

Consumer Track

I Surrender: Getting Rid of Unwanted Encumbered Property in a Consumer Bankruptcy Case

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Surrendering and Vesting Chapter 13 Issues

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I. ELIMINATING OVER-ENCUMBERED PROPERTY IN CHAPTER 13 THROUGH SURRENDER AND VESTING.

1. Potential problems a Debtor faces when the Lender won't foreclose on a house the debtor does not want.

- a. Future HOA fees.
 - i. Debtor's personal liability for HOA dues continues post-petition and is unaffected by his discharge.
Foster v. Double R Ranch Assoc. (In re Foster), 435 B.R. 650 (9th Cir. BAP 2010).
 - ii. HOA dues are non-dischargeable pursuant to 11 U.S.C §523(a)(16).
 - iii. HOA dues are also non-dischargeable under a "hardship" discharge under Section 1328(b).
- b. Property taxes
- c. Fines imposed by the city for failure to maintain property.
- d. Damage claims from accidents that occur on the property.
 - i. Squatters, mosquito-infested swimming pools and natural gas leaks.
- e. If the bank takes its sweet time to foreclose, this situation can go on for years and put the Debtor in debt all over again.

2. Lender has NO Explicit duty to Foreclose

- a. Debtor cannot compel the lender to foreclose.
- b. A lender's failure to foreclose is not a violation of the discharge injunction.

3. Why do we need the banks to foreclose if the property has been "surrendered" in the Debtor's Chapter 13 Plan or Schedules?

- a. Surrendering property in chapter 13 plan does **not** transfer title of the surrendered property.
- b. Surrender is not a defined term in the Code, but has been described as the relinquishment of all rights in property, including the right to possess the collateral.
- c. "Surrender" just means that the Debtor will not oppose the transfer of the house and absent some further action (foreclosure, short sale, deed in lieu), surrender does not divest the debtor of ownership or responsibility.
- d. Just because the debtor surrendered his interest in his home does not mean that there is any requirement for the lender to foreclose.

4. Chapter 7 does NOT help

- a. The Code seems to offer little help if the Lender doesn't want to foreclose.
- b. If the home is "underwater", the Chapter 7 trustee will simply abandon it under §541, and the title will remain in the debtor's name and subject to the ongoing charges/liability discussed above.

II. CHAPTER 13: TRANSFERRING THE HOUSE TO THE BANK THROUGH THE CHAPTER 13 PLAN

1. Three Important Provisions:

- a. 11 U.S.C. §1322(b) sets forth what a Chapter 13 plan may contain and
- b. 11 U.S.C. §1325(a) lists criteria which, if met, shall result in the Court confirming a proposed plan.
- c. 11 U.S.C. §1325(a)(3) states that a Court may not confirm a plan unless it is proposed in good faith.

2. 11 U.S.C. §1322(b)(9)

- a. As noted above, merely surrendering property in a chapter 13 plan does not vest title in the secured creditor.
- b. Section 1322(b)(2) says you CANNOT modify the rights of mortgagee who has a security interest in the debtor's principal residence.
- c. However, Section 1322(b)(9) allows a debtor to propose a plan to "provide for the **"vesting"** of property of the estate, on confirmation of the plan or at a later time, in the debtor or in **any other entity**".
- d. The plain meaning of vesting includes a present transfer of ownership.

3. 11 U.S.C. §1325(a)(5)

- a. This section sets out the requirements to confirm a chapter 13 plan as it relates to a secured creditor:
- b. In order to confirm a plan, the plan must either be:
 - 1. Accepted by the secured creditor;
 - 2. Pay the debt as allowed under Chapter 13; or
 - 3. Surrender the property to the secured creditor.

4. 11 U.S.C. §1325(a)(3)

- a. A Plan must be proposed in good faith.
- b. Confirmation could be denied if a debtor attempts to use §1322(b)(9) to transfer property back to the lender to avoid responsibility for a nuisance or environmental problems.

