

# UTAH LAW REVIEW



UNIVERSITY OF UTAH  
S.J. QUINNEY COLLEGE OF LAW

# Security Interests, Repossessed Collateral, and Turnover of Property to the Bankruptcy Estate

Stephen J. Ware\*

## TABLE OF CONTENTS

I.	The Colloquial and Specialist's Understandings of Property in Article 9 and the Bankruptcy Code . . . . .	777
	A. Generally . . . . .	777
	B. Sections 541 and 542(a) . . . . .	778
II.	<i>Whiting Pools</i> and Article 9 Cases Using the Colloquial Understanding of Property . . . . .	780
III.	The Specialist's Understanding of Property Appears in the Case Law: <i>Lewis</i> . . . . .	784
	A. <i>Lewis's</i> Federal Law Holding . . . . .	784
	B. <i>Lewis's</i> State Law Holding . . . . .	787
IV.	State Law Differences and Their Irrelevance . . . . .	789
	A. Introduction . . . . .	789
	B. <i>Greene</i> . . . . .	790
	C. Other Courts "Bound" by <i>Lewis</i> . . . . .	794
	D. Courts not Bound by <i>Lewis</i> . . . . .	799
V.	Conclusion . . . . .	802

---

\*Professor of Law, Cumberland School of Law, Samford University. J.D., University of Chicago; B.A., University of Pennsylvania. Thanks to Ted Janger, Tom Plank, Tom Bennett, Chris Drahozal, Keith Meyer, Robert Chapman, Mike Floyd, Heather Glenn, Leigh Bullard, Burns Logan, Leigh Weaver, and Brad Burnham.

Property is generally understood in two ways. Most people think of property as a *thing* that is *owned* by someone. By contrast, lawyers and other specialists understand property as *rights* against people with respect to things. This more abstract understanding of property dissolves the unitary conception of ownership into a metaphorical "bundle" of rights reflecting the fact that more than one person can have rights with respect to a particular thing.<sup>1</sup> Examples of such joint ownership include the landlord-tenant and mortgagor-mortgagee relationships. In short, most people think of property as thing-ownership while lawyers and other specialists think of property as a bundle of rights.

This duality in our understanding of property can cause confusion when lawmakers (legislators and judges) mix the colloquial understanding of property as thing-ownership with the specialist's understanding of property as a bundle of rights. Such mixing seems to have occurred in the law governing security interests in bankruptcy. As a result, courts are split on a frequently recurring issue: must a secured creditor who, at the time the debtor files for bankruptcy, has repossessed goods but not yet sold them at foreclosure, relinquish possession of those goods?

Law governing secured transactions in bankruptcy includes state law, Uniform Commercial Code (UCC) Article 9,<sup>2</sup> and the federal Bankruptcy Code.<sup>3</sup> Part I of this Article explains that the specialist's understanding of property pervades Article 9 but that an important section of the Bankruptcy Code (§ 542(a)) is not as clear about whether it uses the colloquial understanding of property as thing-ownership or the specialist's understanding of property as a bundle of rights. Part II of this Article briefly summarizes the majority view, based on the United States Supreme Court's decision in *United States v. Whiting Pools, Inc.*,<sup>4</sup> that § 542(a) uses the colloquial understanding of property.<sup>5</sup> Courts applying this view to secured creditors who have repossessed goods, but not yet sold them at foreclosure, hold that the creditor must deliver (turn over) possession of the goods to a debtor who files for bankruptcy or to the bankruptcy trustee. By contrast, Part III of this Article discusses an Eleventh Circuit Court of Appeals case holding that § 542(a) uses the specialist's understanding of property and thus requires such a creditor to deliver (turn over), not possession of such goods, but only the debtor's rights with respect to those goods. The Eleventh Circuit's reading of § 542(a) receives scholarly support from Professor Thomas E. Plank.

---

<sup>1</sup>See A. Mechele Dickerson, *From Jeans to Genes: The Evolving Nature of Property of the Estate*, 15 BANKR. DEV. J. 285, 287-88 (1998); Thomas C. Grey, *The Disintegration of Property*, in 22 NOMOS: PROPERTY 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980); Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 EMORY L.J. 1193, 1193-94 (1998).

<sup>2</sup>U.C.C. §§ 9-101 to -709 (2001).

<sup>3</sup>11 U.S.C. §§ 101-1330 (2000) (originally enacted as Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)).

<sup>4</sup>462 U.S. 198 (1983).

<sup>5</sup>*Id.* at 203-07.

Plank argues that the Eleventh Circuit's reading of § 542(a) is correct on the merits and that this reading is consistent with Supreme Court precedents because *Whiting Pools* is no longer good law.<sup>6</sup> Plank argues that a more recent Supreme Court decision, *Citizens Bank of Maryland v. Strumpf*,<sup>7</sup> "removed the logical underpinnings for the rationale of *Whiting Pools*."<sup>8</sup>

Both the Eleventh Circuit and Plank raise a strong challenge to the majority view about § 542(a) and turnover of property to the bankruptcy estate. There are, however, also strong arguments in defense of the majority view.<sup>9</sup> This Article does not seek to make the case for either view. Rather than try to resolve the debate about the best reading of § 542(a), the goal of this Article is simply to encourage courts to engage the question. Instead of engaging this important question of federal law, courts have been led astray by another topic, different laws in different states. Part IV of this Article critiques these cases and explains why variations in state law are not relevant to bankruptcy cases of goods that have been repossessed but not yet sold at foreclosure. This Article concludes with the hope that courts will stop being led astray by irrelevant variations in state law and confront the task of determining the best reading of Bankruptcy Code § 542(a).

## I. THE COLLOQUIAL AND SPECIALIST'S UNDERSTANDINGS OF PROPERTY IN ARTICLE 9 AND THE BANKRUPTCY CODE

### A. Generally

Secured transactions in personal property are primarily governed by Article 9 of the UCC. Article 9 reflects the specialist's understanding of property as a bundle of rights, rather than the colloquial understanding of property as thing-ownership.<sup>10</sup> This is no surprise given that the subject of Article 9, security interests, cannot arise unless at least two parties (debtor and creditor) each have one or more of the rights regarding the "thing" in question, the collateral. The creditor, who has generally lent money to the debtor, has a security interest in the collateral to secure payment of the debtor's obligation.<sup>11</sup>

---

<sup>6</sup>Thomas E. Plank, *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, 59 MD. L. REV. 253, 258 (2000).

<sup>7</sup>516 U.S. 16 (1995).

<sup>8</sup>Plank, *supra* note 6, at 258.

<sup>9</sup>See *infra* notes 36, 42, 79.

<sup>10</sup>Article 9 states that its rules "apply whether title to collateral is in the secured party or the debtor." U.C.C. § 9-202 (2001). Other portions of the UCC, by contrast, retain the importance of title. See Jeanne L. Schroeder, *Death and Transfiguration: The Myth that the U.C.C. Killed "Property,"* 69 TEMP. L. REV. 1281, 1282-91 (1996) (discussing Karl Llewellyn's criticism of use of "title" and ways those criticisms were later misinterpreted).

<sup>11</sup>U.C.C. § 1-201(37).

Although the owner of the property thing subject to a security interest [the debtor] may continue to think of it as her "property," her property interest is now only an equity interest. This equity interest consists of the right to redeem the lender's security interest by paying the debt and the right to surplus if the lender were to force a sale for her failure to pay the secured debt.<sup>12</sup>

So the specialist's understanding of property as a bundle of rights naturally pervades a statute delineating the particular rights of the debtor, the secured creditor, and others with respect to collateral.

By contrast, the Bankruptcy Code is less pure than Article 9 in its adherence to the specialist's understanding of property. In some of its sections, the Bankruptcy Code uses the specialist's understanding of property as a bundle of rights, in other sections it uses the colloquial understanding of property as thing, and in still other sections it is not clear which understanding it is using.<sup>13</sup>

#### *B. Sections 541 and 542(a)*

An important provision of the Bankruptcy Code that uses the specialist's understanding of property is § 541.

##### § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.<sup>14</sup>

The language of § 541(a)(1) exemplifies the specialist's understanding of property as a bundle of rights,<sup>15</sup> with the word "interests" serving as closely, maybe perfectly, synonymous with "rights." Other subsections of § 541(a) also speak in terms of "interests" in property.<sup>16</sup>

---

<sup>12</sup>Plank, *supra* note 1, at 1202.

<sup>13</sup>*Id.* at 1221 ("Congress itself could not consistently apply an admittedly sophisticated understanding of property interests . . ."). In a few sections of the Bankruptcy Code, "Congress has confused the distinction between an interest in a property item and the property item itself." *Id.* at 1230.

<sup>14</sup>11 U.S.C. § 541(a)(1).

<sup>15</sup>Plank, *supra* note 1, at 1209.

<sup>16</sup>11 U.S.C. § 541(a).

