Real Estate Values Are Climbing (Again): Debtor, Watch Your Back!

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REAL ESTATE VALUES ARE RISING (AGAIN): DEBTOR WATCH YOUR BACK!

I. Rising Real Estate Values & Consumer Bankruptcy Cases (Agenda)

A. Automatic Stay
B. Reaffirmation
C. Lien Stripping
D. Surrender
E. Mortgage Modification Mediation Programs

II. Automatic Stay

A. What are creditors doing?
B. How are debtors handling?

III. Reaffirmation

A. Debtor's perspective
B. Creditor's perspective
C. Lien Stripping

IV. Lien Stripping: Chapter 7 & Chapter 20

A. Chapter 7
B. *Dewsnup v. Timm* (1992)
   1. Decided before *Nobleman*
   2. Chapter 7 debtor was trying to cram down her mortgage to the value of the property
   3. The Supreme Court looked at the legislative history surrounding the enactment of the Code in 1978 and said it could find no indication Congress intended to depart from pre-Code bankruptcy law that allowed cram downs in the reorganization chapters only.
   4. A few courts have recognized that the Supreme Court only addressed strip downs (i.e., reducing an under secured lien to the fair market value of the collateral)
   5. But the Fourth, Sixth and Ninth Circuits have applied the ruling in *Dewsnup* to prohibit both strip-offs and strip-downs
   6. The Fourth Circuit expressly found there was no substantive distinction between strip-offs and strip-downs
C. *In re McNeal* (11th circuit)
   1. The 3 judge panel said reliance on *Dewsnup v. Timm* was incorrect because that's a strip down case and the Supreme Court specifically limited its ruling to the facts in the case
   2. The panel said that, instead, you need to look at *Folendore*, an 11th circuit case decided before *Dewsnup*, and, which the panel said was still good law
   3. The decision was unpublished at first
D. *Bank of America v. Caulkett* (Supreme Court)
   1. The case involved two cases from Florida, both involving Bank of America: David Caulkett, and Edelmiro Toledo-Cardona

2. After oral argument, many thought that, in the very least, the Supreme Court would uphold a debtor's ability to perform a lien strip in Chapter 7

3. There was some speculation that *Dewsnup* might even get overturned

4. The Court's holding in *Dewsnup* provided that a claim was "secured" as long as it was supported by any security interest in the property, even if the value of that property would be sufficient to cover the claim

5. Thus, under *Dewsnup*, § 506(d) voids a lien only when the claim supporting the lien was not allowed under § 502

6. The Court held unanimously that *Dewsnup* resolved the issue presented in these cases, because both of Bank of America's claims were secured by liens under *Dewsnup*, and were allowed under § 502

7. The Court declined the debtors' invitation to adopt a distinction between wholly underwater liens (like Bank of America's liens in these cases) and partially underwater liens (like the liens in *Dewnsup*)

E. What happens if a debtor receives a discharge in Chapter 7 and then files a Chapter 13 within the next 4 years?

1. This is commonly known as Chapter 20

2. Can a debtor strip off a wholly unsecured lien even though s/he is not eligible to receive a discharge in the Chapter 13 case?

3. A few years ago, the growing minority was yes; now, the majority of courts agree

4. 3 relevant Code sections in the debate are:

a) 1328(f)(1) prohibits an individual from receiving a discharge in a chapter 13 if he or she has received a discharge in 7, 11, or 12 in the last 4 years

b) 1322(b)(2)prevents modification of a claim that is secured only by the principal residence

c) 1325(a)(5)the plan must provide that the holder of an allowed secured claim retain its lien until the earlier of a) the payment of the underlying debt, or b) discharge

5. **No:** Since the debtor is not eligible for discharge, the only way to extinguish the lien is by payment of the underlying debt, in full

6. **Yes:** Whether a debtor is eligible for discharge is irrelevant

a) If the claim is unsecured pursuant to section 506, then the debtor may modify the rights of the secured creditor pursuant to 1322(b)(2), and 1325(a)(5) is inapplicable since it only applies to secured claims

b) *In re Davis*, 716 F.3d 331 (4th Cir. 2013)

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e) *In re Boukatch*, 533 B.R. 292 (9th Cir. BAP 2015)

f) *In re Scantling*, 754 F.3d 1323 (11th Cir. 2014)

F. No Consensual Liens

1. *In re Mayer*: A new limitation on *Dewsnup*.

