Consumer Potpourri: Student Loan Discharge, Surrender Issues, Section 109(e); Chapter 13 Plan Modifications

Hon. Paul M. Glenn, Moderator
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OUTLINE JUDGE PASKAY ABI SEMINAR
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"surrender, surrender, but don't give yourself away…"

Definition of "Surrender"/ Term of Art:

1. In re Plummer, 513 B.R. 135 (Bankr. M.D. Fla. 2015).

Implications of Surrendering Assets Chapter 7 & Chapter 13- Relating To State Court Foreclosure Defense:

1. In re Failla, 529 B.R. 786 (Bankr. S.D. Fla. 2015).
2. In re Metzler, 530 B.R. 894 (Bankr. M.D. Fla. 2015).

Bankruptcy Consequences For Failure To Comply With Intention to Surrender

1. In re Lapeyre, 2016 Bankr. LEXIS 225 (Bankr. S.D. Fla. 2016).
2. In re Calzadilla 534 B.R. 216 (Bankr. S.D. Fla. 2015).

Exceptions - Timing

1. In re Townsend, 2015 Bankr. LEXIS 225 (Bankr. M.D. Fla. 2015).
2. In re Guerra, 2016 Bankr. LEXIS 308 (Bankr. S.D. Fla. 2016).

Practical Solutions

1. Deed in Lieu of Foreclosure
2. Short Sale
3. Use of Mortgage Modification Mediation Program "Surrender Options"

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Document(1)

1. *In re Plummer, 513 B.R. 135*
   Client/Matter: -None-

In re Plummer

United States Bankruptcy Court for the Middle District of Florida, Orlando Division

March 25, 2014, Decided

Case No. 6:11-bk-09917-KSJ, Chapter 7

Reporter
513 B.R. 135; 2014 Bankr. LEXIS 1156; 24 Fla. L. Weekly Fed. B 275

In re FREDERICK KELLY PLUMMER and BETTY ANN PLUMMER, Debtors.

Core Terms

surrender, attorney's fees, collateral, injunction, foreclosure, costs, mortgage, deed, foreclosure judgment, sanctions, personal liability, secured creditor, courts, void, notice, warranty deed, deliver, rent, motion for sanctions, foreclosure action, foreclosure case, actual damage, state law, obligations, discharged, abandoned, provides, reaffirm, requires, rights

Case Summary

Overview

HOLDINGS: [1]-Chapter 7 debtors who owned rental property were not required under *11 U.S.C.S. § 521(a)(2)* to deed the property to a creditor who held a mortgage on the property to fulfil their promise to surrender the property, and the creditor violated *11 U.S.C.S. § 524* when he obtained an order from a Florida court which required the debtors to pay costs and attorney's fees he incurred to foreclose on the property; [2]-Because the creditor willfully violated the discharge injunction and it appeared that he did so because he received erroneous advice from his attorney, the creditor and his attorney were both subject to sanctions under *11 U.S.C.S. § 105*, and were both liable for paying attorney's fees the debtors incurred to defend the action in state court and seek sanctions in the bankruptcy court, as well as actual damages the debtors sustained.

Outcome

The court granted the debtors' motion for sanctions against the creditor, found that the creditor and his attorney were jointly and severably liable to pay the debtors $4,411 within 30 days, and struck paragraph 10(b) of the Summary Final Judgment of Foreclosure that was entered against the debtors by the Circuit Court for the Fifth Judicial Circuit, in and for Lake County, Florida.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > Liquidations > General Overview

Real Property Law > Bankruptcy > Secured Claims

HN1 If a Chapter 7 debtor lists in his schedules a debt secured by property of the debtor's bankruptcy estate, *11 U.S.C.S. § 521(a)(2)(A)* requires the debtor to file a statement of his intention with respect to the retention or surrender of that property. *Section 521(a)(2)(B)* requires the debtor to perform his stated intention within the specified time period, also emphasizing that nothing in paragraphs *§ 521(a)(2)(A)* or *(B)* shall alter the debtor's or the trustee's rights with regard to the collateral under the Bankruptcy Code. Hence, *§ 521(a)(2)* does not affect or create substantive rights.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > Hearings & Reaffirmation

Real Property Law > Bankruptcy > Secured Claims

HN2 In many jurisdictions, including the Eleventh Circuit, if a debtor chooses to retain nonexempt collateral under *11 U.S.C.S. § 521(a)(2)*, he only has two options: reaffirmation or redemption. He may "reaffirm" his

agreement with the secured creditor to pay the pre-petition debt, or "redeem" the collateral by paying the allowed secured claim amount in full. But, where a debtor decides not to reaffirm, the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: surrender the collateral.

Governments > Courts > Judicial Precedent > Dicta

HN3 Dicta is not binding on anyone for any purpose. What is said in a prior opinion about a question not presented there is dicta.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Real Property Law > Bankruptcy > Secured Claims

HN4 Many courts have determined that *11 U.S.C.S. § 521(a)(2)* is primarily a notice statute, designed to provide creditors notice of a debtor's intention with respect to their collateral early in the case without having to incur substantial costs, such as filing an adversary proceeding, to discover the debtor's intentions. However, as the United States Court of Appeals for the Eleventh Circuit stated in Taylor v. AGE Fed. Credit Union (In re Taylor), the plain language of *§ 521(a)(2)* indicates that a debtor must perform some act with respect to the property within a specified period of time. Section *§ 521(a)(2)* indeed does serve to notify secured creditors of a debtor's intention as to their collateral, but the statute also requires the debtor then to act consistent with their intentions.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Governments > Legislation > Interpretation

Real Property Law > Bankruptcy > Secured Claims

HN5 "Surrender" is not defined in *11 U.S.C.S. § 521(a)(2)* or elsewhere in the Bankruptcy Code. Where the words in a statute are not defined terms, the court should look to their ordinary, dictionary-defined meaning. Law dictionaries define "surrender" as the act of yielding to another's power or control, or the giving up of a right or claim.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > Estate Property > Abandonment of Property > Trustee Action

Real Property Law > Bankruptcy > Secured Claims

HN6 Few courts have examined "surrender" in the context of *11 U.S.C.S. § 521(a)(2)*. The United States Court of Appeals for the First Circuit stated, in In re Pratt, that the most sensible connotation of "surrender" is that a debtor agreed to make collateral available to a secured creditor, viz., to cede his possessory rights in the collateral. And in In re Cornejo, the United States Bankruptcy Court for the Middle District of Florida observed that unless a valid exemption is claimed, a debtor relinquishes its interest in the collateral when an intention to surrender is communicated and the collateral becomes part of the bankruptcy estate. Ultimately, because fully encumbered collateral is likely of little value to the estate, a trustee in almost all cases abandons the property.

Governments > Legislation > Interpretation

HN7 Generally, identical words used in different parts of the same act are intended to have the same meaning.

Bankruptcy Law > Estate Property > Abandonment of Property > Operation of Law

Bankruptcy Law > Estate Property > Abandonment of Property > Trustee Action

HN8 A trustee may abandon property under *11 U.S.C.S. § 554(a)* or *(b)* during a bankruptcy case, or the asset may become abandoned by operation of law under *§ 554(c)*. Surrender, in the vast majority of Chapter 7 bankruptcy cases (approximately 98%) has no effect vis-a-vis a trustee because the property is fully administered through non-administration and *§ 554(c)* abandonment.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Real Property Law > Bankruptcy > Secured Claims

HN9 The Bankruptcy Code makes a clear distinction between delivering and surrendering property.

"Surrender" does not require a debtor to turn over physical possession of the collateral; the Bankruptcy Code uses the word "deliver" when it intends physical turnover of property. Moreover, construing "surrender" to require a debtor to deliver property to a secured creditor would circumvent state law obligations by allowing the secured creditor to bypass state foreclosure requirements. "Surrender" is not equivalent to "foreclosure," and 11 U.S.C.S. § 521 was not designed to provide a mechanism by which creditors may avoid obligations imposed by state law.

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Conversion & Dismissal > Liquidations

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Real Property Law > Bankruptcy > Secured Claims

HN10 Although we know what "surrender" does not require—turnover of physical possession—the definition of "surrender" in 11 U.S.C.S. § 521(a)(2) is still murky. The common element appears to require a debtor to relinquish his rights in the collateral. When a debtor states his intent to surrender collateral under § 521(a)(2)(A), he complies with that intention, for purposes of § 521(a)(2)(B), when he allows the secured creditor (or in rare cases the Chapter 7 trustee) to obtain possession by available legal means without interference. The debtor is not required to take any affirmative action to physically deliver the property. But the debtor cannot impede the creditor's efforts to take possession of its collateral by available legal means. If a debtor fails to comply with his intention, courts have employed a variety of remedies, such as relief from the automatic stay, motions to compel compliance, and dismissal of the case under 11 U.S.C.S. § 707(a).

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Conversion & Dismissal > Liquidations

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Real Property Law > Bankruptcy > Secured Claims

HN11 Although the Bankruptcy Code provides for relief from the automatic stay as an explicit remedy in 11 U.S.C.S. § 362(h), that section only applies when the collateral is personal property, not real property. Moreover, although relief from the stay is the appropriate remedy in some cases to enforce a debtor's failure to perform under 11 U.S.C.S. § 521(a)(2), other remedies also exist. No set remedy exists for nonperformance of a debtor's obligations under § 521. In some cases, dismissal may be appropriate, particularly when a debtor deliberately ignores his or her obligations under § 521(a)(2). Courts consistently have used other methods to enforce a debtor's compliance under § 521(a)(2), such as orders to compel compliance and dismissal of a debtor's bankruptcy case under 11 U.S.C.S. § 707(a).

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Real Property Law > Bankruptcy > Secured Claims

HN12 With respect to real estate in particular, a debtor has no obligation to sign a deed or any other legal document to effectuate a creditor's possession.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Real Property Law > Bankruptcy > Secured Claims

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN13 Residing in a surrendered home, or allowing others to reside there, is not an act that interferes with a secured creditor's ability to seek possession by available legal means. In Florida, a lien theory state, Fla. Stat. § 697.02 (2013), a mortgagee has no right to possession until transfer at a foreclosure sale. So, the mortgagor continues to legally own the property after default until a foreclosure or otherwise valid transfer of title occurs. A debtor's indication of intent to surrender real property does not change this. Property interests are created and defined by state law.

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > Protection of Debtors

HN14 11 U.S.C.S. § 524 prescribes the effect of a discharge in bankruptcy and imposes an injunction

against collection of discharged debts. Section 524(a) provides that a discharge: (1) voids any judgment at any time obtained to the extent that such judgment is a determination of personal liability of the debtor with respect to any debt discharged under 11 U.S.C.S. §§ 727, 944, 1141, 1228, or 1328, whether or not discharge of such debt is waived; and (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Estate Property > Redemption of Property

Bankruptcy Law > Liquidations > General Overview

Real Property Law > Bankruptcy > Secured Claims

HN15 Bankruptcies under Chapter 7 of the Bankruptcy Code do not culminate in a "plan," so any reference to a "plan" as a basis for an attorney's fee award is inapposite. 11 U.S.C.S. § 722 is titled "Redemption," and allows a debtor to redeem certain kinds of property by paying a secured creditor's allowed claim in full.

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > Protection of Debtors

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN16 11 U.S.C.S. § 524(a)(1) provides that a discharge voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of a debtor with respect to a discharged debt. Federal courts have used § 524(a)(1) to void parts of state court judgments that violate the discharge injunction while keeping parts of the judgments that are not in violation intact.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > Protection of Debtors

Civil Procedure > Sanctions > Contempt > General Overview

Governments > Courts > Authority to Adjudicate

HN17 11 U.S.C.S. § 105 gives bankruptcy courts the statutory power to award damages for a violation of the discharge injunction. All courts, including bankruptcy courts, also have inherent contempt powers to achieve the orderly and expeditious disposition of cases. But, because of their very potency, inherent powers must be exercised with restraint and discretion.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > Protection of Debtors

Civil Procedure > Sanctions > Contempt > General Overview

HN18 The key factor in determining whether a creditor may be held liable for contempt under 11 U.S.C.S. § 105 for a violation of the discharge injunction is whether the creditor's conduct was willful. Conduct is considered "willful" if a creditor: (1) knew that the discharge injunction was invoked, and (2) intended the actions which violated the discharge injunction. The willfulness requirement refers to the deliberateness of a creditor's conduct and the creditor's knowledge of a debtor's bankruptcy filing. Moreover, the subjective beliefs or intent of a creditor are irrelevant. A creditor's mistaken belief that his or her actions did not violate 11 U.S.C.S. § 524(a) is no defense to a § 105 contempt action.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > Protection of Debtors

Civil Procedure > Sanctions > Contempt > General Overview

HN19 Proof that a creditor had notice that a debtor received a discharge in bankruptcy satisfies the knowledge prong of the test that is used to determine whether a creditor may be held liable under 11 U.S.C.S. § 105 for a willful violation of the discharge injunction.

Bankruptcy Law > ... > Retention of Professionals > Compensation > General Overview

HN20 11 U.S.C.S. § 330 allows for the award of "reasonable compensation." A court determines the reasonableness of a fee award by examining the twelve factors the United States Court of Appeals for the Fifth Circuit laid out in Johnson v. Georgia Highway Express, Inc.

Counsel: **[**1]** For Frederick Kelley Plummer, Debtor: Joel L Gross, The Law Office of Joel L Gross PA, Clermont, FL.

For Betty Ann Plummer, Joint Debtor: Joel L Gross, The Law Office of Joel L Gross PA, Clermont, FL.

Trustee: Arvind Mahendru, Winter Springs, FL.

Judges: KAREN S. JENNEMANN, Chief United States Bankruptcy Judge.

Opinion by: KAREN S. JENNEMANN

Opinion

[*139] MEMORANDUM OPINION GRANTING DEBTORS' MOTION FOR SANCTIONS

Debtors, Frederick and Betty Plummer, seek sanctions[1] against their creditor, William Hickey ("Hickey"), for obtaining a judgment against them in violation of the discharge injunction imposed by *§ 524 of the Bankruptcy Code*.[2] The post-discharge judgment against the Debtors awarded the attorney fees Hickey incurred in a state court foreclosure action. Hickey argues the attorney's fee award did not violate the discharge injunction because the Debtors somehow failed to timely "surrender" the foreclosed real property.[3] I now will explain why I reject Hickey's arguments, clarifying that the Debtors did everything expected of them to surrender the Property, and, further, will grant sanctions against Hickey *and* his attorney, jointly and severally, in the amount of $4,411.88.

Frederick Plummer and Hickey were friends and business associates for many years. In 2006, Hickey financed the Debtors' purchase of a residential rental property (the "Property"), and the Debtors executed a mortgage in favor of Hickey.[4] It is this Property that is the source of dispute between the parties.

Debtors filed this Chapter 7 case on June 30, 2011.[5] In their Statement of Intentions, the Debtors stated they intended to surrender the Property.[6] During the pendency of the bankruptcy case, the parties disagreed about whether the Debtors were obligated to give Hickey a quitclaim deed or not.[7] But, it is undisputed that neither the Chapter 7 Trustee nor Hickey filed any motion or other request with the Court seeking a clarification of the Debtors' surrender obligation relating to the Property.

Debtors received a discharge in their bankruptcy case on October 4, 2011.[8] Hickey later presented a warranty deed to the Debtors for them to sign.[9] The proposed warranty deed required the Debtors to deed the Property free and clear of all liens to Hickey and expressly stated that the conveyance would *not* satisfy the note and mortgage signed in 2006. Essentially, Hickey was asking the Debtors to reaffirm **[*140]** their full monetary obligation to him under this warranty deed.

Debtors rightfully refused to sign the warranty deed. First, any personal liability of the Debtors to Hickey already was discharged. Second, a second lienholder, the Internal Revenue Service, had placed a substantial junior lien on the Property.[10] No scenario exists that would have justified the Debtors signing this warranty deed.

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1 Doc. No. 91.

2 All references to the Bankruptcy **[**2]** Code refer to ***11 U.S.C. § 101*** *et. seq.*

3 Doc. No. 98.

4 *See* Mortgage Pages 1-3, Hickey's Exhibit 2. Only the first three pages of the mortgage were offered into evidence.

5 Doc. No. 1.

6 Debtor's Statement of Financial Affairs, Doc. No. 1 at p. 48.

7 Hickey's counsel insisted the Debtors were obligated to execute a quitclaim deed for the Property. (Doc. No. 91, Exhibit 2.) Debtors' counsel disagreed and **[**3]** suggested Mr. Hickey should pursue a foreclosure action. *Id*. Mr. Plummer testified at trial that he would have signed a quitclaim deed, if Hickey had provided one to him.

8 Doc. No. 34.

9 Hickey's Exhibit 1.

10 The Internal Revenue Service purportedly had a recorded tax lien of $598,383.94 securing unpaid income taxes. *See* Claim No. 22-2.

On October 8, 2012, almost a year later, Hickey finally served his **[**4]** foreclosure complaint relating to the Property. During this long period when Hickey took no action to protect his interest in the Property, the Debtors allowed two tenants to stay in the home. One tenant, Simon Brazil, testified he would have been homeless but for living at the Property. He paid little if any rent to live in the home, and the Debtors informed him that rental payments, if any, were to be paid to the Chapter 7 trustee.

The other tenant was an employee for the Debtors. He also desperately needed a place to stay and paid little, if any, rent, although he did provide infrequent services, such as lawn care, to maintain the Property. When the tenants eventually received notice of Hickey's foreclosure action, the Debtors directed the two tenants to tender all future rent payments directly to Hickey, not to the Chapter 7 Trustee.[11]

Hickey failed to prove how much, if anything, the Debtors collected in rent payments or the value of any services provided during the period in which he did nothing to take possession of the Property.[12] I specifically find that allowing these two tenants to reside in the Property during this period of uncertainty served **[**5]** only to preserve the value of the Property and in no way established that the Debtors intended to retain possession or any benefits of the Property. Debtors merely allowed two people in need to stay at an empty home. The tenants provided a value to Hickey insofar as they maintained and protected the Property for him.

Debtors further did not contest Hickey's foreclosure action. Granted, to protect the viability of their bankruptcy discharge, they did file a notice to ensure the foreclosure judgment was limited to *in rem* relief against the Property and not for *in personam* relief against the Debtors.[13] Yet, on May 29, 2013, the state court inexplicably entered a very unusual Summary Final Judgment for Foreclosure in favor of Hickey (the "Foreclosure Judgment").[14] In paragraph 10(b), the state court retained jurisdiction to impose monetary attorney fees and costs against the Debtors *in personam* stating:

> However, due to the Defendants failure **[**6]** to surrender the property to the plaintiffs in accordance with their approved plan and *11 U.S.C. 722*, the Defendants shall be liable for the costs and attorney's fees associated with this transaction as such costs and fees were incurred after the bankruptcy discharge and the property was not transferred by the defendants according to the approved **[*141]** plan during the bankruptcy proceedings.

Hickey argues that this post-discharge assessment of personal liability against the Debtors for attorney fees and costs is appropriate because the Debtors breached some affirmative duty to execute and deliver a deed transferring title of the Property to Hickey. Based on this alleged failure, Hickey continues to seek payment for the attorney fees and costs he incurred in the foreclosure action. Debtors vociferously disagree, contending they did everything expected of them in their bankruptcy case to surrender the Property and now seek sanctions against Hickey for the costs incurred in bringing the issue back to this Court to resolve.[15] The real issue between the parties is what exactly *were* the Debtors expected to do to surrender the Property.

What Constitutes Surrender?

HN1 If a Chapter 7 debtor lists in his schedules a debt secured by property of the estate, *§ 521(a)(2)(A) of the Bankruptcy Code* requires the debtor to file a "statement of his intention with respect to the retention or surrender" of that property.[16] *Section 521(a)(2)(B)* requires the debtor to perform his stated intention within the specified

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[11] Hickey's Exhibits 5 and 6.

[12] Moreover, even if the tenants paid rent to the Debtors prior to the foreclosure, Hickey did not allege the existence of an assignment of rents clause in the mortgage or demonstrate compliance with the procedures of section 697.07 of the Florida Statutes.

[13] Doc. No. 91, Exhibit 3 at ¶ 6.

[14] Hickey's Exhibit 9.

[15] Debtors **[**7]** were required to ask this Court to reimpose the automatic stay (Doc. No. 93) as well as file and litigate, through a lengthy evidentiary hearing, held on November 12, 2013, their motion for sanctions (Doc. No. 91).

[16] 11 U.S.C. § 521(a)(2)(A) (2013).

time period, also emphasizing that "nothing in paragraphs (A) or (B) . . . shall alter the debtor's or the trustee's rights with regard to [the collateral] under this title."[17] Hence, § 521(a)(2) "does not affect nor create substantive rights."[18]

HN2 In many jurisdictions, including the Eleventh Circuit, if the debtor chooses to retain nonexempt collateral under § 521(a)(2), he only has two options: reaffirmation or redemption.[19] He may "reaffirm" **[**8]** his agreement with the secured creditor to pay the prepetition debt, or "redeem" the collateral by paying the allowed secured claim amount in full. But, "[w]here the debtor decides not to reaffirm, or the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: 'surrender' the collateral."[20]

Most of the case law discussing § 521(a)(2) focuses on the retention options mentioned above and only briefly mention "surrender."[21] One example is *In re Taylor*, in which Eleventh Circuit Court of Appeals, discussing whether a "ride-through" is permitted, noted that "[s]urrender provides that a debtor surrender the collateral to the lienholder who then disposes of it pursuant to the requirements of state law."[22] As one court observed, **[*142]** "[t]he footnote in *Taylor* notes debtor has the option to surrender but does not define the term surrender."[23] Consequently, the Eleventh Circuit's dictum in *Taylor* provides little guidance.[24]

HN4 Many courts have determined that § 521(a)(2) is primarily a notice statute, designed to provide creditors notice of a debtor's intention with respect to their collateral early in the case without having to incur substantial costs, such as filing an adversary proceeding, to discover the debtor's intentions.[25] However, as the Eleventh Circuit **[**10]** stated in *Taylor*, "the plain language" of § 521(a)(2) "indicates that the debtor must perform some act with respect to the property within a specified period of time."[26] Section § 521(a)(2) indeed does serve to notify secured creditors of the debtor's intention as to their collateral, but the statute also requires the debtor then to act consistent with their intentions. What does § 521(a)(2) require the debtor actually to *do* in order to effectuate his or her intent to surrender?

HN5 "Surrender" **[**11]** is not defined in § 521(a)(2) or elsewhere in the Bankruptcy Code.[27] "Where the words in the statute are not defined terms, the court should

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[17] 11 U.S.C. § 521(a)(2)(B) (2013).

[18] *Theobald v. Green Tree Financial Servicing Corp. (In re Theobald)*, 218 B.R. 133, 135 (B.A.P. 10th Cir. 1998).

[19] *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir. 1993).

[20] *In re Pratt*, 462 F.3d 14, 19 (1st Cir. 2006).

[21] More specifically, a wealth of case law discusses whether the Code permits debtor to elect **[**9]** a "ride-through," in which the debtor chooses to retain the collateral without electing to reaffirm or redeem. *See, e.g.,* *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir. 1993); *In re Jones*, 591 F.3d 308 (4th Cir. 2010); *In re Dumont*, 581 F.3d 1104 (9th Cir. 2009); *Bank of Boston v. Burr (In re Burr)*, 160 F.3d 843 (1st Cir. 1998); *In re Boodrow*, 126 F.3d 43 (2d Cir. 1997).

[22] *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512, 1514 n.2 (11th Cir. 1993).

[23] *In re Cornejo*, 342 B.R. 834, 836 (Bankr. M.D. Fla. 2005).

[24] ***HN3*** "[D]icta is not binding on anyone for any purpose." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010). "[W]hat is said in a prior opinion about a question not presented there is dicta . . . ." *Id.* (citing *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir. 1992)).

[25] *In re Cornejo*, 342 B.R. 834, 835-36 (Bankr. M.D. Fla. 2005). Because the automatic stay limited a secured creditor's contact with the debtor, "[t]he secured creditor would often incur the expense of filing an adversary proceeding to lift the stay only to learn the debtor intended to surrender the collateral without contest." *Id.* at 836. *See also* *Theobald*, 218 B.R. at 136 (citing multiple decisions construing § 521(2) as a notice statute).

[26] *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512, 1516 (11th Cir. 1993). *Accord* *Matter of Edwards*, 901 F.2d 1383, 1386 (4th Cir. 1990) ("[T]he statute clearly contemplates performance—within a specified time period—of the alternatives outlined by it.").

[27] *In re Pratt*, 462 F.3d 14, 18 (1st Cir. 2006) ("Subsection 521(a)(2) does not, however, define the term 'surrender'."). *Cornejo*, 342 B.R. at 836 ("The Code . . . does not define the parameters of the term surrender.").

look to their ordinary, dictionary-defined meaning."[28] Black's Law Dictionary defines "surrender" as "[t]he act of yielding to another's power or control" or "[t]he giving up of a right or claim."[29]

HN6 Few courts have examined "surrender" in the context of § 521(a)(2).[30] The **[*143]** First Circuit Court of Appeals, in *In re Pratt*, stated "the most sensible connotation of 'surrender' . . . is that the debtor agreed to make the collateral *available* to the secured creditor-*viz*., to cede his possessory rights in the collateral."[31] And in *In re Cornejo*, Judge Arthur Briskman similarly observed that unless a valid exemption is claimed, "the [d]ebtor relinquishes its interest in the collateral when an intention to surrender is communicated" and "the collateral becomes part of the bankruptcy estate."[32] Ultimately, because fully encumbered collateral is likely of little value to the estate, the trustee in almost all cases abandons the property.[33]

HN9 The Bankruptcy Code however makes a clear distinction between *delivering* and *surrendering* property.[34] "Surrender" does not require the debtor to turn over physical possession of the collateral; the Bankruptcy Code uses the word "deliver" when it intends physical turnover of property.[35] Moreover, construing "surrender" to require the debtor to deliver property to the secured creditor would circumvent state law obligations by allowing the secured creditor to bypass state foreclosure requirements.[36] "Surrender" is not equivalent to "foreclosure."[37] "Section 521 was not designed to provide a mechanism by which creditors may avoid obligations imposed by state law."[38]

HN10 Although we know what surrender does *not* require—turnover of physical possession—the definition

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[28] *In re Ralston*, 400 B.R. 854, 860 (Bankr. M.D. Fla. 2009) (citing *Consolidated Bank, N.A. v. U.S. Dep't of the Treasury*, 118 F.3d 1461, 1464 (11th Cir.1997) ("In the absence of a statutory definition of a term, we look to the common usage of words for their meaning.")).

[29] *Black's Law Dictionary*, surrender (9th ed. 2009). The Fourth Circuit Court of Appeals examined various dictionary definitions of the word in formulating its own definition of "surrender," albeit in the Chapter 13 context. *In re White*, 487 F.3d 199, 205 (4th Cir. 2007) (noting, in addition to the Black's Law Dictionary definition, the Merriam-Webster definition defining **[**12]** "surrender" as "the action of yielding one's person or giving up the possession of something [especially] into the power of another") (citing *Merriam-Webster's Collegiate Dictionary* 1258 (11th ed. 2003)).

[30] Many courts have considered the definition of "surrender" in the Chapter 13 context. *See, e.g., In re White*, 487 F.3d 199 (4th Cir. 2007); *In re Anderson*, 316 B.R. 321 (Bankr. W.D. Ark. 2004). ***Section 1325(a)(5)*** allows a Chapter 13 debtor to "surrender[] **[**13]** the property securing the claim to such holder" as a way to treat a secured creditor in a Chapter 13 plan. ***11 U.S.C. § 1325 (2013)***. Notably, this surrender provision explicitly provides that the debtor surrender the property to the secured creditor, unlike § 521(a)(2)'s surrender option. *Compare* ***11 U.S.C. § 1325(a)(5) (2013)*** *with* 11 U.S.C. § 521(a)(2) (2013).

HN7 Generally, however, "identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S. Ct. 2499, 110 L. Ed. 2d 438 (1990). In *In re White*, the Fourth Circuit defined the "surrender" in the Chapter 13 context to mean "the relinquishment of all rights in property, including the possessory right, even if such relinquishment does not always require immediate physical delivery of the property to another." *In re White*, 487 F.3d at 205.

[31] *In re Pratt*, 462 F.3d 14, 18 (1st Cir. 2006).

[32] *In re Cornejo*, 342 B.R. 834, 837 (Bankr. M.D. Fla. 2005).

[33] ***HN8*** The trustee may abandon the property under § 554(a) or (b) during the case, or the asset may become abandoned by operation of law under § 544(c). 11 U.S.C. § 554 (2013). Surrender, "in the vast majority of Chapter 7 cases **[**14]** (approximately 98%) has no effect *vis a vis* the trustee because the property is fully administered through non-administration and § 554(c) abandonment." *In re Lair*, 235 B.R. 1, 71 n.194 (Bankr. M.D. La. 1999).

[34] *Cornejo*, 342 B.R. at 837.

[35] *See, e.g.*, 11 U.S.C. § 542(a) (2013); 11 U.S.C. § 543(b) (2013). *See also Cornejo*, 342 B.R. at 837-38.

[36] *Theobald v. Green Tree Financial Servicing Corp. (In re Theobald)*, 218 B.R. 133, 136 (B.A.P. 10th Cir. 1998).

[37] *See In re Mayton*, 208 B.R. 61, 67 (B.A.P. 9th Cir. 1997).

[38] *Theobald*, 218 B.R. at 136 **[**15]** (citing *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979)).

of "surrender" in § 521(a)(2) is still murky. The common element appears to require a debtor to relinquish his rights in the collateral. When a debtor states his intent to surrender collateral under § 521(a)(2)(A), he complies with that intention, for purposes of § 521(a)(2)(B), when he allows the secured creditor (or in rare cases the Chapter 7 trustee) to obtain possession by available legal means without interference. The debtor is not required to take any affirmative action to physically deliver the **[*144]** property. But the debtor cannot impede the creditor's efforts to take possession of its collateral by available legal means. If the debtor fails comply with his intention, courts have employed a variety of remedies, such as relief from stay, motions to compel compliance, and dismissal of the case under § 707(a).[39]

HN12 With respect to real estate in particular, a debtor has no obligation to sign a deed or any other legal document to effectuate the creditor's possession. This issue was squarely considered by the Tenth Circuit Bankruptcy Appellate Panel, which considered factual circumstances **[**17]** similar to the present case in *In re Theobald*.[40] There, a creditor argued, like Hickey, that "surrender" of real property under § 521(a)(2) required the debtor to relinquish possession and then execute and deliver a warranty deed to the creditor. The court reasoned that to require the debtor to execute and deliver a warranty deed in such a situation would "eviscerate state law," explaining:

> [The creditor's] definition [of "surrender"] would require a debtor to determine to whom the property should be deeded if more than one lienholder had an interest in the property. The creditor would not be required to hold a foreclosure sale or take any other action to ensure that the rights of the debtor and other creditors provided by state law were protected. If there was value in the property that exceeded the secured creditor's lien, the creditor would simply keep it. This would enable a creditor not only to maintain the benefit of its bargain with the debtor, but also to gain additional income due to the bankruptcy filing and at the expense of other creditors.[41]

I echo the *Theobald* court's concerns. In the present case, there **[**18]** was a substantial tax lien on the Property in addition to Hickey's mortgage.[42] Were the Debtors supposed to unilaterally make the determination of who had the first priority lien? If the value of the property exceeded the Hickey lien, how would the surplus get liquidated or distributed? These concerns demonstrate why foreclosure is often the only remedy available for a mortgage-holder to gain possession of surrendered property after the mortgage debt is discharged in bankruptcy. Debtors simply were not required to deed the property to Hickey to effectuate a surrender.