While § 541 uses the specialist's understanding of property as bundle of rights, § 542(a) may reflect the colloquial understanding of property as thing. Section 542(a) provides:

Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.<sup>17</sup>

Property that “[t]he trustee . . . may use, sell, or lease” under § 363 is, according to § 363(b) and (c), “property of the estate.”<sup>18</sup> So the relevant portion of § 542(a) reads “an entity . . . in possession . . . of property [of the estate] . . . shall deliver to the trustee . . . such property.”<sup>19</sup>

Does this language refer to property as thing or property as bundle of rights? An important word in the text of § 542(a) suggests the colloquial understanding of property as thing. That word is “delivery.” The “delivery” of property is action that fits comfortably with the colloquial understanding of property as thing. In ordinary speech, we routinely speak of couriers like Federal Express “delivering” things. How often, though, does anyone speak of “delivering” rights? Even lawyers and other specialists do not speak this way.<sup>20</sup> When we are speaking of rights, rather than things, we are much more likely to speak of “conveying” than “delivering.” We “convey” rights to property, while we “deliver” things.<sup>21</sup> A statute, § 542(a), that talks about the “delivery” of property sounds like a statute using the colloquial understanding property as a thing rather than as an abstraction, an intangible bundle of rights.

On the other hand, what § 542 requires delivery of is “property of the estate” and the definition of property of the estate in § 541 “refers to ‘interests’ in property, not the property itself.”<sup>22</sup> For this reason, Plank argues that § 542(a) requires delivery of only the debtor's *interests* in property, not of the property

---

<sup>17</sup>*Id.* § 542(a).

<sup>18</sup>*Id.* § 363(b)–(c).

<sup>19</sup>*Id.* § 542(a).

<sup>20</sup>For example, the UCC defines delivery “with respect to instruments, documents of title, chattel paper, or certificated securities” to mean “voluntary transfer of possession.” U.C.C. § 1-201(14).

<sup>21</sup>We might also “assign,” “license,” “transfer,” or “alienate” rights, but we do not “deliver” them.

<sup>22</sup>DOUGLAS G. BAIRD ET AL., CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 364 (3d ed. 2001).

itself.<sup>23</sup> For example, consider the case posed at the start of this Article, *i.e.*, a secured creditor who, at the time the debtor files for bankruptcy, has repossessed goods but not yet sold them at foreclosure. In such a case, according to Plank:

[T]he property of the estate consists not of the property items possessed by the creditor but only the estate's equity interest in those items. This equity interest consists only of the estate's right to any surplus from the sale of the property items, the right to redeem the creditor's lien on the property items by paying the amount of the claim, and its ancillary rights, such as the right to notice of the foreclosure sale. The creditor does not have custody or control over these interests, and section 542(a) does not apply to the creditor in this context.<sup>24</sup>

To reiterate, Plank's analysis concludes that the secured creditor who repossessed goods before bankruptcy is not obligated to deliver (turn over) possession of such goods because possession is not one of the rights held by the debtor at the time of the bankruptcy filing. Possession of the goods is not a right that passes to the estate under § 541. The rights that do pass to the estate are the rights to any surplus from the foreclosure sale, the right to redeem the property prior to foreclosure, and so forth, because those are the rights the debtor had at the time of the bankruptcy filing.<sup>25</sup>

## II. *WHITING POOLS* AND ARTICLE 9 CASES USING THE COLLOQUIAL UNDERSTANDING OF PROPERTY

Professor Plank, although not mentioned by name, has seen his approach rejected by nearly all courts. Plank's approach was rejected (fifteen years before Plank published it) by the United States Supreme Court in *United States v. Whiting Pools, Inc.*<sup>26</sup> In *Whiting Pools*, the debtor failed to pay its taxes, so its property became subject to a lien under the Federal Tax Lien Act.<sup>27</sup> To enforce that lien, the Internal Revenue Service seized<sup>28</sup> all of the debtor's personal property.<sup>29</sup> The next day the debtor filed a Chapter 11 petition in bankruptcy.<sup>30</sup>

---

<sup>23</sup>Plank, *supra* note 6, at 256.

<sup>24</sup>*Id.* at 318 (footnote omitted).

<sup>25</sup>An explanation of how "turnover" of these rights can occur is found *infra* Part III.

<sup>26</sup>462 U.S. 198, 203-07 (1983).

<sup>27</sup>*Id.* at 200 (applying Federal Tax Lien Act, 26 U.S.C. §§ 6321-6334 (2000)). Section 6321 of the Act provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321.

<sup>28</sup>26 U.S.C. § 6331.

<sup>29</sup>*Whiting Pools*, 462 U.S. at 200.

<sup>30</sup>*Id.*; see 11 U.S.C. §§ 1101-1146.

The IRS then sought permission from the bankruptcy court to sell the seized goods in its possession.<sup>31</sup> The debtor counterclaimed for an order pursuant to § 542, requiring the IRS to return possession of the seized goods.<sup>32</sup> The Supreme Court affirmed the Bankruptcy Court's order requiring the IRS to deliver possession of the goods to the debtor.<sup>33</sup>

Justice Blackmun's opinion for the Court in *Whiting Pools* held that § 542(a) required the IRS to deliver (turn over), not merely the debtor's prebankruptcy rights with respect to a thing, but possession of the thing.<sup>34</sup> "In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings."<sup>35</sup> In other words, the *Whiting Pools* Court read § 542(a) to reflect the colloquial understanding of property as thing.<sup>36</sup> The IRS was obligated to turn over the thing even though the debtor had only certain nonpossessory interests in that thing.<sup>37</sup> The Court based this conclusion on particular pieces of legislative history, as well as on the more general statutory purpose of facilitating debtor reorganization while providing "adequate protection" to secured creditors.<sup>38</sup>

---

<sup>31</sup>*Whiting Pools*, 462 U.S. at 200-01. The IRS sought a declaration that the automatic stay of § 362 of the Bankruptcy Code did not apply, or, in the alternative, relief from the automatic stay under § 362(d). *Id.*

<sup>32</sup>*Id.* at 201. The debtor, rather than the trustee, asserted this claim because the debtor in possession has the rights and powers of the trustee. *See* 11 U.S.C. § 1107.

<sup>33</sup>*Whiting Pools*, 462 U.S. at 211-12.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 207.

<sup>36</sup>In other cases, by contrast, the *Whiting Pools* Court likely would have read § 542(a) to reflect the specialist's understanding of property as a bundle of rights. For example, the Court indicated that it would not have ordered delivery of possession to the debtor had the debtor's prebankruptcy rights with respect to a thing been limited to a "minor interest such as a lien or bare legal title," *id.* at 204 n.8:

The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title. Similar statements to the effect that § 541(a)(1) does not expand the rights of the debtor in the hands of the estate were made in the context of describing the principle that the estate succeeds to no more or greater causes of action against third parties than those held by the debtor. These statements do not limit the ability of a trustee to regain possession of property in which the debtor had equitable as well as legal title.

*Id.* (citations omitted). Professor David Carlson says that this distinction between the debtor's equitable interests and legal interests "cannot be justified from the text of the Bankruptcy Code," but that, in making this distinction, "Justice Blackmun may have correctly identified the spirit of the Bankruptcy Code." GRANT GILMORE & DAVID GRAY CARLSON, *GILMORE AND CARLSON ON SECURED LENDING* § 13.03 (2d. ed. 2000).

<sup>37</sup>*Whiting Pools*, 462 U.S. at 211-12.

<sup>38</sup>*Id.* at 203-07. Justice Blackmun went on to say:

[T]o facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate.



Plank calls *Whiting Pools* "dead wrong."<sup>39</sup> Plank disagrees with *Whiting Pools* on both legislative history and on general policy,<sup>40</sup> and concludes that

the property of *Whiting Pools*'s estate consisted not of the goods possessed by the IRS but of the *interests* of *Whiting Pools* in the goods, its equity interests. These interests were only its right to any surplus from the sale of the goods, its right to redeem the IRS's lien on the goods by paying the amount of taxes due, and its right to notice of the

---

This authorization extends even to property of the estate in which a creditor has a secured interest. § 363(b) and (c). Although Congress might have safeguarded the interests of secured creditors outright by excluding from the estate any property subject to a secured interest, it chose instead to include such property in the estate and to provide secured creditors with "adequate protection" for their interests. § 363(e). At the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor. The creditor with a secured interest in property included in the estate must look to this provision for protection, rather than to the nonbankruptcy remedy of possession.

Both the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate.

The statutory language reflects this view of the scope of the estate. As noted above, § 541(a)(1) provides that the "estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The House and Senate Reports on the Bankruptcy Code indicate that § 541(a)(1)'s scope is broad. Most important, in the context of this case, § 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.

Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee. Given the broad scope of the reorganization estate, property of the debtor repossessed by a secured creditor falls within this rule, and therefore may be drawn into the estate. While there are explicit limitations on the reach of § 542(a), none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings.

As does all bankruptcy law, § 542(a) modifies the procedural rights available to creditors to protect and satisfy their liens. In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings.

*Id.* (citations and footnotes omitted).

<sup>39</sup>Plank, *supra* note 6, at 256.