a) On November 20, 2015, the U.S. Bankruptcy Court for the Eastern District of Louisiana further limited the applicability of *Dewsnup* by holding that a nonconsensual lien is avoidable when insufficient equity exists to secure its debt.

b) The *Mayer* decision impacts the holders of an entire class of liens by providing debtors with an argument for avoiding nonconsensual liens that are under secured

V. Surrender

A. Forced Transfer or Vesting of Title

1. *In re Arsenault*, 456 B.R. 627 (Bankr. S.D. Ga. 2011)
2. *In re Rosa*, 495 B.R. 522 (Bankr. D. Haw. 2013)
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B. Surrender: Post-Discharge and/or Post Confirmation

1. *In re Failla*, 529 BR 786, 792 (Bankr. SDFL 2014). Post-discharge in a chapter 7 case, Chief Judge Paul Hyman entered an order granting Citibank's motion to compel debtors to "surrender" certain real property, pursuant to their statement of intention, explaining that "the Debtors are not permitted to defend or oppose the [post-discharge] 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." Chief Judge Hyman's decision was later affirmed on appeal at 542 B.R. 606 (S.D. Fla. 2015). The debtors have filed an appeal to the Eleventh Circuit. As of the date of these materials, the appeal is pending.

2. *In re Metzler*, 530 B.R. 894 (Bankr. MDFL 2015). In a combined memorandum opinion dealing with a chapter 7 and a chaper 13 case, Chief Judge Michael G. Williamson held that the term "'[s]urrender' must mean something. 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."

3. *In re Calzadilla*, 534 B.R. 216 (Bankr. SDFL 2015). After the debtor's mortgage modification mediation failed to result in a loan modification, the debtors modified their plan to terminate the stay as to the secured creditor, but did not explicitly "surrender" the real property as set forth in the court's mortgage modification mediation order. The secured creditor filed a motion to compel surrender. Judge Robert A. Mark held that (1) the debtors' modified plan should have surrendered the property after mediation failed, and (2) "by surrendering the property under the plan, the Debtors cannot return to state court and contest the lender's right to complete its foreclosure."

4. *In re Lapeyre*, 544 B.R. 719 (Bankr. SDFL 2016). In a chapter 13 case where the debtors confirmed a plan surrendering real property, Judge Robert A. Mark entered an order compelling the chapter 13 debtor to withdraw their affirmative defenses and counterclaim they subsequently filed in the foreclosure proceeding. Judge Mark explained "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."

5. Additional Cases to Consider:
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   b) *In re Kourogenis*, 539 B.R. 786 (Bankr. SDFL 2015)
   c) *In re El Kouby*, Case No.: 14-23934 (SDFL – LMI)
   d) *One West Bank FSB v. Francis*, 2016 WL 1389291 (Fla. 17th Cir. 2016)

VI. Mortgage Modification Mediation Update – Tips from a Creditor's Attorney

A. History and State of the Program

B. Tips from the Creditor's Attorney
   1. Remember the goal
   2. Mediators matter
   3. Communication is key
   4. Good faith

Consumer Real Estate Panel

Real Estate Values are Rising (Again) Debtor Watch your Back!

Rising Real Estate Values & Consumer Bankruptcy Cases (Agenda)

- Automatic Stay
- Reaffirmation
- Lien Stripping
- Surrender
- Mortgage Modification Mediation Programs

Automatic Stay

- What are creditors doing?
- How are debtors handling?

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- Debtor's perspective
- Creditor's perspective

Lien Stripping

Chapter 7 & Chapter 20

Lien Stripping: Chapter 7

Dewsnup v. Timm (1992)

- Decided before *Nobleman*
- Chapter 7 debtor was trying to cram down her mortgage to the value of the property
- The Supreme Court looked at the legislative history surrounding the enactment of the Code in 1978 and said it could find no indication Congress intended to depart from pre-Code bankruptcy law that allowed cram downs in the reorganization chapters only.