Hickey also argued that the Debtors violated their purported surrender obligations by allowing tenants to remain in the rental property prior to Hickey's foreclosure. ***HN13*** Residing in a surrendered home, or allowing others to reside **[*145]** there, is not an act that interferes with a secured creditor's ability to seek possession by available legal means. In Florida, a lien theory state,[43] a mortgagee has no right to possession

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[39] ***HN11*** Although the Code provides for relief from stay as an explicit remedy in ***§ 362(h)***, the section only applies when the collateral is personal property, not real property. *See* ***11 U.S.C. § 362(h) (2013)***. **[**16]** Moreover, although relief from stay is the appropriate remedy in some cases to enforce a debtor's failure to perform under § 521(a)(2), other remedies also exist. "[N]o set remedy exists for nonperformance of a debtor's obligations under Section 521. In some cases, dismissal may be appropriate, particularly when a debtor deliberately ignores his or her obligations under Section [521(a)(2)]." *In re Sullivan-Anderson*, 307 B.R. 726, 729 (Bankr. M.D. Fla. 2003). Courts consistently have used other methods to enforce a debtor's compliance under § 521(a)(2), such as orders to compel compliance and dismissal of the bankruptcy case under ***§ 707(a)***. *See Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir. 1993) (upholding the bankruptcy court's order compelling the debtor to comply with his stated intention under § 521); *In re Harris*, 226 B.R. 924 (Bankr. S.D. Fla. 1998) (dismissing case for cause under ***§ 707(b)***).

[40] 218 B.R. 133 (B.A.P. 10th Cir. 1998).

[41] *Theobald*, 218 B.R. at 136-37.

[42] *See* Claim No. 22-2.

[43] Fla. Stat. § 697.02 (2013) ("A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.").

until transfer at a foreclosure sale.[44] So, the mortgagor continues to legally own the property after default until a foreclosure or otherwise valid transfer of title occurs.[45] A debtor's **[**19]** indication of intent to surrender real property does not change this. "Property interests are created and defined by state law."[46]

During the recent recession and the accompanying flood of residential mortgage defaults, many lenders waited years to foreclose on surrendered homes, encouraging the debtors to maintain the home in the interim. Lenders benefit from a lived-in home, and this avoids placing the burdens of an abandoned property on the neighbors and the community.[47]

In this case, the Debtors did everything needed to surrender the Property pursuant to their stated intention under § 521(a)(2)(A). When Hickey filed the foreclosure action against the Debtors, a year after the discharge was entered, the Debtors allowed him to obtain possession by available legal means without interference. Debtors even sent notices to the tenants informing them to tender any rent payments to Hickey.[48] Debtors appeared in the foreclosure case merely to ensure that the foreclosure judgment was limited to *in rem* relief—apparently to little effect—not to contest the foreclosure.[49] Hickey was mistaken in his understanding that the Debtors were required to deed the property over to him to effectuate their "surrender" of the Property. As discussed at length, they were not.

The Post-Discharge Imposition of Attorney's Fees Violated the Discharge Injunction

Debtors now seek sanctions alleging Hickey's attorney's **[**21]** fee award in the foreclosure case violated the discharge injunction. ***HN14*** Section 524 of the Bankruptcy Code prescribes the effect of a discharge and imposes an injunction against collection of discharged debts.[50] Section 524(a) provides that a discharge:

> (1) voids any judgment at any time obtained to the extent that such judgment is a determination of personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, **[*146]** the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;[51]

Did the imposition of personal liability for attorney's fees on the Debtors violate the discharge injunction set out in § 524(a)(2)? If yes, then the Foreclosure Judgment's finding of personal liability is void by § 524(a)(1), and an award of sanctions justified.

The Foreclosure Judgment bases its attorney's fee award on the Debtors' "failure **[**22]** to surrender the property to the plaintiffs in accordance with their approved plan and 11 U.S.C. 722."[52] The judgment goes on to hold the Debtors liable for Hickey's costs and fees in the foreclosure proceeding, because "such costs and fees were incurred after the bankruptcy discharge and the property was not transferred by the defendants

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[44] *Accord* Martyn v. First Federal Sav. & Loan Ass'n of West Palm Beach, 257 So.2d 576 (1971) (citing Folks v. Chesser, 106 Fla. 836, 106 Fla. 837, 145 So. 602 (Fla. 1932)).

[45] *See* In re Phillips, 368 B.R. 733, 744 (Bankr. N.D. Ind. 2007) (holding that in a lien theory state, "the mortgagor continues to be the owner of the estate until foreclosure").

[46] Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

[47] *Cf.* In re Canning, 706 F.3d 64, 72 (1st Cir. 2013) (discussing the debtor's vacation of their surrendered residence before the creditor **[**20]** foreclosed on the property, stating that the debtors "placed many of the burdens of dealing with an abandoned property on their neighbors, their town, and their city—in other words, on everyone but them").

[48] Hickey's Exhibits 5 and 6.

[49] *See* Doc. No. 91, Exhibit 3 at ¶ 6.

[50] In re Hardy, 97 F.3d 1384, 1388-89 (11th Cir. 1996).

[51] 11 U.S.C. § 524(a) (2013).

[52] Hickey's Exhibit 9 at ¶ 10(b).

according to the approved plan during the bankruptcy proceedings."[53]

The Foreclosure Judgment's rationale finds no basis in law. First, the Debtors' bankruptcy was filed under Chapter 7. ***HN15*** Bankruptcies under Chapter 7 do not culminate in a "plan." So any reference to a "plan" as a basis for an attorney's fee award is inapposite. Second, *§ 722 of the Bankruptcy Code* is titled "Redemption," and allows a debtor to redeem certain kinds of property by paying a secured creditor's allowed claim in full.[54] Debtors never stated any intention to redeem the Property, and *§ 722* does not require a debtor to "surrender" property as the Foreclosure Judgment contemplates. Neither of the reasons stated in the Foreclosure Judgment make any sense.

The rationale in the Foreclosure Judgment simply does not provide **[**23]** a basis for the fee award, and as discussed at length, neither does Hickey's claim that the Debtors were required to deed the property over to him to perform their *§ 521(a)(2)* intent to surrender. So what provided the basis for the attorney's fee award? The only logical explanation is the mortgage, which secured a pre-petition debt that is now discharged. At trial, Hickey testified that he pursued attorney's fees in the Foreclosure Judgment because it "said so" in the mortgage. The attorney's fee award stemmed from the discharged pre-petition mortgage debt and, therefore, violated the discharge injunction of *§ 524(a) of the Bankruptcy Code*.

State Court's Award of Attorney's Fees is Void

Because a portion of the Foreclosure Judgment's attorney's fee award violated the discharge injunction, that portion is void. ***HN16*** *Section 524(a)(1)* provides that a discharge "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor" with respect to a discharge debt.[55] Courts have used *§ 524(a)(1)* to void parts of state court judgments that violate the discharge injunction while keeping parts of the judgments that are not in violation **[**24]** intact.[56]

The state court judgment is void "to the extent" it was a finding of personal liability **[*147]** on the Debtors.[57] That is, the Court specifically voids paragraph 10(b) of the Foreclosure Judgment, the section that found the Debtors liable for attorney's fees. Debtors are not personally liable to pay anything under the Foreclosure Judgment. The remainder of the Foreclosure Judgment shall remain valid and enforceable.

Sanctions

Finally, I will turn to the issue of sanctions. ***HN17*** *Section 105 of the Bankruptcy Code* gives bankruptcy courts the statutory power to award damages for a violation of the discharge injunction.[58] All courts, including bankruptcy courts, also have inherent contempt powers to "achieve the orderly and expeditious disposition of cases."[59] But, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[60]

HN18 The key factor in determining whether a creditor may be held liable for contempt under *§ 105* for a violation of the discharge injunction is whether the

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[53] *Id.*

[54] 11 U.S.C. § 722 (2013).

[55] 11 U.S.C. § 524(a)(1) (2013).

[56] *See In re Egleston*, 448 F.3d 803 (5th Cir. 2006) (holding those parts of the state court damages award based on pre-petition conduct void, but maintaining parts of the judgment based on post-petition conduct found not to violate the discharge injunction).

[57] 11 U.S.C. § 524(a)(1) (2013).

[58] *In re Nibbelink*, 403 B.R. 113, 119-20 (Bankr. M.D. Fla. 2009) **[**25]** (citing *In re Hardy*, 97 F.3d 1384, 1389-90 (11th Cir. 1996)).

[59] *Jove Engineering v. I.R.S. (In re Jove Engineering)*, 92 F.3d 1539, 1553 (11th Cir. 1996) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991)).

[60] *Chambers*, 501 U.S. at 43.

creditor's conduct was willful.[61] Conduct is considered willful if the creditor: "1) knew that the discharge injunction was invoked and 2) intended the actions which violated the discharge injunction."[62] "The willfulness requirement refers to the deliberateness of the creditor's conduct and its knowledge of the bankruptcy filing."[63] Moreover, "the subjective beliefs or intent of the creditor are irrelevant."[64] A creditor's mistaken belief that his or her actions did not violate § 524(a) is no defense to a § 105 contempt action.[65]

HN19 Proof that the creditor had notice of the discharge satisfies the knowledge prong of the willfulness test.[66] Debtors' discharge was entered on October 4, 2011. Hickey clearly had notice of the discharge before seeking attorney's fees in the foreclosure case in 2013, and Hickey never alleged a lack of knowledge of the discharge as a defense to his actions. The second prong, intent, is also satisfied. Hickey deliberately filed the motion for attorney's fees and costs in an effort to impose personal liability upon the Debtors for fees and costs incurred in the foreclosure case.

Hickey argues that his misunderstanding of "surrender" and the lack of a clear definition of the term excuses his actions. If Hickey truly believed "surrender" required the Debtors to deed the Property to him, Hickey should have attempted to enforce this right through a motion to compel compliance or motion for turnover in the Debtors' bankruptcy case. As far as the record shows, Hickey never filed such a motion or otherwise attempted to enforce this alleged right. Hickey, perhaps due **[**27]** to the erroneous advice of his **[*148]** attorney, willfully violated the discharge injunction. An award of sanctions is appropriate.

Damages

The Debtors request actual damages and $20,000 in punitive damages. The Court awards the Debtors actual damages but declines to assess any punitive damages under § 105(a).[67] After the hearing on the motion for sanctions, the Court asked the Debtors to submit an affidavit of actual damages. The Court has reviewed the Debtors' affidavits, Hickey's response, and considered all applicable legal factors in determining the reasonableness of the attorney's fees requested.[68] Actual damages are limited to reasonable attorney fees, costs, and lost wages the Debtors incurred in enforcing their discharge.

HN20 Section 330 of the Bankruptcy Code allows for the award of "reasonable compensation."[69] A court determines the reasonableness of a fee award by examining the twelve factors laid out in *Johnson v. Georgia Highway Express, Inc.*[70] The Court awards the Debtors $4,180 in reasonable attorney's fees. This sum represents fees incurred by the Debtors after Hickey filed his motion for fees and costs in the foreclosure case.[71] **[**28]** The Debtors themselves submitted an affidavit of expenses incurred, which included lost wages for attending to the matter and travel costs, totaling $231.88.[72] The Court finds this amount reasonable and awards the Debtors the additional $231.88 in actual damages, for a total sanction of $4,411.88.

The Court further will award the sanctions against both Hickey and his lawyer, James L. Homich, jointly and severally. Hickey testified that he relied on his attorney's

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61 *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996).

62 *Id.*

63 *In re Dynamic Tours & Transp., Inc.*, 359 B.R. 336, 343 (Bankr. M.D. Fla. 2006) (citing *Davis v. United States (In re Davis)*, 201 B.R. 835, 837 (Bankr. S.D. Ala. 1996)).

64 *Id.* (citations **[**26]** omitted).

65 *In re Martin*, 474 B.R. 789 at *6 (B.A.P. 6th Cir. 2012).

66 *Dynamic Tours*, 359 B.R. at 343 (citing *Hardy*, 97 F.3d at 1390).

67 ***11 U.S.C § 105(a) (2013)***.

68 Doc. Nos. 110, 113, 115.

69 11 U.S.C. § 330 (2013).

70 488 F.2d 714, 717-20 (5th Cir. 1974).

71 Affidavit of Debtors' Attorney Regarding Time, Doc. No. 113.

72 Affidavit of Debtor's Costs, Doc. No. 114, Exhibit 1.

legal advice in seeking the attorney's fees in the foreclosure case. Because I find Hickey's attorney at the very least complicit in the violation of the discharge injunction, he is liable for all sanctions, jointly and severally with his client.

Conclusion

Hickey's pursuit of attorney's fees against the Debtors in a post-discharge foreclosure proceedings relating to surrendered property violated the discharge injunction of *§ 524(a)*. The Debtors were not required to deed the Property to Hickey to fulfil their obligation to surrender under *§ 521(a)(2)*. **[**29]** The Court awards the Debtors $4,411.88 in actual damages under its statutory contempt power of *§ 105*, which Hickey and his attorney are jointly and severably liable to pay. A separate order consistent with this memorandum opinion shall be entered.

DONE AND ORDERED in Orlando, Florida, March 25, 2014.

/s/ Karen S. Jennemann

KAREN S. JENNEMANN

Chief United States Bankruptcy Judge

ORDER GRANTING DEBTORS' MOTION FOR SANCTIONS

The Debtors, Frederick Kelly Plummer and Betty Ann Plummer, request the imposition of sanctions against the creditor, William Hickey, for violation of the discharge injunction. Consistent with the Memorandum Opinion Granting Debtors' Motion for Sanctions, entered simultaneously, it is

ORDERED:

1. The Debtors' Motion for Sanctions Against Creditor William Hickey (Doc. No. 91) is granted.

2. William Hickey and his attorney, James L. Homich, are jointly and severably **[*149]** liable to pay the Debtors $4,411.88 within 30 days of the entry of this Order. If William Hickey or James L. Homich fail to timely make this payment, the Court, upon request, will enter a final judgment upon which execution shall lie.

3. Paragraph 10(b) of the Summary Final Judgment of Foreclosure entered against **[**30]** the Debtors in the Circuit Court for the Fifth Judicial Circuit, in and for Lake County, Florida on May 29, 2013 is stricken.

4. The Debtors have no personal liability to William Hickey.

DONE AND ORDERED in Orlando, Florida, March 25, 2014.

/s/ Karen S. Jennemann

KAREN S. JENNEMANN

Chief United States Bankruptcy Judge

User Name: Gregory Champeau
Date and Time: Feb 09, 2016 2:34 p.m. EST
Job Number: 28959795

Document(1)

1. *In re Failla, 529 B.R. 786*
   Client/Matter: -None-

In re Failla

United States Bankruptcy Court for the Southern District of Florida, West Palm Beach Division

December 19, 2014, Decided

CASE NO.: 11-34324-BKC-PGH, CHAPTER 7

Reporter
529 B.R. 786; 2014 Bankr. LEXIS 5310

In re: David A. Failla and Donna N. Failla, Debtor(s).

Core Terms

surrender, Mortgage, reaffirm, collateral, motion to compel, state court, real property, exempt, redeem, foreclosure action, rights, lines, foreclosure

Case Summary

Overview

HOLDINGS: [1]-Chapter 7 debtors were not permitted to defend or oppose the foreclosure and/or sale of their real property in state court because they, pursuant to *11 U.S.C.S. § 521*, swore under oath that they intended to surrender the property and benefited from that declaration.

Outcome

Motion granted.

LexisNexis® Headnotes

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

HN1 See *11 U.S.C.S. § 521(a)*.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

HN2 In many jurisdictions, including the Eleventh Circuit, if the debtor chooses to retain nonexempt collateral under *11 U.S.C.S. § 521(a)(2)*, he only has two options: reaffirmation or redemption. He may "reaffirm" his agreement with the secured creditor to pay the prepetition debt, or "redeem" the collateral by paying the allowed secured claim amount in full. But, where the debtor decides not to reaffirm, or the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: surrender the collateral.

Governments > Legislation > Interpretation

HN3 Where the words in the statute are not defined terms, the court should look to their ordinary, dictionary-defined meaning. In the absence of a statutory definition of a term, a court looks to the common usage of words for their meaning.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

HN4 Congress intended the bankruptcy laws to provide a debtor a "fresh start" by allowing a debtor to discharge all dischargeable debts while retaining assets that are exempt. *11 U.S.C.S. §§ 727* and *522*, respectively. Allowing a debtor to retain property without reaffirming or redeeming gives the debtor not a "fresh start" but a "head start" since the debtor effectively converts his secured obligation from recourse to nonrecourse with no downside risk for failing to maintain or insure the lender's collateral. *11 U.S.C.S. § 521* mandates that a debtor who intends to retain secured property must specify an intention to redeem or reaffirm.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

HN5 A debtor unwilling to reaffirm and unable to pay off the mortgage obligation is required to indicate an intent to surrender the home and to tender the property to the mortgagee.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

HN6 A debtor may not state an intention to surrender while also contesting foreclosure in a state court.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

HN7 What surrender means under *11 U.S.C.S. § 521* is that the debtor does not have to take affirmative action to physically deliver property to a lien holder, but the debtor cannot impede a creditor's efforts to take possession of its collateral by available legal means.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

HN8 See *11 U.S.C.S. § 105(a)*.

Counsel: **[**1]** For David A Failla, Debtor: Michael E Zapin, Boca Raton, FL.

For Donna N Failla, Joint Debtor: Michael E Zapin, Boca Raton, FL.

Trustee: Michael R Bakst, West Palm Beach, FL.

Judges: Paul G. Hyman, Jr., Chief United States Bankruptcy Judge.

Opinion by: Paul G. Hyman, Jr.

Opinion

[*787] **ORDER GRANTING CITIBANK'S AMENDED MOTION TO COMPEL DEBTORS TO SURRENDER REAL PROPERTY PURSUANT TO STATEMENT OF INTENTION**

THIS MATTER came before the Court for upon the *Amended Motion to Compel Debtors to Surrender Real Property Pursuant to Statement of Intention and Incorporated Memorandum of Law* (the "Motion to Compel Surrender") (ECF No. 40) filed by CitiBank, N.A. as Trustee for the Certificate Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust, Mortgage Pass-Through Certificate Series 2006-7 ("CitiBank") against David A. Failla and Donna N. Failla (the "Debtors"). The Court took the matter under advisement at a hearing on October 7, 2014. Thereafter, the parties submitted a *Stipulation of Facts and Statement of Legal Issues for Ruling on Motion to Compel Debtors to Surrender Real Property* (the "J. Stip." or the "Joint Stipulation") (ECF No. 78).[1] For the reasons discussed below, the Court grants CitiBank's **[**2]** Motion to Compel Surrender.

FACTS

The following facts are undisputed. The Debtors own real property located at 1498 SW 19th Street, Boca Raton, Florida 33486 (the "Property"). J. Stip. at ¶ 3. On August 25, 2006, David A. Failla obtained a loan (the "Loan") from HomeBanc Mortgage Corporation, and in connection therewith executed a promissory note (the "Note") payable to HomeBanc Mortgage Corporation in the principal amount of $500,000.00. *Id*. at ¶ 4. As security for the Loan, the Debtors executed a mortgage (the "Mortgage") on August 25, 2006, pledging the Property as collateral. *Id*. at ¶ 5. The Mortgage was recorded on September 12, 2006, in Official Records Book 20836, Page 0544 et al. of the Official **[**3]** Records of Palm Beach County, Florida. *Id*. at ¶ 6.[2]

Subsequently, the Debtors defaulted under the Note and Mortgage. *Id*. at ¶ 7. On July 7, 2009, CitiBank filed a complaint to foreclose the Mortgage and re-establish the Note in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm **[*788]** Beach County, Florida (the "State Court"). *Id*.

Thereafter, on August 31, 2011, the Debtors filed their *Chapter 7 Voluntary Petition* (ECF No. 1). On the same day, the Debtors filed their Schedules A through J (the "Schedules"), in which the Debtors made declarations concerning the Property and the Mortgage under penalty of perjury. The Debtors stated that they own the Property, the Property is encumbered by the Mortgage, and the Mortgage is a valid first mortgage lien on the Property and represents a non-contingent, liquidated, and undisputed secured claim against the Debtors and the Property. The Debtors declared that the amount they owe pursuant to the Loan exceeds the value of the Property. On September 2, 2011, the Debtors filed their *Statement of Intention* (ECF No. 8), in which they declared under penalty **[**4]** of perjury their intention to surrender the Property pursuant to *11 U.S.C. §*

[1] On December 5, 2014, the Debtors filed their *Brief in Opposition to Creditor CitiBank B.A., As Trustee, Etc. Motion to Compel Surrender of Real Property* (ECF No. 81) and CitiBank filed its *Memorandum of Law in Support of Motion to Compel Surrender of Real Property* (ECF No. 82). Thereafter, on December 12, 2014, the Debtors filed their *Reply Law Memorandum* (ECF No. 84) and CitiBank filed its *Reply to Debtors' Brief in Opposition to Motion to Compel Surrender of Real Property* (ECF No. 85).

[2] The parties attached copies of the Note and Mortgage to the Joint Stipulation as Exhibit A.

521(a)(2)(A). Nevertheless, on October 14, 2011, the Debtors attempted to amend their Statement of Intention to instead declare an intention to reaffirm the Mortgage and Loan. *See Amended Document* (ECF No. 14). The amendment, however, was untimely and invalid under applicable law, and therefore, did not result in the amendment of the original Statement of Intention. J. Stip. at ¶ 15.

On December 16, 2011, the Court issued the *Order Discharging Debtor(s)* (ECF No. 23) and on December 19, 2011, the Clerk of the Court closed the Debtors' case. *See Final Decree and Discharge of Trustee* (ECF No. 25). Subsequently, the Stat Court set a non-jury trial for August 21, 2013, regarding the Property. J. Stip. at ¶ 17. As of December 1, 2014, and since September 2, 2011, the Debtors have retained possession and title to the Property, and oppose CitiBank's action to foreclose on the Mortgage in the State Court. *Id*. at ¶ 18.

CONCLUSIONS OF LAW

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to *28 U.S.C. § 1334*. This is a core proceeding under *28 U.S.C. §§ 157(b)(2)(A)* and *(O)*.

II. The Debtors Must Surrender the Property

The parties agree that there are no factual disputes for **[**5]** the Court to determine in ruling on the Motion to Compel Surrender, and that the only issues left to decide are the following purely legal issues: (1) What actions or inactions, if any, are required of the Debtors to effectively and sufficiently perform their Statement of Intention to surrender the Property?; (2) What remedies or rights are available to CitiBank for the Debtors' failure to comply with their obligation to perform their Statement of Intention to surrender the Property?; and (3) Does the "exception" language of *11 USC § 521(a)(2)(B)*—which states that "except that nothing in *subparagraphs (A)* and *(B)* of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in *section 362 (h)*"—implicitly permit a debtor to lawfully defend a foreclosure action as a matter of "right" of such property ownership?

When a debtor files for bankruptcy, the debtor must state her intention to surrender, reaffirm, or redeem property in which a creditor has a secured interest. The Bankruptcy Code provides:

> ***HN1*** (a) The debtor shall—
>
> . . .
>
> (2) if an individual debtor's schedule of assets and liabilities includes debts **[*789]** which are secured by property of the estate—
>
> (A) within **[**6]** thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and
>
> (B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)
>
> *11 U.S.C. § 521*.

HN2 "In many jurisdictions, including the Eleventh Circuit, if the debtor chooses to retain nonexempt collateral under *§ 521(a)(2)*, he only has two options: reaffirmation or redemption." *In re Plummer, 513 B.R. 135, 141 (Bankr. M.D. Fla. 2014)* (*citing* *Taylor v. AGE Fed. Credit Union (In re Taylor), 3 F.3d 1512 (11th Cir. 1993))*. Judge Jennemann **[**7]** of the Bankruptcy Court for the Middle District of Florida elaborated:

> He may "reaffirm" his agreement with the secured creditor to pay the prepetition debt, or "redeem" the collateral by paying the allowed secured claim amount in full. But, "[w]here the debtor decides not to reaffirm, or the parties cannot negotiate a

> reaffirmation, or redemption is not economically feasible, the debtor has but one option: 'surrender' the collateral."

Id. (quoting In re Pratt, 462 F.3d 14, 19 (1st Cir. 2006)); *see also* In re Steinberg, 447 B.R. 355, 357 (Bankr. S.D. Fla. 2011) ("In this circuit, a chapter 7 debtor has only three options with respect to property subject to a lien or mortgage: (1) surrender the property; (2) redeem the property; or (3) reaffirm the debt."). The Debtors agreed in the Stipulation of Facts that their proposed amendment to the Statement of Intention was ineffective and that they are obligated to surrender the Property. Accordingly, the issue before the Court is what the Debtors need to do in order to effectively surrender the Property pursuant to the Bankruptcy Code.

"Surrender," however, is not defined in 11 U.S.C. § 521(a)(2) or elsewhere in the Bankruptcy Code. *In re Plummer, 513 B.R. at 142* (*citing* In re Pratt, 462 F.3d at 18 (1st Cir. 2006); In re Cornejo, 342 B.R. 834, 836 (Bankr. M.D. Fla. 2005)). "'***HN3*** Where the words in the statute are not defined terms, the court should look to their **[**8]** ordinary, dictionary-defined meaning.'" *Id. (quoting* In re Ralston, 400 B.R. 854, 860 (Bankr. M.D. Fla. 2009) (*citing* Consolidated Bank, N.A. v. U.S. Dep't of the Treasury, 118 F.3d 1461, 1464 (11th Cir. 1997) ("In the absence of a statutory definition of a term, we look to the common usage of words for their meaning.")). Black's Law Dictionary defines "surrender" as "[t]he act of yielding to another's power or control" or "[t]he giving up of a right or claim." Black's Law Dictionary 1581 (9th ed. 2009).

Furthermore, "[f]ew courts have examined 'surrender' in the context of **[*790]** § 521(a)(2)." *In re Plummer, 513 B.R. at 142*. Sections 521(a)(1) and (2) of the Bankruptcy Code do not state to whom a secured property should be surrendered. The Bankruptcy Court for the District of Columbia, in a case cited by the Debtors, noted that "[m]ost courts appear to assume that the surrender option entails a surrender to the lienholder, not to the trustee *In re Kasper, 309 B.R. 82, 85-86 (Bankr. D.D.C. 2004)*. Likewise, the Eleventh Circuit Court of Appeals stated in dicta that "[surrender provides that a debtor surrender the collateral to the lienholder who then disposes of it pursuant to the requirements of state law." *In re Taylor, 3 F.3d at 1514*.[3] Additionally, the First Circuit Court of Appeals, in *In re Pratt*, stated that "the most sensible connotation of 'surrender' . . . is that the debtor agreed to make the collateral available to the secured creditor-viz., to cede his possessory rights in the collateral." *462 F.3d at 18*.

The Debtors, however, contend that they already surrendered the Property to the Trustee, Michael Bakst. The Debtors contend that the Trustee abandoned the Property and thus that it reverted back to them because they were restored to their pre-petition rights. The Debtors cite *In re Kasper* for the proposition that "surrender" should be to the Trustee. The *Kasper* court stated:

> Viewed in isolation, the term "surrender" in § 521(2)(A) is at best ambiguous. However, when § 521(2)(A) is read in the context of its companion provision, § 521(4), which requires that the debtor shall "surrender to the trustee all property of the estate," and of the lack of a clear congressional intention to alter nonbankruptcy law, § 521(2)(A)'s use of the term "surrender" plainly was not intended to mean turning over physical possession to the lienholder.

In re Kasper, 309 B.R. at 90.[4]

In contrast, CitiBank contends that it would be unfair to permit the Debtors to retain the Property for longer, if not permanently, while the Debtors contest the foreclosure action in the State Court. The Eleventh Circuit Court of Appeals stated:

> We recognize ***HN4*** Congress intended the bankruptcy laws to provide a debtor a "fresh start"

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[3] Nonetheless, as **[**9]** the Bankruptcy Court for the Middle District of Florida observed, "[t]he footnote in *Taylor* notes debtor has the option to surrender but does not define the term surrender." *In re Cornejo*, 342 B.R. at 836. "Consequently, the Eleventh Circuit's dictum in *Taylor* provides little guidance." *In re Plummer*, 513 B.R. at 141-42 (*citing* Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir. 2010) ("[D]icta is not binding on anyone for any purpose.")).

[4] The Eleventh Circuit Court of Appeals, however, seemingly does not agree with the *Kasper* **[**10]** court's interpretation that the Code is ambiguous. "The Eleventh Circuit holds that a debtor must comply with 11 U.S.C. § 521(2) because the statutory language is unambiguous and to be read literally and narrowly." *In re Jones*, 261 B.R. 479, 485-86 (Bankr. N.D. Ala. 2001) (*citing In re Taylor*, 3 F.3d 1512, 1516-17 (11th Cir. 1993)). "In *Taylor*, the Circuit Court specifically found that the statutory duties placed upon debtors are mandatory." *Id*.

> by allowing a debtor to discharge all dischargeable debts while retaining assets that are exempt. *See* 11 U.S.C. §§ 727 and 522, respectively. Allowing a debtor to retain property without reaffirming or redeeming gives the debtor not a "fresh start" but a "head start" since the debtor effectively converts his secured obligation from recourse to nonrecourse with no downside risk for failing to maintain or insure the lender's collateral. Section 521 mandates that a debtor who intends to retain **[*791]** secured property must specify an intention to redeem or reaffirm.

In re Taylor, 3 F.3d at 1516. Accordingly, as noted by Judge Kimball, "[u]nder *Taylor*, ***HN5*** a debtor unwilling to reaffirm and unable to pay off the mortgage obligation is required to indicate an intent to surrender the home and to tender the property **[**11]** to the mortgagee." *In re Steinberg, 447 B.R. at 358*. Therefore, the Eleventh Circuit Court of Appeals seems to have rejected, at least in part, the approach taken by the Bankruptcy Court for the District of Columbia in *Kasper*. Essentially, if the Court determined that the Debtors already properly surrendered the Property to the Trustee, they would be effectively permitted to retain the Property, at least until a successful foreclosure action concludes, without redeeming the Property or reaffirming the Note. Furthermore, *11 U.S.C. § 521(a)(2)* does not explicitly require the Debtors to surrender the Property "to the Trustee."

Both Judge Kimball and Judge Williamson in the neighboring Bankruptcy Court for the Middle District of Florida utilized the same approach in finding that ***HN6*** a debtor may not state an intention to surrender while also contesting foreclosure in a state court. *See In re Cheryl L. Troutt*, Case No. 13-39869-BKC-EPK and *In re Luther Burnett, Jr.*, Case No. 13-12274-BKC-MGW. Judge Kimball, summarizing Judge Williamson's position in *Burnett*, stated:

> [Judge Williamson's] thought is that if the debtor files a bankruptcy case, and takes action in the case that shows an intent to surrender the property, that recognizes the lien and **[**12]** its validity, and gets an advantage through doing that, and then obtains a discharge, but the truth is that the debtor had no intention of giving up the property, and has filed the case in part for strategic reasons, that a discharge was obtained through fraud and should be revoked. And gives the debtor the chance to do the right thing, or have the Court reach the fairly obvious conclusion that discharge should be revoked. And that's why he entered that order.

In re Cheryl L. Troutt, Case No. 13-39869-BKC-EPK at ECF No. 31, Tr. p. 7, lines 2-14.