<sup>40</sup>Plank, *supra* note 1, at 1247-50 (discussing general policy); *id.* at 1251-54 (discussing legislative history).

foreclosure sale. The IRS did not have custody or control over these interests, and thus section 542(a) did not apply to the IRS.<sup>41</sup>

Other scholars, by contrast, are more supportive of the *Whiting Pools* result, if not always of its reasoning.<sup>42</sup>

While the creditor in *Whiting Pools* had a tax lien rather than a security interest, many courts around the United States have applied *Whiting Pools*' reasoning to security interests.<sup>43</sup> These cases hold that a secured creditor who has repossessed goods, but not yet sold them at foreclosure, must deliver (turn over) possession of the goods to a debtor who files for bankruptcy or to the bankruptcy trustee. These cases, following *Whiting Pools*, read § 542(a) as using the colloquial understanding of property as thing. They read § 542(a) to require the creditor who has repossessed something to deliver possession of the thing rather

---

<sup>41</sup>Plank, *supra* note 6, at 256 (footnotes omitted).

<sup>42</sup>After quoting the three sections of the Bankruptcy Code discussed above, §§ 542(a), 363, and 541(a)(1), Justice Blackmun said: "Although these statutes could be read to limit the estate to those 'interests of the debtor in property' at the time of the filing of the petition, we view them as a definition of what is included in the estate, rather than as a limitation." *Whiting Pools*, 462 U.S. at 201 n.5, 202-03 (citation omitted). As Baird, Jackson, and Adler point out, however, "definitions function as limitations." BAIRD ET AL., *supra* note 22, at 364. These three leading bankruptcy scholars add that "[p]erhaps Justice Blackmun would have been on more solid ground had he noted that, in order for the trustee to protect even a partial interest in property, the trustee needs to obtain possession of or control over that property." *Id.*

Like Carlson, quoted *supra* note 36, Professor Charles Tabb seems to hold the *Whiting Pools* result in higher regard than its reasoning:

Surely Justice Blackmun was not suggesting that property of the estate included *more* than the debtor's interests in property because the legislative history indicated that the term was to have a broad scope. These cryptic statements do not really address the fact that a literal reading of the statutes leads to the result argued for by the government. However, it seems clear from reading the entire statute and from considering its history that Congress did in fact intend for turnover to be available in this situation. A simpler and clearer resolution [than the textual reading attempted by Justice Blackmun] is to acknowledge that the statutory language does not really do what it sets out to do, and that the operative principle is that if the debtor has *any* interest in property, the *entire* property is subject to turnover.

Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 507-14 & n.219 (1988) (citation omitted). Tabb uses the derogatory term "mechanical" to describe the statutory reading preferred by Plank. *Id.* at 509-10. Tabb concludes that "[a]lthough [*Whiting Pools*] struggled to explain why the statutory reading urged by the government was wrong, the Court properly read the various complimentary [sic] sections of the Code as a whole in coming up with a plausible interpretation of those sections." *Id.* at 510-11 (footnote omitted).

<sup>43</sup>See *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 686-87 (B.A.P. 6th Cir. 1999); *In re Berscheit*, 223 B.R. 579, 581-82 (Bankr. D. Wyo. 1998); *In re Zaber*, 223 B.R. 102, 104-06 (Bankr. N.D. Tex. 1998); *Gen. Motors Acceptance Corp. v. Ryan*, 183 B.R. 288, 289 (M.D. Fla. 1995); *Carr v. Sec. Sav. & Loan Ass'n*, 130 B.R. 434, 437 (D.N.J. 1991); *In re Radden*, 35 B.R. 821, 823, 826 (Bankr. E.D. Va. 1983); see also discussion and notes *infra* Part IV.

than requiring the creditor to deliver (per Plank) only the debtor's rights with respect to the thing.

### III. THE SPECIALIST'S UNDERSTANDING OF PROPERTY APPEARS IN THE CASE LAW: *LEWIS*

#### A. *Lewis's Federal Law Holding*

There is, however, one case that Professor Plank praises as "a step in the right direction."<sup>44</sup> It is the Eleventh Circuit's 1998 decision in *Charles R. Hall Motors, Inc. v. Lewis (In re Lewis)*.<sup>45</sup> *Lewis* involved a security interest in an automobile.<sup>46</sup> Following the debtors' default, the secured creditor repossessed the vehicle.<sup>47</sup> The debtors then filed a joint petition for Chapter 13 bankruptcy.<sup>48</sup>

When the secured creditor refused to deliver possession of the vehicle to the Lewises, the Lewises initiated an adversary proceeding seeking a court order requiring the secured creditor to deliver (turn over) possession of the vehicle.<sup>49</sup> While the bankruptcy court concluded that the vehicle was "property of the estate" and ordered the secured creditor to deliver (turn over) possession of it to the Lewises,<sup>50</sup> the district court reversed,<sup>51</sup> and the Eleventh Circuit affirmed the district court.<sup>52</sup> In so affirming, *Lewis* held that the estate's only interest in a repossessed vehicle is the right to redeem the vehicle, and not the vehicle itself, and therefore the vehicle itself is not subject to turnover under § 542(a).<sup>53</sup> "[W]e hold that the Lewises' bankruptcy estate's only interest in the repossessed automobile—a bare right of redemption—failed to render the automobile

---

<sup>44</sup>Plank, *supra* note 6, at 258 n.28.

<sup>45</sup>137 F.3d 1280 (11th Cir. 1998).

<sup>46</sup>*Id.* at 1281–82.

<sup>47</sup>*Id.* at 1281 (noting that Hall Motors' repossession of vehicle followed dismissal of debtors' prior chapter 13 case).

<sup>48</sup>*Id.* In documents filed contemporaneously with the proposed plan, one of the debtors (Elgin Lewis) expressed an intent to "reaffirm" the debt under § 524(c). *Id.* at 1282 n.12; see 11 U.S.C. § 524(c) (2000) ("An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable . . ."). He did not express an intent to "redeem" the vehicle under § 722. *Lewis*, 137 F.3d at 1282 n.12; see 11 U.S.C. § 722 ("An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.").

<sup>49</sup>*Lewis*, 137 F.3d at 1282.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 1285.

<sup>53</sup>*Id.*

'property of the estate' under 11 U.S.C. § 541(a)(1) and subject to turn-over under 11 U.S.C. § 542(a)."<sup>54</sup>

This holding exemplifies Plank's reading of § 542(a) as using the specialist's understanding of property as a bundle of rights rather than the colloquial understanding of property as thing. *Lewis* requires the creditor who has repossessed something to deliver (turn over), not possession of the thing, but only the debtor's rights with respect to the thing.<sup>55</sup> This holding is *Lewis*'s federal law holding because it turns on a reading (also advocated by Plank) of federal law, specifically Bankruptcy Code §§ 542(a) and 541(a)(1).<sup>56</sup> By contrast, *Lewis*'s state law holding is discussed below in Part III.B of this Article.

The *Lewis* fact pattern is a paradigmatic example of how Plank's reading of the Bankruptcy Code leads to a different result than the result under *Whiting Pools* and the cases applying *Whiting Pools* to security interests. A difference in result, however, does not occur in all cases in which a secured creditor has repossessed goods but, at the time the debtor files for bankruptcy, has not yet sold them at foreclosure. In three types of cases, Plank agrees with the majority view that such a creditor must relinquish possession of the goods.

First, both Plank and the majority agree that the creditor must relinquish possession of the goods if the estate exercises its right to redeem the goods by paying off the debt.<sup>57</sup> Plank states:

The bankruptcy trustee (including a debtor in possession) can always redeem the creditor's security interest by paying the amount of the creditor's claim. The debtor's right of redemption, part of its equity interest, is part of the property of the estate. Upon such redemption, the

---

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 1282.

<sup>57</sup>The UCC provides as follows:

(a) [Persons that may redeem collateral.] A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) [Requirements for redemption.] To redeem collateral, a person shall tender:

(1) fulfillment of all obligations secured by the collateral; and

(2) the reasonable expenses and attorney's fees described in Section 9-615(a)(1).

(c) [When redemption may occur.] A redemption may occur at any time before a secured party:

(1) has collected collateral under Section 9-607;

(2) has disposed of collateral or entered into a contract for its disposition under Section 9-610; or

(3) has accepted collateral in full or partial satisfaction of the obligation it secures under Section 9-622.

U.C.C. § 9-623 (2001).

entire property interest in the property item becomes property of the estate.<sup>58</sup>

Second, both Plank and the majority agree that the creditor must relinquish possession of the goods if “[t]he estate has a positive equity in the property items and the trustee seeks possession to sell them and to pay the creditor’s claim.”<sup>59</sup> This type of case applies only to oversecured creditors (creditors whose collateral is worth more than the debt), not to undersecured creditors (creditors whose collateral is worth less than the debt).<sup>60</sup> Third, both Plank and the majority agree that the creditor must relinquish possession of the goods if “[i]n reorganizations under chapter 11 or adjustment of debts under chapters 12 or 13, the confirmed plan requires the return of the property items.”<sup>61</sup>

Plank’s disagreement with the majority, therefore, is with respect to an undersecured creditor whose debtor seeks to reorganize but has not yet confirmed a plan requiring the creditor to relinquish possession of the goods.<sup>62</sup> *Lewis* is such a case. And there are many more such cases.<sup>63</sup> Debtors often file for bankruptcy under Chapters 11, 12, or 13 shortly after goods are repossessed because such repossession is often the “last straw” that breaks the debtor’s hopes of continuing outside of bankruptcy. In such cases, Plank’s reading of § 542(a) permits a creditor who has repossessed goods before bankruptcy to retain possession of those goods. This reading of § 542(a) is adopted by *Lewis*’s federal law holding, “that the Lewises’ bankruptcy estate’s only interest in the repossessed automobile—a bare right of redemption—failed to render the automobile ‘property of the estate’ under 11 U.S.C. § 541(a)(1) and subject to turn-over under 11 U.S.C. § 542(a).”<sup>64</sup>

### B. *Lewis*’s State Law Holding

As noteworthy as *Lewis* is for its federal law holding, *Lewis* is even more notorious for its state law holding. Alabama law was the relevant state law in

---

<sup>58</sup>Plank, *supra* note 6, at 319 (footnote omitted).