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- But the Fourth, Sixth and Ninth Circuits have applied the ruling in *Dewsnup* to prohibit both strip-offs and strip-downs
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- The case involved two cases from Florida, both involving Bank of America: David Caulkett, and Edelmiro Toledo-Cardona
- After oral argument, many thought that, in the very least, the Supreme Court would uphold a debtor's ability to perform a lien strip in Chapter 7
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- The Court's holding in *Dewsnup* provided that a claim was "secured" as long as it was supported by any security interest in the property, even if the value of that property would be sufficient to cover the claim
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Lien Stripping: Chapter 20 (7+13)

- What happens if a debtor receives a discharge in Chapter 7 and then files a Chapter 13 within the next 4 years?
  - This is commonly known as Chapter 20
- Can a debtor strip off a wholly unsecured lien even though s/he is not eligible to receive a discharge in the Chapter 13 case?
- A few years ago, the growing minority was yes; now, the majority of courts agree

Lien Stripping: Chapter 20 (7+13)

- 3 relevant Code sections in the debate are:
  - 1328(f)(1)
    - prohibits an individual from receiving a discharge in a chapter 13 if he or she has received a discharge in 7, 11, or 12 in the last 4 years
  - 1322(b)(2)
    - prevents modification of a claim that is secured only by the principal residence
  - 1325(a)(5)
    - the plan must provide that the holder of an allowed secured claim retain its lien until the earlier of a) the payment of the underlying debt, or b) discharge

Lien Stripping: Chapter 20 (7+13)

No:

- Since the debtor is not eligible for discharge, the only way to extinguish the lien is by payment of the underlying debt, in full

Lien Stripping: Chapter 20 (7+13)

Yes:

- Whether a debtor is eligible for discharge is irrelevant
- If the claim is unsecured pursuant to section 506, then the debtor may modify the rights of the secured creditor pursuant to 1322(b)(2), and 1325(a)(5) is inapplicable since it only applies to secured claims

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In re Mayer: A new limitation on *Dewsnup*

- On November 20, 2015, the U.S. Bankruptcy Court for the Eastern District of Louisiana further limited the applicability of *Dewsnup* by holding that a nonconsensual lien is avoidable when insufficient equity exists to secure its debt
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Surrender

- Forced Transfer or Vesting of Title
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Surrender

- Forced Transfer or Vesting of Title: No
  - *Bank of New York Mellon v. Watt (In re Watt)* 2015 WL 1879680 (D. Or.)
    - Plan cannot use 1322(b)(9) to vest property in lienholder because "vesting" power is not include in the permitted treatments of a secured claim in 1322(a)(5)
  - *In re Sherwood*, 2016 WL 355520, at *3-*8 (Bankr. S.D.N.Y. 2016)
    - Plan cannot vest property in mortgagee because vesting title is not the same as surrender

Surrender

- Forced Transfer or Vesting of Title: Yes
  - *In re Brown*, No. 14-12357-JNF, slip op. at 17-26 (Bankr. D. Mass. 2016
    - Plan can satisfy 1325(a)(5)(C) by surrendering property to mortgagee and then vesting property in mortgagee consistent with 1322(b)(8)
  - In re Stewart, 536 B.R. 273, 277 (Bankr. D. Minn. 2015)
    - While the "surrender" concept found in 1325(a)(5)(C), and the "vesting" concept embodied in 1322(b)(9) are different, they may nonetheless be used in tandem when providing for the treatment of a secured claim in a chapter 13 plan

Surrender: Post-Discharge and/or Post Confirmation

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  - *One West Bank FSB v. Francis*, 2016 WL 1389291 (Fla. Cir. Ct.)(Trial Order – Case No.: CACE 09029684(25), Jan. 13, 2016)

Mortgage Modification Mediations in Bankruptcy
Tips from Creditors' Counsel

THE BANK DOES NOT WANT YOUR CLIENT'S HOME.

#IMHO

REMEMBER THE GOAL:

Keep QUALIFYING BORROWERS IN HOME

Mediators matter.

- #IMHO - the choice of mediator is supremely important.
- Choose someone with experience.
- Mortgage Modification Mediations are different.
- "Settlement authority" means that the servicer representative has authority under investor guidelines.

COMMUNICATION IS Hard sometimes…

- All written communications "shall" be done via the portal per the MMM order. Pay attention to the mail anyway and tell your client to do the same.
- If you don't know what the acronym stands for, ask for an explanation.