Likewise, the same issues of fairness considered by Judge Williamson in *Burnett* were also considered by Judge Kimball in *Troutt*. Judge Kimball summarized the case before him:

> This is a case where the debtor was actively resisting a foreclosure action at the time that the petition was filed, and the petition was filed in December of 2013. The schedules filed in the case show that there was no equity in the property, and the debtor filed a statement of intention indicating a desire to surrender the subject property. The debtor, as a result, had the benefit of the additional wild card exemption under Florida Statute as it's implemented through the **[**13]** Bankruptcy Code and took advantage of the whole thing, thereby getting another $4,000 of exempt property, personal property.

Id. at Tr. p. 11, lines 14-25.

In *Troutt*, Judge Kimball reviewed the positions of other courts when faced with a similar set of facts in which a debtor has stated his intention to surrender a property:

> I think there are only two views, two views that I've seen and heard from other bankruptcy judges. One is that the debtor must take affirmative action to actually turn over the property. Lenders may not actually want that, by the way. And the other is, that the debtor cannot take action to impede the lawful course that would normally be **[*792]** pursued in State Court or elsewhere by the secured creditor.

Id. at Tr. at p. 12; lines 18-25. He then determined "that ***HN7*** what surrender means is the debtor doesn't have to take affirmative action to physically deliver property to a lien holder, but the debtor cannot impede a creditor's efforts to take possession of its collateral by available legal means." *Id*. at Tr. p. 13, lines 13-17.[5] He elaborated:

> In this case the debtor admitted the validity of the debt and the mortgage, did not claim the property

[5] Judge Jennemann also took this approach in *In re Plummer*, she stated:

> as exempt, and in fact, used the **[**14]** wild card exemption, thereby denying the estate administrable assets, all while having no intention of actually giving up the real property. If the debtor persists in refusing to surrender the property then the only conclusion the Court could reach is that the debtor obtained the discharge based on fraud, and so the discharge should be revoked. Even if this wasn't—even if the standard did not apply here, I would still rule that it's appropriate for the Court to threaten to revoke the discharge for the debtor's failure to live up to the statement of intentions and the duty under Section 521.
>
> . . .
>
> And so it's my view that it's proper for the Court to rule that failure to surrender will result in revocation of discharge.

Id. at Tr. p. 13, line 25; p. 14, lines 1-16; p. 15, lines 5-7.

Here, the facts are remarkably similar to those in *Troutt*. The Debtors have admitted the validity of the debt, did not claim the Property as exempt, and have benefitted from the "wildcard" exemption pursuant to Fla. Stat. § 222.25(4). Nevertheless, they wish to utilize affirmative defenses in the State Court and to contest the foreclosure. Moreover, they have not reaffirmed the Note or redeemed the Property. Accordingly, the Court agrees with the approach taken by Judge Kimball and Judge Williamson and determines that the Debtors must surrender the Property to CitiBank.

While the Debtors do not have to physically surrender the Property to CitiBank, they cannot continue to defend and/or contest the **[**16]** foreclosure in the State Court which is in effect resisting the surrender of the Property to CitiBank. The Debtors do not have an absolute "right" to defend in a foreclosure action because the Debtors explicitly admitted the validity of the debt and stated their intention before this Court to surrender the Property. The Bankruptcy Code provides:

> ***HN8*** (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to **[*793]** preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105. Consequently, if the Debtors persist in their refusal to "surrender" the Property pursuant to 11 U.S.C. § 521(a)(2), their discharge will be in jeopardy pursuant to 11 U.S.C. § 105. The Debtors' refusal to effectively surrender the Property to CitiBank could be considered not only a fraud on the Court, but also a violation of 11 U.S.C. § 521(a)(2)(B), which requires that "within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time **[**17]** as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property."

III. Conclusion

For the reasons described above, the Debtors' active defense of the foreclosure action in the State Court does not comport with the definition of "surrender" for purposes of the Bankruptcy Code. Therefore, the Debtors are not permitted to defend or oppose the foreclosure and/or sale of the Property in the State Court because they swore under oath in this Court that they intended to surrender the Property and benefited from this declaration.

ORDER

> Although we know what surrender does not require—turnover of physical possession—the definition of "surrender" in § 521(a)(2) is still murky. The common element appears to require a debtor to relinquish his rights in the collateral. When a debtor states his intent to surrender collateral under § 521(a)(2)(A), he complies with that intention, for purposes of § 521(a)(2)(B), when he allows the **[**15]** secured creditor (or in rare cases the Chapter 7 trustee) to obtain possession by available legal means without interference. The debtor is not required to take any affirmative action to physically deliver the property. But the debtor cannot impede the creditor's efforts to take possession of its collateral by available legal means. If the debtor fails comply with his intention, courts have employed a variety of remedies, such as relief from stay, motions to compel compliance, and dismissal of the case under ***§ 707(a)***.

In re Plummer, 513 B.R. at 143-44.

The Court, being fully advised in the premises and for the reasons discussed above, hereby **ORDERS AND ADJUDGES** that:

1. CitiBank's Motion to Compel Surrender is **GRANTED** to the extent set forth herein.

2. The Debtors shall cease all defense and/or oppoBsition related to the foreclosure and/or sale of the Property in the State Court.

3. If the Debtors fail to abide by Paragraph 2 of this Order, CitiBank may file a motion with the Court requesting that the Court enter an order vacating the Debtors' discharge.

4. If CitiBank files a motion pursuant to Paragraph 2 of this Order and the Court finds that the Debtor failed to abide **[**18]** by Paragraph 2 of this Order, the Court may enter an order vacating the Debtors' discharge.

5. The Court reserves jurisdiction to enforce the provisions of this Order.

ORDERED in the Southern District of Florida on December 19, 2014.

/s/ Paul G. Hyman, Jr.

Paul G. Hyman, Jr.

Chief United States Bankruptcy Judge

User Name: Gregory Champeau
Date and Time: Feb 09, 2016 2:15 p.m. EST
Job Number: 28958068

Document(1)

1. *In re Metzler, 530 B.R. 894*
   Client/Matter: -None-

In re Metzler

United States Bankruptcy Court for the Middle District of Florida, Tampa Division

May 13, 2015, Decided

Case No. 8:12-bk-16792-MGW, Chapter 13, Case No. 8:13-bk-09736-MGW, Chapter 7

Reporter
530 B.R. 894; 2015 Bankr. LEXIS 1627; 25 Fla. L. Weekly Fed. B 245

In re: Lisa Michelle Metzler, Debtor.In re: Nootan Patel, Debtor.

Core Terms

surrender, foreclosure action, secured creditor, secured property, collateral, mortgage, state court, relinquishment, foreclose, reaffirm, redeem, opposing, rights, confirmation, daughter, bankruptcy case, homestead, actively, defended, reopen, ride

Case Summary

Overview

HOLDINGS: [1]-Bankruptcy debtors failed to surrender real properties to secured creditors as contemplated by one debtor's statement of intention and another debtor's confirmed plan, since the debtors continued to actively oppose the creditors' foreclosure actions and thus failed to relinquish all rights in the secured properties.

Outcome

Order entered.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN1 At a minimum, "surrender" under *11 U.S.C.S. §§ 521*, *1325* means a bankruptcy debtor cannot take an overt act that impedes a secured creditor from foreclosing its interest in secured property. The debtor must relinquish any rights in the secured property—including the right of possession—and make it available to the secured creditor.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > Liquidations > Estate Property Distribution > Encumbered Property

HN2 A chapter 7 bankruptcy debtor has three options when it comes to secured property: the debtor can redeem the secured property, reaffirm the debt it secures, or surrender the secured property. *11 U.S.C.S. § 521* expressly requires a chapter 7 debtor to file a statement of intentions indicating whether he or she intends to redeem secured property or reaffirm the debt it secures.

Bankruptcy Law > Liquidations > Estate Property Distribution > Encumbered Property

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN3 See *11 U.S.C.S. § 521(a)(2)(A)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > Liquidations > Estate Property Distribution > Encumbered Property

HN4 A bankruptcy debtor must perform his or her stated intention concerning secured property, generally within thirty days after the date first set for the meeting of creditors. The Eleventh Circuit has interpreted *11 U.S.C.S. § 521* to mean that a debtor cannot retain collateral unless he or she redeems it or reaffirms the debt it secures. *§ 521(a)(2)(B)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

HN5 A chapter 13 bankruptcy debtor is not required to file a statement of intentions concerning secured property. But a chapter 13 debtor is required to file a plan of reorganization indicating how he or she proposes to treat secured property. And *11 U.S.C.S. § 1325* only gives chapter 13 debtors three options for treating secured debt in a plan: gain the secured creditor's consent to the plan treatment, cram down the plan treatment over the secured creditor's objection, or surrender the secured property. *§ 1325(a)(5)(A)-(C)*. Under the cramdown option, the debtor is required to pay the secured creditor the total present value of the allowed secured claim over the life of the plan. *§ 1325(a)(5)(B)*. Absent consent from a secured creditor, then, a chapter 13 debtor cannot retain collateral without paying for it. *§ 1325(a)(5)(C)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN6 Surrender in bankruptcy, at a minimum, requires a bankruptcy debtor to relinquish secured property and make it available to the secured creditor. That does not mean that the debtor must deliver the property to the secured creditor.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > Liquidations > Estate Property Distribution > Encumbered Property

HN7 In the context of *11 U.S.C.S. §§ 521*, *1325*, the term "surrender" means that a bankruptcy debtor must relinquish secured property and make it available to the secured creditor by refraining from taking any overt act that impedes a secured creditor's ability to foreclose its interest in secured property.

Counsel: **[**1]** For Wells Fargo Bank N.A.: Hywel Leonard, Esq., Carlton Fields, P.A.

For Lisa Michelle Metzler: Kenneth R. Case, Esq., Stopa Law Firm.

For U.S. Bank: Adam A. Diaz, Esq., SHD Legal Group, P.A.

For Nootan Patel: David R. Singha, Esq., David R. Singha, P.A.

Judges: Michael G. Williamson, United States Bankruptcy Judge.

Opinion by: Michael G. Williamson

Opinion

[*896] **MEMORANDUM OPINION ON SURRENDER**

These two bankruptcy cases—one a chapter 7 and the other a chapter 13—present a relatively novel question: how does a debtor surrender real property in bankruptcy? In the chapter 7 case, the debtor failed to schedule real property that was subject to a state court foreclosure action or file a statement of intentions under *Bankruptcy Code § 521* indicating whether she intended to retain or surrender the property. In the chapter 13 case, the debtor filed a plan that proposed to surrender her homestead, which was also subject to a foreclosure action, under *Bankruptcy Code § 1325*. But in both cases, the debtors actively defended the state court foreclosure actions after they either received a discharge or surrendered their property. This Court must decide whether actively opposing a state court foreclosure action is inconsistent with "surrendering" property.

HN1 At a minimum, "surrender" **[**2]** under *Bankruptcy Code §§ 521* and *1325* means a debtor cannot take an overt act that impedes a secured creditor from foreclosing its interest in secured property. Although "surrender" is not defined in the Bankruptcy Code, the First and Fourth Circuits have interpreted that term to mean a debtor must relinquish any rights in the secured property—including the right of possession—and make it available to the secured creditor. Because those definitions accord with the dictionary definition of "surrender" and public policy, this Court agrees with the First and Fourth Circuits. By actively opposing the state court foreclosure actions, the debtors in these cases failed to "surrender" their property.

Background

The facts in *In re Metzler* are straightforward: Before Lisa Metzler filed for chapter 13 bankruptcy, Wells Fargo sued in state court to foreclose its mortgage on her homestead. Debtors typically file chapter 13 bankruptcy to save their home. And in fact, that is what Metzler

initially attempted to do. Her original chapter 13 plan provided for adequate protection payments and cure of $35,000 in prepetition arrearages.[1] Metzler, however, amended her plan three times.[2] Metzler's third amended chapter 13 plan, which **[**3]** the Court confirmed,[3] indicated that she intended to surrender her homestead.[4]

After the Court confirmed Metzler's third amended plan, Wells Fargo went back to state court to conclude its foreclosure action. But Metzler actively defended Wells Fargo's efforts to foreclose is mortgage. So Wells Fargo moved this Court for an order revoking its confirmation order.[5] Metzler explained her continued efforts to defend the foreclosure action even after she "surrendered" her property by claiming "surrender" merely means "to make the collateral available to the creditor *by dissolving the automatic stay*."[6]

The facts in *In re Patel* are more complicated: Nearly ten years ago, Nootan Patel bought property located at 5105 West Grace Street, Tampa, Florida, with a **[*897]** loan from Wells Fargo Bank, N.A.[7] Patel gave Wells Fargo a first mortgage on her property to secure her obligations on the loan. Patel eventually defaulted on the loan, and Wells Fargo sued to foreclose its mortgage.[8] Five years after Wells Fargo sued to foreclose its mortgage, Patel filed for chapter 7 **[**4]** bankruptcy.[9] But when she filed for bankruptcy, the Debtor failed to list the West Grace Street property on her schedules because she did not realize she still owned it.[10]

Apparently, Patel had originally taken title to the West Grace Street property in her name and her daughter's name as joint tenants with a right of survivorship.[11] At some point after Wells Fargo sued to foreclose its mortgage, Patel's daughter (Shree Patel) quitclaimed her interest in the property to Patel's ex-husband, which meant Patel actually owned the property with her ex-husband as tenants in common as of the petition date.[12] But it appears Patel believed her ex-husband owned the house after the daughter quitclaimed her interest to him, so Patel listed the Wells Fargo debt on Schedule D and made a notation that the property securing that debt—i.e., the West Grace Street property—was the ex-husband's house.[13]

Because she did not believe she owned the West Grace Street property, Patel never filed a statement of intentions indicating whether **[**5]** she intended to reaffirm the mortgage debt, redeem the property, or surrender it.[14] And since the West Grace Street property was not scheduled, it was never administered by the chapter 7 trustee. Eventually, Patel received her chapter 7 discharge, and her bankruptcy case was closed.[15] After Patel received her discharge, U.S. Bank, which took assignment of the mortgage on the West Grace

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1 Metzler Doc. No. 2.

2 Metzler Doc. Nos. 6, 7 & 30.

3 Metzler Doc. No. 33.

4 Metzler Doc. No. 30.

5 Metzler Doc. No. 41.

6 Metzler Doc. No. 46 (emphasis added).

7 Patel Doc. No. 46-1.

8 Patel Doc. No. 46 at P 4.

9 Patel Doc. No. 1.

10 Patel Doc. No. 1 at Schedule A.

11 Patel Doc. No. 46-2.

12 Patel Doc. No. 46-4; Patel Doc. No. 49 at 6.

13 Patel Doc. No. 1 at Schedule D.

14 Patel Doc. No. 1.

15 Patel Doc. No. 41.

Street property, continued pursuing the foreclosure action originally filed by Wells Fargo.[16]

Unbeknownst to Patel, Mark Stopa (of the Stopa Law Firm) began defending the foreclosure action on behalf of Patel and her daughter.[17] For instance, Stopa filed an answer to the foreclosure complaint and asserted ten different affirmative defenses.[18] Stopa also filed a motion for summary judgment on behalf of Patel and her daughter seeking judgment as a matter of law because (i) U.S. Bank allegedly failed to give Patel and her daughter notice of their default under the mortgage and an opportunity to cure; and (ii) Wells Fargo allegedly failed to give Patel notice it was assigning her mortgage to U.S. Bank.[19] Stopa also filed an affidavit in support of the summary **[**6]** judgment motion.[20] Contending **[*898]** a debtor must either reaffirm or redeem property he or she seeks to retain, U.S. Bank moved this Court to reopen Patel's bankruptcy case and compel her to surrender the West Grace Street property since she had neither reaffirmed the mortgage debt nor redeemed the property.[21]

Conclusions of Law

HN2 A chapter 7 debtor has three options when it comes to secured property: the debtor can redeem the secured property, reaffirm the debt it secures, or surrender the secured property.[22] *Bankruptcy Code § 521*—titled "Debtor's duties"—expressly requires a chapter 7 debtor to file a statement of intentions indicating whether he or she intends to redeem secured property or reaffirm **[**7]** the debt it secures:

> ***HN3*** [W]ithin thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, . . . [the debtor shall] file with the clerk a statement of his intention with respect to the retention or surrender of such [secured] property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.[23]

HN4 A debtor must then perform his or her stated intention, generally within thirty days after the date first set for the meeting of creditors.[24] The Eleventh Circuit has interpreted *§ 521* to mean that a debtor cannot retain collateral unless he or she redeems it or reaffirms the debt it secures.[25]

The Bankruptcy Code imposes similar requirements on a chapter 13 debtor. ***HN5*** A chapter 13 debtor is not required to file a statement of intentions. But a chapter 13 debtor is required to file a plan of reorganization indicating how he or she proposes to treat secured property. And *Bankruptcy Code § 1325* only gives chapter 13 debtors three options for treating secured debt in a plan: gain the secured creditor's consent to the **[**8]** plan treatment, cram down the plan treatment over the secured creditor's objection, or surrender the secured property.[26] Under the cramdown option, the debtor is required to pay the secured creditor the total present value of the allowed secured claim over the life

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[16] Patel Doc. No. 46 at P 10.

[17] Patel Doc. No. 46-6; Patel Doc. No. 49 at 12-13.

[18] Patel Doc. No. 46-6 at 7-12.

[19] *Id.* at 21-22.

[20] Based on Patel's testimony at an April 30, 2015 hearing on U.S. Bank's motion to reopen Patel's bankruptcy case and compel her to surrender the West Grace Street property, the Court finds that Patel (i) had not seen the affidavit Stopa filed in state court until receiving a copy from U.S. Bank's counsel; (ii) had no idea where the facts in it came from; (iii) had not signed the affidavit; and (iv) had not authorized Stopa to file it.

[21] Patel Doc. No. 46.

[22] *In re Plummer*, 513 B.R. 135, 141 (Bankr. M.D. Fla. 2014) (citing *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir. 1993) and *In re Pratt*, 462 F.3d 14, 19 (1st Cir. 2006)).

[23] 11 U.S.C. § 521(a)(2)(A).

[24] 11 U.S.C. § 521(a)(2)(B).

[25] *In re Taylor*, 3 F.3d at 1516.

[26] ***11 U.S.C. § 1325(a)(5)(A)-(C)***.

of the plan.[27] Absent consent from a secured creditor, then, a chapter 13 debtor cannot retain collateral without paying for it.[28]

In fact, neither Metzler nor Patel dispute that they cannot retain the collateral at issue without paying for it. As it turns out, Patel actually does not oppose foreclosure at all. Her lawyer apparently has been opposing the foreclosure action without her authorization. Metzler, however, does oppose foreclosure, but she contends the fact that she "surrendered" her homestead under the confirmed plan does not preclude her from defending Wells Fargo's foreclosure action.

[*899] So the issue really is what is "surrender" under the Bankruptcy Code. As Judge Jennemann observed in *In re Plummer*, the term "surrender" is "not defined in § 521(a)(2) or elsewhere in the Bankruptcy Code."[29] In attempting to define the term "surrender," the First Circuit Court of Appeals, in an opinion authored by former bankruptcy judge Conrad **[**9]** Cyr in *In re Pratt* almost nine years ago, observed that Congress purposely chose to use the term "surrender" rather than "deliver" in § 521(a)(2).[30] Given that word choice, Judge Cyr reasoned that "'surrender' does not necessarily contemplate that the debtor physically have transferred the collateral to the secured creditor."[31] According to Judge Cyr, "surrender" means to make the property "available" to the secured creditor:

> Thus, the most sensible connotation of "surrender" in the present context is that the debtor agreed to make the collateral *available* to the secured creditor—*viz*., to cede his possessory rights in the collateral—within 30 days of the filing of the notice of intention to surrender possession of the collateral.[32]

Less than a year after the First Circuit construed the term "surrender" in § 521 to mean to "make available," the Fourth Circuit, in *In re White*, construed it in the context of § 1325 in a similar fashion.[33] There, the Fourth Circuit relied on *Collier on Bankruptcy*, which has defined "surrender" in § 1325 "as the 'relinquishment of any rights in the collateral,' including the right to possess the collateral." The Fourth Circuit noted that the *Collier* definition was consistent with **[**10]** numerous other bankruptcy courts that have focused on the "complete relinquishment of rights." According to the Fourth Circuit, the relinquishment of rights is at the heart of "surrender":

> At the most basic level, then, the word "surrender" means the relinquishment of all rights in property, including the possessory right, even if such relinquishment does not always require immediate physical delivery of property to another.[34]

The Court agrees with the First and Fourth Circuits that ***HN6*** surrender, at a minimum, requires a debtor to relinquish secured property and make it available to the secured creditor. That does not mean, as Judge Jennemann noted in *In re Plummer*, that the debtor must "deliver" the property to the secured creditor.[35] For one, Congress did not require "delivery." For another, requiring the debtor to deliver property to the secured creditor could circumvent state law by allowing the secured creditor to bypass the foreclosure requirement.[36] In this context, this Court concludes that relinquishing property and making it available to the secured creditor—i.e., "surrendering" the property—means not taking an overt act to prevent the

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[27] ***11 U.S.C. § 1325(a)(5)(B)***.

[28] ***11 U.S.C. § 1325(a)(5)(C)***.

[29] 513 B.R. 135, 142 (Bankr. M.D. Fla. 2014).

[30] *In re Pratt*, 462 F.3d 14, 18-19 (1st Cir. 2006).

[31] *Id.* at 18.

[32] *Id.* at 19.

[33] 487 F.3d 199, 205 (4th Cir. 2007).

[34] *Id.*

[35] 513 B.R. 135, 143 (Bankr. M.D. Fla. 2014).

[36] *Id.*

secured creditor from foreclosing its interest **[**11]** in the secured property.

Here, both Metzler and Patel plainly took overt acts to prevent Wells Fargo and U.S. Bank from foreclosing their mortgages. Patel filed an answer and affirmative defenses and even sought summary judgment in her favor. Of course, Patel can be forgiven for opposing **[*900]** the foreclosure action considering she apparently did not authorize her state court counsel to do so. Like Patel, Metzler actively defended Wells Fargo's foreclosure action, although unlike Patel, she did so intentionally apparently on the theory that "surrender" means something akin to simply dissolving the automatic stay without abrogating any state law rights the debtor may have.

But simply dissolving the automatic stay cannot be what "surrender" means because it would effectively permit the type of "ride through" that the Eleventh Circuit held was impermissible in *In re Taylor*.[37] The issue in *Taylor* was whether a chapter 7 debtor could retain possession of collateral property by staying current on his or her obligation to the secured creditor, but without reaffirming or redeeming the underlying debt. In bankruptcy parlance, this is called a "ride through." The Eleventh Circuit held that the plain **[**12]** language of § 521 did not provide for a ride-through option, and besides, permitting a "ride through" would give the debtor a "head start"—not a "fresh start."[38] The Eleventh Circuit also reasoned that if a ride-through option existed, it would render the other alternatives in § 521 "nugatory."[39]

Under Metzler's definition of "surrender," a "ride through" would be permissible. After all, "surrender" is complete, under Metzler's definition, the moment the automatic stay is lifted, and the creditor is permitted to pursue its state court remedies. If that were the case, a debtor could enjoy possession of the collateral indefinitely while hindering and prolonging the state court process. Moreover, like the "ride through" at issue in *Taylor*, Metzler's definition of surrender would also render the other alternatives in § 1325(a)—and § 521—of little value.

Conclusion

"Surrender" must mean something. ***HN7*** In the context of Bankruptcy Code §§ 521 and 1325, the Court concludes the term means that a debtor must relinquish secured property and make it available to the secured creditor by refraining from taking any overt act that impedes a secured creditor's ability to foreclose its interest in secured property. **[**13]** Because Metzler and Patel took affirmative steps to oppose the state court foreclosure actions here, they failed to surrender their property as required under Bankruptcy Code §§ 521 and 1325.[40]

ORDERED.

Dated: May 13, 2015

/s/ Michael G. Williamson

Michael G. Williamson

United States Bankruptcy Judge.

ORDER REOPENING BANKRUPTCY CASE

THIS CASE came on for consideration on the Court's own motion to reopen this bankruptcy case. Wells Fargo Bank, N.A. previously moved to revoke the Court's confirmation order because the Debtor allegedly failed to surrender her homestead as required under her plan.[1] The Court granted the Bank's motion[2] and later dismissed this case.[3] The Court, however, has recently issued a Memorandum Opinion on Surrender explaining the reasons it granted the Bank's motion because it will

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[37] 3 F.3d 1512 (11th Cir. 1993).

[38] *Id.* at 1516.

[39] *Id.* at 1515 (quoting *In re Kennedy*, 137 B.R. 302, 304 (Bankr. E.D. Ark. 1992))(internal citations omitted).

[40] The Court has already entered an order on the motion to revoke Metzler's confirmation order (Metzler Doc. No. 52). The Court will enter a separate order granting the motion to compel Patel to surrender the West Grace Street property (Patel Doc. No. 46).

[1] Doc. No. 41.

[2] Doc. No. 52.

[3] Doc. No. 55.

provide guidance to other debtors that are proposing to surrender property. Accordingly, it is

ORDERED:

1. The Clerk of Court is directed **[**14]** to reopen this case and file the Court's Memorandum Opinion on Surrender.

2. The Clerk of Court shall close this case immediately after filing the Court's Memorandum Opinion on Surrender.

ORDERED.

Dated: May 13, 2015

/s/ Michael G. Williamson

Michael G. Williamson

United States Bankruptcy Judge

User Name: Gregory Champeau
Date and Time: Feb 09, 2016 2:18 p.m. EST
Job Number: 28958448

Document(1)

1. *In re Lapeyre, 2016 Bankr. LEXIS 225*
   Client/Matter: -None-

Neutral
As of: February 9, 2016 2:18 PM EST

In re Lapeyre

United States Bankruptcy Court for the Southern District of Florida

January 25, 2016, Decided

CASE NO. 13-17069-RAM, CHAPTER 13

Reporter
2016 Bankr. LEXIS 225

In re: CARLOS LUIS LAPEYRE and IVONNE ALVARE LAPEYRE, Debtors.

Core Terms

surrender, Mortgage, Confirmation, foreclosure case, motion to compel, affirmative defense, counterclaim, state court, foreclosure, lender, sanctions, Modified

Case Summary

Overview

HOLDINGS: [1]-Where Chapter 13 debtors' confirmed plan provided for the surrender of their interest in one of their properties, the assertion of affirmative defenses and a counterclaim in a state court foreclosure action violated debtors' confirmed plan; [2]-The court had jurisdiction to order debtors to withdraw their affirmative defenses and dismiss their counterclaim in the foreclosure action; [3]-Sanctions against debtors was not warranted because the court did not find egregious behavior on the part of debtors justifying the imposition of sanctions, as the meaning of "surrender" in Chapter 13 plans was not yet settled in the Eleventh Circuit.

Outcome

Motion granted in part.

LexisNexis® Headnotes

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN1 A Chapter 13 debtor's surrender of property means something more than simply stay relief. Rather, surrender precludes a debtor from contesting the lender's right to complete its foreclosure.

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN2 Surrendering property by a Chapter 13 debtor means not taking an overt act to prevent the secured creditor from foreclosing its interest in the secured property.

Counsel: **[*1]** For Carlos Luis Lapeyre, aka Carlos L. Lapeyre, aka Carlos Lapeyre, aka Carlos La Peyre, Debtor: Gianny Blanco, Michael A. Frank, Esq., Laila S. Gonzalez, Miami, FL.

For Ivonne Alvare Lapeyre, aka Ivonne Celeste Lapeyre, aka Ivonne C. Lapeyre, aka Ivonne Lapeyre, aka Ivonne Alvare C Lapeyre, aka Yvonne Lapeyre, Joint Debtor: Gianny Blanco, Michael A. Frank, Esq., Laila S. Gonzalez, Miami, FL.

Trustee: Nancy K. Neidich, Miramar, FL.

Judges: Robert A. Mark, United States Bankruptcy Judge.

Opinion by: Robert A. Mark

Opinion

ORDER GRANTING IN PART MOTION TO COMPEL SURRENDER

The Debtors in this chapter 13 case confirmed a plan that provided for the surrender of their interest in one of their properties. After confirmation of the plan, the Debtors filed affirmative defenses and a counterclaim in a foreclosure action filed by the lender who holds a mortgage on the surrendered property. Because the confirmed plan provides for the surrender of the property, the Court finds that the assertion of affirmative defenses and a counterclaim in the foreclosure case violates the Debtor's confirmed plan. The issue is

presented in Nationstar Mortgage LLC.'s ("Nationstar") Motion to Compel Surrender of Property and for Sanctions (the "Motion **[*2]** to Compel Surrender") [DE #193].

Factual and Procedural Background

On September 29, 2006, the Debtors executed a $2,560,000 note (the "Note") in favor of Countrywide Bank, N.A. secured by a mortgage (the "Mortgage") on property located at 1120 San Marco Rd., Marco Island, Florida 34145 (the "Marco Property"). The Debtors defaulted on the Note and Mortgage by failing to make the August 1, 2008 installment, and all installment payments thereafter. On March 28, 2013 the Debtors filed this chapter 13 case. They listed the Mortgage on Schedule D and identified Bank of America N.A. ("Bank of America") as the creditor. Nationstar is the servicer of the Note and Mortgage. The Debtors' Schedule D did not list the Mortgage on the Marco Property as contingent, unliquidated, or disputed. The Debtors also did not schedule or describe any contingent claims against Bank of America.

The Debtors filed their Fourth Amended Chapter 13 Plan (the "Plan") on August 23, 2013 [DE #103]. The Plan contains the following language as to the Marco Property: "Debtors surrender their interest in the property located at: 1120 San Marco Rd., Marco Island, Florida 34145, Bank of America Acct No. 150518742 is granted in **[*3]** rem stay relief to pursue its collateral." The Court confirmed the Plan on January 16, 2014 [DE #139] (the "Confirmation Order"). The Debtors' Plan was modified several times and the plan currently in effect is the Fifth Modified Plan filed on June 12, 2014 [DE #178]. The Fifth Modified Plan contains the identical surrender language with respect to the Marco Property.

After confirmation, on December 22, 2014, Nationstar filed a foreclosure action in Collier County against the Debtors (Case No. 11-2014-002771-0001-XX) (the "Foreclosure Case"). On July 7, 2015 the Debtors retained state court counsel and actively began defending the Foreclosure Case. Specifically, on September 23, 2015, the Debtors filed Homeowners' Answer, Affirmative Defenses and Counterclaim [DE #193, pp. 41-67]. The affirmative defenses and counts in the Debtors' counterclaim include, among other things, allegations that the Note and Mortgage are unenforceable and that Nationstar lacks standing to enforce the Note and Mortgage, as well as allegations of fraud in the inducement, violations of the Federal Truth in Lending Act, and unjust enrichment.

In response to the Debtors' vigorous defense of the Foreclosure Case, **[*4]** Nationstar filed its Motion to Compel Surrender. The Court conducted a preliminary hearing on December 8, 2015, and, after determining that further briefing and argument was required, entered its Order Setting Briefing Schedule and Further Hearing on Motion to Compel Surrender [DE #202], which scheduled a further hearing on January 14, 2016. On December 30, 2015 the Debtors filed their response and memoranda objecting to the Motion to Compel Surrender [DE #204], and, on January 8, 2016, Nationstar filed its reply in support of the Motion to Compel Surrender [DE #206]. The Court heard oral argument at the January 14, 2016 hearing.