5. How do we deal with Section 1322(b)(9) and Section 1322(b)(2)?

- a. Section 1322(b)(2) says you CANNOT modify the rights of mortgagee who has a security interest in the debtor's principal residence.
- b. However, Section 1322(b)(9) allows a debtor to propose a plan to "provide for the **"vesting"** of property of the estate, on confirmation of the plan or at a later time, in the debtor or in **any other entity**".
- c. Is vesting of the property considered a modification?
 - i. Isn't that what the Lender bargained for in response to non-payment by the Debtor?

III. THREE RECENT DECISIONS DEALING WITH A CHAPTER 13 DEBTOR'S ATTEMPT TO VEST TITLE TO THEIR HOME VIA A CHAPTER 13 PLAN.

1. In re Rosa – 495 B.R. 522 (Bankr. D. Haw. 2013)

- a. Summary of Facts: Debtor proposed a Chapter 13 plan which provided for surrender of her home and that title would vest in the lender upon confirmation. Lender did not object, but the Chapter 13 trustee did.
- b. Section 1322(b)(9):
 - i. Court held that §1322(b)(9) authorized the Debtor to include vesting language in the plan.
 - ii. However, the Court concluded that the Debtor's rights under 1322(b)(9) were constrained by the requirements of §1325(a)(5) – *plan confirmation standards*.
- c. Section 1325(a)(5)
 - i. The Court dealt with the issue of whether the plan can be confirmed with this non-standard vesting provision.
 - ii. Section 1325 sets out the requirements to confirm a chapter 13 plan as it relates to a secured creditor. The plan must either:
 1. Be accepted by the secured creditor;
 2. Pay the debt as allowed under Chapter 13; or
 3. Surrender the property to the secured creditor.
 - iii. This Court held that a Chapter 13 plan cannot vest surrendered property in the Lender **without the Lender's consent**.
 1. The Court reasoned that under Section 1325(a)(5) – the only way to treat the creditor was under the first standard – acceptance by the secured creditor.
 2. The Court further reasoned that the second standard (Payment of the Debt) was not applicable to these facts.
 3. Finally, the Court held that the third standard - Surrender- was not an option because the debtor proposed vesting in addition to surrender.
- d. Section 1325 and Acceptance
 - i. If a creditor does not object to the confirmation of the plan, then Section 1325 has been satisfied.
 - ii. Court reasoned that acceptance can be inferred if the Creditor did not object.
- e. Notice
 - i. This Court concluded that there was adequate notice of the proposed chapter 13 plan. The lender had notice and failed to object.
 - ii. Plan was confirmed based upon the Acceptance standard (non-objection) by the secured creditor.

- f. **Also see:**
- i. In re Williams, 542 B.R. 514 (Bankr.KS.2015)
 - ii. In re Weller, 2016 Bankr. LEXIS 108 (Bankr.C.D.MA. 2016)
 - iii. In re Sherwood, 2016 Bankr. LEXIS 236 (Bankr.S.D.NY. 2016).
 - iv. In re Tosi, 2016 Bankr. LEXIS 690 (Bankr. E.D.MA. 2016).
 - v. HBC Bank USA, N.A. v. Zair, 2016 U.S. Dist. LEXIS 49032 (April 12, 2016)
 - vi. In re Lemming, 532 B.R. 398 (Bankr. N.D.GA. 2015)

2. **In re Rose**, 512 B.R. 790 (Bankr. W.D.N.C. 2014)

