurance covering loss of or damage to the [V]ehicle for the term of this [C]ontract. The insurance must cover [GM Financial’s] interest in the [V]ehicle.” (Joint Stipulations at Ex. A, Contract ¶ 2.d, Doc. No. 75).

John Mallory, a staff attorney with the Trustee’s office, was called to testify on behalf of the Debtors. He testified that the Debtors were not only current on their plan payments but ahead. The case was scheduled to complete in three months, in month fifty-seven of the case. GM Financial has received payments under the plan, and at the time of the hearing, the balance of its secured claim was \$282.94, comprised of \$281.06 in principal and \$1.88 in interest.

III. Arguments

GM Financial argues that the plain language of Section 1325(a)(5)(B)(i) controls the issue before the Court.⁶ That subsection provides, as one option for plan confirmation, that, “the plan provides that—(I) the holder of such [allowed secured] claim retain the lien securing such claim until the earlier of—(aa) the payment of the underlying debt determined under nonbankruptcy law; or (bb) discharge under section 1328.” 11 U.S.C. §1325(a)(5)(B)(i) (2018). GM Financial argues that because neither of these statutory conditions has been met, its lien remains, and it is entitled to the insurance proceeds to the extent of that lien. Because the

⁵ Clyde Smith entered into the Contract with Ford of West Memphis and the Contract was assigned to AmeriCredit Financial Services at the time of the purchase. According to the Motion, AmeriCredit Financial Services is doing business as GM Financial.

⁶ GM Financial did not object to its proposed plan treatment and is, therefore, deemed to have accepted the Debtors’ treatment of its secured claim. *Wachovia Dealer Servs. v. Jones (In re Jones)*, 530 F.3d 1284, 1291 (10th Cir. 2008) (“if a secured creditor fails to object to confirmation, the creditor will be bound by the confirmed plan’s treatment of its secured claim”). Such an acceptance would allow confirmation of its plan treatment under Section 1325(a)(5)(A). Both parties agreed and argued that the issues raised are governed by Section 1325(a)(5)(B), so the Court will follow their lead.

contractual lien amount under nonbankruptcy law (\$6,504.50) is greater than the amount of the insurance proceeds (\$4,379.85), GM Financial argues it is entitled to the full amount of the insurance proceeds to pay down its lien. GM Financial argues that the Court should consider the facts as they presently are, not whether the Debtors may receive their discharge in the future.⁷

The Debtors argue they are on schedule to complete their Chapter 13 Plan early and expect to receive their discharge in approximately three months. They acknowledge GM Financial's lien remains until they receive their discharge, but they argue the Court should allow either the insurance company or the Trustee to hold the proceeds to allow the Debtors to complete their plan and receive their discharge. They argue under this approach, GM Financial will be protected because it will retain its lien until discharge as provided by the Bankruptcy Code, but the Debtors' equity will also be protected.

IV. Discussion

GM Financial brings its Motion seeking relief from stay as to the insurance proceeds under Section 362(d)(1)⁸ of the Bankruptcy Code, which provides:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

⁷ At the hearing, GM Financial also stated the case of *Fisette v. Keller (In re Fisette)*, 455 B.R. 177 (B.A.P. 8th Cir. 2011), supported its position. The Court disagrees. In *Fisette*, the Court evaluated whether a Chapter 13 debtor could strip off a wholly unsecured lien on his principal residence even where the debtor was ineligible for a discharge. It did not concern entitlement to insurance proceeds.

⁸ GM Financial cites to Section 554 of the Bankruptcy Code and Bankruptcy Rule 6007(b) in the first paragraph of its Motion but does not include abandonment in its pleading title or in its prayer for relief. To the extent the Motion requests abandonment of the insurance proceeds, the Motion is denied. Bankruptcy Rule 6007(b) directs a motion for abandonment to be served on all creditors. FED. R. BANKR. P. 6007(b). The record does not reflect such service. "Notification to creditors is essential; abandonment is ineffective without the procedural safeguards afforded by the Code and Rules." *In re Gibson*, 218 B.R. 900, 905 (Bankr. E.D. Ark. 1997) (citing *Killebrew v. Brewer (In re Killebrew)*, 888 F.2d 1516, 1523 (5th Cir. 1989), *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 709–10 (9th Cir. 1986), *In re Heil*, 141 B.R. 112, 114 (Bankr. N.D. Tex. 1992), *Barletta v. Tedeschi*, 121 B.R. 669, 671 (N.D.N.Y. 1990)).

11 U.S.C. § 362(d)(1) (2018). GM Financial bears the burden of proving it has an interest in the property and that its interest needs protection. *First Nat'l Bank of Denver v. Turley*, 705 F.2d 1024, 1026 (8th Cir. 1983) (“creditor must show the court that its interest in the debtor’s property is sufficiently clear and in need of protection to justify exempting the property from the normal course of bankruptcy proceedings”); *see also In re May*, No. 4:02-bk-14785E, 2002 WL 32114562, at *3 (Bankr. E.D. Ark. July 18, 2002).