Discussion

This is not the Court's first look at the meaning of "surrender" in a chapter 13 plan. Last year, the Court issued its opinion in *In re Calzadilla, 534 B.R. 216 (Bankr. S.D. Fla. 2015)*("*Calzadilla*"). In that case, the debtors' efforts to modify their mortgage utilizing the Court's Mortgage Modification Mediation ("MMM") Program were unsuccessful. Under the MMM Procedures then in place, after a failed mediation, debtors were required to amend the plan to conform to the lender's proof of claim or provide for surrender of the property subject of the mortgage.[1]

The debtors in *Calzadilla* amended their plan to provide for stay relief to the lender, but did not use the term surrender. The lender objected and the Court had to determine whether stay relief was the equivalent of surrender. The Court held that ***HN1*** surrender means something more than simply stay relief. Rather, surrender precludes a debtor from contesting the lender's right to complete its foreclosure.

The Court's *Calzadilla* decision adopted the holding and reasoning of Bankruptcy Judge Williamson in *In re*

[1] Effective July 9, 2015, this Court's Mortgage **[*5]** Modification Mediation Program Procedures were modified. Under the amended procedures, if mediation is unsuccessful, the debtor no longer has to provide for surrender. The Debtor now has the option of filing an amended plan that provides that the property will be treated outside the plan and that the lender will be entitled to in rem stay relief to pursue its state court remedies.

Metzler, 530 B.R. 894 (Bankr. M.D. Fla. 2015) ("*Metzler*"). In *Metzler*, Wells Fargo moved to revoke the order confirming the debtors' chapter 13 plan because the debtors were actively defending Wells Fargo's foreclosure complaint. Like the Debtors here, the debtors in *Metzler* provided for surrender in their confirmed chapter 13 plan. Judge Williamson concluded **[*6]** that ***HN2*** surrendering property "means not taking an overt act to prevent the secured creditor from foreclosing its interest in the secured property." Id. at p. 899.[2]

As noted in *Calzadilla*, Chief Judge Hyman of this district has interpreted the meaning of surrender in a chapter 7 statement of intentions pursuant to 11 U.S.C. §521(a)(2)(A). In re Failla, 529 B.R. 786 (Bankr. S.D. Fla. 2014)("*Failla*"). The debtors in *Failla* continued to defend a foreclosure case after stating their intent to surrender the property in their statement of intentions. The court held that the debtors' defense of the foreclosure action "does not comport with the definition of 'surrender,'" and therefore, "the Debtors are not permitted to defend or oppose the foreclosure and/or sale of the Property...." *Failla*, 529 B.R. at 793. Chief Judge Hyman's decision was affirmed on appeal at 542 B.R. 606 (S.D. Fla. 2015). The debtors have filed an appeal to the Eleventh Circuit.

This Court followed *Metzler* in *Calzadilla* and none of the arguments presented by the Debtors **[*7]** in this case have convinced the Court to reconsider its conclusion. Therefore, the Court finds that the Debtors' assertion of affirmative defenses and the prosecution of a counterclaim in the Foreclosure Case is inconsistent with the Plan provision "surrendering" the Marco Property, constitutes a breach of the Debtors' obligations under the Plan, and is a violation of the Confirmation Order.

The Appropriate Remedy

Nationstar seeks broad relief in the Motion to Compel Surrender, including injunctive relief requiring the Debtors to withdraw their affirmative defenses and counterclaim in the Foreclosure Case. Nationstar also requests sanctions "equal to the accrued interest and litigation tax and insurance expenses resulting from Debtors' failure to surrender." Motion to Compel Surrender, p. 11.

The request for sanctions is denied. The meaning of "surrender" in chapter 13 plans is not yet settled in the Eleventh Circuit.[3] Therefore, the Court does not find egregious behavior on the part of the Debtors justifying the imposition of sanctions.

The request for injunctive relief is a closer question. In In re Kourogenis, 539 B.R. 625 (Bankr. S.D. Fla. 2015), Judge Olson denied a creditor's motion to reopen a closed chapter 7 case to entertain a lender's motion to compel surrender. The court held that laches barred the relief sought where the chapter 7 case had been closed for five years. The court also found that, even if laches did not apply, the bankruptcy court lacked jurisdiction to interfere in the state court litigation.

This Court agrees that if the requested relief is grounded in judicial estoppel, the relief must be sought in the subsequent forum and, in fact, that principle was articulated in this Court's decision in *In re Marty*, 2014 WL 7466757 (Bankr. S.D. Fla. Dec. 31, 2014) (denying state court defendant's request to order the debtor to dismiss a state court lawsuit where the claim was not listed in the debtor's schedules).

The request for injunctive relief here is different. It is not merely an argument for judicial estoppel. Nationstar is arguing that the Debtors are acting in violation of the Confirmation Order. Bankruptcy judges lack jurisdiction to tell state court judges what to do. However, we regularly exercise jurisdiction to tell parties what they can or cannot do in a non-bankruptcy **[*9]** forum, including, in particular, ordering creditors who violate the automatic stay to take corrective action in the non-bankruptcy litigation. Therefore, the Court concludes that it has jurisdiction to order the Debtors to withdraw their affirmative defenses and dismiss their counterclaim in the Foreclosure Case.

For the foregoing reasons, it is —

ORDERED as follows:

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[2] On December 5, 2013, Judge Williamson entered an Order on Wells Fargo Bank, N.A.'s Motion to Revoke Plan Confirmation [DE# 52 in 8:12-bk-16792]. That Order gave the debtor 14 days to comply with her plan by advising the state court that "she consents to and has no opposition to the foreclosure."

[3] As noted earlier, the *Failla* decision is presently on appeal to the Eleventh Circuit. Perhaps the law in this circuit will be settled if the Eleventh Circuit **[*8]** issues a published opinion in that case.

1. The Motion to Compel Surrender is granted in part.

2. By filing affirmative defenses and a counterclaim in the Foreclosure Case, the Debtors have breached their Plan obligation to surrender their rights in the Marco Property and are in violation of the Confirmation Order.

3. The Debtors are given fourteen (14) days from the date of the entry of this Order to comply with the surrender provision in their Plan by withdrawing their affirmative defenses and moving to dismiss their counterclaim in the Foreclosure Case.

4. Nationstar's request for sanctions is denied without prejudice to Nationstar seeking further relief in this Court if the Debtors fail to comply with this Order.

ORDERED in the Southern District of Florida on January 25, 2016.

/s/ Robert A. Mark

Robert A. Mark, Judge

United States Bankruptcy Court

User Name: Gregory Champeau
Date and Time: Feb 09, 2016 2:19 p.m. EST
Job Number: 28958625

Document(1)

1. *In re Calzadilla, 534 B.R. 216*
   Client/Matter: -None-

Positive
As of: February 9, 2016 2:19 PM EST

In re Calzadilla

United States Bankruptcy Court for the Southern District of Florida

June 16, 2015, Decided

CASE NO. 14-11318-RAM, CHAPTER 13

Reporter
534 B.R. 216; 2015 Bankr. LEXIS 1975; 25 Fla. L. Weekly Fed. B 254

In re: JOSE ANTONIO CALZADILLA and DIGNA M. ESPINOSA, Debtors.

Core Terms

surrender, foreclosure, mediation, modified plan, confirmed, Lender, Modify, mortgage

Case Summary

Overview

HOLDINGS: [1]-The court's Mortgage Modification Mediation Program Procedures, adopted by U.S. Bankruptcy Court for the Southern District of Florida Administrative Order 14-03, explicitly required "surrender" and "surrender" meant that debtors could not thereafter take any overt action to defend or impede the foreclosure; [2]-The court's Order in this case confirmed that a modified plan filed after a failed mediation must provide for surrender, not just stay relief; and clarified that by surrendering the property under the plan, debtors could not return to state court and contest the lender's right to complete its foreclosure.

Outcome

The Motion to Modify Plan was denied without prejudice to debtors filing a renewed motion to modify seeking approval of a plan providing for surrender of the home.

LexisNexis® Headnotes

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Real Property Law > Financing > Foreclosures > General Overview

HN1 The U.S. Bankruptcy Court for the Middle District of Florida's In re Metzler decision noted that the term "surrender" is not defined in the Bankruptcy Code. However, the decision concluded that "surrendering" property means not taking an overt act to prevent the secured creditor from foreclosing its interest in the secured property. The U.S. Bankruptcy Court for the Southern District of Florida's research did not reveal any published decisions in the district interpreting the meaning of "surrender" in chapter 13 plans. However, In re Failla interpreted the meaning of "surrender" in a chapter 7 debtors' statement of intentions filed under *11 U.S.C.S. § 521(a)(2)(A)* and reached the same conclusion as Metzler. In In re Failla, after receiving their discharge and after their case was closed, the debtors continued to defend a foreclosure case. The court held that the debtors' defense of the foreclosure action did not comport with the definition of "surrender" and therefore, the debtors were not permitted to defend or oppose the foreclosure and/or sale of the property. In In re Failla, the court also cited to a bench ruling by a judge of the Middle District of Florida, which concluded that surrender does not require a debtor to physically deliver property to a lien holder but "the debtor may not impede a creditor's efforts to the possession of its collateral by available means."

Real Property Law > Financing > Foreclosures > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN2 In short, the U.S. Bankruptcy Court for the Southern District of Florida's Mortgage Modification Mediation Program Procedures, adopted by the U.S. Bankruptcy Court for the Southern District of Florida Administrative Order 14-03, explicitly require "surrender" and "surrender" means that debtors cannot thereafter take any overt action to defend or impede the foreclosure.

Counsel: **[**1]** For Jose Antonio Calzadilla, aka Jose Antonio Calzadilla Leiva, aka Jose A. Calzadilla, Debtor: Patrick L Cordero, Esq, Miami, FL.

For Digna M. Espinosa, aka Digna Maria Espinosa, Joint Debtor: Patrick L Cordero, Esq, Miami, FL.

Trustee: Nancy K. Neidich, Miramar, FL.

Judges: Robert A. Mark, United States Bankruptcy Court.

Opinion by: Robert A. Mark

Opinion

[*217] ORDER DENYING MOTION TO MODIFY AND INTERPRETING MEANING OF "SURRENDER" IN CHAPTER 13 PLANS

The Debtors in this chapter 13 case confirmed a plan that contemplated modification of their mortgage with U.S. Bank National Association ("U.S. Bank"). The Debtors pursued this modification under the Court's Mortgage Modification Mediation Program Procedures (the "MMM Procedures") adopted by this court's Administrative Order 14-03. Under the court's MMM Procedures, if mediation is unsuccessful, a debtor must amend the plan to conform to the lender's proof of claim or provide that the real property subject of the mortgage will be "surrendered." In this case, the mediation failed. This Order will (1) confirm that a modified plan filed after a failed mediation must provide for surrender, not just stay relief; and (2) clarify that by surrendering the property under the plan, the **[**2]** Debtors cannot return to state court and contest the lender's right to complete its foreclosure.

Factual and Procedural Background

The Debtors filed their chapter 13 petition on January 21, 2014. Their house located at 12910 SW 82nd Street, Miami, Florida (the "House") is subject to a first mortgage held by U.S. Bank. The Debtors' Second Amended Plan (the "Plan") [DE# 63], filed on April 23, 2014, was confirmed on May 20, 2014 [DE# 75]. The Plan provided for mediation of the U.S. Bank mortgage and included language required by Section X.B. of the Court's MMM Procedures. Specifically, the Plan states as follows:

> If the Lender and the Debtors fail to reach a settlement; then no later than 14 calendar days after the Mediator's Final Report is filed, the Debtors will amend or modify the plan to (a) conform to the Lender's Proof of Claim ... or (b) provide that the real property will be surrendered. If the amended or modified plan provides that the real property is to be surrendered, then the obligations to the Lender will be considered "treated outside the plan" and the Lender shall have in rem relief from the automatic stay as to the real property being surrendered.

DE# 63 (emphasis added). **[**3]**

U.S. Bank and the Debtor participated in mediation but did not reach an agreement. *See* Final Report of Mediator, March 2, 2015 [DE# 94]. The failure to reach an agreement triggered the Debtors' obligation to modify the Plan to conform to the abovequoted language in the Plan.

On March 10, 2015, the Debtors filed a Motion to Modify Plan [DE# 95] and a Second Modified Plan [DE# 110]. The Second Modified Plan proposes to pay $15,609.83 in month 15 to U.S. Bank, which represents the adequate protection payments made prior to the unsuccessful mediation. The Second Modified Plan does not include a "surrender" provision. Instead, it simply says that U.S. Bank "is outside the plan with consent to stay relief" [DE# 110, p. 2].

U.S. Bank filed a Response to Debtors' Motion to Modify Chapter 13 Plan and Limited Objection to the Debtors' Proposed Second Modified Plan ("U.S. Bank's Objection") [DE# 116]. U.S. Bank's Objection argues that the Second Modified Plan fails to comply with the MMM Procedures because it fails to "surrender" the Home.

The Court conducted a hearing on the Motion to Modify Plan on June 9, 2015. At the hearing, the Debtors argued that the Second Modified Plan complies with the **[**4]** MMM Procedures because treating the **[*218]** mortgage outside of the plan and consenting to stay relief is the same thing as "surrender." U.S. Bank challenged this assertion arguing that (1) the MMM Procedures specifically require "surrender;" and (2) consent to stay relief is not the same as surrender because a debtor surrendering real property in a chapter 13 case may not contest the lender's right to conclude its foreclosure. The Court agrees with U.S. Bank on both points.

Discussion

The MMM Procedures and the language in the confirmed Plan explicitly require "surrender" of the

Home. The Debtors and U.S. Bank have different interpretations of the meaning of "surrender." Therefore, to resolve this dispute, and to provide guidance to state courts in foreclosure cases that continue after "surrender," the Court finds it appropriate to opine on the meaning of "surrender" in subsequent non-bankruptcy litigation.

Bankruptcy Judge Williamson recently addressed the meaning of "surrender" in chapter 13 plans in *In re Metzler, 530 B.R. 894, 2015 Bankr. LEXIS 1627, 2015 WL 2330131 (Bankr. M.D. Fla., May 13, 2015)*. In *Metzler*, the debtor was unable to confirm a plan that cured the arrearages under her mortgage with Wells Fargo. Her third amended plan, which was confirmed, provided for surrender of the **[**5]** property.

After confirmation, the debtor actively defended Wells Fargo's foreclosure action. Wells Fargo returned to the bankruptcy court and sought to revoke confirmation arguing that the debtor could not contest Wells Fargo's right to foreclose after she had "surrendered" the property. Like the Debtors in this case, the debtor in ***Metzler*** argued that surrender had no legal effect beyond granting stay relief to the lender. The court framed the issue as "whether actively opposing a state court foreclosure action is inconsistent with 'surrendering' property." ***2015 Bankr. LEXIS 1627, 2015 WL 2330131 at *1***.

HN1 The *Metzler* court noted that the term "surrender" is not defined in the Bankruptcy Code. However, citing to First and Fourth Circuit decisions, the court concluded that "surrendering" property "means not taking an overt act to prevent the secured creditor from foreclosing its interest in the secured property." ***2015 Bankr. LEXIS 1627, [WL] at *2***, (*citing In re White, 487 F.3d 199, 205 (4th Cir. 2007)* (surrender means the relinquishment of all rights in property) and *In re Pratt, 462 F.3d 14, 18-19 (1st Cir. 2006))*. *See also In re White, 282 B.R. 418, 422 (Bankr. N.D. Ohio 2002)* (Surrender functions as both the debtor's consent to stay relief and estoppel of the right to defend a foreclosure).

This Court's research did not reveal any published decisions in this district interpreting the meaning of "surrender" **[**6]** in chapter 13 plans. However, Chief Judge Hyman, in *In re Failla, 529 B.R. 786 (Bankr. S.D. Fla. 2014)*, interpreted the meaning of "surrender" in a chapter 7 debtors' statement of intentions filed under *§ 521(a)(2)(A)* and reached the same conclusion as Judge Williamson in *Metzler*. In *Failla*, after receiving their discharge and after their case was closed, the debtors continued to defend CitiBank's foreclosure case. The court held that the debtors' defense of the foreclosure action did "not comport with the definition of 'surrender'" and therefore, "[t]he Debtors are not permitted to defend or oppose the foreclosure and/or sale of the Property...." *529 B.R. 786 at 793*.[1]

HN2 **[*219]** In short, the Court's MMM Procedures explicitly require "surrender" and "surrender" means that debtors cannot thereafter take any overt action to defend or impede the foreclosure. Therefore, it is —

ORDERED that the Motion to Modify Plan **[**7]** is denied without prejudice to the Debtors filing a renewed motion to modify seeking approval of a plan providing for surrender of the Home.

ORDERED in the Southern District of Florida on June 16, 2015.

/s/ Robert A. Mark

Robert A. Mark, Judge

United States Bankruptcy Court

[1] In *Failla*, the court also cited to a bench ruling by Judge Kimball, of this district, in which Judge Kimball concluded that surrender does not require a debtor to physically deliver property to a lien holder but "the debtor may not impede a creditor's efforts to the possession of its collateral by available means." *In re Cheryl L. Trout*, Case No. 13-39869 at DE# 21, Tr. p. 13.

User Name: Gregory Champeau
Date and Time: Feb 09, 2016 2:20 p.m. EST
Job Number: 28958698

Document(1)

1. *In re Townsend, 2015 Bankr. LEXIS 3023*
   Client/Matter: -None-

Neutral
As of: February 9, 2016 2:20 PM EST

In re Townsend

United States Bankruptcy Court for the Middle District of Florida, Fort Myers Division

September 1, 2015, Decided

Case No. 9:08-bk-12383-FMD, Chapter 13

Reporter
2015 Bankr. LEXIS 3023; 2015 WL 5157505

In re: Rowland T. Townsend and Lisa A. Townsend, Debtors.

Core Terms

surrender, state court, bankruptcy court, bankruptcy case, real property, foreclosure action, state law contract, foreclosure case, foreclosure, REOPEN, rights, district court, indicates, abrogate, lender

Counsel: **[*1]** For Roland T Townsend, Debtor: Richard J. Hollander, Miller & Hollander, Naples, FL.

For Lisa A. Townsend, Joint Debtor: Richard J. Hollander, Miller & Hollander, Naples, FL.

Trustee: Jon Waage, Bradenton, FL.

Judges: Caryl E. Delano, United States Bankruptcy Judge.

Opinion by: Caryl E. Delano

Opinion

ORDER DENYING MOTION TO REOPEN BANKRUPTCY CASE AND TO COMPEL DEBTORS TO COMPLY WITH INTENTION TO SURRENDER REAL PROPERTY

THIS CASE came on for consideration, without a hearing, of the *Motion to Re-open Bankruptcy Case, to Compel Debtors to Comply with Intention to Surrender Real Property, and for Other Relief, and Incorporated Memorandum of Law* (Doc. No. 63) (the "Motion") filed by Bank of America, N.A. (the "Bank"). The Motion asserts that Debtors, despite having elected in their Chapter 13 Plan to surrender certain real property (the "Property") to the mortgage holder (the Bank), have continued, together with a non-debtor third party to whom Debtors allegedly transferred the Property, to vigorously defend against the Bank's foreclosure suit in state court.

The record reflects that Debtors filed their Chapter 13 case on August 16, 2008.[1] Debtors' Chapter 13 Plan proposed to surrender the Property to the Bank. But the surrender **[*2]** provision of the Plan also stated that "[n]othing herein is intended . . . to abrogate Debtor's state law contract rights."[2] The Plan was confirmed in April 2009.[3] Debtors completed all payments under the Plan, and their discharge was entered on April 24, 2014.[4] The docket in the state court foreclosure action indicates that the Bank filed its foreclosure complaint on March 26, 2014.[5]

Over one year after Debtors received their discharge and their bankruptcy case was closed, the Bank seeks to reopen Debtors' bankruptcy case and asks this Court to find that Debtors and the alleged third-party purchaser of the property (over whom this Court has no jurisdiction) are estopped from defending the state court foreclosure case and to compel them to withdraw all pleadings and papers in the foreclosure case and to dismiss a pending appeal.

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[1] Doc. No. 1.

[2] Doc. No. 2, p. 3, § G.

[3] Doc. No. 38.

[4] Doc. Nos. 54, 61.

[5] Doc. No. 63, p. 18.

The Bank relies on a line of cases published in 2014 and 2015.[6] In *Metzler*, the bankruptcy court addressed what it referred to as the "relatively novel question" of how a debtor is to surrender real property in bankruptcy. The court determined that by actively opposing the state court foreclosure **[*3]** actions, a Chapter 7 debtor and a Chapter 13 debtor had failed to "surrender" their property.[7] In *Plummer*, the bankruptcy court found that a Chapter 7 debtor who intended to surrender his property to the secured lender was not required to execute a deed in favor of the lender.[8] And in *Failla*, the bankruptcy court held that the "[d]ebtors' active defense of the foreclosure action in the State Court does not comport with the definition of 'surrender' for purposes of the Bankruptcy Code."[9]

But the courts in *Metzler, Plummer*, and *Failla* did not address the legal effect of the specific language included in the Debtors' Plan: "[n]othing herein is intended . . . to abrogate Debtor's state law contract rights."[10] Debtors' defense of the state court foreclosure action—a foreclosure case that the Bank did not initiate until nearly six years after Debtors filed their Plan—is consistent with their reservation of their state law contract rights. And, the rationale of *Metzler, Plummer* **[*4]** , and *Failla*—with which this Court concurs—should not be applied retroactively to a case filed in 2008.

Accordingly, it is

ORDERED that the Motion is DENIED.

DATED: September 1, 2015.

/s/ Caryl E. Delano

Caryl E. Delano

United States Bankruptcy Judge

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6 *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015), *In re Plummer*, 513 B.R. 135 (Bankr. M.D. Fla. 2014), and *In re Failla*, 529 B.R. 786 (S.D. Fla. 2014). (Note: although the Westlaw citation to *Failla* indicates that it is a decision of the district court, it was rendered by the Chief Judge of the Bankruptcy Court for the Southern District of Florida, not by the district court.).

7 *Metzler*, 530 B.R. at 896.

8 *Plummer*, 513 B.R. at 144.

9 *Failla*, 529 B.R. at 793.

10 Doc. No. 2, p. 3, § G.

User Name: Gregory Champeau
Date and Time: Feb 09, 2016 2:14 p.m. EST
Job Number: 28958058

Document(1)

1. *In re Guerra, 2016 Bankr. LEXIS 308*
   Client/Matter: -None-

Neutral
As of: February 9, 2016 2:14 PM EST

In re Guerra

United States Bankruptcy Court for the Middle District of Florida, Tampa Division

January 28, 2016, Decided

Case No. 8:11-bk-15663-MGW, Chapter 7

Reporter
2016 Bankr. LEXIS 308

In re: Cecelia Ann Guerra, Debtor.

Core Terms

foreclosure action, surrender, state court, foreclosure, reopen, mortgage, foreclose, oppose, positions, impede, judicial estoppel, mockery

Case Summary

Overview

HOLDINGS: [1]-Where a Chapter 7 debtor indicated an intention to surrender her home to her secured creditor at the time she filed her case, but three years later actively defended the creditor's foreclosure action and succeeded in getting the case dismissed, the bankruptcy court could revoke debtor's discharge or compel her to withdraw her defense to the state court foreclosure for perpetrating a fraud on the court; [2]-However, the court declined to reopen her case and grant the creditor the relief it sought because years had passed between the time debtor indicated an intent to surrender and the time she opposed the foreclosure; [3]-In these circumstances, the issue of whether judicial estoppel precluded debtor from defending the foreclosure action based on her inconsistent statements should be left to the state court.

Outcome

The court denied the creditor's motion to reopen debtor's bankruptcy case and compel surrender.

LexisNexis® Headnotes

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Consensual Confirmations

HN1 The term "surrender," in the context of *11 U.S.C.S. §§ 521* and *1325*, means that a debtor must relinquish secured property and make it available to the secured creditor by refraining from taking any overt act that impedes a secured creditor's ability to foreclose its interest in secured property.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN2 Laches is a defense sounding in equity that serves to bar suit by a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN3 Under both federal and state law, the doctrine of judicial estoppel generally precludes a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. The purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. The doctrine prevents parties from making a mockery of justice by inconsistent pleadings and playing fast and loose with the courts. The question is which court is in the best position to determine whether judicial estoppel applies.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

HN4 If a debtor, who has indicated an intent to surrender real property, opposes a foreclosure while his or her bankruptcy case is still pending or within a relatively short time afterwards, then the bankruptcy court should be the one to address the issue. In that case, it would appear the debtor is perpetrating a fraud on the bankruptcy court or making a mockery of the bankruptcy

system. But if years pass between the time a debtor indicates an intent to surrender and the time the debtor opposes a state court foreclosure, then the issue of judicial estoppel should be decided by the state court, which is in the best position to determine whether the debtor is making a mockery of the foreclosure action by taking a position inconsistent with the one she took in the bankruptcy case.

Counsel: **[*1]** For Debtor: Stanley J. Galewski, Esq., Galewski Law Group, P.A.

For Deutsche Bank: Florence T. Barner, Esq., Eric R. Schwartz, Esq., Weitz & Schwartz, P.A.

Judges: Michael G. Williamson, Chief United States Bankruptcy Judge.

Opinion by: Michael G. Williamson

Opinion

MEMORANDUM OPINION AND ORDER ON DEUTSCHE BANK'S MOTION TO REOPEN BANKRUPTCY CASE AND COMPEL SURRENDER

When the Debtor filed this case, she indicated an intent to surrender her home to her secured creditor. Three years later, the Debtor actively defended the creditor's foreclosure action and succeeded in getting the case dismissed. This Court must now decide whether it should reopen this case and revoke the Debtor's discharge—or compel her to withdraw her defense of the secured creditor's foreclosure action—based on her statement of intention.

Under the facts of this case, the Court declines to reopen this case and grant the relief the secured creditor seeks. The secured creditor is correct that the Court can revoke a debtor's discharge or compel a debtor to withdraw her defense to a state court foreclosure for perpetrating a fraud on the Court. But given the lapse in time between the time the Debtor obtained her discharge and the time she opposed the secured **[*2]** creditor's foreclosure action, the Court cannot conclude the Debtor never intended to surrender her home. The Court concludes it should be left to the state court to determine whether the Debtor, based on her contradictory positions, is judicially estopped from defending the state court foreclosure action. Accordingly, the Court will deny the secured creditor's motion to reopen this case.

BACKGROUND

The Debtor owns real property located at 402 13th Street NE, Ruskin, Florida.[1] That property was encumbered by a mortgage in favor of BAC Home Loans. When the Debtor filed for chapter 7 bankruptcy in 2011, she listed the property on Schedule A and the debt owed to BAC Home Loans on Schedule D.[2] In her Statement of Intentions, the Debtor indicated that she would be surrendering the property to BAC Home Loans.[3]

On December 6, 2011, the Debtor received her chapter 7 discharge.[4] Two-and-a-half years later, Deutsche Bank (BAC Home Loans' successor-in-interest) sued to foreclose its mortgage on the Debtor's property.[5] The Debtor opposed the foreclosure action by filing various defensive motions and was ultimately able to get **[*3]** it dismissed on summary judgment.[6] Now the Debtor is seeking fees and costs against the Bank in the foreclosure action.[7] The Bank says that the Debtor's efforts—successful as it turns out—to oppose its foreclosure action after she has received her chapter 7 discharge is contrary to her stated intent to surrender the property.

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1 Doc. No. 1 at Schedule A.

2 *Id.* at Schedules A & D.

3 *Id.* at Statement of Intentions.

4 Doc. No. 14.

5 Doc. No. 18 at ¶ 5.

6 *Id.* at ¶ 8.

7 *Id.*

So the Bank now asks the Court to reopen this bankruptcy case and revoke the Debtor's discharge.[8] According to the Bank, the Court may vacate a debtor's discharge if it was obtained through a fraud on the court.[9] Here, the Bank contends the debtor's discharge was entered based, in part, on her intent to surrender her property. By opposing the Bank's state court foreclosure action, the Debtor, in the Bank's view, effectively violated her oath to—and perpetrated a fraud on—this Court.

CONCLUSIONS OF LAW

This Court addressed a similar issue in *In re Metzler*, where the Court consolidated two cases (one a chapter 7 and the other a chapter 13) to consider how a debtor surrenders real property in bankruptcy.[10] There, like here, the debtors contested state court foreclosure actions after **[*4]** indicating in their statements of intention that they would be surrendering their homes.[11] This Court observed that "surrender" must mean something.[12] The Court concluded that ***HN1*** the term, in the context of §§ 521 and 1325, "means that a debtor must relinquish secured property and make it available to the secured creditor by refraining from taking any overt act that impedes a secured creditor's ability to foreclose its interest in secured property."[13] Because the debtors in *Metzler* had taken overt acts to oppose state court foreclosure actions pending at the same time the debtors were actively prosecuting their cases in this Court, the Court determined the debtors had failed to "surrender" their property within the meaning of §§ 521 and 1325. The Court required the debtors in *Metzler* to advise the state court they no longer opposed the foreclosure or withdraw any paper that opposed it.

At first glance, the Court's decision in *Metzler* would appear to dictate the outcome here. After all, in this case and in ***Metzler***, the debtors have taken overt acts to impede a secured creditor's ability to foreclose its interest in property after indicating an intent to surrender it. And in *Metzler*, the Court granted the precise **[*5]** alternative relief the Bank seeks here—i.e., require the Debtor to stop opposing the state court foreclosure. The Bank's other request for relief is for the Court to revoke the Debtor's discharge. ***Metzler***, however, is distinguishable from this case in one crucial respect.

In *Metzler*, the efforts to impede the state court foreclosure took place immediately or soon after the debtors received their chapter 7 discharge or the Court confirmed their chapter 13 plan. In fact, foreclosure actions had been filed against both debtors in *Metzler* before they sought bankruptcy relief. And the efforts to oppose summary judgment took place within two months in the case of one debtor and nine months in the case of the other. What went unstated in *Metzler*, but was the rationale behind the Court's decision, was that the short time between the time the debtors received the relief they sought in bankruptcy, on the one hand, and opposed foreclosure contrary to their statement of intentions, on the other hand, led the Court to infer the debtors had no intention of surrendering their property—i.e., they had misled this Court.

The same is not true here. For one thing, the Bank did not even file its foreclosure **[*6]** action until more than two years after the Debtor received her discharge. The record is unclear why the Bank waited so long to foreclose its mortgage. But what is clear is that it was not until nearly three years after she received her chapter 7 discharge that the Debtor first took some affirmative action to impede the Bank's foreclosure efforts. And then the Bank waited another year before seeking to reopen this case. Judge Olson confronted similar facts in *In re Kourogenis*.[14]

In *Kourogenis*, the lender waited more than five years after the debtor received her discharge and her case was closed before it sought to reopen her case and obtain an order barring the debtor from contesting its

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[8] *Id.; see also* Doc. No. 23.

[9] Doc. No. 18 at ¶ 10.

[10] *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015).

[11] *Id.* at 896-97.

[12] *Id.* at 900.

[13] *Id.*

[14] 539 B.R. 625 (Bankr. S.D. Fla. 2015).

foreclosure action.[15] The basis of the lender's motion in *Kourogenis* was the same as the Bank's motion here—i.e., the debtor had contested a foreclosure action after indicating an intent to surrender her property. It is unclear whether the foreclosure action in *Kourogenis* had been filed before the bankruptcy or how long it was after the debtor received her discharge before she contested the foreclosure action. In any event, Judge Olson concluded that the defense of laches barred the mortgage lender from **[*7]** reopening the case.[16]

While the Court agrees with the outcome in *Kourogenis*, it is not clear laches is the proper grounds here. As Judge Olson points out, ***HN2*** "[l]aches is a defense sounding in equity that serves to bar suit by a plaintiff 'whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant.'"[17] Here, the record is unclear why the Bank delayed in seeking to foreclose its mortgage in this case or to seek relief from this case once the Debtor first opposed its foreclosure efforts.[18] Besides, even if the delay was unexcusable, the Court is not convinced, like Judge Olson was in *Kourogenis*, that the Debtor here will be prejudiced by reopening the case for the limited purpose of enforcing the Debtor's stated intention. In this Court's view, resort to laches is unnecessary.