- a. **Summary of Facts:**
- i. Debtors' confirmed Chapter 13 plan provided for the surrender of their home to the SBA.
 - ii. Relief from the stay was granted for the SBA to foreclose.
 - iii. SBA never foreclosed and the Debtors filed a Motion for Authority to Transfer Real Property to SBA by Quitclaim Deed.
- b. **Section 1322(b)(9): - Plan Contents**
- i. This Court held that vesting under §1322(b)(9) does NOT require a Creditor to ACCEPT title to property.
 - ii. This Court further reasoned that §1322(b)(9) contemplates that a plan "may" revest property in third parties, it does NOT state whether such relief can be imposed on a third party at the debtor's election.
 - iii. This Court disagreed with the interpretation of §1322(b)(9) held in *In re Rosa*.
 - 1. "This Court held that taking title by deed could impair a lender's rights in the collateral, subject it to ownership liabilities that it never would have voluntarily assumed, and contravene state property law"
- c. **Section 1325(a)(5): - Plan Confirmation**
- i. Section 1325 sets out the requirements to confirm a chapter 13 plan as it relates to a secured creditor. The plan must either be:
 - 4. Accepted by the secured creditor;
 - 5. Pay the debt as allowed under Chapter 13; or
 - 6. Surrender the property to the secured creditor.
 - ii. This Court held that surrendering the home pursuant to 11 U.S.C. §1325(a)(5)(C) does **not** require a creditor to accept the surrendered property.
- d. **Section 105(a)**
- i. *Section 105* gives the bankruptcy court the power to issue any orders, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.

- ii. This Court held that §105 does not allow Court to alter the substantive rights of the parties.

e. **Conclusion:**

- i. Held that A mortgage holder's failure to object to vesting does NOT constitute consent.
- ii. Court gave the debtor the choice to deliver a quitclaim deed to the mortgage holder, with the deed becoming a final conveyance only if the mortgage holder failed to take a definitive action within 60 days after receiving the deed.

f. **Also see:**

- i. In re Brown, Case No. 14-12357-JNF (Bankr.MA.2014, Memorandum)
- ii. In re Stewart, 536 B.R. 273 (Bankr.MN.2015)
- iii. In re Sagendorph, 2015 Bankr.LEXIS 2055 (Bankr.C.D.MA. 2015)

3. **In re Watt, 520 B.R. 834 (Bankr.D. Or.2014)**

**** An appeal to the 9th Circuit Bankruptcy Appellate Panel is pending.**

a. **Summary of Facts:**

- i. Debtors propose a chapter 13 plan vesting title to their property in the lender.

b. **Section 1322(b)(9):**

- i. §1322(b)(9) – nothing in the language requires consent from the lender.
- ii. “ A plan which provides for vesting of property in a secured lender at time of confirmation may be confirmed over the lender's objection.
- iii. However, a plan must still comply with §1325(a)(5) with respect to how secured creditors are treated.

c. **Section 1325(a)(5):**

- i. Section 1325 sets out the requirements to confirm a chapter 13 plan as it relates to a secured creditor. The plan must either be:
 - 1. Accepted by the secured creditor;
 - 2. Pay the debt as allowed under Chapter 13; or
 - 3. Surrender the property to the secured creditor.
- ii. Unlike Rose and Rosa Courts, this Court held that the plan **can be** confirmed under the “Surrender” option of 1325.
 - 1. Therefore there is no need for the creditor to “accept”.
- iii. This Court rejects *Rosa's* holding that the “surrender” option cannot be used if the Debtor is also attempting to vest his interest as well.

d. **Section 1325(a)(3):**

- i. The court cannot confirm a plan unless it is proposed in good faith.

- ii. Therefore, a Debtor cannot use Section 1322(b)(9) to transfer property to a third party to relieve themselves of the responsibility for a nuisance or some other environmental problem on their property.
- e. **Reversed by U.S. District Court in:**
 - i. Bank of N.Y. Mellon v. Watt, 2015 WL 1879680 (April 22, 2015)

IV. Other Options for Getting Rid of your Property

1. Short Sale

- a. This occurs when a homeowner sells his home to a third party for less than the total debt remaining on the mortgage and the lender agrees to accept the proceeds in exchange for releasing the lien on the property.
- b. The Short Sale Application/Process
 - i) Sellers submits an application which usually includes a financial statement re income/expenses.
 - ii) Proof of income to be provided to the lender
 - iii) Tax returns and bank statements
 - iv) Hardship letter.
 - v) Purchase offer – lenders generally require an offer on the table from a third party before they will consider a short sale.