For the reasons stated below, the Court finds that GM Financial has an interest in the insurance proceeds, but GM Financial is entitled to relief from stay of the proceeds only in the amount of \$282.94, the balance remaining on its allowed secured claim under the terms of the Debtors’ confirmed plan.

A. GM Financial’s Interest in the Insurance Proceeds

As an initial matter, the parties do not dispute that as the lienholder on the Vehicle, GM Financial has an interest in the insurance proceeds. (Joint Stipulations ¶ 9, Doc. No. 75). GM Financial is correct that pursuant to Section 1325(a)(5)(B)(i), it retains its lien in the proceeds until the Debtors receive a discharge or its claim under nonbankruptcy law is paid in full. The Debtors acknowledge this in the Joint Stipulations.

The retention of lien language was added to Section 1325(a)(5)(B)(i) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“**BAPCPA**”). The purpose of adding the language was to overrule cases requiring a creditor to release its lien upon payment in full of its bifurcated *secured* claim only to have the bankruptcy case later dismissed, leaving the creditor without state law remedies to enforce the lien on the balance of its claim under state law. *In re Cotton*, No. 11-42420-13-drd, 2015 WL 5601454, at *2 (Bankr. W.D. Mo. Sept. 22, 2015) (citing 8 COLLIER ON BANKRUPTCY ¶ 1325.06[3][a] (Richard Levin & Henry J. Sommer eds.,

16th ed.)). The amendment made clear that a creditor retains its lien until the debtor receives a discharge or its claim under state law is paid in full. 11 U.S.C. § 1325(a)(5)(B)(i) (2018). In the case before the Court, neither condition has been met and GM Financial's lien in the insurance proceeds remains until one of the conditions in Section 1325(a)(5)(B)(i) occurs.

However, contrary to GM Financial's argument, the analysis does not end here. The Court must also analyze GM Financial's interest in the insurance proceeds in the context of the Debtors' confirmed Chapter 13 plan. *In Holtslander*, 507 B.R. 779, 783 (Bankr. N.D.N.Y. 2014) (GM Financial's interest "must be determined in the context of both state and federal law with a particular emphasis on the Bankruptcy Code provisions affecting [GM Financial's] state law rights."); *In re Norred*, No. 09-40186-elp13, 2011 WL 4433598, at *4 (Bankr. D. Or. Sept. 21, 2011) (where insurance policy "insures the creditor's interest in the underlying collateral, the creditor's interest is determined according to the confirmed plan, if the claim is dealt with in the plan").

Section 1325 of the Bankruptcy Code governs plan confirmation. Pursuant to Section 1325(a)(5)(B)(ii), a debtor may determine the value of a creditor's secured claim in the plan confirmation process. "Bifurcation of claims into secured and unsecured portions based on value as of a particular date does not occur outside of bankruptcy cases." *In re Cotton*, 2015 WL 5601454, at *3. Section 506(a)(1) determines the value of a creditor's interest in property of the estate and provides:

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 such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a)(1) (2018).

Here, the proof of claim filed by GM Financial reflects a claim amount of \$10,542.89. The Debtors' plan bifurcated GM Financial's claim by valuing the Vehicle at \$8,000.00 and proposing to treat the remaining \$2,542.89 as a nonpriority unsecured claim. GM Financial did not object to this plan treatment, the Debtors' plan was confirmed, and GM Financial's bifurcated claims were allowed by the confirmation process. Payments have been made to GM Financial so that the balance remaining on its secured claim is \$282.94.

The confirmation process created a new binding relationship between GM Financial and the Debtors. 11 U.S.C. § 1327(a) (2018) ("The provisions of a confirmed plan bind the debtor and each creditor"). "The post-confirmation relationship between [GM Financial and the Debtors] thus requires [GM Financial] to forgo certain rights in exchange for the [Debtors'] promise to make payments under the plan." *In re Holtslander*, 507 B.R. at 785. Under the provisions of Section 1325(a)(5)(B), GM Financial's "secured claim was fixed in amount and status." *Id.* (citing 11 U.S.C. § 1325(a)(5)(B)). The case has not been dismissed or converted to negate the plan provisions.

Therefore, while GM Financial has a lien on all the insurance proceeds under Section 1325(a)(5)(B)(i), GM Financial remains bound by the terms of the confirmed plan. Under the terms of the confirmed plan, the balance of its allowed secured claim is \$282.94, which is GM Financial's present interest in the insurance proceeds.