<sup>59</sup>*Id.* at 261; *see also id.* at 320–23 (discussing trustee’s power to require turnover and sale of property to pay creditor’s oversecured claim).

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 261; *see also id.* at 323–26 (discussing trustee’s power to require turnover where property is necessary for reorganization).

<sup>62</sup>There is no disagreement with respect to undersecured creditors where the debtor seeks to liquidate because the creditor will not have to relinquish possession of the goods, either because the trustee abandons the goods under Bankruptcy Code § 554 or because the court lifts the stay with respect to such goods under § 362(d)(2).

<sup>63</sup>*See infra* Part IV.

<sup>64</sup>*Lewis*, 137 F.3d at 1285.

*Lewis*, and Alabama enacted Article 9 in 1965, long before *Lewis*.<sup>65</sup> Yet *Lewis* did not rely upon Article 9. *Lewis* relied upon non-UCC conversion cases in holding that “[u]pon a debtor’s default, title and right of possession pass to the creditor.”<sup>66</sup> “Accordingly, we conclude that, at the commencement of the Lewises’ [bankruptcy] case, Elgin Lewis did not retain title, possession or any other functionally equivalent ownership interest in the repossessed automobile.”<sup>67</sup>

*Lewis*’s focus on the passage of title is odd in the era since enactment of Article 9 because Article 9 states that its rules “apply whether title to collateral is in the secured party or the debtor.”<sup>68</sup> Article 9 has, for a couple of generations now, purported to make the location of title irrelevant. Yet *Lewis* focused on title. *Lewis*’s anachronistic focus on title was crucial because it was what allowed *Lewis* to reconcile its holding with *Whiting Pools*. “Our holding reconciles with *United States v. Whiting Pools, Inc.* Unlike the IRS tax levy and seizure in *Whiting*, the repossession in this case effectively transferred ‘ownership in the property’ from the debtor to the creditor.”<sup>69</sup>

Notwithstanding its focus on non-UCC cases regarding title, *Lewis* did concede that Article 9 applied in one crucial respect. Article 9 gave the debtors a right to redeem repossessed collateral.<sup>70</sup>

Although Elgin Lewis lacked title to or possession of the automobile at the commencement of the second Chapter 13 [bankruptcy] case, it is undisputed that he retained a right of redemption pursuant to Ala.Code § 7-9-506.<sup>71</sup> Thus, our second concern is whether his redemption interest under state law was sufficient to render the automobile “property of the estate” under federal law. In the context of real property, a prior panel of this court recently stated that Alabama’s statutory right of redemption is “a right that becomes property of the bankruptcy estate under the broad definition provided in Bankruptcy Code section 541.” Finding no reason not to extend this principle to personal property, we readily conclude that Elgin Lewis’s statutory right of redemption in the automobile became “property of the estate” under 11 U.S.C. § 541(a)(1) at the commencement of the case. As such,

---

<sup>65</sup>See ALA. CODE § 7-9-102 (1993); U.C.C. § 9-102 (1962).

<sup>66</sup>137 F.3d at 1283 (quoting *Am. Nat’l Bank & Trust Co. of Mobile v. Robertson*, 384 So. 2d 1122, 1123 (Ala. Civ. App. 1980)).

<sup>67</sup>*Id.* at 1284.

<sup>68</sup>U.C.C. § 9-202 (2001).

<sup>69</sup>*Lewis*, 137 F.3d at 1285 n.8 (citation omitted). Despite this purported distinction, Carlson says *Lewis* “blatantly ignores *Whiting Pools*.” GILMORE & CARLSON, *supra* note 36, § 13.03.

<sup>70</sup>*Lewis*, 137 F.3d at 1284; see U.C.C. § 9-506 (1962).

<sup>71</sup>The Alabama statute is substantially similar to U.C.C. § 9-506 (1962).

the Lewises' Chapter 13 estate, through the trustee, could exercise or "use" this right just as Elgin Lewis could have.<sup>72</sup>

While *Lewis* recognized that the right of redemption became property of the estate, *Lewis* held that this unexercised right did not automatically make the right to possess the vehicle property of the estate.<sup>73</sup> "We are not convinced, however, that the mere existence of the estate's ability to redeem the automobile renders the automobile itself 'property of the estate,' at least to the extent that it should be turned over pursuant to 11 U.S.C. § 542(a)."<sup>74</sup> To reiterate, *Lewis* held that "a bare right of redemption" does not "render the automobile 'property of the estate' under 11 U.S.C. § 541(a)(1) and subject to turn-over under 11 U.S.C. § 542(a)."<sup>75</sup>

That, again, is the federal law holding of *Lewis*. It expressly recognizes the distinction, highlighted by Plank, between the right to redeem, which belongs to the estate, and the right to possession, which does not. In making this distinction, *Lewis* made new law. It was an outlier when decided in 1998 and remains an outlier today. Research revealed no judicial or scholarly support for *Lewis* except for courts within the Eleventh Circuit and Plank's writings.<sup>76</sup> Nevertheless, Plank argues that courts should adopt *Lewis*'s federal law holding and "that *Whiting Pools* [should] no longer be considered good law."<sup>77</sup> Plank argues that a more recent Supreme Court decision, *Citizens Bank of Maryland v. Strumpf*,<sup>78</sup> "removed the logical underpinnings for the rationale of *Whiting Pools*."<sup>79</sup> If Plank is right

---

<sup>72</sup>*Lewis*, 137 F.3d at 1284 (citations and footnote omitted).

<sup>73</sup>*Id.* at 1284-85.

<sup>74</sup>*Id.* at 1284.

<sup>75</sup>*Id.* at 1285.

<sup>76</sup>There is, however, pre-*Whiting Pools* precedent for *Lewis*. See *Cross Elec. Co. v. United States (In re Cross Elec. Co.)*, 664 F.2d 1218, 1220-21 (4th Cir. 1981).

<sup>77</sup>Plank, *supra* note 6, at 258.

<sup>78</sup>516 U.S. 16 (1995).

<sup>79</sup>Plank, *supra* note 6, at 258. Plank says of *Strumpf*:

In a situation analogous to *Whiting Pools*, the Court limited the meaning of "property of the estate" to the specific definition in the Code. If the definition of property of the estate is so confined, section 542(a) cannot be read to give a reorganizing debtor in possession a right to turnover.

*Id.* (footnote omitted). One can, however, question whether the situations in *Strumpf* and *Whiting Pools* are analogous. Plank says:

In *Strumpf*, a bank had put an administrative hold on a checking account of the debtor to preserve its right to set-off a debt owed by the debtor. The Court held that such an administrative hold was not exercising control over "property of the estate" since the property of the estate was not the money in the debtor's account, but the debtor's contract right to withdraw money, subject to the bank's right of set-off. The creditor in *Strumpf* with a right of set-off in intangible property, the debtor's account, and the creditor in *Whiting Pools* with possession of goods pursuant to a lien were both creditors holding a secured claim in a property item in which the debtor claimed an interest. In both cases, the creditor had gained control of the property item before

about *Strumpf*, then *Lewis* did not need to reconcile its holding with *Whiting Pools*, and thus did not need its anachronistic focus on title. *Lewis* could have ignored non-UCC law. *Lewis* could have announced that *Whiting Pools* had been superseded by *Strumpf*, and then noted the debtor's Article 9 right to redeem before holding that this right to redeem did not "render the automobile 'property of the estate' under 11 U.S.C. § 541(a)(1) and subject to turn-over under 11 U.S.C. § 542(a)." <sup>80</sup>

#### IV. STATE LAW DIFFERENCES AND THEIR IRRELEVANCE

##### A. Introduction

The split in the case law created by the Eleventh Circuit in *Lewis* is a significant one. Professor Plank and *Lewis* raise a strong challenge to the majority view about § 542(a) and turnover of property to the bankruptcy estate. There are, however, also strong arguments in defense of the majority view. <sup>81</sup> This Article does not seek to make the case for either view. Rather than try to resolve the debate about the best reading of § 542(a), the goal of this Article is simply to encourage courts to focus on it, rather than being led astray by another topic. The other topic is state law.

---

bankruptcy. Yet, the creditor in *Strumpf* was able to retain control over the debtor's account and was not required to release the debtor's account to the debtor, while the IRS in *Whiting Pools* was required to relinquish possession of the goods it rightfully held.

*Id.* at 258 n.25 (citation omitted). In this passage, Plank analogizes *Strumpf* to *Whiting Pools* by characterizing the debtor's bank account as "intangible property," and even a "property item." *Id.* A bank account, however, is not a bailment but merely a contract in which the bank promises to pay the depositor. The Supreme Court can thus reconcile *Whiting Pools* and *Strumpf* with the distinction between property and contract, between in rem and in personam. The debtor in *Whiting Pools* had a property interest while the debtor in *Strumpf* merely had a contract right, a claim, against the bank.