2. Deed in Lieu of Foreclosure

- a. A deed in lieu of foreclosure is a transaction where the homeowner/borrower transfers the property by deed back to the lender voluntarily in return for negotiated resolution of the debt.
- b. Some lenders require the borrower to request a loss mitigation package from the lender.
- c. Borrower will provide financial information including proof of income, tax returns, bank statements and hardship letter.
- d. Many lenders require the borrow to try to sell the home for at least 90 days before it will consider accepting a deed in lieu.

3. Sale Subject to the Mortgage

- a. No application of §363(f).
- b. No modification of mortgagee's rights.
- c. Buyers may be available.

4. Transfer by Quit Claim Deed

- a. Deeds must be prepared/executed by the form your state/county requires.
- b. Must be accepted by the new owner.
- c. The recipient of the transfer must be capable of owning property or may be seen as fraud
 - i) Cannot transfer to your pet or to a non-existent entity.

5. Lease the property until the lender forecloses

- a. Use the rent to pay the ongoing HOPA dues, taxes and maintenance.

6. Live for free ☺

IV PRACTICAL ADVICE TO GIVE THE DEBTOR

1. If you have decided to move out of your house, do so prior to filing the bankruptcy so you won't have to deal with the potential problems in §1322(b)(2).
 - a. §1322(b)(2): a plan may “modify the rights of holders of secured claims, other than a claim secured by a security interest in real property that is the debtor’s principal residence...”

Surrendering and Vesting Chapter 13 Issues



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What we're going to discuss

The problem: Debtors can't afford their mortgage, but the home isn't worth as much as the mortgage balance—it's "underwater."

The question: Can debtors give up the home and stop ongoing expenses, including maintenance, taxes, and homeowners association assessments?

Chapter 7 isn't likely to help

- The trustee, not the debtor, controls estate property.
- **§ 554(a)**: “[T]he trustee may abandon any property of the estate . . . that is of inconsequential value and benefit to the estate.”
- Since the property can't be sold for more than the mortgage, the trustee will abandon it, and the debtor will remain in title, subject to the ongoing charges.

Chapter 7 isn't likely to help

- And that's not all.
- **§ 523(a)(16)**: The Chapter 7 discharge does not cover postpetition homeowners association fees.
- So, after a Chapter 7 discharge, but before the home is sold or the mortgagee takes title, the debtor is personally liable for all the costs of ownership other than the mortgage itself.
- A deal of some sort is likely the only option in Chapter 7.

Chapter 13 Possibilities

- **§ 1303:** Debtors have the power of a trustee under §363 to sell estate property. There might be **5 possibilities**—
 1. **Sell** the home **free and clear** of the mortgage lien.
 2. **Simply surrender** the home to the mortgagee.
 3. **Surrender** the home **and vest** it in the mortgagee.
 4. **Transfer** the home to the mortgagee **to pay the debt**.
 5. **Sell** the home **subject to** the mortgage lien.Let's look at each one.

1. Sale free and clear?

- Probably won't work—two reasons.
- **First reason, § 1322(b)(2):** A plan may “modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence . . .*”
- A short sale that terminated the mortgage would obviously modify the mortgagee's rights.
- So the home can't be the debtor's principal residence at the time of the bankruptcy filing.

1. Sale free and clear?

- And if the property isn't the debtor's principal residence—
- **Second reason, § 363(f):** “The [debtor] may sell property . . . free and clear of [liens], **only if** one of five conditions applies.
 - (1) applicable nonbankruptcy law permits [such a] sale . . .
 - (2) [the lienholder] consents . . .
 - (3) the [sale] price . . . is greater than the aggregate value of all liens on such property . . .