The concern here is that the Debtor is making a mockery of the **[*8]** legal system by taking inconsistent positions. In an effort to obtain her chapter 7 discharge, the Debtor swears—under the penalty of perjury—an intention to "surrender" her property. In other words, the Debtor is representing to the Court that she will make her property available to the Bank by refraining from taking any overt act that impedes the Bank's ability to foreclose its interest in the property. Yet, once she receives her discharge, the Debtor in fact impedes the Bank's ability to foreclose its mortgage. Courts, however, have a mechanism for dealing with parties taking inconsistent positions.

HN3 Under both federal and state law, the doctrine of judicial estoppel "generally precludes a party from 'asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'"[19] As the Supreme Court recognized in *New Hampshire v. Maine*, the purpose of judicial estoppel "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[20] The doctrine "prevents parties from 'making a mockery of justice by inconsistent pleadings' . . . and 'playing fast and **[*9]** loose with the courts.'"[21] The question is which court is in the best position to determine whether judicial estoppel applies.

HN4 If a debtor, who has indicated an intent to surrender real property, opposes a foreclosure while his or her bankruptcy case is still pending or within a relatively short time afterwards, then the bankruptcy court should be the one to address the issue. In that case, it would appear the debtor is perpetrating a fraud on the bankruptcy court or making a mockery of the bankruptcy system. But if years pass between the time a debtor indicates an intent to surrender and the time the debtor opposes a state court foreclosure, then the issue of judicial estoppel should be decided by the state court, which is in the best position to determine whether the debtor is making a mockery of the foreclosure action by taking a position inconsistent with the one she took in the bankruptcy case.

CONCLUSION

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[15] *Id.* at 627.

[16] *Id.* at 628.

[17] *Id.* (quoting *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1283 (11th Cir. 2015)).

[18] The Court notes it is not unusual for a bank's bankruptcy counsel to be different from its foreclosure counsel. And foreclosure counsel cannot reasonably be expected to conduct a nationwide search to see if its borrower has previously filed for bankruptcy. That is why discharge in bankruptcy is generally an affirmative defense.

[19] *In re Digital Comty. Networks, Inc.*, 496 B.R. 243, 249 (Bankr. M.D. Fla. 2013) (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002)); *Carter v. State*, 980 So. 2d 473, 484 (Fla. 2008) (explaining that "[j]udicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings") (quoting *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001)).

[20] 532 U.S. 742, 749-50, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

[21] *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (internal citations omitted).

Here, years passed between the time **[*10]** the Debtor swore she would surrender her home and the first time she opposed the state court foreclosure action. Given that intervening lapse of time, the Court cannot conclude the Debtor intended to perpetrate a fraud on this Court or make a mockery of the bankruptcy system. Perhaps circumstances have since changed that would allow the Debtor to make the required mortgage payments.[22] But that does not mean the Debtor should be permitted to take obviously contradictory positions. The decision whether judicial estoppel precludes the Debtor from defending the foreclosure action based on her inconsistent statements should, under the facts of this case, be left to the state court.

Accordingly, it is

ORDERED that the Bank's motion to reopen this case[23] is DENIED.

ORDERED.

Dated: January 28, 2016

/s/ Michael G. Williamson

Michael G. Williamson

Chief United States Bankruptcy Judge

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[22] It is not clear that is the case here since it is undisputed the Debtor has not made any mortgage payments since 2009, which is troubling to the Court.

[23] Doc. No. 18.

User Name: Gregory Champeau
Date and Time: 01 Mar 2016 9:55 a.m. EST
Job Number: 29731665

Document(1)

1. *In re Elkouby, 2016 Bankr. LEXIS 617*

Client/Matter: -None-
Narrowed by:

Content Type	Narrowed by
Cases	-None-

In re Elkouby

United States Bankruptcy Court for the Southern District of Florida

February 29, 2016, Decided

CASE NO. 14-23934-BKC-LMI Chapter 7

Reporter
2016 Bankr. LEXIS 617

IN RE ABRAHAM A. ***ELKOUBY***, Debtor.

Notice: Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

Core Terms

surrender, lienholder, lender, collateral, bankruptcy case, personal property, reaffirm, foreclosure action, bankruptcy court, exempt, reopen, real property, individual debtor, district court, requires, courts, abandoned, rights, property of the estate, secured creditor, consequences, provisions, mortgage, provides, redeem, cases, ride, foreclose, holder, ***surrender*** property

Opinion

[*1] ORDER DENYING MOTION OF THEIA LLC TO COMPEL DEBTOR TO

SURRENDER AND DENYING THE DEBTOR'S MOTION TO STAY

This matter came before me on November 2, 2015 on the motion of Theia LLC ("Theia") to Reopen Bankruptcy Case and Compel Debtor to ***Surrender*** (ECF # 28)("Motion to Reopen") and the Motion of the Debtor, Abraham A. ***Elkouby*** (the "Debtor"), incorporated in the Debtor's

Response to the Motion to Reopen (ECF #34), to stay any ruling on the matter, pending resolution of an appeal of a similar legal argument currently pending before the district court.

CASE NO. 14-23934-BKC-LMI

For the reasons more fully outlined below, the Motion to Compel is DENIED and the Motion to Stay is DENIED.

Section 521(a)(2) of the *Bankruptcy Code*[1] requires individual chapter 7 debtors to file a statement of intention advising whether, with respect to property securing debt, the debtor intends to retain or ***surrender*** such property, whether the property is exempt, and whether, if the debtor intends to retain the property, the debtor intends to redeem such property or reaffirm the debt encumbering such property. This case is the latest in an ongoing debate about the meaning of "***surrender***" and what the consequences of ***surrender*** are. The answer depends on **[*2]** what chapter the debtor has filed under, the nature of the property involved, and when the issue is brought before the court.

FACTS

There are no material facts in dispute. The Debtor filed a chapter 7 voluntary petition on June 18, 2014 (ECF #1). At the time the Debtor filed for bankruptcy, he was involved in a foreclosure action brought by Newbury Place REO IBL, LLC, a predecessor-in-interest to the note and mortgage held by Theia (the "foreclosure action"). The bankruptcy petition included a statement of intention that indicated the Debtor planned to ***surrender*** the property involved in the foreclosure action, located at 210 174thStreet #906, Sunny Isles Beach, Florida 33160 (the

"Property"). The Debtor did not claim the Property as exempt on Schedule C, nor did the Debtor

1 Title 11 of the United States Code.

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list the debt as disputed.2 Furthermore, the Debtor did not oppose Theia's Motion for Relief from

Stay (ECF #11).

The Debtor received his bankruptcy discharge on September 26, 2014 (ECF #25) and the case was administratively closed shortly thereafter (ECF #27). Although the Debtor stated his intention to ***surrender*** the Property during the bankruptcy case, he never turned over the Property to **[*3]** Theia.3Moreover, the Debtor continued to defend the foreclosure action, including the filing of an answer and affirmative defenses and issuing discovery requests.

2Nothing in this opinion is intended to address whether and to what extent the failure to schedule a secured debt as disputed, or failure to schedule potential counterclaims against a foreclosing lienholder as an asset, has any collateral estoppel or judicial estoppel effect in an action to foreclose that lienholder's security interest. Of course events subsequent to the filing of the bankruptcy petition or the statement of intention may have an impact on the applicability of either of these doctrines. For the most part, such issues should be raised before, and decided by, the state court before which the foreclosure action is pending. *In re Kourogensis, 539 B.R. 625 (Bankr. S.D. Fla. 2015)*. I recognize that many of my colleagues reopen bankruptcy cases to address disputes between debtors and lienholders with respect to ***surrendered*** property. However, the time for a lender to seek relief from the bankruptcy court due to a debtor's failure to perform a statement of intention is during the bankruptcy case, and the lender's failure to do so should foreclose the lender's return to **[*4]** bankruptcy court for such relief. *See In re Rodriguez*, No. 12-12043-BKC-AJC, 2015 WL 4872343, at *2 (Bankr. S.D.Fla. Aug. 12, 2015) (During the bankruptcy case a lender failed to tender a reaffirmation agreement to a debtor and did not move to compel the debtor to present a reaffirmation agreement notwithstanding the debtor's stated intention to reaffirm. The court refused to reopen the bankruptcy case three years later to compel the debtor to ***surrender*** the property because, among other reasons, the lender had "sat on its rights". The debtor's failure to perform his stated intention is a failure that the lender should have brought before the court during the pendency of the bankruptcy case.).

3At a hearing on November 9, 2015, both parties agreed that ***surrender*** is not synonymous with physical turn over of the Property. Virtually every court that has considered the meaning of ***surrender*** has agreed that ***surrender*** and turn over are not synonymous, whether ***surrender*** is to the chapter 7 trustee or to a lienholder, and whether ***surrender*** is in chapter 7 or chapter 13. *See, e.g., Pratt v. General Motors Acceptance Corp.* (*In re Pratt*), 462 F.3d 14 (1st Cir. 2006) (***surrender*** means to make the **[*5]** collateral available); *In re Plummer, 513 B.R. 135, 143 (M.D. Fla. 2014)*

("'***Surrender***' does not require the debtor to turn over physical possession of the collateral" but rather allows the secured creditor or chapter 7 trustee, as the case may be "to obtain possession by available legal means without interference."); *In re Kasper, 309 B.R. 82 (Bankr. D.C.C. 2004)*; *In re Kourgenis, 539 B.R. 625 (Bankr. S.D. Fla. 2015)*; *In re Metzler, 530 B.R. 894 (Bankr. M.D. Fla. 2015)*. *Accord Internal Revenue Serv. v. White* (*In re White*),

487F. 3d 199, 205 (4th Cir. 2007) (***Surrender*** in a chapter 13 case "entails the secured creditor ultimately holding all rights, including the right of possession, in the property securing the claim."); *In re Cornejo, 342 B.R. 834, 836*

(Bankr. M.D. Fla. 2005) ("'[S]urrender,' in the context of a Chapter 13 plan, means the relinquishment of any rights a debtor has in the collateral."). *See also* 4 Collier on Bankruptcy ¶521.16, p. 521-61 (16th ed. 2015).

As a practical matter, in most consumer chapter 7 cases, the debtor ***surrenders*** only constructive possession of property to the trustee, unless the trustee demands that physical possession also be ***surrendered***.… In this regard, the use of the word "***surrender***" rather than "turn over" is significant. Unlike the duty of a third party holding property of the estate to turn over that property under *section 542*, the debtor's duty is simply to relinquish the debtor's rights in property to the trustee, and to cooperate with **[*6]** the trustee's efforts to take possession of it should the trustee choose to do so.

3

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In response to the Debtor's ongoing state court efforts, Theia filed the Motion to Reopen, arguing that the Debtor's defense of the foreclosure action is barred by the Debtor's stated intention to ***surrender***. In support of its motion Theia has cited to several cases decided by other bankruptcy courts in Florida, including the Southern District of Florida, that have held that a debtor's election to ***surrender*** property in his or her statement of

intention bars the debtor's defense of any foreclosure action. The Debtor argues that "***surrender***" only required the Chapter 7 Debtor to "***surrender*** to the trustee," and that the Bankruptcy Code clearly provides that since the trustee did not administer the ***surrendered*** Property, the Property was abandoned back to the Debtor when the bankruptcy case was closed. Consequently, the Debtor argues, he should not be precluded from defending the foreclosure action.

ANALYSIS

As always, we start with the statute itself. "[W]e begin with the understanding that

Congress says in a statute what it means and means in a statute what it says there .... [W]hen **[*7]** the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." *Gordon v. NovaStar Mortgage, Inc. (In re Hedrick), 524 F.3d 1175, 1186 (11th Cir. 2008)* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)*).

Section 521 of the Bankruptcy Code outlines various obligations of all debtors seeking protection under any chapter of the Bankruptcy Code. Within *section 521* there are various

I also agree that "***surrender***" and "turn over" are not synonymous.

However, courts do not necessarily agree what "not interfering" with the lender means. *Compare Failla v. Citibank, N.A.* (*In re Failla*), 542 B.R. 606, 610- 12 (S.D. Fla. 2015) (***Surrender*** means the debtor is prohibited from

"interfering or impeding the secured creditor's efforts to take possession of the property by available legal means.");

In re Calzadilla, 534 B.R. 216 (Bankr. S.D. Fla. 2015) (same) *with Rodriguez*, 2015 WL 4872343 at *4 (Failure to ***surrender*** entitles a lienholder stay relief; ***surrender*** is "not a bar by injunction to defending a foreclosure action which would be unconstitutional, inequitable and unjust.").

4

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provisions that apply only to individual debtors and some that only apply to individuals in a chapter 7 case. *Section 521(a)(2)* sets forth the obligations of an individual debtor in a chapter 7 case with respect to debts secured by **[*8]** property of the estate. The individual debtor must advise in a statement of intention4whether he or she intends to keep the property of the estate or ***surrender*** the property and whether the debtor claims the property is exempt. If the debtor is going to keep the property then the debtor must advise whether he will be redeeming the property or reaffirming the debt secured by the property.

Section 521(a)(4) of the Bankruptcy Code directs *any* debtor to ***surrender*** all property of the estate to the trustee, if a trustee has been appointed. While chapters 11, 12, and 13 specifically excuse the individual debtor from this obligation,5there is no exception for a chapter 7 debtor other than, implicitly, the property that the debtor seeks to retain whether by reaffirmation, redemption, or exemption.6

If an individual chapter 7 debtor7 fails to timely file a statement of intention or fails to perform his or her intention within 45 days after the first meeting of creditors, and only with respect to *personal* property, the *personal* property loses its character as property of the estate8

4 Official form number 8.

5 11 U.S.C. §§1207, 1306, 1115.

6 For an excellent discussion on the different options set forth in *11 U.S.C. §521(2)* (predecessor to *11 U.S.C. §521(a)(2)*), *see In re Kasper*, 309 B.R. 82.

7While **[*9]** only a chapter 7 individual debtor is required to file a statement of intention, in an example of poor statutory drafting, *11 U.S.C. §1307* lists as a basis for conversion or dismissal a debtor's failure to file a statement of intention as required by *section 521(a)(2)*, *11 U.S.C. §1307(c)(10)*, and includes in a chapter 13 trustee's duties an obligation to make sure the chapter 13 debtor performs his statement of intention as required by *section 521(a)(2)*. *11 U.S.C. §1302(b)(1)* incorporating by reference *11 U.S.C. §704(a)(3)*. Since a chapter 13 debtor has no obligation under *section 521(a)(2)* these Bankruptcy Code sections are meaningless. 4 Collier on Bankruptcy ¶521.14, p. 521-45 (16th ed. 2015).

8 The automatic lifting of the stay provided in *sections 521(a)(6)* and *521(a)(7)* (dangling paragraph) and in

section 362(h)(1), applies to all personal property securing a claim, irrespective of whether that property is still property of the estate at the time the applicable deadlines have expired.

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and the automatic stay is lifted so that a lienholder may pursue its non-bankruptcy remedies.9

Moreover, if a chapter 7 individual debtor fails to perform his or her statement of intention within 30 days after the first meeting of creditors, the debtor may "not retain possession of *personal* property"(emphasis added) as to which a creditor has an allowed claim for the purchase price of such *personal* **[*10]** property.10

The Bankruptcy Code directs a chapter 7 trustee to distribute property of the estate pursuant to the priority scheme of *11 U.S.C. §726* but, notwithstanding *section 726, 11 U.S.C.*

§725 directs the chapter 7 trustee to "dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title." Thus, assuming the debtor is not retaining the property, and, assuming the debtor has not successfully claimed the property as exempt, and the lienholder has not already obtained stay relief or the trustee has not already abandoned the property to the lienholder,11a chapter 7 trustee

"shall" dispose of the property, in some way, to the lienholder.12 However, to the extent that any trustee has not administered property scheduled by the debtor under *11 U.S.C. §521(a)(1)* prior to the closing of a bankruptcy case, that property is "abandoned to the debtor."13

In sum, the Bankruptcy Code unambiguously provides that with respect to property of the estate securing a debt, the individual debtor must choose to retain or ***surrender***. Retention

9 11 U.S.C. §362(h)(1); *11 U.S.C. §521(a)(6)*; *11 U.S.C. §521(a)(7)*(dangling paragraph). This is subject to the rights of the trustee to argue that the property has some value to the estate **[*11]** such that the stay should not be lifted. *11 U.S.C. §362(h)(2)*; *11 U.S.C. §521(a)(7)*(dangling paragraph).

10It is not clear what "not retain possession" means. Nor is it stated who instead is entitled to the possession, although based on the context, presumably possession would be relinquished to the holder of the purchase money security interest. *See In re Alvarez, No. 10-B-28565,*2012 WL 441257, (Bankr. N.D. Ill. Feb. 10, 2012).

1111 U.S.C. §554(a) or (b).

12To my knowledge, I have not had a case where a chapter 7 trustee has offered, or any secured creditor has requested the trustee, to hand over the creditor's collateral as provided by *11 U.S.C. §725*.

1311 U.S.C. §554(c).

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requires a choice - redeem, reaffirm or exempt.14,15If the property is *personal property* and if the debtor does not timely state his or her intention or perform redemption or reaffirmation timely, the chapter 7 debtor cannot retain possession,16and the stay is lifted, unless the trustee takes action to preserve the estate's interest in the *personal* property.17However, there is no provision in the Bankruptcy Code that provides similar relief with respect to *real* property. The Bankruptcy Code requires that the holder of a claim secured by real property take affirmative steps to obtain relief **[*12]** if the debtor has not performed his statement of intention. Whether or not the property of the estate is real property or personal property, in chapter 7, ***surrender*** is to the trustee,18who may or may not choose to administer the property during the course of the bankruptcy case. If the property is not administered, it goes back to the debtor at the closing of the case, subject of course to any non-bankruptcy rights reserved to a lienholder, including the right to foreclose its security interest if appropriate.

14If the debtor successfully exempts the real property then the property is no longer property of the estate and the property is no longer subject to the requirements of *section 521(a)(2)*. However a chapter 7 individual debtor still has the right to redeem the exempt property, as well as property that has been abandoned by the trustee to the debtor in accordance with section 554. *11 U.S.C. §722*. Conversely, even if the property is abandoned back to the debtor, a lienholder still has its right to pursue its remedies against the collateral, limited only

by the discharge injunction which limits the lender's *in personam* rights against the now former debtor, but not its *in rem* rights. *See In re Canning*, 706 F.3d 64 (1st Cir. **[*13]** 2013).

15In some jurisdictions courts had held there is a fourth option - do nothing - also referred to as "the ride through."

See, e.g. Price v. Delaware State Police Fed. Credit Union (*In re Price*), 370 F.3d 362 (3rd. Cir. 2004); McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668 (9th Cir. 1998); *Homeowners Funding Corp. v. Belanger*

(*In re Belanger*), 962 F. 2d 345 (4th Cir. 1992). However, those cases have been overruled, at least in part - *see n.*

26 infra - by BAPCPA. *See DaimlerChrysler Financial Services Americas, LLC v. Jones* (*In re Jones*), 591 F. 3d

308 (4th Cir. 2010); Dumont v. Ford Motor Credit Co., 581 F. 3d 1104 (9th Cir. 2009); In re Miller, 443 B.R. 54 (Bankr. D. Del. 2011). The "ride through" was never an option in the Eleventh Circuit. In Taylor v. AGE Federal Credit Union (In re Taylor), 3 F. 3d 1512 (11th Cir. 1993), the court held that an individual chapter 7 debtor must make and perform his statement of intention and if retention is the choice, then the debtor must redeem or reaffirm.

Accord Bank of Boston v. Burr (*In re Burr*), 160 F.3d 843 (1st Cir. 1998); Johnson v. Sun Finance Co. (In re Johnson), 89 F.3d 249 (5th Cir. 1996); In re Edwards, 901 F.2d 1383 (7th Cir. 1990).

1611 U.S.C. §521(a)(6).

17 11 U.S.C. §362(h)(2); 11 U.S.C. §521(1)(7)(dangling paragraph).

18 11 U.S.C. §521(a)(4).

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What the Bankruptcy Code does not state, anywhere, is that real property ***surrendered*** by an individual chapter 7 debtor is ever ***surrendered*** to the lienholder.19*See In re Kasper*, 309 B.R. 82, 89 (Bankr. D.D.C. 2004). Another basic rule of statutory construction is "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally **[*14]** presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. U.S., 464 U.S. 16, 23 (1983)(citation omitted); U.S. v. White, 466 F. 3d 1241, 1246 (11th Cir. 2006). The Bankruptcy Code specifically deals with ***surrender*** of *personal* property to the holder of a purchase money security interest if an individual debtor does not perform his statement of intention. The Bankruptcy Code gives the holder of a lien on *personal* property automatic stay relief if the chapter 7 debtor doesn't timely perform his statement of intention. The Bankruptcy Code also specifically excuses ***surrender*** by a chapter 11, 12, or 13 debtor to a trustee, but specifically requires that if such debtor is not retaining the collateral, either the lienholder gets the collateral or it gets paid the value of the collateral.20If Congress, which amended several provisions of section 521 when it enacted BAPCPA, wanted to require a chapter 7 debtor to ***surrender*** property to a lienholder instead of, or subsequent to, ***surrender*** to a chapter 7 trustee, Congress knew how to draft such a provision. Thus, it is apodictic that a lienholder cannot, in any court, assert that a debtor's indicated intent to ***surrender*** real property in a chapter 7 case has any consequence with respect to the lienholder **[*15]** post-

19 Some courts have cited a footnote in *Taylor* where, when describing ***surrender***, the court wrote "[s]urrender provides that a debtor ***surrender*** the collateral to the lienholder who then disposes of it pursuant to the requirements of state law." 3 F.2d at 1514, n.2. This footnote is clearly dicta, In re Plummer, 513 B.R. 135 (Bankr. M.D. Fla. 2014). Had the court analyzed ***surrender*** in the context of chapter 7, presumably it would not have made such a broad statement, since ***surrender*** of collateral to the lienholder is not an option in chapter 7, except, perhaps with respect to ***surrender*** of personal property pursuant to 11 U.S.C. §521(a)(6), a section of the Bankruptcy Code that did not exist when *Taylor* was decided. The *Taylor* footnote illustrates why dicta is not binding - because dicta is recognized as something not relevant or not directly relevant to the facts of the case before the court. As the

Eleventh Circuit has repeatedly noted "dicta is not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir. 2010). *See Hillson v. GDCP Warden*, 759 F. 3d 1210 (11th Cir. Cir. 2014); Pretka v. Kolter City Plaza 11, Inc., 608 F. 3d 744 (11th Cir. 2010).

20See 11 U.S.C. §§ 1129(b)(2); 1225(a)(5); 1325(a)(5).

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bankruptcy, including precluding that debtor from defending an action by a lienholder to foreclose its security interest in real property.

Notwithstanding the express **[*16]** provisions of the Bankruptcy Code, cases around the country, including cases in this district, have held that a chapter 7 debtor who indicates in his statement of intention that he is ***surrendering*** property, has, by so stating, agreed that he is ***surrendering*** to the lienholder and has, therefore, forfeited his right to contest any post-discharge action to foreclose the lienholder's security interest. *In re Metzler, 530 B.R. 894 (Bankr. M.D. Fla. 2015)*;21*In re Failla, 529 B.R. 786 (Bankr. S.D. Fla. 2014)*, *aff'd sub nom. Failla v. Citibank, N.A.* (*In re Failla),* 542 B.R. 606 (S.D. Fla. 2015); *In re Steinberg, 447 B.R. 355 (Bankr. S.D. Fla. 2011)*. *Accord In re Kourogenis*, 539 B.R. 624 (Bankr. S.D. Fla. 2015) (assumes in *dicta* that ***surrender*** in chapter 7 requires ***surrender*** to the lienholder). *Cf. In re Kasper*, 309 B.R. 82 (***surrender*** in chapter 7 is to the chapter 7 trustee).22

21The *Metzler* court reviewed a chapter 7 case and a chapter 13 case together in its opinion but, notwithstanding the different chapters, analyzed the two cases in the same way. However, that analysis is flawed because while ***surrender*** means the same thing in chapter 7 and chapter 13, the consequences of ***surrender*** in chapter 7 and chapter 13 are not the same.

22Several of these courts have also held that such debtors have defrauded the bankruptcy court such that their discharges **[*17]** are at risk or are lost. While not an issue in this case, the remedies suggested by these courts are also in direct conflict with the Bankruptcy Code. The Bankruptcy Code addresses when and under what circumstances a debtor may lose his discharge. Failure to fully perform a statement of intention is not among them. In chapter 7, if the debtor interferes with the chapter 7 trustee's administration of estate property, the debtor could lose his discharge. *See, e.g.*, *11 U.S.C. §§727(a)(2)(B)* and *727(d)(2)*. If a chapter 12 or chapter 13 debtor fails to ***surrender*** property to a lienholder in accordance with a confirmed plan, that debtor has violated a court order, the consequences of which, pre-discharge may be dismissal, or conversion (*11 U.S.C. §§1208* and *1307*), and, post-discharge is the collateral estoppel effect of the confirmation order. *11 U.S.C. §§1227* and *1327* (unless the creditor could prove fraud and only for one year after discharge *11 U.S.C. §§1228(d)* and *1328(e)*). While these courts rely on *11 U.S.C. §105*, the Supreme Court has made very clear that the bankruptcy courts may not use their equitable powers to override express provisions of the Bankruptcy Code, no matter how badly a debtor has behaved. *Law v. Siegel, 134 S.Ct. 1188 (2014)*. *Accord Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988). *Cf.* 4 Collier on Bankruptcy **[*18]** s ¶521.14, p. 521-53 (16th ed. 2015):

The 2005 amendments to the Bankruptcy Code, by specifying particular consequences in certain situations involving the statement of intentions clarify the law [regarding options and ride-through] to some degree. While these [added] provisions … have their ambiguities and uncertainties, they at least delineate situations in which Congress intended some consequences to flow from the failure to comply with the requirement of filing a statement of intentions or the failure to perform specific acts with respect to the statement. It

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The debtors in *In re Failla* filed a chapter 7 bankruptcy case on August 31, 2011. Like the Debtor here, the Faillas scheduled real property as encumbered by a mortgage and, in the statement of intention, indicated the property was going to be ***surrendered***. The debtors did not list the property as exempt. Significantly, the debtors also did not list the debt to the mortgage holder as disputed or contingent. The debtors received their discharge in 2011. After the bankruptcy case was completed, the mortgage lender continued the pre-petition foreclosure action, and the debtors actively defended that action. In late **[*19]** 2014 the mortgage holder moved to reopen the Faillas' bankruptcy case and asked the bankruptcy court to compel the debtors to ***surrender*** the property in accordance with the statement of intention (that is, stop defending the foreclosure action).

The court acknowledged that *section 521(a)(1)* and *(a)(2)* do not identify to whom a debtor should ***surrender*** property in order to perform the statement of intention. Nonetheless, the court concluded that a chapter 7

debtor who has not scheduled property as exempt and who has agreed to ***surrender*** the property (and as a result claimed the wild card exemption23), has committed a fraud on the court by resisting the lender's foreclosure action,24the consequence of which puts the debtor's discharge in jeopardy.25

The *Failla* court, and the opinions on which it relies, did not address whether and to what extent the debtors' non-interference with the chapter 7 trustee's administration of the property in

must be assumed that if Congress intended any other consequences to result from such failure it would have stated them is these new detailed provisions.

23 Fla. Stat §222.25(4). This statute allows a Florida debtor who does not claim, or receive the benefit of, a homestead exemption in a bankruptcy case, **[*20]** to claim an additional $4000 in personal property exemptions, in addition to the $1000 in personal property exemption to which all Florida individual debtors are entitled.

24The court did not address the lender's delay of three years before seeking relief from the bankruptcy court for the debtor's failure to stand down in the foreclosure action. *Compare In re Rodriguez*, 2015 WL 4872343 (the court held a lender's delay of over three years after a bankruptcy discharge to seek to reopen the chapter 7 case to compel ***surrender*** - relief to which the court held the lender was not entitled in any event - was barred by laches, and the court denied the lender's motion to reopen).

25 The court conflates the debtor challenging a debt scheduled as undisputed, an issue addressed by collateral estoppel or judicial estoppel, *see n. 2 supra*, with the debtor's perceived failure to ***surrender*** which, as I have already held, has different consequences in different chapters.

question meant the debtors complied with their stated intention to ***surrender***, but assumed, based

on Taylor v. AGE Federal Credit Union (In re Taylor), 3 F. 3d 1512 (11th Cir. 1993), that

surrender in chapter 7 means complete forfeiture of any defense to a lienholder's foreclosure of its interest in the **[*21]** collateral.26 That question was answered in a recent district court opinion that

affirmed the *Failla* ruling. In Failla v. Citibank N.A. (In re Failla), 542 B.R. 606 (S.D. Fla.

2015) (the *"Failla* appeal*"*), the district court held that it is not critical to determine whether the

property should be ***surrendered*** to the trustee or the secured creditor, but "rather, the critical

question is what is the legal effect of the debtor's decision to ***surrender*** the property." 542 B.R.

at 611. The answer, according to the district court is

that once the debtor decides to "***surrender***" secured property, the debtor has abandoned any interest or claim that he may have had to the property as against the trustee, if the trustee decides to administer the property, or against any secured creditor the debtor listed in the filed schedules having a valid, undisputed, non-contingent and enforceable secured lien on the property.

Id. However, the district court did not cite to any Bankruptcy Code section that would support

its conclusion. In fact, there is no Bankruptcy Code section that provides that if a chapter 7

trustee doesn't administer ***surrendered*** real property what follows is a second ***surrender*** -

26The *Taylor* court held that "ride through' should not be a fourth option **[*22]** to a chapter 7 debtor because "[a]llowing a debtor to retain property without reaffirming or redeeming gives the debtor not a 'fresh start' but a 'head start' since the debtor effectively converts his secured obligation from recourse to nonrecourse with no downside risk". 3 F.2d at

1516. However, this observation was made in the context of ruling that a debtor who intends to *retain* property must redeem or reaffirm. The *Taylor* court, other than its casual inference in a footnote, never discussed the ***surrender*** option. *See n. 19 supra.* The discharge of personal liability with respect to a debt that continues to be secured by collateral is a fundamental aspect of the Bankruptcy Code. To hold that a debtor must either reaffirm a debt secured by real estate or give up the asset is not required by or consistent with

the bankruptcy system. *Accord Johnson v. Home State Bank*, 501 U.S. 78 (1991) (in holding that a chapter 13 debtor whose *in personam* obligation to a secured creditor was discharged in a chapter 7 case could nonetheless treat the secured creditor's lien in the chapter 13 plan, the Supreme Court implicitly acknowledged that a debtor whose *in personam* liability is discharged can retain possession **[*23]** of the collateral). *But see In re Steinberg*, 447 B.R. 355 (Bankr. S.D. Fla. 2011) (the case seems to suggest that the lender does not have to accept post-discharge payments on a non-recourse obligation). Collier on Bankruptcy suggests that the additions of *sections 521(a)(6)*, 521(a)(7)(dangling paragraph) and 362(h) in 2005, which additions clearly eliminate the ride through option for *personal property*, as well as the enactment of *11 U.S.C. §524(j)*, evidence first, that until *BAPCPA* there *was* a ride through option, and, second, by specifically eliminating the ride through for personal property, *Taylor* has been partially overruled, and there still is a ride through option for real property. 4 Collier on Bankruptcy ¶521.14, p. 521-53 (16th ed. 2015).

surrender to the lienholder. Rather, what the Bankruptcy Code specifically provides is that what follows is the property is abandoned to the debtor.