A potentially confusing message:

Good Morning,The following information is need info provided is still incomplete please have docs submitted within the next 3 business day to avoid file being declined:(1) PITIA: unpaid principle balance, principle and intr payment. property taxes and homeowners ins as well Home owners property taxes and homeowners ins as well Home owners assoc due(2) VOO LETTER- current utility bill (gas or light bill) (3) COMPLETED 4506-T FORM (FOR CUSTOMER/CO-MAKER OR ANYONE ELSE CONTRIBUTING INCOME & LIVING IN THE PROPERTY).). (4) MOST RECENT QUARTERLY OR YEAR TO DATE SIGNED AND DATED PROFIT & LOSS STATEMENT,(5) COPY OF YOUR MOST RECENTLY FILED TAX RETURNS.

Communication is hard sometimes…(cont'd)

- PITIA : principal, interest, taxes, insurance, association dues
- VOO = Verification of Occupancy. Some servicers require a luxury bill (credit card/phone bill)
- 4506 T Issues:
  - It will go stale. If it is nearing the three month mark, have your client update it and sign it again.
  - Complete every box, even if it is N/A.
  - Make sure it matches bk schedules or include LOE as to why it doesn't. Consider amending the bk schedules to match.

Communication is hard sometimes… (Cont'd)

- If someone else is contributing to the borrower's income, be prepared to provide documents proving it.
- If borrower is self-employed, a profit and loss statement will be required. If your client doesn't have a CPA, consider making a P&L template that you can help your client complete, and make sure it is signed and dated.
- Make sure the tax returns are signed and dated, even if client filed electronically.
- Include a LOE, even if the servicer did not request it.
- If client has income property, make sure they have a lease in place and obtain a copy.
- Be Proactive. Always.
- Ask your client to continue to provide you with updated bank statements, pay check stubs, and P&L statements so you have the docs on hand if something becomes stale.

REMEMBER THE GOAL!

Good Faith requirement:

- The MMM order requires BOTH parties to act in good-faith.
- Good faith does not mean that the servicer is required to offer a loan modification or specific terms.
- If the borrower is denied a loan mod, ask for a mediation conference/conciliation call to determine the reason.
- If the denial stands afterwards, file an appeal.

And, another thing… (or two)

- Open the case on the portal, or risk a denial. It's best to have the loan mod application complete before you file the motion.
- If a service transfer has occurred, remind the prior servicer that it is required to notify the new servicer of the MMM order. But, don't rely on the servicer to do so.
  - Look for a Notice of Appearance by new servicer.
  - Ask your client if s/he received a "hello" or "goodbye" letter.

Any Questions?

Lien on Me

By Elan A. Gershoni and James C. Moon[1]

Surrender, Reaffirmation and Right to Defend a Post-Discharge Foreclosure Action

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O'Quinn Stumphauzer & Sloman, PL; Miami

James C. Moon
Meland Russin & Budwick, PA; Miami

Elan Gershoni is a business litigator, restructuring and executive defense attorney with O'Quinn Stumphauzer & Sloman, PL in Miami and serves as a coordinating editor for the ABI Journal. *James Moon is a bankruptcy and commercial litigation attorney with Meland Russin & Budwick, PA in Miami.*

Section 521(a)(2)(A) of the Bankruptcy Code requires chapter 7 consumer debtors that own encumbered property to formally declare, on their statements of intention, whether they intend to (1) redeem the property,[2] (2) reaffirm the debt secured by the property, or (3) surrender the property. However, what happens when the debtor does not follow through with his/her stated intention to surrender the property or reaffirm the debt but nonetheless receives a discharge? Is it appropriate for a secured creditor to seek to reopen long-closed bankruptcy cases to compel debtors to cease asserting defenses to foreclosure actions that survive or are commenced after a debtor's discharge?

Courts are split on the appropriate remedy available to a secured creditor in such circumstances. Some courts hold that a debtor's failure to follow through on the stated intentions mandates that the debtor cannot assert defenses in a foreclosure action. Other courts hold that a debtor may continue to assert defenses in the foreclosure action, notwithstanding the debtor's failure to surrender the property or reaffirm the debt.

A Debtor Fails to Act in Conformity with the Statement of Intention

Historically, lenders faced with a prior-debtor borrower that failed to act in conformity with the statement of intention, particularly a stated intent to surrender property, could either (1) negotiate with the borrower or (2) initiate a foreclosure proceeding or continue one that was stayed during the pendency of the bankruptcy case. They still do.