The question raised by § 363(f)(3)

- Is the sale of a home at market price (plus \$1) “greater than the aggregate value” of the liens on the home?
 - Some Chapter 11 cases say “Yes,” *e.g.*, *In re Boston Generating, LLC*, 440 B.R. 302, 332 (Bankr. S.D.N.Y. 2010).
 - But most Chapter 11 decisions say “No,” *e.g.*, *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25, 41 (9th Cir. BAP 2008). And at least one Chapter 13 decision agrees—the “aggregate value” is the face amount of the liens. *In re Canonigo*, 276 B.R. 257, 260–64 (Bankr. N.D.Cal. 2002).
 - If not, the other paragraphs of § 363(f) are superfluous

1. Sale free and clear?

- Probably doesn't work. Two reasons:
- **Second reason, § 363(f):** "The [debtor] may sell property . . . free and clear of [liens], **only if**—
 - (4) such interest is in bona fide dispute
 - (5) [the sale] could be compelled, in a legal or equitable proceeding

The question raised by § 363(f)(5)

- Is a **Chapter 11 cramdown** sale "a legal or equitable proceeding" that the debtor could use to force a sale?
 - § 1129(b)(2)(A)(ii) lets a Chapter 11 plan propose sales free and clear of liens as long as credit bidding is allowed. *Rad-LAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065 (2012).
 - *In re Gulf States Steel, Inc.*, 285 B.R. 497, 412 (Bankr. N.D.Ala.2002), says Chapter 11 plan confirmation is a legal or equitable proceeding allowing § 363(f)(5) sales.

The question raised by § 363(f)(5)

- Is a **Chapter 11 cramdown** sale “a legal or equitable proceeding” that the debtor could use to force a sale?
 - But using § 1129(b)(2)(A)(ii) as a sale right to make §363(f)(5) applicable is rejected in *In re PW, LLC*, 391 B.R. 25, 46 (9th Cir. BAP 2008) (“§ 1129(b)(2) permits a cramdown of a lien to the value of the collateral, but it does so only in the context of plan confirmation.”).

The question raised by § 363(f)(5)

- Is the hypothetical potential for the property being subject to **eminent domain** a sale that “could be compelled in a legal or equitable proceeding”?
 - No published opinion appears to adopt this position.
 - Several reject it. *E.g.*, *In re Haskell L.P.*, 321 B.R. 1, 9 (Bankr. D.Mass. 2005) (“[T]he only logical interpretation of . . . § 363(f)(5) is . . . that the trustee or the debtor [must] be the party able to compel monetary satisfaction for the interest which is the subject of the sale.”)
 - Both this and cramdown have the problem of superfluity.

1. Sale free and clear?

- Bottom line: for a sale free and clear:
 - the debtor must have a different residence from the property that the debtor no longer wants to own, and
 - the court must accept a minority interpretation of § 363(f)(3) or § 363(f)(5).

2. Simple surrender to the mortgagee?

- Doesn't work.
- § 1325(a)(5) does allow surrender: In addition to (A) acceptance of plan treatment by the creditor or (B) cramdown, a secured claim may be satisfied (C) if “the debtor surrenders the property securing such claim to [the claim] holder.”
- But “surrender” doesn't convey ownership.
- And it can't convey ownership—multiple creditors.

2. Simple surrender to the mortgagee?

- *In re Rosa*, 495 B.R. 522, 524 (Bankr. D. Haw. 2013), states **the rule**:
- “[S]urrender does not transfer ownership of the surrendered property.”
- “Rather, ‘surrender’ means only that the debtor will **make the collateral available** so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral.”

3. Surrender plus vesting?

- § 1322(b)(9): a plan may “provide for the **vesting of property of the estate . . . in . . . any . . . entity**.”
- This possibility is a matter very much in dispute.
- So far, there are **12 decisions** dealing with surrender/vesting; all **accept** that **vesting transfers ownership**.
- **But** they **disagree about** whether a plan can **impose vesting** on an unwilling mortgagee.

3. Surrender plus vesting?

The 13 decisions.