B. Relief from Stay

In its Motion, GM Financial states that "cause exists, including the lack of adequate protection," to lift the automatic stay as to "its collateral and the proceeds thereof, and any insurance proceeds." (Mot. ¶ 6, Doc. No. 69). In their Response, the Debtors argue that

GM Financial is adequately protected. At the hearing, the Debtors further argued that relief from stay is usually sought when a debtor has fallen behind on payments or the security is in danger, neither of which is the case here.

The order confirming the Debtors' last modified plan states, "[t]he Court finds that the modified plan as filed by the [D]ebtors on 06/19/2018 complies with all provisions of Chapter 13 and with all other provisions of Title 11 of the United States Code . . . that the plan complies with Section 1325 of the United States Bankruptcy Code and that the plan should be confirmed." (Order, Doc. No. 66).

Included in the plan confirmation requirements of Section 1325 is the following:

if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan[.]

11 U.S.C. § 1325(a)(5)(B)(iii) (2018).

This provision was also added by BAPCPA. The purpose of the addition was to ensure that secured creditors are adequately protected for the life of the plan. As explained by a leading treatise:

Section 1325(a)(5)(B)(iii)(II) simply codifies once more the right of the holder of an allowed secured claim to receive payments during the plan that are sufficient to provide adequate protection to the creditor's interest in the property, as already provided by sections 362 and 363. . . .

The fact that provision of adequate protection has now been explicitly included in the standards for plan confirmation further buttresses those cases which have held that a creditor may not, after confirmation, seek relief from the stay based on a lack of adequate protection because the issue of adequate protection should have been raised before confirmation and confirmation of the plan is *res judicata* on the issue of adequate protection. Moreover, if a secured creditor does not object

to the plan, the creditor is deemed to have accepted the adequate protection provided by the plan.

8 COLLIER ON BANKRUPTCY ¶ 1325.06[3][b][ii][B] (Richard Levin & Henry J. Sommer eds., 16th ed.).

In the case before the Court, the Debtors promised to pay GM Financial's \$8,000.00 secured claim, plus 4.00% interest, in monthly payments of \$148.00 over sixty months. GM Financial did not object to this plan treatment and is deemed to have accepted the plan.

Wachovia Dealer Servs. v. Jones (In re Jones), 530 F.3d 1284, 1291 (10th Cir. 2008). The Court confirmed the plan and, in doing so, found the periodic monthly payments to be in an amount sufficient to provide GM Financial adequate protection during the life of the plan. Moreover, by not objecting, GM Financial is "deemed to have accepted the adequate protection provided by the plan." 8 COLLIER ON BANKRUPTCY ¶ 1325.06[3][b][ii][B] (Richard Levin & Henry J. Sommer eds., 16th ed.).

The Debtors have kept their promise for almost five years. The testimony of Mr. Mallory was that the Debtors are current on their plan payments to the Trustee and are likely to complete their plan early. No evidence was introduced that GM Financial has not received the periodic monthly payments required by the confirmed plan. Based on the foregoing, the Court finds no lack of adequate protection to support granting GM Financial's motion for relief from stay on that basis.

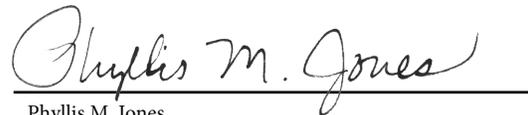
However, under Section 362(d)(1), the Court may grant relief from stay for "cause" even if a lack of adequate protection is not found. The Court does find that "cause" exists to grant GM Financial relief from stay as to the \$282.94 balance of its secured claim under the terms of the Debtors' confirmed plan. The insurance proceeds in this amount represent the balance of GM Financial's secured claim, which claim was secured by the Vehicle. The Vehicle no longer

secures GM Financial's claim but has been replaced by the insurance proceeds. At the hearing, the Debtors represented they were agreeable to allowing GM Financial to be paid the balance of its secured claim under the plan. The Court finds that cause exists to grant GM Financial relief from stay to obtain \$282.94 in the proceeds.

V. Conclusion

For the foregoing reasons, GM Financial's Motion is granted in part and denied in part. GM Financial has an interest in the insurance proceeds and a lien on all the insurance proceeds. Under Section 1325(a)(5)(B)(i), GM Financial will retain its lien until the Debtors receive a discharge or its claim under nonbankruptcy law is paid. GM Financial is also bound by the terms of the Debtors' confirmed plan, under which the balance of GM Financial's secured claim is \$282.94. Accordingly, GM Financial is entitled to payment of \$282.94 from the insurance proceeds. It will retain its lien in the balance of the insurance proceeds until one of the events of Section 1325(a)(5)(B)(i) occurs.

IT IS SO ORDERED.



Phyllis M. Jones
United States Bankruptcy Judge
Dated: 06/04/2020