Lenders that initiate or proceed with such foreclosure actions can be — and frequently are — subject to vigorous defenses asserted by defendants who had previously received a bankruptcy discharge. A recent trend has emerged whereby some lenders, mired in lengthy foreclosure proceedings, have seized upon a novel strategy to short-circuit the foreclosure process by seeking to reopen a prior-debtor defendant's bankruptcy case (in some cases, years after the debtor receives a discharge) to force the defendant to "surrender" the property by ceasing to defend the foreclosure action.[3]

The Statement of Intention

A debtor's requirement to state the debtor's intention to redeem, reaffirm or surrender is governed by § 521 in chapter 7 cases and § 1325 in chapter 13 cases. In pertinent part, § 521 of the Bankruptcy Code provides that the debtor shall

> file … 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.[4]

The debtor makes this intention known by filing a "statement of intention" in a bankruptcy case.[5]

Courts Differ on Remedy

The Southern and Middle Districts of Florida have become a battleground for determining the appropriate post-discharge remedy for dealing with a debtor's failure to act in conformity with the statement of intention. Although case law on this issue has yet to be fully developed, two primary rationales are taking hold.

One rationale holds that a debtor who has stated an intent to surrender encumbered property, or reaffirm the debt and fails to do so, does not waive the substantive rights to defend a foreclosure action. Conversely, the other rationale holds that a debtor waives the ability to defend a foreclosure action if the debtor previously stated an intent to surrender the property.[6] In addition, at least one court has considered the failure to reaffirm the debt to be "con-

1 Mr. Moon is currently representing the appellee in the appellate case of *Bank of America v. Rodriguez*, Case No. 1:15-cv-23609-FAM (S.D. Fla.).

2 Practically speaking, redemption is only relevant with respect to personal property.

3 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 Arana*, 456 B.R. 161, 172 (Bankr. E.D.N.Y. 2011).

4 11 U.S.C. § 521(a)(2)(A).

5 Relatedly, a chapter 13 debtor is not required to file a statement of intention. However, a chapter 13 debtor is required to file a reorganization plan indicating how he/she proposes to treat any secured property. Section 1325 of the Bankruptcy Code only gives chapter 13 debtors three options for treating secured debt in a plan: (1) gain the secured creditor's consent to the plan treatment, (2) cram down the plan treatment over the secured creditor's objection, or (3) surrender the secured property. 11 U.S.C. § 1325(a)(5)(A)-(C). For the sake of brevity, this article does not discuss chapter 13 aspects of this rationale in depth; however, the rationale can be consistently applied in the chapter 13 context.

6 Most of the courts adopting this view were faced with debtors who failed to comply with their stated intent to "surrender" property. Such courts find defense of a foreclosure action incompatible with the concept of surrender. A failure to reaffirm a debt is arguably a zebra of a different stripe because reaffirmation "takes two to tango." Unlike "surrender," which arguably does not require a debtor to take any further affirmative steps, a reaffirmation agreement is (by definition) an agreement between a debtor and a lienholder to repay a pre-petition debt under renegotiated terms that are acceptable to the secured creditor. *See, e.g., In re Pratt*, 462 F.3d 14, 18 (1st Cir. 2006).

structive surrender" and ordered the debtor to cease defense of his foreclosure action utilizing the same rationale applied to debtors that continue to defend a foreclosure action after stating an intention to surrender the property.[7]

Debtor *Does Not* Relinquish Substantive Rights by Failing to Act in Conformity

Courts that have held that a debtor's statement of intent to surrender property does not waive substantive rights to defend a foreclosure action against that property reason that § 521(a)(2) of the Bankruptcy Code is primarily a notice statute that does not affect a debtor's substantive rights.[8] For example, the court in *In re Hooker*[9] observed that a statement of intention's purpose is "to give notice to creditors of the debtor's intention, without the need for communication with debtor's counsel or improper communication with the debtor in the event [that] counsel is not responsive."[10] In sum, *Hooker* stands for the proposition that a statement of intention serves an informational purpose only. Under this rationale, the appropriate relief for a secured creditor during the pendency of a bankruptcy case is relief from the automatic stay to proceed with a foreclosure action, in response to which debtors may assert valid defenses. Specifically, § 362(h)(1)(B) of the Bankruptcy Code provides that a creditor is entitled to relief from the automatic stay when a debtor fails to "take timely the action specified in such statement [of intention]."[11]