The essence of [the Court's] position in *Strumpf* was that failing to perform a contract by the bank was not the same as controlling property, from the perspective of a third party. That is, the debtor has an in personam right to the bank's performance, and that *in personam* right against third parties is indeed property. Therefore, garnishment by a third party would constitute a violation of the automatic stay. But, as between the bank and debtor, matters of contract performance should not be considered property. Therefore, the bank's refusal to perform a contract is not the same as controlling property of the estate. Refusal to perform does not violate the automatic stay.

GILMORE & CARLSON, *supra* note 36, § 13.03[A].

<sup>80</sup>*Lewis*, 137 F.3d at 1285.

<sup>81</sup>See *supra* notes 36-37, 42; see also GILMORE & CARLSON, *supra* note 36, §§ 13.01, .03, .03[A] (explaining *Whiting Pools* and majority view interpretation of § 542(a)); David Gray Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. ST. U. L. REV. 549, 567-68 (1999) (arguing that § 542(a) "would be largely superfluous in light of § 541(a)(1)" if interpreted according to minority view).



Since *Lewis*, courts have not confronted *Lewis*'s reading (Plank's reading) of § 542(a). To put it another way, courts have not confronted *Lewis*'s federal law holding that § 542(a) requires the creditor who has repossessed something to deliver (turn over), not possession of the thing, but only the debtor's rights with respect to the thing. Courts have instead been led astray by *Lewis*'s state law holding that, after default, the debtor no longer had title to the collateral.

Courts mistakenly treat *Lewis*'s federal law holding about § 542(a) as if it is inseparable from *Lewis*'s state law holding that title moves from debtor to creditor upon default. Accordingly, courts distinguish *Lewis*, and order creditors to deliver (turn over) possession of collateral, when courts find that the state law before them leaves title in the debtor after default and repossession.<sup>82</sup> The best illumination of this point comes from a case in which, like *Lewis*, Alabama law is the relevant state law. That case is *In re Greene*,<sup>83</sup> a long and scholarly opinion by Bankruptcy Judge Bennett of the Northern District of Alabama.

#### B. Greene

The facts of *Greene* resemble those of *Lewis*.<sup>84</sup> *Greene* involved a security interest in a vehicle.<sup>85</sup> Following John Greene's default, the secured creditor repossessed the vehicle.<sup>86</sup> *Greene* then filed a petition for Chapter 13 relief and an adversary proceeding seeking turnover of the vehicle.<sup>87</sup> In contrast to *Lewis*'s holding that the repossessed vehicle was not property of the estate,<sup>88</sup> *Greene* held that "the Mustang was, on filing of Mr. Greene's case, part of the property of his bankruptcy estate under § 541(a) of the Bankruptcy Code."<sup>89</sup>

*Greene* declared that "the *Hall Motors [Lewis]* precedent is wrong in its holding on what property interest a defaulted debtor retains in a motor vehicle under Alabama law following its repossession, but before its sale."<sup>90</sup> *Greene* contains an elaborate discussion of Alabama law. It recounts the history of UCC Article 9 unifying the law of security interests in personal property.<sup>91</sup> Article 9

---

<sup>82</sup>See *infra* Part III. Conversely, courts apply *Lewis*, and allow creditors to retain possession of collateral, when courts find that the state law before them moves title from debtor to creditor upon default or repossession. See *infra* notes 128–30 and accompanying text.

<sup>83</sup>248 B.R. 583 (Bankr. N.D. Ala. 2000).

<sup>84</sup>The one important factual distinction is discussed below. See *infra* notes 87, 116.

<sup>85</sup>248 B.R. at 586.

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 586–87. The Associates held a foreclosure sale of the repossessed vehicle and *Greene* contended that this sale violated the stay. *Id.* The foreclosure sale is a factual difference between *Greene* and *Lewis*.

<sup>88</sup>*Lewis*, 137 F.3d at 1285.

<sup>89</sup>248 B.R. at 604.

<sup>90</sup>*Id.* at 585.

<sup>91</sup>*Id.* at 596–602.

replaced a chaotic array of chattel mortgages and other security devices recognized by non-UCC law.<sup>92</sup> *Greene* emphasizes a basic point of Article 9, that its rules “apply whether title to collateral is in the secured party or in the debtor.”<sup>93</sup> “*Greene* correctly explained why the repossession by a creditor of goods owned by a debtor does not extinguish the debtor’s title to or ownership of the goods, and why *Hall Motors*’ [*Lewis*’s] reliance on Alabama pre-UCC conversion law on this issue was incorrect.”<sup>94</sup> In short, *Greene* successfully refutes *Lewis*’s state law holding.

While refuting *Lewis*’s state law holding in *Greene*, Judge Bennett acknowledged his duty to follow Eleventh Circuit rulings with which he disagrees.<sup>95</sup> Nevertheless, Judge Bennett’s *Greene* opinion distinguished *Lewis* under the non-UCC Alabama law applied by *Lewis*. That law, as noted above, turns on the location of title, and *Greene* held that John Greene retained title up to the time of his bankruptcy<sup>96</sup> while, by contrast, the Lewises had lost it in *Lewis*.<sup>97</sup> Therefore, the facts of *Greene* required a different result from that reached in *Lewis* even under *Lewis*’s (mis)understanding of Alabama law.

While much of *Greene* is devoted to refuting *Lewis*’s state law holding, there is a lesson of national importance from *Greene* and *Lewis*. That lesson is the irrelevance of state law differences in analyzing the topic of this Article: turnover with respect to goods which, at the time of the bankruptcy filing, have been repossessed but not yet sold at foreclosure. Analysis of such cases turns on the federal Bankruptcy Code, especially § 542(a), and not on state law.

This is demonstrated by the fact that *Lewis* and *Greene* actually agree on the substance of Alabama law, yet, because they read § 542(a) differently, they still disagree on whether the creditor may retain possession of the collateral. The following paragraphs explain that *Lewis* and *Greene* agree on the substance of Alabama law, *i.e.*, the rights and duties specified by that law, even while they disagree on the form or labels (like “title”) of Alabama law. Because much of *Greene* is devoted to refuting *Lewis*’s state law holding, it is not immediately obvious that *Lewis* and *Greene* actually agree on the substance of Alabama law, but agree they do. *Lewis* and *Greene* agree that, in the time period between repossession of goods and foreclosure, the debtor has the right to redeem the goods, *i.e.*, obtain possession of them by paying the amount due to the creditor.

*Lewis* directly states that the debtor has the right to redeem: “Although Elgin Lewis lacked title to or possession of the automobile at the commencement of the

---

<sup>92</sup>*Id.* at 595.

<sup>93</sup>*Id.* at 594; see U.C.C. § 9-202.

<sup>94</sup>Thomas E. Plank, *More Muddy Water from Whiting Pools: In re Greene Contends with the Errors of a Higher Court*, NORTON BANKR. L. ADVISER, Feb. 2001, at 11, 12.

<sup>95</sup>*Greene*, 248 B.R. at 604.

<sup>96</sup>*Id.*

<sup>97</sup>137 F.3d at 1285.

[bankruptcy] case, it is undisputed that he retained a right of redemption pursuant to Ala.Code § 7-9-506 [UCC 9-506 (1962 Official Text)].<sup>98</sup> *Greene* states that “under Alabama’s Uniform Commercial Code a defaulting debtor, before the occurrence of either a sale or other disposition of collateral under Ala.Code §§ 7-9-504, 506 (1997), possesses a property interest in the collateral securing repayment of the defaulted obligation.”<sup>99</sup> Section 9-506 was the old Article 9 section granting the right to redeem, so *Greene*’s cite to this section while stating that the debtor possesses a “property interest” shows that the property interest *Greene* refers to includes the right to redeem.<sup>100</sup> *Greene* also cites section 9-504 showing that the property interest *Greene* refers to also includes the debtor’s rights granted by section 9-504, *i.e.*, the right to any surplus from the foreclosure sale and the right to notice of the foreclosure sale.<sup>101</sup> While *Lewis* does not mention these section 9-504 rights, that should not be taken as a denial of them. *Lewis* merely singles out the one right that, if exercised, would have required the creditor to relinquish possession of the vehicle.<sup>102</sup> That, of course, is the right to redeem. To reiterate, *Greene* and *Lewis* agree on the substance of the debtor’s state law rights in the time period between repossession of goods and foreclosure. Both courts agree that, along with rights unrelated to possession, the debtor has the right to get possession by redeeming the goods.

The agreement between *Lewis* and *Greene* on the substance of the debtor’s state law rights is easy to miss because *Lewis* focuses on non-UCC law,<sup>103</sup> while *Greene* focuses on Article 9,<sup>104</sup> and because *Lewis* emphasizes the importance of title,<sup>105</sup> while *Greene* emphasizes the unimportance of title.<sup>106</sup> The agreement on the substance of the debtor’s state law rights is also easy to miss because *Lewis* makes those rights sound small by referring to “a bare right of redemption”<sup>107</sup> or a “mere right to redeem,”<sup>108</sup> while *Greene* makes them sound large by calling them “a property interest.”<sup>109</sup> Despite all this, *Greene* and *Lewis* agree on the substance of the debtor’s state law rights. They agree that the debtor has, along with rights unrelated to possession, the right to get possession by redeeming the goods.