The lienholder in a chapter 7 case is not without recourse. The Bankruptcy Code allows the lienholder to seek stay relief; the Bankruptcy Code allows the lienholder to compel the chapter 7 trustee to abandon the property; the Bankruptcy Code allows the lienholder to demand the property from the chapter 7 trustee; the Bankruptcy Code allows the lienholder to ask the bankruptcy **[*24]** court to compel the debtor to comply with his statement of intention.27What the Bankruptcy Code does not allow the lienholder to do is wait three years, or even three months, and then come back to the bankruptcy court and seek relief to which it is not entitled.

The assumption that if the chapter 7 debtor states it will ***surrender*** property to the trustee, and the trustee doesn't administer the asset, somehow the debtor is "getting away with something" if the debtor does not then ***surrender*** to the lienholder, is a conclusion that is not supported by the Bankruptcy Code. 28The Bankruptcy Code does not penalize the debtor if the trustee chooses not to administer property ***surrendered*** by the chapter 7 debtor. The discharge of personal liability is not, as suggested by the district court in the *Failla* appeal, a consequence that dictates a punitive response if the right to ***surrendered*** property reverts to the chapter 7 debtor at

27 Because debtors were encountering difficulty getting lenders to execute reaffirmation agreements, the Southern District of Florida adopted a local rule giving the *debtor* the option of filing a motion to compel the lender to perform. Local Rule 1007-3.

28 The cases that **[*25]** hold otherwise ignore a fundamental fact - while the Bankruptcy Code requires an individual debtor to file a statement of intention and perform that statement of intention, the Bankruptcy Code does not require the party on the other end of the intention to accept tender of performance. *In re Canning*, 706 F.3d at 69-70. *But, c.f.*, *Pratt v. General Motors Acceptance Corp. (In re Pratt), 462 F.3d 14 (1st Cir. 2006)* (secured lender's refusal to repossess a worthless vehicle or release the lien on the vehicle violated the discharge injunction). A debtor has satisfied his obligations if the debtor has tried to perform his intention. The debtor is not punished if the secured creditor or the trustee does not accept performance. *See In re Molnar,* 441 B.R. 108 (Bankr. N.D. Ill. 2010) (the debtor timely performed his intention by reaching out repeatedly to the secured lender during the 30 day period to discuss redemption, which overtures the lender ignored); *In re Hinson, 352 B.R. 48 (Bankr. E.D.N.C. 2006)* (the debtor timely performed her statement of intention by signing a reaffirmation agreement even though the lender did not accept the signed agreement because the debtor had removed attorney fee language that was outside the original loan agreement); *In re Alvarez, No. 10-B-28565,2012 WL 441257 at 7 (Bankr. N.D. Ill., Feb. 10, 2012)* (a debtor's obligation to perform his intention "requires only acts **[*26]** within the debtor's control").

the conclusion of a chapter 7 case. That result is what the Bankruptcy Code provides, and any modification to that result is up to Congress, not the courts.

The Debtor has asked that I stay my ruling until resolution of *Dolan v. Carrington Mortgage Services*, Case No. 9:15-CV-80879-DMM (S.D. Fla. 2015). There

is no reason to do so. The Southern District of Florida is not a single judge district; accordingly, the holding of one district judge in a case is not binding on a bankruptcy judge in any other case.29

CONCLUSION

A chapter 7 debtor who indicates ***surrender*** of real property in his statement of intention is not obligated to ***surrender*** that property to the lienholder, whether or not the property is administered by the chapter 7 trustee. Compulsory ***surrender*** of real property collateral by a debtor to a lienholder in chapter 7 is not supported by, and indeed ignores, the express provisions of the Bankruptcy Code. And, consequently, I must disagree with my colleagues who have held otherwise.

In this case the Debtor performed his stated intention to ***surrender*** with respect to the Property because he did not interfere with the Chapter 7 Trustee's administration of the Property.

Theia took no action in the bankruptcy **[*27]** case other than to seek stay relief, which it obtained.

Because the Debtor's ***surrender*** in this case was to the Chapter 7 Trustee and not to Theia, I do not need to determine whether and to what extent ***surrender*** to a lienholder, as required by chapter 12 or 13, requires a debtor to relinquish defenses to foreclosure. Consequently, there is

29 Courts are not in agreement regarding when and to what extent a bankruptcy court is bound by the holdings of a district court as controlling precedent. *Compare Health Services Credit Union v. Shunnarah* (*In re Shunnarah*), 273 B.R. 671 (M.D. Fla. 2001) (finding bankruptcy courts are "inferior" and bound by published district court opinions, unless an opinion that contains a different holding is published) *with In re Romano,* 350 B.R. 276 (Bankr. E.D. La. 2005) (holding a single decision of a district court in a multi-judge district is not binding upon a bankruptcy court in the district). I have previously ruled that in the absence of direction from the Eleventh Circuit to the contrary, at least in non-single court districts such as the Southern District of Florida, district court opinions may be persuasive, but they are not binding precedent. *Committee v. FDIC as Receiver* **[*28]** (*In re BankUnited Financial Corp.*), 442 B.R. 49 (Bankr. S.D. Fla. 2010).

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no purpose in reopening the bankruptcy case,30and Theia's Motion to Compel is denied. The Debtor's Motion to Stay is also denied.

# # #

Copies to:

John C. Brock, Jr., Esq.

Matis H. Abarbanel, Esq.

Attorney Abarbanel shall serve a copy of this Order upon all parties in interest and file a certificate of service with the clerk of the court.

30 A bankruptcy court may reopen a case to "administer assets, to accord relief to the debtor, or for other cause. *11 U.S.C. §350*. "A decision to reopen a case under *section 350(b)* is based on 'the particular circumstances and equities of each case'. … When deciding whether to reopen a closed case, courts generally consider the benefit to creditors, the benefit to the debtor, the prejudice to the affected party and other equitable factors." *In re Rodriguez, 2015 WL 4872343 at *1-2*.

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Undue Hardship Under 11 U.S.C. §523(a)(8) and Administrative Alternatives to Bankruptcy Discharge of Student Loan Debt

April 1, 2016

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I. GENERAL BACKGROUND AS TO FEDERAL STUDENT LOANS

A. Higher Education Act of 1965: In 1965, Congress, in response to a perceived need for financial assistance to students in higher education, passed the Higher Education Act of 1965 ("HEA").

B. Federal Student Loan Programs: The HEA governs two federally-backed student loan programs: the Federal Family Education Loan Program ("FFEL Program" or "FFELP") and the William D. Ford Federal Direct Loan Program ("Direct Loan Program").[1] Effective July 1, 2010, Congress eliminated the FFEL Program under the Health Care and Education Reconciliation Act of 2010.

1. FFEL Program: Under the FFEL Program, eligible lenders make guaranteed loans on favorable terms to students or parents to help finance student education. The loans are guaranteed by guaranty agencies (state agencies or private non-profit corporations), which are ultimately reinsured by the United States Department of Education ("ED").

2. The Direct Loan Program: Under the Direct Loan Program, ED makes loans directly from the federal treasury to student and parent borrowers. ED is both the lender and the guarantor.

C. Types of Federal Loans:

1. HEA: Loans under the HEA include Perkins Loans, Stafford (subsidized and unsubsidized) Loans, parent PLUS Loans, graduate PLUS Loans, and Consolidation Loans. Grants include Pell Grants and Supplemental Education Opportunity Grants. The terms of Stafford, parent PLUS, graduate PLUS, and Consolidation loans in both the FFEL Program and the Direct Loan Program are similar except that the Direct Loan Program offers a Public Service

[1] The Direct Loan Program is also referred to as the "Ford Program."

Loan Forgiveness program and offers both and an income based and an income contingent repayment option. *See infra* at IV.

2. Health and Human Services Loans: The United States Department of Health and Human Services ("HHS") also administered a student loan program, Health Education Access Loan program, ("HEAL"), for borrowers engaged in health related studies. This program is no longer active. Like FFEL Program loans, HEAL loans are also presumptively nondischargeable. Courts have construed the dischargeability standard of "unconscionability" for HEAL loans as being a "higher standard" than that of FFEL Program/Direct Loan Program loans, which require a showing of "undue hardship." Even though HEAL loans are administered by HHS, HEAL loans are eligible for consolidation along with FFEL Program loans in the Direct Loan Program.

D. Non-HEA Loans: Private Loans: Private loan programs also exist and provide educational funds to students who have exhausted their federal loan limits or are otherwise ineligible to borrow under the federal loan programs. Private loans are not eligible for the administrative relief discussed below and may not be consolidated under federally-backed consolidation programs. Since 2005, however, private loans enjoy the presumption of nondischargeability under 11 U.S.C. § 523(a)(8).

II. UNDUE HARDSHIP

Under the Bankruptcy Code, educational benefits, overpayments, or loans are presumptively non-dischargeable unless a debtor, after commencing an adversary proceeding, proves that he/she or his/her dependents suffer from an "undue hardship" under 11 U.S.C. § 523(a)(8). In 2003, the Eleventh Circuit adopted the following three-pronged test, first established by the Second Circuit, that a debtor must meet in order to discharge an otherwise non-dischargeable student loan as an undue hardship:

> "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans;
>
> (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
>
> (3) the debtor has made good faith efforts to repay the loans."

In re Cox, 338 F.3d 1238, 1241 (11th Cir. 2003) quoting *Brunner v. New York State Higher Educ. Services*, 831 F.2d 395, 396 (2nd Cir. 1987).[2] *See also In re Mosley*, 494 F.3d 1320, 1324 (11th Cir. 2007)(court reiterated *Brunner* test as standard in the 11th Circuit). All three prongs of the *Brunner* test must be satisfied before an undue hardship discharge can be granted, such that if any one of the three prongs is not met, a bankruptcy court cannot discharge the student loan indebtedness. As the Eleventh Circuit reasoned: "[c]onsidering the evolution of § 523(a)(8), it is clear that Congress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness." *In re Cox*, 338 F.3d at 1243,

In addressing Prong 2 of the *Brunner* test, the Eleventh Circuit requires that a debtor show a "certainty of hopelessness" in order to meet his or her burden of proof. *In re Mosley*, 494 F.3d at 1326. In addition, the cases make clear that "good faith" in repayment under Prong 3 does not simply mean that a debtor has made payments on his or her student loans. Rather, the courts in the Eleventh Circuit interpreting good faith note that a debtor must also prove that the debtor has made sufficient efforts to obtain employment, maximize income, and minimize expenses. *See, e.g., In re Mosley,* 494 F.3d at 1327. Moreover, a debtor's efforts to take advantage of eligible repayment or restructuring options that make the debt less onerous, including those afforded by the Ford Program and its income driven repayment options discussed *infra*, are a component of the good-faith inquiry. *See, e.g., In re Mosley,* 494 F.3d at 1327.

III. ADMINISTRATIVE REMEDIES

There are a number of administrative remedies for student loan borrowers to consider in lieu of seeking a discharge through bankruptcy. Unlike relief under 11 U.S.C § 523(a)(8), borrowers may be entitled to administrative relief irrespective of whether they have filed for bankruptcy protection.[3]

Borrowers who want to challenge or appeal from a ruling on an administrative remedy must seek relief though the HEA, the Administrative Procedures Act, or federal district court. Bankruptcy courts do not have jurisdiction to decide matters arising under the HEA. *See Williams v. Nat'l Sch. of Health Tech. Inc.,* 836 F. Supp. 273, 279 (E.D. Penn.1993), *cited in In re Bega*, 180 B.R. 642, 643 (Bankr. Kan. 1995).

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[2] The "*Brunner* Test" has been adopted in the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits. The "totality of circumstances" test has been adopted in the Eighth Circuit. The First Circuit has not yet adopted any one test. That being said, the First Circuit recently had oral arguments in an appeal that addressed, in part, what test should apply in that circuit.

[3] The discharge provisions described here are illustrative only of the administrative relief available under the HEA. For full detail of requirements necessary for relief, *see* 34 C.F.R. §§ 682.100 *et seq.*, 685.100 *et seq.* These administrative options are available for both FFEL Program and Direct Loan Program loans unless otherwise noted.

A. Total and Permanent Disability Discharge: Borrowers may be eligible to have their federal student loan debt discharged because of a Total and Permanent Disability ("TPD").

1. Eligibility Criteria for a TPD: TPD means that an individual (1) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that (i) can be expected to result in death; (ii) has lasted for a continuous period of not less than 60 months; or (iii) can be expected to last for a continuous period of not less than 60 months; or (2) has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability. 34 C.F.R. § 682.200(b)

2. Requesting a TPD Discharge: There are two ways in which a borrower can request review for a TPD discharge:

a. Doctor certification on a TPD application: A medical doctor or doctor of osteopathy must certify that the borrower meets the definition of TPD as described in § 682.200(b).

b. Certification with a social security award letter: Today, borrowers who receive Social Security Disability Insurance ("SSDI") or Supplemental Security Income ("SSI") benefits may use their SSA award letter in lieu of obtaining a separate certification from a physician on the TPD discharge application. The SSA award letter must state that the borrower's next scheduled disability review will be within 5 to 7 years from the date of the most recent SSA disability determination.

Borrowers may also submit a Benefits Planning Query ("BPQY"). The BPQY provides a summary of SSA disability benefits, including the scheduled date for the next disability review. A BPQY summary can be obtained by calling 1-800-772-1213, if the SSA award letter is unavailable. Borrowers must still complete their section of the TPD application and submit it with their SSA award letter.

3. Veterans with service-connected disabilities: Veterans have been determined by the U.S. Department of Veterans Affairs ("VA") to be unemployable due to a service-connected disability or have a service-connected disability that is 100% disabling are eligible for immediate discharge of their federal student loans. They need only provide their Veteran's Administration disability paperwork along with their TPD application.

4. Agency review of TPD discharge request: ED has designated Nelnet as its disability servicer for all TPD applications submitted after July 1, 2013. Under the TPD process, borrowers must submit a single TPD discharge application directly to ED/Nelnet rather than to their individual loan holders. Borrowers may initiate the TPD process by going to www.disabilitydischarge.com. Once informed of a TPD request, ED/Nelnet will notify the loan holders.

If the TPD request is approved, the account is immediately discharged by ED.[4] The three-year post-discharge monitoring period remains in effect. During this three-year period, borrowers cannot earn more than 100% of the federal poverty guidelines for a family of two (in 2016 = $16,020) and cannot have obtained any new federal student loans. Borrowers must notify Nelnet of any address change during the three-year period. Typically, Nelnet will contact the borrower when the three-year mark is approaching to update the disability status and financial status to ensure that the borrower's discharge criteria have not changed. Borrowers, who fail to respond with updated information, will have their TPD request cancelled and their loans reinstated, until they comply with the request for updated information so their account can be finally reviewed.

B. Loan Rehabilitation: Federal regulations allow borrowers who default on repayment of their loan a one-time opportunity to bring their loans out of a default status. Payment amounts are set at a reasonable rate and borrowers must make nine on-time payments over a 10-month period.

Entering a loan rehabilitation agreement has an immediate effect on a borrower's defaulted loans: it stops all collections activity and legal proceedings, prevents wage garnishment, and it may protect a borrower's state and federal tax refunds from IRS offsets. Successfully completing a loan rehabilitation program restores loans to their pre-default status, it reestablishes eligibility for deferment, forbearance, alternative repayment options, title IV financial aid, and shows positive payment progress on a borrower's credit report, which may repair some of the damage done by default.

C. Closed School Discharge: Borrowers whose school closed before they could complete the program of study may be eligible for discharge. The borrower must show they were enrolled at the time of closure or that they withdrew from the school not more than 90 days prior to the date the school closed and that they were unable to complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school.

D. False Certification Discharge: A borrower's student loans can be discharged if a school falsely certified the student's eligibility for a federal student loan on the basis of ability to benefit from the education, signed the borrower's name without authorization by the borrower on the loan application or promissory note, or someone else obtained a federal student loan because of identity theft.

E. Death Discharge: If an individual borrower dies or the student for whom a parent received a PLUS loan dies, the obligation of the borrower and any endorser to make any further payments on the loan is discharged.

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[4] Under the Internal Revenue Code, student loan debt forgiven or discharged by TPD may constitute a taxable event. However, under existing tax laws, any forgiven debt is taxable only to the extent the borrower is solvent.

F. Teacher Loan Forgiveness Program: Teachers who meet the requirements in 34 C.F.R. § 685.217 are eligible for forgiveness of up to $17,500. Typically, this provision is for teachers in low-income areas and those who teach math or science at schools designated eligible by the U.S. Department of Education. (Direct Loan Program loans only).

G. Public Service Loan Forgiveness: Borrowers who make 120 qualifying payments under the IBR, ICRP, REPAYE, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. Public service includes employment with most local, state, federal, tribunal nation, or § 501(c)(3) corporations. This program is available only in the Direct Loan Program. Borrowers who have FFEL Program loans and wish to take advantage of this program, may consolidate their FFEL Program loans into the Direct Loan Program to become eligible. *See* 34 C.F.R. § 685.219.

H. September 11 Survivors Discharge: Survivors of or eligible victims of the September 11 attacks may request discharge of their student loan debt. (Direct Loan Program loans only).

IV. FLEXIBLE, AFFORDABLE PAYMENT OPTIONS: INSIDE OR OUTSIDE OF BANKRUPTCY

Both the FFEL Program and the Direct Loan Program have flexible, affordable payment options for borrowers who have financial hardship. These payment options are available whether or not the borrower has filed bankruptcy.

A. Consolidation: Consolidation benefits a borrower by spreading the payments over a term of up to 30 years, depending on the total loan balance. Since July 1, 2010, new consolidation loans are available only through the Direct Loan Program. Borrowers who have previously consolidated their loans in the FFEL Program may reconsolidate their loans (even if defaulted) into the Direct Loan Program but not vice-versa. Today, borrowers who wish to consolidate their federal loans into the Direct Loan Program must do so by completing an application on-line.

B. Income-Driven Payments: In addition to fixed, amortized extended and graduated payment terms, there are now three payments options that are based on a borrower's income and family size: the Income Based Repayment plan ("IBR") (available in both the FFEL Program and Direct Loan Program), the Income Contingent Repayment Plan ("ICRP) (available only in the Direct Loan Program), and the REPAYE plan that just went into effect on December 16, 2015 (available only in the Direct Loan Program).

1. Income Based Repayment:

a. Eligible Loans: Most federally-backed loans are eligible for the IBR:

- Direct Subsidized Loans,
- Direct Unsubsidized Loans,
- Direct PLUS loans made to graduate or professional students,
- Direct Consolidation Loans without underlying parent PLUS loans made to parents,
- Subsidized Federal Stafford Loans,
- Unsubsidized Federal Stafford Loans,
- FFEL Program PLUS loans made to graduate or professional students,
- FFEL Program Consolidation Loans without underlying parent PLUS loans made to parents
- Perkins loans that are or have been consolidated into a new consolidation loan.

b. Ineligible Loans: Defaulted student loans, parent PLUS loans, or federal consolidation loans that contain underlying parent PLUS loans or a mix of Stafford loans and parent PLUS loans are not eligible for the IBR in either the FFEL Program or the Direct Loan Program. Private loans that are not federally-backed are not eligible. Stand-alone Perkins loans are also not eligible for the IBR, unless they are included in a consolidation loan that is IBR-eligible.

c. Restoring IBR eligibility to defaulted loans: Borrowers who have defaulted FFEL Program loans and want to opt into the IBR may re-consolidate their defaulted loans into the Direct Loan Program and elect the IBR in the Direct Loan Program. (Re-consolidating removes the default because the borrower has a new loan). Borrowers who have defaulted FFEL Program *and* Direct Loan Program loans may consolidate both sets of loans into a new Direct consolidation loan. Borrowers with defaulted loans also have a one-time opportunity to rehabilitate their loan to remove the default status and regain eligibility for the IBR in either federal student loan program. *See supra* at III.b.

d. Partial Financial Hardship Threshold: Borrowers who have IBR-eligible loans must first demonstrate partial financial hardship ("PFH").[5] Borrowers can demonstrate PFH if the annual amount due on all eligible student loans under a 10-year repayment schedule is more than 15% of their adjusted gross income ("AGI"). Most borrowers whose total loan balance exceeds their annual earnings will satisfy the PFH requirement.

e. IBR Calculation and Terms: The IBR payment is typically calculated using the borrower's AGI, from the most recent federal tax return, and family size.

[5] As shown *infra*, PFH is not required for the REPAYE.

Borrowers who earn less than 150% of the poverty level for their family size will have a $0 IBR payment but will still be considered "in repayment" and in good-standing. Otherwise, the required monthly loan payment under the IBR is capped at 15% of annual household earnings above 150% of the applicable poverty level divided by 12 months. The IBR payment is recalculated annually based on household AGI and family size.

Borrowers may contact their lender/servicer at any time if they experience a change in financial circumstances that could impact their required IBR payment. The IBR repayment period is 25 years. At the conclusion of the 25-year repayment period, any remaining balance is forgiven.[6] *But see infra* IV.B.4 (discussing 10-year repayment term for the Public Service Loan Forgiveness Program).

Although interest continues to accrue at the contract rate in the IBR, the government will pay unpaid accrued interest on FFEL Program or Direct Loan Program subsidized loans for up to three consecutive years from the date the borrower enters the IBR. Also, during a period of PFH, interest that accrues but is not covered by the IBR payment will not be capitalized, even if interest accrues during a deferment or forbearance.

i. Documenting income: Borrowers who do not file, or are not required to file, a federal tax return may provide alternative documentation of their income such as pay stubs, letter(s) from employer(s) stating income, bank statements, etc. Untaxed income such as SSDI, SSI, child support, federal or state public assistance are not included in the IBR calculation. Borrowers who have no income or have only untaxed income may self-certify their income on the IBR request form at Section 5.10.

ii. Special rule for married borrowers: Married borrowers who file separate tax returns may have their IBR payments based on their own respective incomes but may still count each other and any dependents in the family size.

2. Income Contingent Repayment: Like the IBR, the ICRP, which is available only in the Direct Loan Program, is recalculated annually and the payment amount is based on 20% of the difference between a borrower's AGI and 100% of the federal poverty level for the family size. If the AGI is below 100% of the poverty level for the borrower's family size, then the ICR payment is $0.

Interest continues to accrue at the contract rate and is capitalized until the loan balance is 10% higher than the original loan balance when the borrower entered repayment. After that, interest continues to accrue but is not capitalized. Interest that accrues during forbearance or deferment does not count toward the 10% capitalization rule.

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[6] Under the Internal Revenue Code, student loan debt forgiven at the end of the IBR (and ICRP, unless it is forgiven under the Public Service Loan Forgiveness Program, discussed *infra*) term may constitute a taxable event. As noted above, this is a nonissue in most cases because any forgiven debt is taxable only to the extent the borrower is solvent.

The ICRP is the only income-driven payment option available to parent PLUS loan borrowers or to borrowers who have defaulted loans in the Direct Loan Program. The ICRP is always based on household income regardless of tax filing status. The term is 25 years. *But see infra* at III.B.3. After 25 years, any balance that is remaining is forgiven by the Secretary of Education. *See infra*. Note 6.

3. REPAYE:

a. Eligible Loans: Same as the IBR

b. Ineligible Loans: Same as the IBR.

c. Restoring IBR eligibility to defaulted loans: Same as the IBR

d. Partial Financial Hardship Threshold: Unlike the IBR, there is no partial financial hardship threshold for REPAYE.

e. REPAY Calculation and Terms: Like the IBR, the REPAYE payment is calculated using the borrower's AGI, from the most recent federal tax return, and family size. Borrowers who earn less than 150% of the poverty level for their family size will have a $0 REPAYE payment but will still be considered "in repayment" and in good-standing. However, the formula for calculating the REPAYE monthly payment is different from the IBR. The required monthly loan payment under the REPAYE is capped at 10% of annual household earnings above 150% of the applicable poverty level divided by 12 months. Like the IBR, the REPAYE payment is recalculated annually based on household AGI and family size.

Borrowers may contact their lender/servicer at any time if they experience a change in financial circumstances that could impact their required REPAYE payment. The REPAYE repayment period is 20 years for undergraduate loans, and 25 years for consolidation of graduate loans or a combination of graduate and undergraduate loans. At the conclusion of the 20 or 25-year repayment period, any remaining balance is forgiven. *But see infra* III.B.3 (discussing 10-year repayment term for the Public Service Loan Forgiveness Program).

Although interest continues to accrue at the contract rate in the REPAYE, the government will pay unpaid accrued interest on Direct Loan Program subsidized loans for up to three consecutive years from the date the borrower enters the REPAYE. Following the 3-year period, ED charges 50% of the remaining accrued interest on subsidized loans during periods of negative amortization. If monthly payment does not cover all interest, unpaid interest is capitalized when the borrower leaves the plan except that amount capitalized under these conditions is limited to 10% of the original principal balance at time borrower entered REPAYE Plan.

i. Documenting income: Same as IBR.

ii. Rules for married borrowers: The rules for married borrowers under the REPAYE are different than the IBR. Under the REPAYE, a borrower must provide income documentation for both the borrower and his or her spouse regardless of whether the borrower files a joint or separate Federal income tax return unless the borrower and his or her

spouse (1) are separated or (2) the borrower is unable to reasonably assess the borrower's spouse's income information.

4. Public Service Loan Forgiveness: Borrowers who make 120 qualifying payments under the IBR, ICR, REPAYE, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. Public service includes employment with most local, state, federal, tribunal nation, or § 501(c)(3) corporations. There is specific language in this regulation that exempts any forgiven debt from constituting a taxable event. (Direct Loan Program loans only).

C. Alternative Payment Arrangements: Borrowers who believe that none of the payment options are suitable may request an alternative repayment plan from the Secretary of Education. *See* 34 C.F.R. § 685.208(l).

D. Suspension of Payments: In addition to the different types of repayment plans, borrowers may seek deferment or forbearance. Deferment or forbearance may be granted for specific bases stated in federal regulations, which include, but are not limited to, poor health, economic hardship, federal student loan payments equal to or greater than 20% of monthly gross income, or other reasons acceptable to ED.

During a deferment period, the government pays the interest accruing on subsidized loans. The borrower is responsible for interest that accrues on unsubsidized loans during a deferment. The borrower may pay the accruing interest on any unsubsidized loans or have it added to the principal when the deferment expires.

Forbearance postpones or reduces the monthly repayment for a limited, specific period, during which interest on subsidized and unsubsidized loans continues to accrue and is owed by the borrower. If the interest is not paid during the forbearance, it is added to the principal balance when the forbearance period ends.

V. PRACTICE TIPS

A. Who Has My Loans? ED maintains an information repository called National Student Loan Data Systems ("NSLDS"). NSLDS is a database that contains information, including chain of custody, interest rate, loan type, loan status, etc., regarding every *federal* student loan a person has borrowed. Lenders, servicers, and guarantors have access to borrower NSLDS reports if they hold the loan. Borrowers may access their own NSLDS reports by going to www.nslds.ed.gov. They must first obtain a PIN at www.pin.ed.gov.

B. Know *Who* to Name: When initiating a dischargeability action, debtors (with the assistance of their counsel if represented) should consult NSLDS to determine what entities hold a valid interest in their federally-backed loans. Debtors often mistakenly name their student loan servicers in lieu of ED, the lender, and/or the guarantor likely because the servicer was the last entity who contacted them. Servicers do not hold any right, title, or interest in the loans and, therefore, are not proper parties in a dischargeability adversary proceeding.

For federally-backed loans obtained through the Direct Loan Program, ED is usually—if not always—the only party to hold a valid interest in a Direct Loan. But, in the FFEL Program, debtors who have non-defaulted loans should be sure to name both the lender *and* the guarantor. Naming just the lender will be problematic because the guarantor has a contingent interest in the student loan debt and is a creditor in its own right. Thus, the guarantor is entitled to separate notice and a right to defend its rights separate and apart from the lender. *See Alfes v. Educ. Credit Mgmt Corp. (In re Alfes),* 709 F. 3d 631 (6th Cir. 2013). In *Alfes*, the 6th Circuit held that student loan guarantors had rights separate and apart from those received by assignment from the original lender. In affirming the district court, the Court ruled that these guarantor rights were not extinguished by a default judgment against the lender while the lender held the loan. In many adversary proceedings, the guarantor will seek to intervene or be substituted as a party defendant with respect to the federally-backed loans it receives. That being said, it is the responsibility of the plaintiff to name the correct parties.

VI. INDUSTRY RESOURCES

- National Student Loan Data System: www.nslds.ed.gov
- ED PIN website: www.pin.ed.gov
- Federal Student Aid: https://studentaid.ed.gov; https://studentloans.gov.
- Finaid (consumer financial aid website): www.finaid.org
- Department of Education www.ed.gov
- Department of Education Ombudsman Office www.ombudsman.ed.gov
- William D. Ford Federal Direct Loan Program: www.direct.ed.gov
- National Counsel of Higher Education Resources (www.ncher.us)
- Educational Credit Management Corporation (www.ecmc.org)
- FFEL Program Forms: (http://www.ecmc.org/topic/mainForms.html)
- Direct Loan Forms: https://studentloans.gov or contact your federal loan servicer

VII. PANELIST CONTACT INFORMATION

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JUDGE PASKAY ABI SEMINAR 2016

CONSUMER POTPOURRI - CHAPTER 13 PLAN MODIFICATION

WAYNE B. SPIVAK

I. WHEN IS PLAN MODIFICATION REQUIRED?

A. CHANGE OF CIRCUMSTANCES FOR INCOME, EXPENSES, ASSETS

B. ADMIN ORDER FOR MD FL

C. COMPLETION OF MEDIATION

II. CHANGE OF CIRCUMSTANCES

A. CHANGE OF INCOME/EXPENSES
   1. TAX RETURNS REVIEWED ANNUALLY
   2. AMENDED SCHEDULE I/J

B. POST PETITION ACQUISITION OF ASSETS–541(a)(5) negated by 1306(a)(1)
   1. *IN RE WALDRON* 536 F. 3d 1239 (11th Cir. 2008)
   2. *CAROL V. LOGAN*, 735 F.3d 147 (4th Cir. 2013)

C. POST PETITION LOSS OF HOMESTEAD EXEMPTION

D. SURRENDERING PROPERTY

III. OBJECTION TO MODIFED PLANS
   A. *IN RE FORD* 12-00615-JAF

IV. ADMIN ORDER IN MD FL ADMIN ORDER FLMB 2016-1, PRESCRIBING PROCEDURES FOR CH 13 CASES
   A. TAX REFUNDS GO TO TRUSTEE – Section 18
   B. COOPERATION WITH TRUSTEE – Section 21
   C. DUTY TO SUPPLEMENT – Section 22

V. FAILURE TO MODIFY CAN BE A BAD FAITH ISSUE
   A. 9011(b) “INQUIRY REASONABLE UNDER THE CIRCUMSTANCES”

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 4, 2008
THOMAS K. KAHN
CLERK

No. 07-15081

D. C. Docket No. 06-00270-CV-WTM-4
BKCY No. 04-41875-BKC-LW

MICHAEL WALDRON,
BARBARA A. WALDRON,

Debtors.