These courts justify their holdings on a number of theories. First, they note that the Bankruptcy Code does not provide creditors with a direct mechanism to compel a debtor to comply with the statement of intention, as that authority is vested in the chapter 7 trustee.[12] Second, these courts note that the last paragraph of § 521(a)(2) provides that "nothing in [this section] 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)*." Section 362(h) provides a creditor with grounds for relief from the stay in the event that a debtor fails to comply with the statement of intention. Finally, these courts find that as a matter of policy, § 521(a)(2) should not allow creditors to short-circuit the foreclosure process. For example, in *In re Trussel*,[13] a case in which a lender sought to reopen a prior debtor's bankruptcy case to force the prior debtor to cease defending the foreclosure action based on a failure to reaffirm the debt, the court observed:

> The Court cannot discern any factual circumstances warranting such extreme relief as an injunction under § 105. "The mere fact that ordering surrender might be more efficient for the [creditor] from a process standpoint ... is not enough to warrant a more serious remedy." Rather, the Court concludes [that] the Creditor primarily is seeking an injunction to preclude or to short-circuit Trussel's right to raise legitimate defenses in the pending state court foreclosure. Trying to avoid responding to legitimate defenses does not constitute sufficient compelling cause to obtain the extraordinary remedy of an injunction.[14]

The court in *In re Rodriguez* also declined to reopen a bankruptcy case that had been closed for three years based on a failure to reaffirm, citing the doctrine of *laches*, among other things, and further stating:

> Even in a case where the debtor indicates an intent to surrender the property in its petition and then fails to do so, the remedy would be stay relief and not a bar by injunction to defending a foreclosure action which would be unconstitutional, inequitable and unjust.[15]

In *In re Anastasia Kourogenis*,[16] the court also relied on the application of the doctrine of *laches* and declined to reopen a bankruptcy case. The court agreed with previous decisions that held that "surrender" does not equate to waiving a debtor-borrower's right to defend a foreclosure action. However, the court observed that a debtor who stated an intent

> to surrender property in her bankruptcy case ... could properly be confronted in the ... foreclosure case with the legal consequences of her indicated intent to surrender.... [Specifically, the foreclosing secured lender could argue that the debtor's] continued defense of the foreclosure case is barred by judicial estoppel.[17]

Notably, the court observed that "federal courts [are] without jurisdiction to intervene in pending state court litigation to tell the state court how or if it should exercise its judicial discretion in cases pending before it." In sum, in these courts, a secured creditor may have a difficult time convincing the court to reopen a bankruptcy case to force a debtor to cease defending a foreclosure action. They would likely find that a statement of surrender "is not the equivalent of an effective legal surrender of real property."[18]

Debtor *Does* Relinquish Substantive Rights by Failing to Act in Conformity

Other courts, to the contrary, have held that a debtor's statement of intention to either surrender property or reaffirm debt *does* affect the debtor's substantive rights.[19] In large part, such courts base their reasonings on a determination that a debtor who states an intent to surrender property has explicitly admitted the validity of the debt owed to the secured creditor. Bankruptcy courts adopting this rationale look to the Eleventh Circuit's decision in *In re Taylor*[20] for support, which reasoned that § 521(2)(B) "indicates that the debtor must perform some act with respect to the property within a specified period of time."[21] "No other meaning can

7 *See, e.g., In re Bartlett*, Case No. 8:10-bk-23758-MGW (Bankr. M.D. Fla. July 28, 2015), Order Granting in Part and Denying in Part Creditor's Motion to Reopen Debtor's Bankruptcy, Compel Surrender of the Property Pursuant to § 521(A)(2)(B) and for Sanctions.

8 *See In re Hooker*, Case No. 3:12-bk-02052 [ECF No. 51] (Bankr. M.D. Fla. Dec. 12, 2013); *In re Rodriguez*, 2015 WL 4872343, Case No. 12-12043-BKC-AJC (Bankr. S.D. Fla. Aug. 12, 2015) (internal citations omitted); *In re Townsend*, 2015 WL 5157505 at *1 (Bankr. M.D. Fla. Sept. 1, 2015) (*slip op.*).; *In re Plummer*, 513 B.R. 135, 143 (Bankr. M.D. Fla. 2014).

9 Case No. 3:12-bk-02052 [ECF No. 51] (Bankr. M.D. Fla. Dec. 12, 2013).

10 *Hooker* at p. 5 (citing Ervin.; *In re Rodale*, 452 B.R. 290, 297 (Bankr. M.D. Fla. 2011) (same)).