---

<sup>98</sup>*Id.* at 1284 (citations omitted).

<sup>99</sup>248 B.R. at 589.

<sup>100</sup>*Id.* at 614.

<sup>101</sup>*Id.* at 599.

<sup>102</sup>137 F.3d at 1284.

<sup>103</sup>*Id.* at 1282–85.

<sup>104</sup>248 B.R. at 591–601.

<sup>105</sup>137 F.3d at 1282–83.

<sup>106</sup>248 B.R. at 612–14.

<sup>107</sup>137 F.3d at 1285 (emphasis added).

<sup>108</sup>*Id.* at 1284 (emphasis added).

<sup>109</sup>248 B.R. at 614.

The disagreement between *Lewis* and *Greene* relates, not to state law, but to federal bankruptcy law. The disagreement is whether the debtor's prebankruptcy right to redeem a thing makes possession of the thing property of the estate. That, as discussed above, turns on how one reads the Bankruptcy Code, especially § 542(a).<sup>110</sup> It has nothing to do with disagreements about Alabama law because both courts (*Lewis* and *Greene*) recognize that Alabama law grants debtors a right to redeem. Similarly, it has nothing to do with differences among states because all states grant debtors a right to redeem.<sup>111</sup> In determining whether *Lewis* or *Greene* is correct, the law of Alabama (or any other state) is irrelevant. The only legal question that is relevant is whether § 542(a) requires the creditor who has repossessed something to deliver (turn over) possession of the thing or just the debtor's rights with respect to the thing.<sup>112</sup>

So *Greene*'s long and scholarly attempt to distinguish *Lewis* ultimately fails. However successful *Greene*'s attempt to reconcile its ruling with *Lewis*'s state law holding, *Greene* fails to reconcile its ruling with *Lewis*'s federal law holding. In fact, *Greene* obliterates the distinction at the heart of *Lewis*'s federal holding, *i.e.*, the distinction between the right to redeem, which belongs to the estate, and the right to possession, which does not. After *Greene* noted that the debtor retained "a property interest" (the right to redeem) in the vehicle after repossession,<sup>113</sup> *Greene* stated "§ 541(a)'s expansive scope makes 'all legal or equitable interests of the debtor in property as of the commencement of the case'—which included the Mustang—property of Mr. Greene's bankruptcy estate."<sup>114</sup> Here, *Greene* makes a leap from the estate having an interest in property to the estate having a *possessory* interest. *Greene* makes a leap from the estate having one stick in the bundle of rights to the estate having a *different* stick in the bundle of rights. This is precisely the leap forbidden by *Lewis*'s federal law holding.<sup>115</sup> *Lewis*'s federal law holding required *Greene*, if it was truly following the Eleventh Circuit's precedent, to hold that the right to possess the vehicle was not property of the estate.<sup>116</sup>

---

<sup>110</sup>See *supra* Part I.

<sup>111</sup>Revised Article 9, which has been enacted in all fifty states, grants a right to redeem. U.C.C. § 9-623.

<sup>112</sup>To put it another way, the only legal question that is relevant is whether § 542(a) uses the specialist's understanding of property as bundle of rights or the colloquial understanding of property as thing.

<sup>113</sup>248 B.R. at 594.

<sup>114</sup>*Id.* at 597.

<sup>115</sup>Plank, *supra* note 94, at 12–13. This is precisely the leap that Plank seeks to prevent.

<sup>116</sup>Plank, however, contends that *Greene* could still have ruled against the creditor even while conforming to *Lewis*'s federal law holding. That is because of a factual distinction between the two cases. The creditor in *Greene*, but not in *Lewis*, conducted a postpetition foreclosure sale:

In *Greene*, the creditor conducted a post-petition foreclosure sale, and the legal issue was whether the sale violated the automatic stay under § 362. In *Hall Motors* [*Lewis*],

*C. Other Courts "Bound" by Lewis*

*Greene* is not the only case to be led astray by the mistaken belief that *Lewis*'s federal law holding about § 542(a) is inseparable from its state law holding that title moves from debtor to creditor when the debtor defaults. Other courts within the Eleventh Circuit have mistakenly distinguished *Lewis* on the irrelevant ground that the state law before them leaves title in the debtor after default and repossession.<sup>117</sup> An example is *American Honda Finance Corp. v. Littleton (In re Littleton)*.<sup>118</sup>

Like *Lewis* and *Greene*, *Littleton* involved a security interest in a vehicle. The creditor repossessed the vehicle and the debtor filed for bankruptcy the following day.<sup>119</sup> The *Littleton* court determined that Georgia law applied<sup>120</sup> and then proceeded with the following analysis:

The court must now determine whether the Georgia law with respect to what rights a debtor retains after repossession is the same as what the Eleventh Circuit concluded the law is in Alabama. If the Georgia law is the same or similar to Alabama law, then the court would assume that the Eleventh Circuit would rule the same way with respect to a Georgia repossession. However, if the Georgia law is different from the Alabama law, then the Eleventh Circuit's holding in *In re Lewis* would not be controlling with respect to a Georgia repossession.

In *In re Lewis*, the Eleventh Circuit concluded that Alabama courts have continued to rely upon the common law of conversion, even after the Alabama legislature adopted the UCC in 1965. The court, however, finds that Georgia courts have in fact relied upon the UCC instead. For example, in *Jeweler's Financial Services, Inc. v. Chapes, Ltd.*, the court

---

the creditor still had possession of the car, and the legal issue was whether the creditor was required, either after a hearing or automatically, to turn the car over to the debtors.

*Id.* at 12.

While Plank contends that the creditors in *Greene* and *Lewis* had no duty to deliver (turn over) possession of the cars, he also contends that a foreclosure sale by such a creditor violates the automatic stay:

Under nonbankruptcy law, the creditor may sell the Mustang only for the purpose of collecting its debt. Hence, the foreclosure sale is an "act to collect, assess, or recover" a pre-petition claim against the debtor under § 362(a)(6). The automatic stay prevented the creditor from selling the Mustang. The creditor violated the automatic stay. End of story.

*Id.*

<sup>117</sup>See *infra* text accompanying notes 118–32.

<sup>118</sup>220 B.R. 710 (Bankr. M.D. Ga. 1998).

<sup>119</sup>*Id.* at 712.

<sup>120</sup>*Id.* at 714.

stated "The default provisions of the UCC do not automatically transfer title to a secured creditor merely by reason of the debtor's default."

....

The court finds that, in accordance with *Chapes*, under Georgia law upon repossession a creditor acquires the right of possession, but not absolute title. As a result, a debtor retains a title interest in the vehicle. Moreover, § 541(a) of the Code provides that "The commencement of a case . . . creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case."

The court finds that upon repossession Debtors retained an interest in the title to the vehicle. Furthermore, the court finds that this interest is sufficient to make the vehicle property of the estate.<sup>121</sup>

In the last two quoted paragraphs, *Littleton* makes a leap from the debtor having "an interest in the title to the vehicle" to the estate having a *possessory* interest. *Littleton*, like *Greene*, makes a leap from the debtor having one stick in the bundle of rights to the estate having a *different* stick in the bundle of rights. As noted above in connection with *Greene*, this is precisely the leap forbidden by *Lewis*'s federal law holding. *Littleton* reads § 542(a) as requiring the creditor who has repossessed something to deliver possession of the thing rather than requiring the creditor to deliver (per *Lewis*) only the debtor's rights with respect to the thing. For that reason, *Littleton*'s showing of differences between Georgia law and the Alabama law applied in *Lewis* failed to distinguish the two cases.<sup>122</sup> *Littleton* was led astray by irrelevant differences in state law. *Lewis*'s federal law holding required *Littleton* to hold that the right to possess the vehicle was not property of the estate. *Littleton*, like *Greene*, is an example of the mistaken belief that *Lewis*'s federal law holding is inseparable from its state law holding that title moves from debtor to creditor when the debtor defaults.

This mistaken belief has caused much confusion in Florida cases. Shortly after *Lewis*, some bankruptcy courts in Florida made the *Greene/Littleton* mistake of distinguishing *Lewis* on the irrelevant ground that the state law before them leaves title in the debtor after default and repossession. *In re Iferd*,<sup>123</sup> for example, involved the now-familiar fact pattern of vehicular repossession by the secured creditor followed by the debtor's bankruptcy filing.<sup>124</sup> The debtor moved to

---

<sup>121</sup>*Id.* at 714–15 (citations omitted).

<sup>122</sup>Consistent with *Lewis*, however, *Littleton* could have followed Plank's reasoning to deny the creditor's motion for relief from the stay to dispose of the vehicle. Plank, *supra* note 94, at 12.

<sup>123</sup>225 B.R. 501 (Bankr. N.D. Fla. 1998).

<sup>124</sup>*Id.* at 502.

compel the creditor to deliver (turn over) possession of the vehicle and the court ruled for the debtor.<sup>125</sup>

Unlike the *Lewis* court's determination regarding Alabama law, Florida courts have relied on the UCC when determining debtors' rights after repossession. . . . The rights and duties of parties to a security agreement are thus governed by the Florida UCC provisions on sales and secured transactions.