- 1. *In re Rosa*, 495 B.R. at 524, holds that “because the debtor proposes **vesting** in addition to surrender. . . the plan is confirmable **only if** the first standard [of § 1325(a)(5)]—**acceptance**—is met.”
- Confirms the plan only because the mortgagee did not object.

3. Surrender plus vesting?

The 13 decisions.

- 2. *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014): similar result but greater protection to the mortgagee.
- If the mortgagee does not object to **vesting**, the debtor **must give the mortgagee a quitclaim deed**, effective only if the mortgagee fails to take action to refuse the deed within 60 days after receiving it.

3. Surrender plus vesting?

The 13 decisions.

- 3. *In re Watt*, 520 B.R. 834, 839 (Bankr. D. Or. 2014), allows surrender and non-consensual vesting:
- “[N]othing in . . . § 1322(b)(9) requires . . . consent. [A] plan . . . for **vesting** of property in a secured lender . . . **may be confirmed over the lender's objection.**”
- The **good faith** requirement of § 1325(a)(5) **prevents** the **transfer of negative-value property.**

3. Surrender plus vesting?

The 13 decisions.

- 4. *Bank of New York Mellon v. Watt*, 2015 WL 1879680 (D. Or. 2015), reverses the bankruptcy court:
- “§ 1325(a)(5) . . . states that **a plan is confirmable solely where surrender is proposed.** . . . Here, debtors’ . . . plan did not merely propose the cessation of their interest in the Property, it also forcibly transferred that interest, and the attendant liabilities”
- **Now on appeal** to the 9th Circuit.

3. Surrender plus vesting?

The 13 decisions.

- 5. *In re Sagendorph*, 2015 WL 3867955 (Bankr. D. Mass. June 22, 2015), agrees on all points with the bankruptcy court decision in *Watt*: “[A] transfer of property presupposes its surrender by the transferor.”
- 6. *In re Zair*, 535 B.R. 15 (Bankr. E.D.N.Y. 2015), agrees with *Sagendorph*, and cites § 1327(a), which vests property in the debtor at confirmation unless the plan provides otherwise. Now on appeal.

3. Surrender plus vesting?

The 13 decisions.

- 7. *In re Stewart*, 536 B.R. 273 (Bankr. D.Minn. 2015): “While the ‘surrender’ concept . . . and the ‘vesting’ concept . . . are different, they may nonetheless be used in tandem when providing for the treatment of a secured claim in a chapter 13 plan.”
- 8. *In re Williams*, 542 B.R. 514 (Bankr. D. Kan. 2015): agrees with the *Watt* reversal. Notes unpublished contrary opinion from another judge in the district.

3. Surrender plus vesting?

The 13 decisions.

- 9. *In re Weller*, 2016 WL 164645 (Bankr. D. Mass. Jan. 13, 2016). “This Court agrees with the conclusion in *Sagendorf* that §§ 1325(a)(5) and 1322(b)(9) are not in conflict,” but holds that the provisions of § 1322(b) only are effective with creditor consent.
- 10. *In re Sherwood*, 2016 WL 355520 (Bankr. S.D.N.Y. Jan. 28, 2016). Agrees with the anti-vesting decisions.

3. Surrender plus vesting?

The 13 decisions.

- 11. *In re Tosi*, 2016 WL 859034 (Bankr. D. Mass. March 4, 2016). “[s]urrender [does] not merely . . . cede possessory rights, but . . . permit[s] the creditor to exercise its preexisting property rights as to the collateral.”
- 12. *In re Brown*, No. 14-12357-JNF (Bankr. D. Mass. March 4, 2016). Allows vesting as payment: “[N]othing in § 1325(a)(5)(C) undercuts a debtor’s ability to rely on the permissive provisions in § 1322(b).”

3. Surrender plus vesting?

The 13 decisions.