MICHAEL WALDRON,
BARBARA A. WALDRON,

Plaintiffs-Appellants,

versus

SYLVIA FORD BROWN,

Defendant,

O. BYRON MEREDITH, III,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(August 4, 2008)

Before EDMONDSON, Chief Judge, PRYOR, Circuit Judge, and JOHNSON,* District Judge.

PRYOR, Circuit Judge:

The issues in this appeal are whether a debtor's claims for legal relief that arose after the confirmation but before the completion of his plan to pay creditors are property of the estate, under Chapter 13 of the Bankruptcy Code, see 11 U.S.C. § 1306(a), and whether the bankruptcy court abused its discretion by requiring the debtor to amend his schedule of assets to disclose proceeds of any settlement of those claims, see Fed. R. Bankr. P. 1009. Michael and Barbara Waldron appeal the judgment that Mr. Waldron's claims for underinsured-motorist benefits are property of the Waldrons' bankruptcy estate and the Waldrons must disclose any settlement of those claims by an amendment of their schedule of assets. Because the plain text of section 1306(a) establishes that Mr. Waldron's claims are property of the estate and the bankruptcy court has the discretion to require an amendment of the debtors' schedule of assets, under Federal Rule of Bankruptcy Procedure 1009, we affirm.

I. BACKGROUND

The Waldrons filed a petition for relief under Chapter 13, and O. Byron

* Honorable Inge P. Johnson, United States District Judge for the Northern District of Alabama, sitting by designation.

Meredith became the trustee of the bankruptcy estate. On November 16, 2004, the bankruptcy court confirmed the Waldrons' plan to pay their creditors. That plan required the Waldrons to pay the trustee $516 a month.

Mr. Waldron suffered personal injuries in an automobile collision on May 10, 2005, before the Waldrons had completed their payments under the plan. The bankruptcy court approved both the settlement of Mr. Waldron's claim against the other driver for $25,000 and the disbursement of that amount to the Waldrons as part of their exempt property. Mr. Waldron also pursued claims for underinsured-motorist benefits against Georgia Farm Bureau and Selective Insurance Company. The Waldrons moved the bankruptcy court for the authority to settle those claims without further approval by the court. The Waldrons argued that any proceeds of a settlement would not be property of the estate.

The bankruptcy court ruled that Mr. Waldron's remaining claims were property of the estate and any settlement must be disclosed by an amendment of the debtors' schedule of assets and administered in the bankruptcy proceeding. The district court affirmed.

II. STANDARDS OF REVIEW

We review de novo the conclusions of law of both the bankruptcy court and the district court. Equitable Life Assurance Soc'y v. Sublett (In re Sublett), 895 F.2d 1381, 1383–84 (11th Cir. 1990). We review for an abuse of discretion an order of a bankruptcy court that requires a debtor to amend his schedule of assets. Kaelin v. Bassett (In re Kaelin), 308 F.3d 885, 888 (8th Cir. 2002); see also Friendly Fin. Discount Corp. v. Jones (In re Jones), 490 F.2d 452, 457 (5th Cir. 1974).

III. DISCUSSION

We divide our discussion into two sections. First, we address whether Mr. Waldron's claims for underinsured-motorist benefits are property of the estate. Second, we address whether the bankruptcy court abused its discretion when it required the Waldrons to amend their schedules of assets to disclose any settlement of Mr. Waldron's claims.

A. Mr. Waldron's Claims Are Property of the Estate.

Sections 1306(a) and 1327(b) of the Code define property of the estate in a proceeding under Chapter 13. Section 1306(a), on the one hand, expansively defines property of the estate to include all property acquired by the debtor after a case commences and until it ends or is converted:

> Property of the estate includes, in addition to the property specified in section 541 of this title—

> (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
>
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

11 U.S.C. § 1306(a). Section 1327(b), on the other hand, returns some property of the estate to the debtor upon confirmation of the plan: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Id. § 1327(b).

The question presented is whether Mr. Waldron's claims for underinsured-motorist benefits, which arose after confirmation of the Waldrons' plan to pay their creditors, are property of the estate under section 1306(a) or whether those claims are vested in Mr. Waldron under section 1327(b). The Waldrons argue that, upon confirmation, "all of the property of the bankruptcy estate 'revested' in the Waldrons by operation of Section 1327(b)" and Mr. Waldron's claims, which are not part of the Waldrons' plan, did not become property of the estate. The trustee responds that Mr. Waldron's claims are property of the estate under section 1306(a).

We conclude, based on the plain language of section 1306(a), that Mr. Waldron's claims are property of the estate. Mr. Waldron acquired his claims for underinsured-motorist benefits after the commencement of the Waldrons' bankruptcy case but before their case was dismissed, closed, or converted. Section 1306(a) does not mention the confirmation of the debtor's plan as an event relevant to what assets are property of the estate, see Sec. Bank v. Neiman, 1 F.3d 687, 689–91 (8th Cir. 1993), and section 1327(b) does not address assets acquired after confirmation. Section 1327(b) does not, as the Waldrons argue, automatically vest in the debtor assets acquired after confirmation. "If Congress had intended for confirmation to so dramatically affect the expansive definition of property of the estate found in [section] 1306, it knew how to draft such a provision." Id. at 691 (quoting Riddle v. Aneiro (In re Aneiro), 72 B.R. 424, 429 (Bankr. S.D. Cal. 1987)) (internal quotation marks omitted).

Our analysis is not, as the Waldrons argue, governed by the estate transformation approach that we adopted in Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000). We adopted that approach to resolve the tension between sections 1306(a) and 1327(b) regarding property interests that existed at confirmation:

> We . . . "read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all

> the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan."

Id. at 1340 (quoting Black v. U.S. Postal Serv. (In re Heath), 115 F.3d 521, 524 (7th Cir. 1997)). The debtor in Telfair sought to avoid liability for costs incurred in the collection of mortgage payments owed by the debtor outside his plan. The debtor argued that the mortgage payments were property of the estate protected by the automatic stay and could not be applied to pay the collection costs of the mortgagee, but the obligation to make those payments existed at confirmation and had been disclosed to the bankruptcy court, which allowed the payments to occur outside the debtor's plan. The debtor's assets used to make those mortgage payments were vested in the debtor at confirmation.

We did not address in Telfair entirely new property interests acquired by the debtor after confirmation and unencumbered by any preexisting obligation. We instead stated that "confirmation returns so much of that property to the debtor[]," and "that property" referred to the property of the debtor placed in the control of the bankruptcy court when the debtor filed his petition. Id. New assets that a debtor acquires unexpectedly after confirmation by definition do not exist at confirmation and cannot be returned to him then.

We are not alone in our reading of sections 1306(a) and 1327(b). The First Circuit also has concluded that assets acquired after confirmation are property of the estate. Barbosa v. Soloman, 235 F.3d 31, 36–37 (1st Cir. 2000). After their Chapter 13 plan was confirmed, the debtors in Barbosa sold their investment property for a price greater than the value stated in their initial schedules of assets. Id. at 33. The trustee then moved to modify the plan to increase the debtors' payments to the unsecured creditors. Id. at 33–34. The First Circuit agreed with the argument of the trustee that, after confirmation, the estate "continues to be funded by the Debtors' regular income and post-petition assets as specified in section 1306(a)." Id. at 37. The court reasoned that this approach "harmonizes two apparent inconsistent sections," 1306(a) and 1327(b); allows for meaningful plan modification under section 1329; and is consistent with the ability-to-pay policy underlying Chapter 13. Id. Numerous district and bankruptcy courts have reached the same conclusion. See, e.g., United States v. Harchar, 371 B.R. 254, 268 (N.D. Ohio 2007) (postconfirmation tax refund); Woodard v. Taco Bueno Rests., Inc., No. 4:05-CV-804-Y, 2006 WL 3542693, at *10–11 (N.D. Tex. Dec. 8, 2006) (postconfirmation claim for employment discrimination); In re Drew, 325 B.R. 765, 770 (Bankr. N.D. Ill. 2005) (proceeds of a mortgage refinancing completed postconfirmation); In re Pitts, No. 04-81133, 2005 Bankr. LEXIS 490,

at *27 (Bankr. C.D. Ill. Mar. 30, 2005) (life insurance proceeds acquired postconfirmation); In re Grogg, 295 B.R. 297, 302 (Bankr. C.D. Ill. 2003) (same); In re Nott, 269 B.R. 250, 257–58 (Bankr. M.D. Fla. 2000) (postconfirmation inheritance); Annese v. Kolenda (In re Kolenda), 212 B.R. 851, 855 (W.D. Mich. 1997) (automobile acquired with postconfirmation loan); In re Koonce, 54 B.R. 643, 645 (Bankr. D.S.C. 1985) (lottery winnings acquired postconfirmation).

As one court has explained, some property of the estate is vested in the debtor at confirmation, under section 1327(b), but property acquired later vests in the estate, under section 1306(a), until the case ends or is converted:

> While the case is pending, the post-petition property . . . [is] added to the estate until confirmation, the event that triggers [section] 1327(b) and "vests" the property of the estate in the debtor. That is, the property interests comprising the pre-confirmation estate property are transferred to the debtor at confirmation, and this "vesting" is free and clear of the claims or interests of creditors provided for by the plan, [section] 1327(b), (c). Finally, the property of the estate once again accumulates property by operation of [section] 1306(a) until the case is "closed, dismissed, or converted."

City of Chicago v. Fisher (In re Fisher), 203 B.R. 958, 962 (N.D. Ill. 1997). This interpretation "is consistent with the language of sections 1306(a) and 1327(b), and avoids creating a distinction among types of post-confirmation estate property where there exists no textual basis to do so." Id. at 962–63. We affirm the decision that Mr. Waldron's claims are property of the estate.

B. The Bankruptcy Court Did Not Abuse Its Discretion When It Required the Waldrons To Amend Their Schedules of Assets To Disclose Any Settlement of Mr. Waldron's Claims.

Our conclusion that Mr. Waldron's claims for underinsured-motorist benefits are property of the estate answers one of the two questions in this appeal; we must also determine whether the bankruptcy court abused its discretion when it required the Waldrons to amend their schedule of assets to disclose any settlement of Mr. Waldron's claims. The district court and bankruptcy court read our precedents as recognizing a debtor's continuing duty to disclose changes in his financial situation during the pendency of his bankruptcy. In the light of those precedents, the bankruptcy court did not abuse its discretion when it required the Waldrons to amend their schedule of assets to disclose any settlement of Mr. Waldron's claims.

We recognized a debtor's duty to disclose changes in his financial situation in Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002). Levi Billups filed a Chapter 13 petition and did not list any cause of action against his employer as an asset. Id. at 1284. Billups later filed an employment-discrimination suit against Pemco. Id. After Billups filed suit, he requested that his Chapter 13 bankruptcy petition be converted to a Chapter 7 petition. Id. Although the bankruptcy court ordered Billups to file an amended schedule of

assets with the Chapter 7 trustee to reflect any financial changes since the filing of his Chapter 13 petition, Billups never disclosed his pending lawsuit. Id. Billups later received a "no asset" discharge of his debts. Id. The district court concluded that Billups was judicially estopped from asserting his claim against Pemco because he had failed to disclose his claim to the bankruptcy court. Id. We affirmed and concluded that Billups had a continuing duty to disclose changes in financial circumstances:

> A debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court. The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change.

Id. at 1286 (citations omitted).

We later explained that a Chapter 13 debtor had a duty to disclose a claim for legal relief regardless of whether he later converted his case under Chapter 7. In De Leon v. Comcar Industries, Inc., Juan De Leon failed to disclose a complaint of employment discrimination that arose before he petitioned for bankruptcy under Chapter 13. 321 F.3d 1289, 1290–91 (11th Cir. 2003). The district court concluded that De Leon was judicially estopped from prosecuting his complaint of employment discrimination because he had not disclosed the claim. Id. at 1290. "Despite De Leon's continuing duty to disclose all assets or potential assets to the

bankruptcy court, he did not amend his bankruptcy documents to add a potential employment discrimination claim." Id. at 1291–92. We concluded that Burnes applied in proceedings under Chapter 13 and Chapter 7 alike because "any distinction between the types of bankruptcies available is not sufficient enough to affect the applicability of judicial estoppel because the need for complete and honest disclosure exists in all types of bankruptcies." Id. at 1291.

More recently, we concluded that a debtor had a duty to amend his schedule of assets to disclose a complaint that he filed after his plan to pay his creditors had been confirmed. Ajaka v. BrooksAmerica Mortgage Corp., 453 F.3d 1339, 1344 (11th Cir. 2006). After Temidayo Ajaka borrowed from BrooksAmerica $35,000 secured by a second mortgage on his primary residence, he filed a petition under Chapter 13. Id. at 1342. "There [was] no dispute that at the time he filed for bankruptcy," and "at the time the plan was confirmed, Ajaka was not aware of his potential . . . claim." Id. About one month later, Ajaka met with an attorney who told Ajaka that he may have a viable claim under the Truth In Lending Act, 15 U.S.C. §§ 1601–1615, and that Ajaka "would need to disclose his TILA claim as an asset in the bankruptcy proceeding." Ajaka, 453 F.3d at 1342. Ajaka later filed a complaint against BrooksAmerica, but he waited two months to amend his schedule to add the claim for relief as an asset. Id. at 1343. We considered

whether Ajaka was estopped from asserting his complaint against BrooksAmerica and concluded that he had "failed to timely amend his Chapter 13 reorganization plan to reflect his contingent TILA claim, and . . . he therefore 'took inconsistent positions . . . under oath in a prior proceeding.'" Id. at 1344 (second omission in original). We stated that Ajaka had a continuing duty to disclose changes in his financial situation and an amendment was the vehicle for that disclosure. Id. We did not affirm the application of judicial estoppel because an issue of material fact existed about whether Ajaka intended to manipulate the judicial system. Id. at 1345–46.

In the light of our precedents, the bankruptcy court did not abuse its discretion when it required the Waldrons to amend their schedule of assets to disclose any settlement Mr. Waldron may acquire after confirmation. Mr. Waldron must disclose the proceeds of any settlement of his claims for underinsured-motorist benefits. We agree with the district court and bankruptcy court that an amendment under Rule 1009 is a proper vehicle for that disclosure. Fed. R. Bankr. P. 1009.

The Waldrons argue that a postconfirmation duty of disclosure for Chapter 13 debtors conflicts with the Federal Rules of Bankruptcy Procedure, but we disagree. Section 521 of the Code, implemented through Rule 1007, requires the

debtor to file a schedule of all assets and liabilities at the commencement of the case, 11 U.S.C. § 521; Fed. R. Bankr. P. 1007(b), and Rule 1009 permits a debtor to amend his schedule and a court to order an amendment upon the motion of a party in interest, Fed. R. Bankr. P. 1009. These rules complement the continuing duty to disclose recognized by our precedents.

The disclosure of postconfirmation assets gives the trustee and creditors a meaningful right to request, under section 1329, a modification of the debtor's plan to pay his creditors. A confirmed plan may be modified at the request of the debtor, the trustee, or the holder of an allowed unsecured claim to "(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; [or to] (2) extend or reduce the time for such payments." 11 U.S.C. § 1329(a). Payments under a plan are based on the debtor's disposable income when the plan is confirmed. Id. § 1325(b)(1)(B). When a debtor discloses assets acquired after confirmation, creditors may move the bankruptcy court to modify the plan to increase payments made by the debtor to satisfy a larger percentage of the creditors' claims. Id. § 1329(a)(1). If postconfirmation assets were not subject to disclosure, modifications for increased payments would be rare because few debtors would voluntarily disclose new assets, and the trustee and creditors would be unlikely to obtain this information from sources other than the debtor.

The Waldrons argue that a duty to disclose assets acquired after confirmation unduly burdens Chapter 13 debtors, but we disagree. The bankruptcy court is entitled to learn about a substantial asset that the court had not considered when it confirmed the debtors' plan. The Waldrons speculate that debtors will have to amend their schedule of assets to disclose their wages, "weekly groceries, or every tank of gasoline" as new assets, but these assets are the kind that are taken into account by the debtor's plan or are consumed after having been purchased with assets vested in the debtor at confirmation. The bankruptcy court did not require the Waldrons to amend their schedule of assets to disclose ordinary consumption of goods and services.

We do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty, cf. Fed. R. Bankr. P. 1007(h) (requiring a debtor to supplement his schedule regarding interests acquired after petition under section 541(a)(5) of the Code), and our precedents in Burnes, De Leon, and Ajaka do not address that issue. But the bankruptcy court has the discretion, under Rule 1009, to require a debtor to amend his schedule of assets to disclose a new property interest acquired after the confirmation of the debtor's plan.

The Waldrons also argue that, if the court orders a modification of the plan based on postconfirmation assets, the debtor will not have any assets to satisfy the claims of creditors who relied on postconfirmation assets to extend credit to the debtor, but our conclusion balances the competing interests of a debtor's prepetition and postpetition creditors. "[T]o allow post-confirmation creditors to undermine the ability of pre-confirmation creditors to be paid would place creditors who were or should have been aware of debtors' financial difficulties in a better position than those who may have extended credit before debtors' precarious financial position[s] arose." Kolenda, 212 B.R. at 855. During the pendency of the plan, the "competing demands between pre-petition creditors . . . and post-petition creditors can be reconciled and balanced by the court on a case-by-case basis in the context of a motion for relief from the automatic stay." Montclair Prop. Owners Ass'n v. Reynard (In re Reynard), 250 B.R. 241, 249 (Bankr. E.D. Va. 2000).

As we recognized in Burnes, "[f]ull and honest disclosure in a bankruptcy case is 'crucial to the effective functioning of the federal bankruptcy system,'" 291 F.3d at 1286 (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996)), and postconfirmation disclosure reinforces the ability-to-pay standard of Chapter 13. "Congress . . . intended . . . that the debtor

repay his creditors to the extent of his capability during the Chapter 13 period." Arnold v. Weast (In re Arnold), 869 F.2d 240, 242 (4th Cir. 1989) (citing Deans v. O'Donnell (In re Deans), 692 F.2d 968, 972 (4th Cir. 1982)); see also 11 U.S.C. §1325(b); Barbosa, 235 F.3d at 37. "Certainly Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors." Arnold, 869 F.2d at 242. When a debtor discloses assets acquired after confirmation to the court, his creditors may share in any unanticipated gain if the court determines that these assets are available to repay debts. See 11 U.S.C. § 1329(a)–(b). If he loses a stream of income, a debtor likewise can move to modify his plan to decrease his payments. Id. § 1329(a); see also Sys. & Servs. Techs., Inc. v. Davis (In re Davis), 314 F.3d 567, 570 (11th Cir. 2002). Under the ability-to-pay standard, creditors share both the gains and losses of the debtor.

IV. CONCLUSION

The judgment in favor of the trustee is

AFFIRMED.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1024

RICKEY DEAN CARROLL; CHERI CARROLL,

Debtors-Appellants,

v.

JOHN FLETCHER LOGAN,

Trustee – Appellee.

Appeal from the United States Bankruptcy Court for the Eastern District of North Carolina, at Wilson. J. Rich Leonard, United States Bankruptcy Judge. (09-01177-8-JRL)

Argued: September 17, 2013 Decided: October 28, 2013

Before NIEMEYER, WYNN, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Niemeyer and Judge Floyd joined.

ARGUED: Cortney I. Walker, SASSER LAW FIRM, Cary, North Carolina, for Appellants. John Fletcher Logan, OFFICE OF THE CHAPTER 13 TRUSTEE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Travis Sasser, SASSER LAW FIRM, Cary, North Carolina, for Appellants. Michael Brandon Burnett, OFFICE OF THE CHAPTER 13 TRUSTEE, Raleigh, North Carolina, for Appellee.

WYNN, Circuit Judge:

This appeal concerns whether Bankruptcy Code Section 1306(a) extends the 180-day time limit under Bankruptcy Code Section 541 for identifying property that may be included in a bankruptcy estate. Appellants Rickey Dean Carroll and Cheri Carroll argue that the bankruptcy court erred by including an inheritance that postdated their Chapter 13 bankruptcy petition by more than 180 days as part of their bankruptcy estate. Because Section 1306(a) plainly extends the timeline for including "the kind" of property "specified in" Section 541 in Chapter 13 bankruptcy estates, we affirm the bankruptcy court's inclusion of the inheritance in the Carrolls' Chapter 13 bankruptcy estate.

I.

In February 2009, the Carrolls filed a joint petition for relief under Chapter 13 of the Bankruptcy Code. Under that reorganization chapter, debtors with regular income pay back a portion of their debts through a repayment plan. The Carrolls' repayment plan, approved in August 2009, required them to pay $2,416 for 6 months followed by $2,480 for 54 months.

In August 2012, over three years after filing their Chapter 13 petition, the Carrolls notified the bankruptcy court that Mr.

Carroll's mother had died in December 2011 and that, as a consequence, Mr. Carroll anticipated an inheritance of approximately $100,000. Because Mr. Carroll acquired the inherited interest before their bankruptcy case was closed, dismissed, or converted to a proceeding under another bankruptcy code chapter, the Chapter 13 trustee moved to modify the Carrolls' repayment plan to include "an amount of the Inheritance, if and when received, sufficient to pay in full all of the allowed general unsecured claims . . . ." J.A. 76.

Over the Carrolls' objection, the bankruptcy court held that Mr. Carroll's inheritance was property of the bankruptcy estate. In re Carroll, 09-01177-8-JRL, 2012 WL 5512356, at *1 (Bankr. E.D.N.C. Nov. 14, 2012). The bankruptcy court thus ordered that the inheritance be included in the Carrolls' plan to pay unsecured creditors, who, under the original repayment plan, were expected to receive payment on 3.8% of their allowed claims. Id. at *2. The Carrolls noticed their appeal, and the bankruptcy court stayed its order and certified a direct appeal to this Court.

II.

The sole issue on appeal is whether the bankruptcy court properly included Mr. Carroll's inheritance, which postdated the

Carrolls' bankruptcy petition by more than 180 days, in the bankruptcy estate. We review this issue of law de novo. In re Maharaj, 681 F.3d 558, 568 (4th Cir. 2012).

The interplay of Bankruptcy Code Sections 541 and 1306 is at the heart of this dispute. We begin our analysis with the statutes' plain language. "In arriving at the plain meaning, we . . . assume that the legislature used words that meant what it intended; that all words had a purpose and were meant to be read consistently; and that the statute's true meaning provides a rational response to the relevant situation." Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 975 (4th Cir. 1993).

Bankruptcy Code Section 541 identifies the property included in bankruptcy estates generally. 11 U.S.C. § 541. The statute, which is not specific to any particular type of bankruptcy proceeding, includes in estates:

> 5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180
> days after such date--
> (A) by bequest, devise, or **inheritance**[.]

11 U.S.C. § 541(a)(5) (emphasis added).

Section 1306(a) then expands the definition of estate property for Chapter 13 cases specifically, stating:

> (a) Property of the estate includes, **in addition to the property specified in section 541** of [the Code]--

> (1) all property **of the kind specified in such section** that the debtor acquires after the commencement of the case but **before the case is closed, dismissed, or converted** to a case under chapter 7, 11, or 12 of [the Code], whichever occurs first; and

11 U.S.C. § 1306(a) (emphasis added).

Congress has harmonized these two statutes for us. With Section 541, Congress established a general definition for bankruptcy estates. With Section 1306, it then expanded on that definition specifically for purposes of Chapter 13 cases. Thus, "Section 1306 broadens the definition of property of the estate for chapter 13 purposes to include all property acquired and all earnings from services performed by the debtor after the commencement of the case." S. Rep. No. 95-989, at 140-41 (1978).

The statutes' plain language manifests Congress's intent to expand the estate for Chapter 13 purposes by capturing the types, or "kind," of property described in Section 541 (such as bequests, devises, and inheritances), but not the 180-day temporal restriction. 11 U.S.C. § 1306(a). This is because "[t]he kind of property is a distinct concept from the time at which the debtor's interest in the property was acquired." In re Tinney, 07-42020-JJR13, 2012 WL 2742457, at *2 (Bankr. N.D. Ala. July 9, 2012). And on its face, Section 1306(a) incorporates only the kind of property described in Section 541 into its expanded temporal framework.

In essence, Section 1306 is a straightforward formula for calculating Chapter 13 estates:

A Chapter 13 Bankruptcy Estate	=	Property described in Section 541	+	The kind of property (e.g., inheritances) described in Section 541 and acquired before the Chapter 13 case is closed, dismissed, or converted

See 11 U.S.C. 1306(a).

Section 1306's extension of a Chapter 13 bankruptcy estate's reach until the Chapter 13 case is closed, dismissed, or converted constitutes "a rational response to the relevant situation." Salomon Forex, 8 F.3d at 975. Chapter 13 proceedings provide debtors with significant benefits: For example, debtors may retain encumbered assets and have their defaults cured, while secured creditors have long-term payment plans imposed upon them and unsecured creditors may receive payment on only a fraction of their claims. See 11 U.S.C. §§ 1322, 1325.[1]

[1] By contrast, in Chapter 7 liquidation proceedings, a debtor's estate is largely subject to liquidation. Generally, the estate is "identified with a snapshot taken of the debtor's property when his petition for relief is filed." In re Tinney, 2012 WL 2742457, at *2. And the secured creditors are soon free to foreclose on mortgages and repossess encumbered cars and other property. Id. In turn, the debtor is not subject to multi-year repayment obligations.

In exchange for those benefits, a Chapter 13 debtor makes a multi-year commitment to repay obligations under a court-confirmed plan. Id. The repayment plan remains subject to modification for reasons including a debtor's decreased ability to pay according to plan, as well as the debtor's increased ability to pay. See 11 U.S.C. § 1329. As we have stated before, "[w]hen a [Chapter 13] debtor's financial fortunes improve, the creditors should share some of the wealth." In re Arnold, 869 F.2d 240, 243 (4th Cir. 1989).[2]

The overwhelming majority of courts to have addressed this issue "agree that § 1306 modifies the § 541 time period in Chapter 13 cases." In re Vannordstrand, 356 B.R. 788, at *2 (B.A.P. 10th Cir. 2007) (collecting cases); see also In re Tinney, 2012 WL 2742457, at *1 (noting that "[t]he large majority of courts to address the issue agree" and collecting cases). Several treatises state the proposition matter-of-factly. See, e.g., Hon. Joan N. Feeney, Bankruptcy Law Manual

[2] In In re Arnold, we did not address Sections 541 and 1306. Nevertheless, we had to decide whether a $120,000 increase in the debtor's annual income warranted modification of his Chapter 13 repayment plan. We held that the bankruptcy court did not abuse its discretion by increasing the debtor's plan payments to account for his substantially increased income. "It is grossly unfair for a debtor, who experiences an increase in yearly income of $120,000, to refuse to share some of that with creditors who are getting no more than 20 cents on the dollar for their claims under the original Chapter 13 plan." In re Arnold, 869 F.2d at 243.

§ 13:13 (5th ed. 2013) ("Significantly, property of the estate in Chapter 13 cases is a broader concept as it includes property also described in § 1306, which supplements § 541's definition of property of the estate of Chapter 13 debtors."); 8A Corpus Juris Secundum Bankruptcy § 561 (2013) ("In a Chapter 13 individual debt adjudgment case, the estate includes property of the kind generally included in estates, notwithstanding the fact that such property is acquired by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under Chapter 7, 11, or 12 . . . ."). And even this Court has indicated that Section 1306(a) "adds certain property to a § 541 bankruptcy estate in the Chapter 13 context." In re Maharaj, 681 F.3d at 564.[3]

The Carrolls nevertheless contend that Mr. Carroll's inheritance should be excluded from their Chapter 13 bankruptcy estate under two principles of statutory interpretation: the principle that courts "must give effect to every word of a statute," and the principle that "specific language in a statute governs general language." Appellants' Br. at 8-9. We are convinced by neither argument.

[3] We recognize that a couple of courts have taken a contrary view. See In re Key, 465 B.R. 709, 712 (Bankr. S.D. Ga. 2012); In re Walsh, 07-60774, 2011 WL 2621018, at *2 (Bankr. S.D. Ga. June 15, 2011); and In re Schlottman, 319 B.R. 23, 24-25 (Bankr. M.D. Fla. 2004). However, we find those outlier cases unconvincing.

Unquestionably, we agree that courts should give effect to every word of a statute whenever possible. Broughman v. Carver, 624 F.3d 670, 677 (4th Cir. 2010). And doing so here requires us to reject the Carrolls' argument. For if Section 541's 180-day rule restricts what is included in a Chapter 13 estate, then Section 1306(a), which expands the temporal restriction for Chapter 13 purposes, loses all meaning. By contrast, neither statute is rendered superfluous, and both are given effect, if Section 1306(a)'s extended timing applies to Chapter 13 estates and supplements Section 541 with property acquired before the Chapter 13 case is closed, dismissed, or converted.

Further, while we know well the "canon of construction that 'the specific governs the general,'" Broughman, 624 F.3d at 676, applying that canon here does not further the Carrolls' cause. In particular, we reject the Carrolls' contention that Section 541(a)(5) is "specific" while Section 1306(a) is "general." On the contrary, Section 1306(a) is specific to Chapter 13 bankruptcies and defines estates solely for purposes of that reorganization chapter. Section 541, by contrast, is a general provision that provides generic contours for bankruptcy estates. Thus, even under the two statutory interpretation principles the Carrolls press, the bankruptcy court properly included the inherited property in the Carrolls' bankruptcy estate.

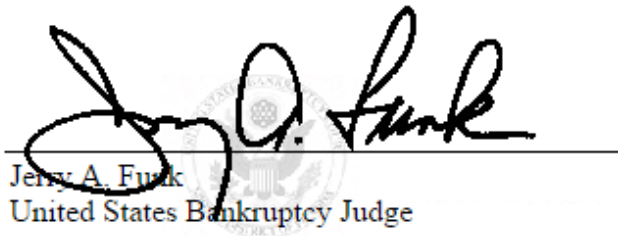
III.

The Supreme Court has eschewed interpreting the Bankruptcy Code such that it "would deny creditors payments that the debtor could easily make." Hamilton v. Lanning, 130 S. Ct. 2464, 2476 (2010). The plain language of Section 1306(a) blocks the Carrolls from depriving their creditors a part of their windfall acquired before their Chapter 13 case was closed, dismissed, or converted. Accordingly, the bankruptcy court correctly held that Mr. Carroll's inheritance was property of the bankruptcy estate under Section 1306(a).

AFFIRMED

ORDERED.

Dated: November 13, 2015



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Case No. 3:12-bk-615-JAF

ALFRED DANIEL FORD, SR.,

Debtor.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon Motion to Modify Confirmed Plan filed by Debtor (the "Motion to Modify") (Doc. 127). The Chapter 13 Trustee (the "Trustee") filed an Objection to the Motion to Modify. The Court conducted an evidentiary hearing on the matter on October 14, 2015 and elected to take the matter under advisement. Upon the evidence and the applicable law, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

On February 3, 2012, Debtor filed a Chapter 13 bankruptcy petition. At that time, Debtor was employed as a pilot by United Airlines. Along with his bankruptcy petition, Debtor filed a Statement of Current Monthly Income and Calculation of Commitment Period and Disposable

Income ("Debtor's Form 22C"). Debtor's Form 22C reflected monthly income of $15,610.00 comprised of: 1) $9,900.00 in wages; 2) $650.00 in rent and other real property income; 3) $50.00 in interest, dividends and royalties; and 4) $5,010.00 in retirement income. Debtor's Form 22C reflected monthly disposable income of $5,125.49.