Upon reviewing Florida case and statutory law, there are many logical reasons to support a ruling that legal title does not shift to the creditor upon repossession. The Florida UCC grants the secured party the right to repossess the collateral but has no language addressing title. . . . The most logical presumption I can make is that the debtor retains legal title to the repossessed vehicle. . . . In Florida, the secured party thus has the right to possession of the collateral upon the debtor's default but not the right to its full use as if it were the owner.

. . . .  
I find that under Florida law, a debtor retains title and other ownership interests in a repossessed motor vehicle until the creditor re-sells the vehicle. Here, TFCU [the creditor] only has possession of the vehicle, and Iferd has legal title. This interest is sufficient to make the vehicle property of estate. *See* 11 U.S.C. § 541(a); *Whiting Pools*. Based on the foregoing, I direct TFCU to turn possession over to Iferd's estate without further delay.<sup>126</sup>

In the last quoted paragraph, *Iferd* makes a leap from the debtor having "legal title" in the vehicle to the estate having the right to *possess* the vehicle. *Iferd*, like *Greene* and *Littleton*, makes a leap from the debtor having one stick in the bundle of rights to the estate having a *different* stick in the bundle of rights. Again, this is precisely the leap forbidden by *Lewis*'s federal law holding. *Iferd* reads § 542(a) as requiring the creditor who has repossessed something to deliver possession of the thing rather than requiring the creditor to deliver (per *Lewis*) only the debtor's rights with respect to the thing. For that reason, *Iferd*'s showing of differences between Florida law and the Alabama law applied in *Lewis* failed to distinguish the two cases.<sup>127</sup> *Iferd* was led astray by irrelevant differences in state law. *Lewis*'s federal law holding required *Iferd* to hold that the right to possess the vehicle was not property of the estate.

---

<sup>125</sup>*Id.* at 505.

<sup>126</sup>*Id.* at 503–05 (citations omitted).

<sup>127</sup>Consistent with *Lewis* and with *Littleton*, *see supra* note 122, *Iferd* could have followed Plank's reasoning to deny the creditor's motion for relief from the stay to dispose of the vehicle. Plank, *supra* note 94, at 12.

*Iferd's* different state law approach to distinguishing *Lewis* was followed by three other bankruptcy courts in Florida,<sup>128</sup> but then two of those decisions were overruled by the United States District Court for the Middle District of Florida.<sup>129</sup> Unfortunately, however, the district court's opinion in *Kalter* did not guide the bankruptcy courts toward Bankruptcy Code § 542(a) and away from the irrelevant differences in state law. Instead, *In re Kalter* repeated other courts' mistake of focusing on whether state law puts title in the debtor or the creditor after default and repossession. Contrary to *Iferd* though, the district court's opinion in *Kalter* held that, under the Florida certificate of title statute, title moves from debtor to creditor when the creditor repossesses collateral.<sup>130</sup> Because title passed to the creditor upon repossession, the district court in *Kalter* reversed the bankruptcy court's finding that possession of the vehicle was part of the bankruptcy estate.<sup>131</sup> So after the district court's decision in *Kalter* there was a split of authority in Florida about whether to apply *Lewis's* result of allowing the creditor to retain possession of repossessed collateral notwithstanding the debtor's bankruptcy. But neither side of this split was arguing about the relevant question—whether Bankruptcy Code § 542(a) requires the creditor who has repossessed something to deliver possession of the thing or only the debtor's rights with respect to the thing. Both sides of the split were arguing about an irrelevant point—state law on the passage of title.<sup>132</sup>

---

<sup>128</sup>*In re Ratliff*, 260 B.R. 526, 529 (Bankr. M.D. Fla. 2000); *In re Chiodo*, 250 B.R. 407, 412 (Bankr. M.D. Fla. 2000); see *In re Kalter*, 257 B.R. 93, 94 (M.D. Fla. 2000).

<sup>129</sup>*In re Chiodo*, 2001 WL 1822417 (M.D. Fla. 2001); *Kalter*, 257 B.R. at 97–98.

<sup>130</sup>According to the court, the Florida certificate of title statute “makes it clear that upon repossession, the party from whom the vehicle has been repossessed is the ‘former owner.’” *Kalter*, 257 B.R. at 96 (citing FLA. STAT. ch. 319.28(1)(b)).

<sup>131</sup>*Id.* at 97–98; accord *In re Chiodo*, 2001 WL 1822417, at \*2, *aff'd*, *In re Kalter*, 292 F.3d 1350 (11th Cir. 2002).

<sup>132</sup>Later Florida cases only descended deeper into irrelevancies and confusion. Despite the district court's ruling in *Kalter* (and *Lewis*), bankruptcy courts in Florida still seemed to want creditors to deliver (turn over) possession of repossessed property. While the district court's decision in *Kalter* was (apparently reluctantly) followed by a bankruptcy court in the Southern District of Florida, *In re Ragan*, 264 B.R. 776, 777–78 (Bankr. S.D. Fla. 2001), it was rejected by two bankruptcy courts within its own Middle District of Florida, *In re Baker*, 264 B.R. 759, 764 (Bankr. M.D. Fla. 2001), and *In re Shunnarah*, 268 B.R. 657, 662 (Bankr. M.D. Fla. 2001). It was also rejected by a bankruptcy court in the Southern District of Florida. *In re Garcia*, 276 B.R. 699, 705 (Bankr. S.D. Fla. 2002).

For example, *Baker* required the creditor to deliver possession of a repossessed vehicle. 264 B.R. at 763. *Baker* rejected the *Kalter* district court's reading of Florida's certificate of title statute:

The Court respectfully disagrees with the district court in *Kalter*. Under this Court's interpretation of Florida law, a debtor's ownership interest in a repossessed vehicle survives until a new certificate of title is issued pursuant to § 319.28. See *In re Ratliff*, 260 B.R. 526, 530 (Bankr.M.D.Fla.2000) (adopting the reasoning of the bankruptcy court in *Chiodo*). If a new certificate of title to a repossessed vehicle is not issued by the petition date, then the surviving ownership interest is property of a debtor's



The district court's ruling in *Kalter* was affirmed by the Eleventh Circuit.<sup>133</sup> The Eleventh Circuit's opinion in *Kalter* concluded, as the district court had, that under the Florida certificate of title statute, title moves from debtor to creditor when the creditor repossesses collateral.<sup>134</sup> Perhaps more importantly, *Kalter* reaffirmed *Lewis*.

Thus, applying *Lewis*'s analysis of identical language in the Alabama statute to the Florida UCC, in factual circumstances very much like *Lewis*, we hold that the Debtors' mere rights to redeem do not bring the vehicles into the Debtors' bankruptcy estates under Florida law. Indeed, not only do the various steps required to redeem suggest that this right does not signify ownership, but the statute itself recognizes a distinction between the two.<sup>135</sup>

In this passage, *Kalter* reaffirms two parts of *Lewis*. First, this passage of *Kalter* reaffirms *Lewis*'s federal law holding, *i.e.*, the distinction between the right to redeem, which belongs to the estate, and the right to possession, which does not. This is the part of *Lewis* adopting Plank's view that Bankruptcy Code § 542(a) uses the specialist's understanding of property so it requires the creditor who has repossessed something to deliver (turn over), not possession of the thing, but only the debtor's rights with respect to the thing. Second, the quoted passage of *Kalter* reaffirms *Lewis*'s anachronistic focus on title which, as noted above, was what allowed *Lewis* (and presumably *Kalter*) to reconcile its holding with *Whiting Pools*.

In sum, the Eleventh Circuit had an opportunity to disavow *Lewis* and chose not to do so. The Eleventh Circuit stuck to its guns in *Kalter*, hardening the circuit split. The Eleventh Circuit is standing behind *Lewis*. Professor David Carlson wrote (before *Kalter*) that "[i]t will be interesting to see how long this outpost

---

bankruptcy estate.

.....  
The Court finds that, under Florida law, Plaintiff maintained an interest in the vehicle on the petition date despite the prepetition repossession by Defendant. Defendant did not complete prepetition the essential steps necessary to erase Plaintiff's ownership interest from the vehicle's title per § 319.28. Therefore, under Florida law, Plaintiff still held a property interest in the vehicle on the petition date. Thus, the vehicle is at least partially property of Plaintiff's bankruptcy estate under § 541 and Defendant must turnover the vehicle in order to cure its ongoing violation of the automatic stay.

*Id.*

<sup>133</sup>*Kalter*, 292 F.3d at 1351. For a thoughtful recent discussion of *Kalter* and similar cases, see Robert B. Chapman, *Bankruptcy*, 53 MERCER L. REV. 1199, 1229-38 (2002).

<sup>134</sup>292 F.3d at 1359-60.

<sup>135</sup>*Id.* at 1355-56.

against *Whiting Pools* withstands reversal within the Eleventh Circuit."<sup>136</sup> *Kalter* indicates that, if reversal of *Lewis* is going to come, it is more likely to come from the Supreme Court than from the Eleventh Circuit.