- 13. *In re Zair*, 2016 WL 1448647 (E.D.N.Y. April 12, 2016). Summarizes prior decisions; reverses bankruptcy court.
- Current score: 5 decisions allow nonconsensual vesting; 8 don't.
- But note the effect of *Bullard*.
- Why pro bono appellate counsel can help.

4. Transfer in payment of the claim?

- § 1322(b)(8): a plan may “provide for the payment of . . . a claim . . . from property of the estate”
- Two conflicting opinions.
- *In re Lemming*, 532 B.R. 398, 410 (Bankr. N.D. Ga. 2015), says not in Chapter 13: § 1322(b)(8) “was enacted to enable payment of claims from property . . . only after such property was liquidated.”
- But—

4. Transfer in payment of the claim?

- *In re Brown* states that payment of secured claims by transferring the collateral is authorized by § 1322(b)(8). No. 14-12357-JNF at 25: “There is nothing in § 1322(b)(8) that requires an additional element of consent of a mortgagee to a transfer of property as treatment of a secured claim.”
- And—

4. Transfer in payment of the claim?

- *In re Kerwin*, 996 F.2d 552, 557 (2d Cir. 1993)
- Chapter 12 debtor owns two pieces of mortgaged farm land, wants to transfer one of them to the creditor in full payment of the mortgage, and keep the other.
- Creditor says, I want both or pay me in cash.
- Court agrees that “the property securing [a secured claim] in (C) refers to all the debtor's collateral and that a transfer of only part of the collateral cannot be accomplished through that section.”

4. Transfer in payment of the claim?

- But goes on to say: “In contrast, **under a [1225(a)(5)](B) distribution of property** a creditor's claim may be deemed fully satisfied provided the property ‘to be distributed’ has been valued as at least equal to the amount of that claim.”
- So an objecting creditor is required to accept payment of its claim through the conveyance of all of its collateral.
- The language of § 1325(a)(5)(B) is identical.

4. Transfer in payment of the claim?

- And what about § 1325(a)(5)(B)? Almost always used for cramdown, but look at the language.
- (i) the plan provides that—
 - (I) the holder of such claim **retain the lien** securing such claim until the earlier of—
 - (aa) the payment of the underlying debt determined under nonbankruptcy law; or
 - (bb) discharge under section 1328; and

4. Transfer in payment of the claim?

- (ii) **the value**, as of the effective date of the plan, **of property to be distributed** under the plan **on account of such claim is not less than the allowed amount** of such claim; and
- (iii) **if—**
 - (I) **property** to be distributed pursuant to this subsection is in the form of **periodic payments**, such payments shall be in equal monthly amounts

4. Transfer in payment of the claim?

- If collateral can be transferred to pay a secured claim under § 1325(a)(5)(B), the meaning of “surrender” under (5)(C) would no longer be relevant.
- Property would only be “surrendered” to junior lienholders, while the allowed secured claim of the first mortgagee would be fully satisfied by the transfer of the collateral, with the lien satisfied at discharge.
- State law property rights would be expressly superseded.

5. Sale subject to the lien?

- **§ 363(b):** sale may be made on notice; no § 363(f) limits.
- Should be possible, but no case law.
- Mortgagee's rights are not modified; no § 1322(b)(2) violation; right to credit bid granted by § 363(k).
- Buyers may be available: non-profit housing center?
- Good faith may be satisfied by the mortgagee's short sale alternative.

Hypothetical Chapter 13 test case

- Debtors file to avoid the cost of owning the home they live in at the time of filing.
- The only lien on the home is for \$300,000.
- The home is valued at \$200,000—underwater.
- What can the debtor do to remove ownership of the home?

Hypothetical Chapter 13 test case

- Possibility 1: Surrender and vesting with a short sale option given to the mortgagee.
- Possibility 2: Payment by property transfer with a short sale option given to the mortgagee.
- Possibility 3: Sale subject to liens with a short sale option given to the mortgagee.
- Would it matter if the debtors had moved before filing?
- What if there were junior liens?

Other questions