11 11 U.S.C. § 362(h)(1)(B); *In re Rodriguez* at *10.

12 *See* 11 U.S.C. § 704(a)(3).

13 2015 WL 1058253, Case No. 1:12-bk-10001-KSJ (Bankr. N.D. Fla. March 5, 2015).

14 *Id.* at *4.

15 *In re Rodriguez*, 2015 WL 4872343 at *4.

16 Case No. 09-bk-32969 [ECF 26] (Bankr. S.D. Fla. Oct. 6, 2015).

17 *In re Kourogenis* at *6.

18 *In re Steinberg*, 498 B.R. 391 (Table) 2013 WL 2351797 at *2 (10th Cir. May 30, 2013).

19 *In re Cheryl L. Troutt*, Case No. 13-39869-BKC-EPK (Bankr. S.D. Fla. Sept. 18, 2014) (Tr. p. 7, lines 2-14); *In re Failla*, 529 B.R. 786 (Bankr. S.D. Fla. 2014); *In re Dolan*, 2015 WL 3462430 at *1 (Bankr. S.D. Fla. April 13, 2015); *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015); and *In re Calzadilla*, 534 B.R. 216 (Bankr. S.D. Fla. 2015).

20 3 F.3d 1512 (11th Cir. 1993).

21 *In re Taylor*, 3 F.3d at 1516.

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be gained from the precise terms of the statute, and nothing suggests [that] the debtor can simply elect to retain the property and ignore other duties required by § 521(2)."[22] Moreover, the Eleventh Circuit held that "[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 a recourse to a nonrecourse with no downside risk for failing to maintain or insure the lender's collateral."[23]

Although these courts do not go so far as to require a debtor to deed over the surrendered property to the secured creditor, they do hold that a debtor who states an intention to surrender property cannot take action to impede a secured creditor's lawful efforts to foreclose on its interests in the property. These courts posit that a debtor who fails to comply with the statement of intention gets an unfair advantage over the secured creditor in the bankruptcy case:

> [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 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.[24]

In sum, courts adopting this rationale will likely take the position that defense of a foreclosure action is incompatible with the definition of "surrender" and may in some cases extend that rationale to a debtor's failure to sign a reaffirmation agreement.

Practice Pointers

The takeaway for secured creditors is to pay attention to your borrowers' bankruptcy filings and take immediate action to preserve your rights. For example, if a debtor indicates an intent to surrender the property, proceed expeditiously with foreclosure or negotiate alternative resolutions that do not necessarily require the secured creditor to hold the property, such as negotiation of a loan modification to which the debtor can agree. The costs of carrying a property prior to sale may pale in comparison to litigation costs in a contested foreclosure case, so secured creditors need to engage in a cost/benefit analysis and determine whether the risk of not being able to reopen a bankruptcy case to force surrender later is worth more than the cost of initiating the foreclosure case and obtaining title to the property as soon as possible, while the bankruptcy case is pending.

If a debtor states an intent to reaffirm the debt, the secured creditor should send the debtor a reaffirmation agreement as soon as possible. If the debtor refuses to sign the agreement (for whatever reason), then simply file a motion to compel execution of the reaffirmation agreement or surrender of the property. This way, the court has an opportunity to address the matter immediately. In addition, as noted by the *In re Kourgenis* court, the secured creditor can always argue judicial estoppel in the foreclosure case.

For their part, debtors need to understand the significance of signing a statement of intention, and if they do not understand it, they should seek counsel. Unfortunately, many debtors are *pro se* and do not have counsel for advisement, but some debtors do have the benefit of counsel, and such counsel should make clear the risks and benefits associated with the choice made on the statement of intention. Moreover, if a prior-debtor is defending a foreclosure action and suddenly is defending a motion to reopen a bankruptcy case, as well as defending the foreclosure action, the prior-debtor's foreclosure defense counsel is advised to immediately get the assistance of competent bankruptcy counsel experienced with this issue to respond appropriately to the secured creditor's attempt to reopen the bankruptcy case. Until these conflicting rationales are resolved by the appellate courts, both secured creditors and debtors should be fully aware of the risks they take with respect to this issue. abi

22 *Id.* at 1515 (internal citations omitted).
23 *Id.*
24 *See In re Failla*, 529 B.R. at 791.