*D. Courts not Bound by Lewis*

While courts within the Eleventh Circuit are at least supposed to act like they are following *Lewis*, courts elsewhere in the country can frankly assess the merits of *Lewis*. So if they disagree with *Lewis*'s federal law holding about Bankruptcy Code § 542(a) they can openly say so. They do not need to rely on irrelevant state law differences to distinguish *Lewis*. They can simply hold that § 542(a) requires the creditor who has repossessed something to deliver (turn over) possession of the thing, rather than just the debtor's rights with respect to the thing. So it is from courts outside the Eleventh Circuit that we should expect a response to *Lewis*'s challenge to the majority view about § 542(a). Unfortunately, we do not always get such a response. Sometimes, we get more courts led astray by irrelevant state law differences.

For example, a bankruptcy court applying Texas law in *In re Clelland*<sup>137</sup> makes the mistake of distinguishing *Lewis* on the irrelevant ground that Texas law leaves title in the debtor after repossession.

Under Texas law and pursuant to the security agreement signed by the debtor, upon the debtor's default, the credit union was entitled to repossess the vehicle. However, neither the debtor's default nor the exercise of the right to repossession, effected a transfer of title from the debtor to the credit union. Indeed, Texas law is to the contrary. It is well settled that in order for title of the property to pass after repossession, a sale must take place.

....  
The credit union's conclusion that, as of the date of the filing of the chapter 13 petition, the debtor had no interest in the vehicle so that the vehicle did not become property of the estate is in error. When the chapter 13 petition was filed, the credit union held possession of the vehicle, but the debtor yet held title to the vehicle. Title to that vehicle was property of the estate and, therefore, the debtor was entitled to turnover of that vehicle.<sup>138</sup>

---

<sup>136</sup>GILMORE & CARLSON, *supra* note 36, § 13.03.

<sup>137</sup>268 B.R. 539 (Bankr. E.D. Ark. 2001).

<sup>138</sup>*Id.* at 540-41 (citations omitted).

Notice the word “therefore” in the last sentence of the quote from *Clelland*. That word avoids the very issue courts should be addressing. Why does the fact that the estate has *title* to the property compel the conclusion that the estate gets *possession* of the property? *Clelland* makes a leap from the estate having one stick in the bundle of rights to the estate having a *different* stick in the bundle of rights. As noted several times above, this is precisely the leap rejected by *Lewis*’s federal law holding. The *Clelland* court, however, was not bound by *Lewis*. The *Clelland* court could have come right out and said (citing *Whiting Pools*) that *Lewis*’s federal law holding is wrong because § 542(a) requires the creditor who has repossessed something to deliver possession of the thing, not just (per *Lewis*) the debtor’s rights with respect to the thing. Instead, *Clelland* was led astray by irrelevant differences in state law.

Interestingly, *Clelland* did cite *Whiting Pools*. It cited *Whiting Pools* for the following proposition: “It is . . . well settled that property of the estate includes all interests of the debtor, even interests in property in which the debtor does not have the right of possession.”<sup>139</sup> This sentence must frustrate Professor Plank because it misses the distinction Plank has tried to highlight, the distinction between a possessory property interest and a nonpossessory property interest. Plank (and the Eleventh Circuit) share *Clelland*’s view that property of the estate includes “all interests of the debtor, even interests in property in which the debtor does not have the right of possession.”<sup>140</sup> But these interests, Plank points out, consist only of the “right to any surplus from the sale of the property items, the right to redeem the creditor’s lien on the property items by paying the amount of the claim, and . . . ancillary rights, such as the right to notice of the foreclosure sale.”<sup>141</sup> Because “[t]he creditor does not have custody or control over these interests,” Plank (and the Eleventh Circuit) argue, “section 542(a) does not apply to the creditor in this context.”<sup>142</sup> *Clelland* simply does not respond to this point.

Perhaps the closest a court has come to responding to Plank and *Lewis*’s federal law holding is *In re Spears*,<sup>143</sup> an opinion by Bankruptcy Judge Lefkow of the Northern District of Illinois. Her thorough and thoughtful opinion deserves to be reproduced at some length:

The linchpin of the creditor’s argument in *Lewis* was that, after default, a creditor acquires title to a repossessed automobile, as well as the right to possession provided by the UCC. To find where title lay, *Lewis* looked to Alabama common law, and decisions finding that a debtor must have both title to and possession of a property in order to

---

<sup>139</sup>*Id.* at 540.

<sup>140</sup>*Id.*

<sup>141</sup>Plank, *supra* note 6, at 318.

<sup>142</sup>*Id.*

<sup>143</sup>223 B.R. 159 (N.D. Ill. 1998).

maintain an action for conversion of that property. From the fact that Alabama courts would not allow a debtor to sue its secured creditor for conversion of repossessed collateral, *Lewis* made a judgment that the debtor's rights were not meaningful.

This court has looked to Illinois law discussing the nature of a debtor's property interest in a repossessed vehicle. As under the Alabama cases, the Illinois Appellate Court has found that legal title to property subject to a security interest passes to a secured creditor after it takes possession following default. *Kouba v. East Joliet Bank*. In contrast to the conclusion in *Lewis*, however, *Kouba* found that the debtors before it had rights under Illinois law that erode a common law creditor's claim to absolute title. Having concluded that the debtors retained significant rights and responsibilities with respect to the creditor's collateral after default, *Kouba* held that the debtors had standing to maintain an action against a third party that negligently damaged the vehicle after default and repossession.

*Whiting Pools* instructs that § 542(a) is among sections of the Code that bring into the bankruptcy estate property in which the debtor did not have a possessory interest at the time bankruptcy proceedings commenced. For example, the Court noted that a debtor's interest in property seized prepetition by the Internal Revenue Service—specifically, rights to notice and the surplus from a tax sale—are already part of the estate by virtue of § 541(a)(1). Because § 542(a) grants a trustee or debtor in possession greater rights than those held by the debtor on the date of its petition, though, the seized property in its entirety may be recovered as part of the bankruptcy estate. . . .

This court believes that the situation presented in this case falls squarely within *Whiting Pools*' conclusion that until a sale is [sic] taken place, property seized prepetition pursuant to a creditor's provisional remedy remains property of the estate, and as such, is subject to the turnover requirement of § 542(a). Also, bearing in mind that *Kouba* finds the property interest to be a significant one, the court concludes that *Lewis* is inapposite here. The court having previously determined that [the secured creditor's] interest in plaintiff's vehicle is adequately protected, plaintiff's motion for turnover is granted.<sup>144</sup>

While the penultimate quoted sentence makes the now-familiar mistake of purporting to distinguish *Lewis* on irrelevant state law grounds, *Spears* does engage *Lewis*'s federal law holding.

---

<sup>144</sup>*Id.* at 164–65 (citations omitted).

*Spears* addresses the distinction between a possessory property interest and a nonpossessory property interest. *Spears* recognizes that, in the case of repossessed collateral, § 541(a)(1) brings into the estate only nonpossessory interests (e.g., “rights to notice and the surplus”). *Spears* recognizes that an order requiring the creditor to deliver (turn over) *possession* requires a court to rule that “§ 542(a) grants a trustee or debtor in possession greater rights than those held by the debtor on the date of its petition.”<sup>145</sup> In other words, a rejection of *Lewis*’s federal law holding compels a court to rule that § 542(a) requires a creditor to deliver (turn over), not merely “property” in the specialist’s bundle-of-rights sense, but the “property” thing in the colloquial sense. And all of this is true regardless of differences in state law because every state gives the postrepossession debtor nonpossessory interests, but not possessory interests. So, whatever the state law, the creditor must deliver (turn over) possession if, but only if, § 542(a) is read to refer to property in the colloquial sense.

#### V. CONCLUSION

There are two plausible readings of Bankruptcy Code § 542(a). *Whiting Pools* read § 542(a) to reflect the colloquial understanding of “property” as thing. Courts applying *Whiting Pools*’ reasoning to security interests hold that a secured creditor who has repossessed goods, but not yet sold them at foreclosure, must deliver (turn over) possession of the goods to a debtor who files for bankruptcy or to the bankruptcy trustee. By contrast, Professor Plank argues that § 542(a) uses the specialist’s understanding of property. This reading of § 542(a) compels the conclusion that a creditor who, at the time the debtor files for bankruptcy, has repossessed goods is not (without more<sup>146</sup>) obligated to relinquish possession of those goods. The Eleventh Circuit’s federal law holding in *Lewis* implicitly adopts Plank’s reading of § 542(a).

The split in the case law created by *Lewis* is significant, in the practical sense, because there many cases in which debtors file for Chapters 11, 12 or 13 bankruptcy shortly after repossession by an undersecured creditor. Furthermore, the split in the case law created by *Lewis* is significant, in the conceptual sense, because it turns on whether an important federal statute, § 542(a), embodies one or another understanding of what may be the most fundamental concept in all law, property.

It is time for courts to stop being led astray by irrelevant state law differences and to engage *Lewis*’s federal law holding on the merits. Perhaps other courts will do this, there will be a discussion about the merits of the two views, and, hopefully, the better one will prevail in the case law. If this discussion and

---

<sup>145</sup>*Id.* at 165.

<sup>146</sup>*See supra* note 55 and accompanying text.

convergence among courts does not occur, then the United States Supreme Court will have to impose convergence from the top.