Despite the fact that Debtor had monthly disposable income of $5,125.49, he proposed a plan which provided for no payments to unsecured creditors in months 1-2 of the Plan, provided for payments of only $1,312.00 to unsecured creditors in months 3-23 of the Plan, and provided for payments of only $2,408.00 to unsecured creditors in months 24-60 of the Plan. Because Debtor's Plan provided to pay unsecured claims in full, the Trustee did not object to the Plan, notwithstanding the fact that it did not require Debtor to pay all of his disposable income into the Plan. On January 27, 2014, the Court entered Order Confirming Chapter 13 Plan Allowing Claims and Directing Distribution (the "Confirmation Order"), which mirrored the payments proposed in Debtor's Plan.

In February of 2015, Debtor became disabled as a result of a torn meniscus. Additionally, in July of 2015, Debtor had neck fusion surgery to repair a herniated disk. Because of these injuries, Debtor can no longer qualify as a pilot and is unable to maintain employment with United Airlines. As a result, Debtor no longer earns wages and, in lieu thereof, receives $2,900.00 monthly in disability income.

On April 30, 2015, Debtor filed an Amended Form 22C ("Debtor's Amended Form 22C"). Debtor's Amended Form 22C reflects monthly income of $9,320.00 comprised of $5,370.00 in retirement income and $3,950.00 in long term disability. According to Debtor's Amended Form 22C, Debtor has a negative monthly disposable income of $266.86. In other words, Debtor has no ability to pay anything to unsecured creditors. On April 23, 2015, Debtor

filed a Modified Confirmed Chapter 13 plan by which he proposes to pay $1,466.04 per month for months 38 through 60 of the plan. The modified plan provides for no payments to unsecured creditors.

Conclusions of Law

Section 1329(b)(1) of the Bankruptcy Code permits the debtor, any time after confirmation of a plan but before the completion of payments under the plan, to seek a decrease in the amount of payments on claims of a particular class provided for by the plan. 11 U.S.C. § 1329(b)(1). A debtor seeking to modify his plan to decrease his plan payments must show a substantial, unanticipated change in circumstances. See In re Savilonis, Case No. 3:12-bk-5762-JAF, 2014 WL 3361986 at *2 (Bankr. M.D. Fla. July 9, 2014). While bankruptcy courts vary widely over what constitutes a substantial, unanticipated change, courts consider a change in the debtor's income or expenses and the debtor's medical condition in contemplating changed circumstances. In re Savilonis, 2014 WL 3361986 at *3.

The Trustee does not dispute that Debtor's medical conditions have resulted in a decrease in his income or that he has a negative monthly disposable income. The Trustee does not assert that this change in Debtor's circumstances is either insubstantial or anticipated. Additionally, the Trustee admits that he did not object to Debtor not paying all of his disposable income into the Plan because the Plan proposed to pay 100% of the unsecured claims in the case. However, the Trustee points out that if Debtor had paid all of his disposable income into the Plan as required by §§ 707 and 1325 of the Bankruptcy Code, the unsecured claims would have been paid off in month 23 of the Plan. The Trustee asserts that because Debtor should have made larger payments when he could have afforded to do so, he should not now be allowed to reduce the

distribution to unsecured creditors. The Trustee contends that Debtor should be required to pay 100% of the unsecured claims in the case.

"[A]ll participants in the bankruptcy case are barred by the doctrine of res judicata from asserting matters they could have raised in the bankruptcy proceedings before confirmation." In re Savilonis, 2014 WL 3361986 at *3 (citing In re Euler, 251 B.R. 740 (Bankr. M.D. Fla. 2000)). The Court conducts approximately 35-45 confirmation hearings every week. The Court does not conduct an independent review of every Chapter 13 case to ensure that each debtor's plan complies with the requirements of the Bankruptcy Code. Instead, the Court relies on the Trustee or an interested party to object to confirmation if a plan does not comply with the Code's mandates. While it is true that §§ 707 and 1325 of the Bankruptcy Code require a debtor to pay all of his disposable income into his plan, neither the Trustee nor any other interested party objected to confirmation of Debtor's Plan on the basis that it did not provide for payment of all of Debtor's disposable income into the Plan. The Trustee is barred from now raising this issue as a defense to Debtor's attempt to modify his Plan. The Court finds that Debtor has met his burden of showing a substantial and unanticipated change in circumstances and that based upon his income and expenses, he can no longer make plan payments which provide for payment to the unsecured creditors. Accordingly, the Court will grant Debtor's Motion to Modify. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

Rules & Procedures

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Open Letter to Debtors and their Counsel

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OPEN LETTER TO DEBTORS AND THEIR COUNSEL

I have noticed a disturbing trend among debtors and their counsel to treat the schedules and statement of affairs as "working papers" which can be freely amended as circumstances warrant and need not contain the exact, whole truth. Notwithstanding execution under penalty of perjury, debtors and their counsel seem to think that they are free to argue facts and values not contained in the schedules or even directly contrary to the schedules. Some debtors have felt justified signing a statement that they have only a few, or even a single creditor, in order to file an emergency petition, knowing full well that the statement is false.

Whatever your attitude is toward the schedules, you should know that as far as I am concerned they are the sacred text of any bankruptcy filing. There is no excuse for them not being 100% accurate and complete. Disclosure must be made to a fault. The filing of false schedules is a federal felony, and I do not hesitate to recommend prosecution of anyone who knowingly files a false schedule.

I have no idea where anyone got the idea that amendments can cure false schedules. The debtor has an obligation to correct schedules he or she knows are false, but amendment in no way cures a false filing. Any court may properly disregard subsequent sworn statement at odds with previous sworn statements. I give no weight at all to amendments filed after an issue has been raised.

As a practical matter, where false statements or omissions have come to light due to investigation by a creditor or trustee, it is virtually impossible for the debtor to demonstrate good faith in a Chapter 13 case or entitlement to a discharge in a Chapter 7 case. I strongly recommend that any of you harboring a cavalier attitude toward the schedules replace it with a good healthy dose of paranoia.

Dated: September 10, 1997 _____
Alan Jaroslovsky
U.S. Bankruptcy Judge

Section 109(e): The Chapter 13 Debt Limits

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To be eligible to file a chapter 13 case, a debtor must have secured and unsecured debts that fall below the debt limits set in 11 U.S.C. § 109(e).[1] Section 109(e) provides as follows:

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $383,175 and noncontingent, liquidated, secured debts of less than $1,149,525, or an individual with regular income and such individual's spouse, . . . may be a debtor under chapter 13 of this title.[2]

A. Treatment of Undersecured Debt

1. Arguments in Support of Claim Bifurcation

One of the initial issues is whether an undersecured debt should be considered a secured or an unsecured debt for purposes of the debt limits. Depending upon the facts of a particular case, the debtor may wish to argue that the entire amount of a secured debt should be considered against the $1,149,525 limit on secured debts, or that only the amount of the allowed secured claim (equal to the value of the collateral) based on the application of section 506(a) should be counted towards the secured debt limit, with the unsecured portion of the claim secured applied to the $383,175 limit on unsecured debts.

One early case considering this question illustrates the problem. In *In re Ballard*[3] the debtors owed secured creditors over $350,000 (the limit on secured debts at the time), but the property securing that debt was worth less than $350,000. A creditor asserted that the debtors were ineligible for chapter 13 because their secured debts were too high. It argued that claims are not filed or determined in a case until after the debtor's eligibility is decided, and that therefore the value of the collateral and any bifurcation of secured claims should not be considered because the court would have to rely on the debtors' valuation in the schedules. The creditor cited no reason why that valuation could not be challenged in a hearing if eligibility is contested.

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[1] Portions of this paper are derived from § 12.2 of the National Consumer Law Center's Consumer Bankruptcy Law and Practice (10th ed. 2012 and Supp.), updated at www.nclc.org/library, and reprinted here with the permission of NCLC.
[2] 11 U.S.C. § 109(e). The dollar amounts in section 109(e) are scheduled to adjust on April 1, 2016. *See* 11 U.S.C. § 104.
[3] 4 B.R. 271 (Bankr. E.D. Va. 1980).

The *Ballard* court rejected these arguments. It looked first to statements in the legislative history which referred to the $350,000 limit as a limit on "secured claims,"[4] and also to the statutory definition of "debt"[5] which incorporates the definition of "claim."[6] The court also found that because a debtor could almost always create a security interest, practically at will, it would undermine the intent of the Congressional limitations to allow the debtor to convert unsecured claims to secured claims in order to qualify for chapter 13. *Ballard* was later followed by all of the courts of appeals that have decided the issue to date.[7] One court of appeals has gone so far as to hold that a debt secured by a judicial lien that can be avoided by the debtor under section 522(f) should be considered an unsecured debt for eligibility purposes.[8]

2. Arguments Against Claim Bifurcation

Although the holding in *Ballard* and the cases which have followed it may often be helpful to consumer debtors with similar fact situations, at least as many debtors will have the opposite problem, in view of the lower limit on unsecured debts for chapter 13 eligibility.[9] This is particularly true in some jurisdictions where home values have dropped significantly and home mortgages are undersecured by significant amounts. In these areas, the bifurcation of secured debts into their secured and unsecured portions has threatened to make increasing numbers of debtors ineligible for chapter 13 based on the high amounts of mortgage debt that would be deemed unsecured debt.

These debtors will want to argue that Congress meant a distinction by using the word "debt" rather than "claim" in section 109(e), and that the *Ballard* court's reading of the definitions was superficial. The definition of "debt" as a "liability on a claim" could just as easily mean the total liability on a claim, whether secured or unsecured, before that claim is divided

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[4] 124 Cong. Rec. H11,089 (daily ed. Sept. 24, 1978) (remarks of Rep. Edwards); 124 Cong. Rec. S17,406 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini), reprinted in 1978 U.S.C.C.A.N. 6441, 6509.

[5] 11 U.S.C. § 101(12) defines "debt" as "liability on a claim."

[6] 11 U.S.C. § 101(5) defines "claim" as including a "right to payment, whether or not such right is . . . secured, or unsecured."

[7] *In re* Ficken, 2 F.3d 299 (8th Cir. 1993); *In re* Balbus, 933 F.2d 246 (4th Cir. 1991); Miller v. United States ex rel. Farmers Home Admin., 907 F.2d 80 (8th Cir. 1990); *In re* Day, 747 F.2d 405 (7th Cir. 1984). *See also* Cavaliere v. Sapir, 208 B.R. 784 (D. Conn. 1997) (only secured portion of mortgage claims counted in determining chapter 13 eligibility when debtor had previously discharged personal liability in chapter 7); *In re* Jerome, 112 B.R. 563 (Bankr. S.D.N.Y. 1990).
The court in *Balbus* rejected a creditor's argument that the hypothetical costs of liquidating the debtor's property should be deducted in determining the amounts of the secured and unsecured claims for this purpose.

[8] *In re* Scovis, 249 F.3d 975 (9th Cir. 2001). *See also In re* Werts, 410 B.R. 677 (Bankr. D. Kan. 2009) (applying same rationale to lien being stripped off under section 506(a)).

[9] *See, e.g.*, *In re* Day, 747 F.2d 405 (7th Cir. 1984); *In re* Bobroff, 32 B.R. 933 (Bankr. E.D. Pa. 1983).

into its secured and unsecured parts under section 506(a). This result, too, has some support in the case law.[10]

Courts have also accepted another argument that bifurcation should not occur in cases in which the secured debt is a mortgage secured only by real estate that is the debtor's principal residence. This argument relies upon the view that such mortgages generally cannot be bifurcated in chapter 13.[11] For such nonmodifiable mortgages, some courts have accepted the argument that it makes no sense to bifurcate them for purposes of a section 109(e) determination of chapter 13 eligibility.[12] However, if the debtor's plan proposes to strip off a wholly unsecured claim based on one of the accepted exceptions to the anti-modification provision in section 1322(b)(2), the court may treat the claim as unsecured.[13]

B. Debt Discharged in Prior Case

If a mortgage is nonrecourse, meaning that the creditor can look only to the property and there can be no deficiency judgment after a foreclosure, some courts have found that no unsecured debt can result. This most often arises because the mortgage debt has been discharged in a prior chapter 7 case.[14] However, other courts have held that the unsecured portion of mortgage debt that had been discharged in an earlier chapter 7 case is considered unsecured debt for chapter 13 eligibility based on the Code's broad definition of "claim," as construed by the Supreme Court in *Johnson v. Home State Bank*, 501 U.S. 78 (1991).[15]

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[10] *In re* Holland, 293 B.R. 425 (Bankr. N.D. Ohio 2002); *In re* Morton, 43 B.R. 215 (Bankr. E.D.N.Y. 1984).

[11] 11 U.S.C. § 1322(b)(2).

[12] *In re* Blackwell, 514 B.R. 19 (Bankr. N.D. Cal. 2014); *In re* Medina, 2010 WL 1462772 (Bankr. N.D. Cal. Apr. 12, 2010); *In re* Munoz, 428 B.R. 516 (Bankr. S.D. Cal. 2010); *In re* Smith, 419 B.R. 826 (Bankr. C.D. Cal. 2009). *But see In re* Werts, 410 B.R. 677 (Bankr. D. Kan. 2009).

[13] *See In re* Lantzy, 2010 WL 6259984 (B.A.P. 9th Cir. Dec. 7, 2010; *In re* Smith, 435 B.R. 637 (B.A.P. 9th Cir. 2010); *In re* Bernick, 440 B.R. 449 (Bankr. E.D. Va. 2010).

[14] *In re* Free, 2015 WL 9252592 (B.A.P. 9th Cir. Dec. 17, 2015) (wholly unsecured mortgage debt discharged in a prior chapter 7 case cannot be counted toward unsecured debt limit); Cavaliere v. Sapir, 208 B.R. 784 (D. Conn. 1997) (unsecured portion of mortgage claims discharged in prior chapter 7 bankruptcy not considered secured or unsecured debts for chapter 13 debt limitations); *In re* Blackwell, 514 B.R. 19 (Bankr. N.D. Cal. 2014) (entire amount of mortgage debt discharged in earlier chapter 7 case treated as secured debt); *In re* Shenas, 2011 WL 3236182 (Bankr. N.D. Cal. July 28, 2011) (discharged personal liability on mortgage debt not considered in unsecured debt calculation); *In re* Medina, 2010 WL 1462772 (Bankr. N.D. Cal. Apr. 12, 2010). *See also In re* Rosa, 521 B.R. 337 (Bankr. N.D. Cal. 2014)(mortgagee could not file claim for unsecured portion of claim because personal liability was discharged in prior chapter 7 case).

[15] *In re* Wimmer, 512 B.R. 498 (Bankr. S.D.N.Y. 2014); *In re* Branam, 476 B.R. 333 (Bankr. S.D. Fla. 2012) (final foreclosure judgment in excess of $12 million is enforceable *in rem* claim against the debtor's property under *Johnson* despite earlier chapter 7 discharge and treated as

C. Debts Secured by Property of Someone Other than the Debtor

Courts have similarly disagreed regarding whether a debt that is secured by property of someone other than the debtor should be considered a secured debt for purposes of section 109(e). It has been held that such debts should be considered secured debts,[16] and it has also been held that, because they are not secured by the debtor's property, they should be considered unsecured debts.[17]

D. Determining Whether Debts Are Liquidated and Non-Contingent

Further problems may arise in determining whether debts are liquidated or non-contingent and therefore countable toward the debt limitations. Neither term is defined in the Code, and thus state law concepts may come into play. As to these questions, debtors filing chapter 13 cases will want to classify the maximum number of debts as non-liquidated or contingent.

Regarding whether a debt is liquidated, the clearest cases are at the extremes. A promissory note as to which a judgment has been entered and to which there are no defenses is perhaps the paradigm of a liquidated debt.[18] A tort claim for personal injuries and pain and suffering, which has not been adjudicated, is clearly unliquidated. Between the extremes, however, there is more doubt.

If a debtor can assert any defense to a debt that is not foreclosed by res judicata or otherwise, it should be argued that the debt is not liquidated. Many of the definitions of "liquidated" suggest that when the amount owing is neither agreed upon nor fixed by operation of law the debt is not liquidated.[19] And even if the defenses go to only a part of the amount due,

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secured claim for eligibility purposes); *In re* DiClemente, 2012 WL 3314840 (D. N.J. Aug 13, 2012) (*in rem* claims of mortgage creditors following discharge of debtor's personal liability on mortgages in prior chapter 7 treated as unsecured debts for purposes of section 109(e)).

[16] Branch Banking & Trust Co. v. Russell, 188 B.R. 542 (E.D.N.C. 1995); *In re* White, 148 B.R. 283 (Bankr. N.D. Ohio 1992); *In re* Gorman, 58 B.R. 372 (Bankr. E.D.N.Y. 1986). *See also In re* Lindsey, Stephenson & Lindsey, 995 F.2d 626 (5th Cir. 1993).

[17] *In re* Lower, 311 B.R. 888 (Bankr. D. Colo. 2004) (debt considered secured only to the extent of the estate's interest in collateral); *In re* Brown, 250 B.R. 382 (Bankr. D. Idaho 2000); *In re* Tomlinson, 116 B.R. 80 (Bankr. E.D. Mich. 1990).

[18] *See In re* Vaughan, 36 B.R. 935 (N.D. Ala. 1984) (readily calculable contract debt was liquidated). *See also In re* Papatones, 143 F.3d 623 (1st Cir. 1998) (debt which had been adjudicated by court but not yet reduced to a docketed judgment was liquidated); *In re* Hammers, 988 F.2d 32 (5th Cir. 1993) (bankruptcy court could not look behind judgment to determine that part of claim was not allowable when claim had already been adjudicated by another tribunal).

[19] *In re* Sugg, 2014 Bankr. LEXIS 3134 (Bankr. D. Or. July 22, 2014)(debt was unliquidated because amount could be determined only after extensive hearing); *In re* Stouder, 2013 WL 504177 (Bankr. D. Kan. Feb. 11, 2013) (claim for attorney fees unliquidated because subject to

these definitions indicate that the debt as a whole should be considered unliquidated because its precise amount is not settled.[20] However, this test does not require that to be liquidated the debt must be *both* agreed upon and fixed by operation of law, so some courts have held that if the amount claimed is readily ascertainable, it is liquidated even if the debtor disputes liability.[21] The Eleventh Circuit has held that a debtor's federal income tax liabilities and penalties, asserted by the Internal Revenue Service in a statutory notice of deficiency and the subject of dispute in a Tax Court petition filed by the debtor, are liquidated unsecured debts for chapter 13 eligibility purposes.[22] The fact that a judgment entered against the debtor is on appeal or subject to post-judgment motions does not by itself make the debt contingent or unliquidated.[23]

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discretion of court); *In re* Horne, 277 B.R. 320 (Bankr. E.D. Tex. 2002) (debt was unliquidated when court had discretion in determining amount of damages). *See* Black's Law Dictionary 1079, 1080 (6th ed. 1990). *See also In re* Hull, 251 B.R. 726 (B.A.P. 9th Cir. 2000) (claim not liquidated because trial on the merits would have been necessary to liquidate claim); *In re* Harbaugh, 153 B.R. 54 (Bankr. D. Idaho 1993) (tax claim was liquidated only to extent it was undisputed or capable of being easily determined without evidentiary hearing); *In re* Robertson, 143 B.R. 76 (Bankr. N.D. Tex. 1992) (IRS claim for almost $900,000 was contingent and unliquidated because IRS had not yet proved tax law violations, which debtor disputed); *In re* Lambert, 43 B.R. 913 (Bankr. D. Utah 1984) (debt subject to bona fide dispute not counted); *In re* King, 9 B.R. 376 (Bankr. D. Or. 1981).

[20] *But see In re* Quintana, 915 F.2d 513 (9th Cir. 1990) (existence of a counterclaim does not reduce amount of claim for purposes of measuring amount of debt for eligibility under chapter 12).

[21] Mazzeo v. United States, 131 F.3d 295 (2d Cir. 1997); United States v. Verdunn, 89 F.3d 799 (11th Cir. 1996) (federal income tax liabilities and penalties were liquidated because they were easily ascertainable through application of fixed legal standards); *In re* Knight, 55 F.3d 231 (7th Cir. 1995) (fact that debt is disputed does not make it unliquidated if amount claimed is easily ascertainable); *In re* Wenberg, 902 F.2d 768 (9th Cir. 1990) (when creditor's damages were unliquidated, but award of attorney fees to creditor was "readily ascertainable" and therefore liquidated, attorney fees award was included in computation of debts), *aff'g* 94 B.R. 631 (B.A.P. 9th Cir. 1988); *In re* De Jounghe, 334 B.R. 760 (B.A.P. 1st Cir. 2005) (neither fact that debt was disputed nor possibly avoidable on a preference theory rendered debt unliquidated); *In re* Crescenzi, 69 B.R. 64 (S.D.N.Y. 1986); *In re* Arcella-Coffman, 318 B.R. 463 (Bankr. N.D. Ind. 2004) (claim is liquidated when judgment or discretion not required to establish amount). *But see In re* Ho, 274 B.R. 867 (B.A.P. 9th Cir. 2002) (substantial dispute about liability, requiring contested evidentiary hearing, can make debt unliquidated); United States v. May, 211 B.R. 991 (M.D. Fla. 1997) (debt found to be unliquidated because it could not be readily determined until Tax Court litigation was resolved).

[22] United States v. Verdunn, 89 F.3d 799, 800 (11th Cir. 1996).

[23] *See In re* Xenos Yuen, 2013 WL 5567266 (Bankr. S.D. Tex. Oct. 9, 2013); *In re* Wiencko, 275 B.R. 772 (Bankr. W.D. Va. 2002).

The question of contingency is somewhat more complicated. Generally, a contingent debt is one which is dependent upon some future event that may never occur.[24] An example is an agreement to pay a debt if (and only if) another person does not do so.[25] Cosigners on debts may be in this position depending on the terms of the contract and state law. The exact status of a debt must always be determined by both the applicable law and the facts.

There may be a dispute regarding whether the condition upon which the debt is contingent has occurred, which may in turn depend upon whether there were valid defenses that justified nonpayment by a principal debtor. Alternatively, the court may find that, due to known facts, the outcome of another proceeding need not be awaited for it to decide that the condition has occurred.[26] It may also find that, as a matter of state law, the creditors need not pursue other assets or co-obligors before looking to the debtor for payment.[27]

If a debt is contingent or unliquidated at the time of a chapter 7 petition, but becomes liquidated before a debtor converts a case to chapter 13, the debt must nonetheless be considered contingent or unliquidated, because the relevant date for determining its status is the date of the original bankruptcy petition.[28] Even when debtors may have misrepresented their eligibility, if a creditor or party in interest fails to raise the issue in a timely fashion and instead waits until after confirmation of a plan, a motion to dismiss will be denied because eligibility is not jurisdictional.[29]

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[24] Black's Law Dictionary 392 (6th ed. 1990). *See In re* Knight, 55 F.3d 231 (7th Cir. 1995) (debt is non-contingent if events giving rise to liability occurred before bankruptcy case was filed); *In re* Fostvedt, 823 F.2d 305 (9th Cir. 1987).

[25] *But see In re* Marchetto, 24 B.R. 967 (B.A.P. 1st Cir. 1982) (co-maker who signs as accommodation party is liable as a maker and bound without prior recourse to the principal); Glaubitz v. Grossman, 2011 WL 147931 (E.D. Wis. Jan. 18, 2011) (guaranty treated as a contingent liability).

[26] *See In re* Stebbins, 2015 Bankr. LEXIS 551 (Bankr. E.D.N.Y. Feb. 24, 2015)(guarantee on mortgage not contingent after mortgagor defaulted); *In re* Prince, 5 B.R. 432 (Bankr. W.D.N.Y. 1980) (court need not await outcome of chapter 7 proceeding concerning debtors' business to determine amount they would owe on loans they guaranteed when it was clear that over $100,000 in unsecured claims would not be paid in chapter 7 case).

[27] *In re* Fostvedt, 823 F.2d 305 (9th Cir. 1987) (debtor was jointly and severally liable); *In re* Glaubitz, 436 B.R. 99, 106 (Bankr. E.D. Wis. 2010) (contract did not require creditor to exhaust remedies against principal or its property); *In re* Kaufman, 93 B.R. 319 (Bankr. S.D.N.Y. 1988) (liability of an agent for an undisclosed principal was unconditional under state law). *See In re* Kelsey, 6 B.R. 114 (Bankr. S.D. Tex. 1980) (creditors of partnership need not first pursue partnership assets before looking to assets of a partner).

[28] *In re* Bush, 120 B.R. 403 (Bankr. E.D. Tex. 1990). *See also In re* Ash, 539 B.R. 807 (Bankr. E.D. Tenn. 2015) (eligibility determined based on amount of debtor's secured and unsecured debt when initial chapter 11 petition was filed and not when case was converted to chapter 13).

[29] *In re* Jones, 134 B.R. 274 (N.D. Ill. 1991); *In re* Dally, 110 B.R. 630 (Bankr. D. Conn. 1990) (mortgage debts could not be excluded from total of secured debts based upon debtor's attempted Truth in Lending rescission of those debts after the bankruptcy petition was filed).

E. Debt Limitations in Joint Cases

The language of 11 U.S.C. § 109(e) could be construed so that the combined debts of both joint filers are counted towards the debt limits.[30] However, some courts have held otherwise, so that each debtor's individual debts in a joint case are tested against the debt limits.[31]

For example, Judge Olson of the Southern District of Florida addressed this issue and relied upon an opinion of Judge Briskman:

> Judge Briskman of the Middle District has persuasively answered this question in a recent unpublished order. *See In re* Scholz, No. 6: 1 0–bk–08446–ABB (Bankr.M.D.Fla. Apr. 11, 2011). The joint debtors in *Scholz* filed a Chapter 13 petition with $386,221.31 of unsecured debt, and the Chapter 13 Trustee moved to dismiss because the Debtors jointly exceeded § 109(e)'s $360,475 limit. Judge Briskman held that the "plain and unambiguous language of Section 302(b)" provides that each Debtor's filing "creates a separate estate which may be administered jointly." *Id*. at 3. He further held that, because § 109(e) uses the word "individual" rather than "individuals," "[e]ach person who files a petition must individually meet the § 109(e) eligibility requirements" and:
>
> > It would be inconsistent with the plain meaning of the language of Sections 302(a), 302(b), and 109(e) to treat joint filers as a consolidated entity, whose debts taken together may not exceed the Section 109(e) ceilings, rather than two separate individuals who must separately each qualify as a debtor pursuant to Section 109(e). It would also be inconsistent with the exemption of assets to treat joint filers as a consolidated entity rather than separate individuals. Each debtor in a joint case may claim exemptions separately. *In re* Gatto, 380 B.R. 88, 95 (Bankr.M.D.Fla.2007). *Id*. at 4.[32]

If the court has indicated that the debts of joint filers must be combined, it may be possible to avoid eligibility issues by filing separate cases for a married couple rather than filing a joint petition. Because the debt limitation amounts would then apply separately to the debts of each, rather than to their combined debts as in a joint case, the total amount of combined debt permitted can be increased to the extent that the debts owed are not joint obligations. In other

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[30] *In re* Pete, 541 B.R. 917 (Bankr. N.D. Ga. 2015) (debtors were ineligible to file chapter 13 case based on their aggregate unsecured debt even though the unsecured debt of each debtor, considered individually, was less than debt limit); *In re* Miller, 493 B.R. 55 (Bankr. N.D. Ill. 2013).

[31] *See In re* Hannon, 455 B.R. 814 (Bankr. S.D. Fla. 2011); *In re* Bosco, 2010 WL 4668595 (Bankr. E.D.N.C. Nov. 9, 2010); *In re* Werts, 410 B.R. 677 (Bankr. D. Kan. 2009) (debts not combined for eligibility test in joint case).

[32] *In re* Hannon, 455 B.R. 814, 815-16 (Bankr. S.D. Fla. 2011).

cases, if one spouse owes a large debt which exceeds the eligibility limits and the other does not, the goals of the bankruptcy often may be accomplished by filing a chapter 13 petition for only the spouse not owing the large debt. In such a case, the codebtor stay would protect the non-filing spouse with respect to most joint debts and the incomes of both spouses could be used to cure or satisfy the claims of secured creditors or other creditors.

F. Procedure for Determining Eligibility

The courts have also differed concerning whether a hearing is necessary to determine the amount of non-contingent liquidated claims. While some courts have held that such a hearing may be appropriate,[33] the Sixth and Seventh Circuits have held that the court should normally rely solely upon the representations in the debtor's chapter 13 filings, provided that the representations are made in good faith.[34] The Sixth Circuit found that the dollar limits of section 109(e) are analogous to the amount in controversy jurisdictional requirement in federal diversity cases. Noting that section 109(e) states nothing about computing eligibility after a hearing on disputed claims, and that the Code contemplates that a chapter 13 case will move expeditiously to confirmation, the Sixth Circuit concluded that a hearing on threshold eligibility issues would defeat the Code's objectives.[35]

As in the diversity situation, the Sixth Circuit held that having a hearing on the merits of the claim at the outset of the case is unnecessary and that the case should not be dismissed unless it appears to a legal certainty that the debtor is not eligible.[36] If it appears that the debtor meets the requirements of section 109(e) when the case is commenced based upon good faith statements in the debtor's schedules, courts have held that the case may proceed as a chapter 13 even if subsequent determinations prove that this initial determination was incorrect, because eligibility is determined as of the date the petition is filed.[37] In a similar vein, other courts have held that eligibility provisions contained in section 109 are not jurisdictional.[38] This protects

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[33] *See, e.g., In re* Sylvester, 19 B.R. 671 (B.A.P. 9th Cir. 1982).

[34] *In re* Lybrook, 951 F.2d 136 (7th Cir. 1991); *In re* Pearson, 773 F.2d 751 (6th Cir. 1985). *But see In re* Wentz, 2014 Bankr. LEXIS 4628 (Bankr. E.D. Ky. Nov. 6, 2014)(court not bound by amounts in schedules and can look to other reliable sources of information).

[35] *In re* Pearson, 773 F.2d 751, 756, 757 (6th Cir. 1985). *But see* Lucoski v. Internal Revenue Serv., 126 B.R. 332 (S.D. Ind. 1991) (court may look beyond the schedules if it determines, within reasonable period of time, that debts exceed statutory limits).

[36] Pearson, 773 F.2d at 757.

[37] *Id*., at 758. *See also In re* Slack, 187 F.3d 1070 (9th Cir. 1999) (eligibility determined as of date of petition; postpetition state court judgment did not affect eligibility); *In re* Ridgon, 94 B.R. 602 (Bankr. W.D. Mo. 1988) (court looked beyond debtors' schedules to find debtors ineligible only because schedules were filed in bad faith).

[38] Rudd v. Laughlin, 866 F.2d 1040 (8th Cir. 1989) (fact that debtors were ineligible for chapter 13 did not deprive bankruptcy court of jurisdiction necessary to enter valid order converting case to chapter 7); *In re* Jarvis, 78 B.R. 288 (Bankr. D. Or. 1987). *See also* Gen. Lending Corp. v. Cancio, 505 B.R. 63 (S.D. Fla. 2014), *aff'd* 578 Fed. Appx. 632 (11th Cir. 2014)(challenge to eligibility first made after debtors had made two years of payments, even though made before

judgments and orders entered in a bankruptcy case from collateral attack on the basis of the provisions of section 109.[39]

confirmation of plan, barred by laches); *In re* Republic Trust & Sav. Co., 59 B.R. 606 (Bankr. N.D. Okla. 1986) (eligibility challenged in chapter 11). *But see In re* Harwood, 519 B.R. 535 (Bankr. N.D. Cal. 2014) (laches did not prevent trustee from filing dismissal motion more than three years after commencement of case).

[39] *In re* Jarvis, 78 B.R. 288 (Bankr. D. Or. 1987).