AMERICAN BANKRUPTCY INSTITUTE

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Recent Decisions on Retention and Surrender of Secured Property in Consumer Cases

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CONCURRENT SESSION

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LaQuinta Resort & Club
LaQuinta, CA

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This presentation summarizes certain cases and developments, and is for educational purposes only. It is not, and should not be attributed as, the views of the authors, of the panel members, of their respective courts or offices, or of their respective firms or clients.

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1. A Primer on Reaffirmation Agreements, Ride-Throughs and Post-Discharge Refinance Loans.

2. Modifications and the Discharged Mortgage Loan Dilemma.

A PRIMER ON REAFFIRMATION AGREEMENTS, RIDE THROUGHS AND POST-DISCHARGE REFINANCE LOANS

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Overview of Bankruptcy Reaffirmation Agreements

Section 524(a) of the Bankruptcy Code, 11 U.S.C. § 524(a), is the provision which protects a debtor who receives a bankruptcy discharge. A discharge is one of the most basic bankruptcy protections afforded to individual debtors. It discharges the debtor's personal liability for pre-bankruptcy debts and operates as an injunction against acts to collect or recover any discharged debt as a personal liability of the debtor. Because it contains such a basic protection afforded by the Bankruptcy Code, § 524 provides for strict limitations on the ability of a debtor to enter into a binding agreement reaffirming a debt that otherwise would be discharged. Such agreements must conform to all the requirements of subsections (c) and (d) of § 524 in order to be valid.

However, subsection (j) of § 524 provides a limited exception to the discharge injunction of § 524(a). It permits a creditor holding a security interest in real property that is the principal residence of the debtor to seek or obtain periodic payments associated with the *in rem* security interest in the ordinary course of business and in lieu of pursuing *in rem* relief against the encumbered property. Importantly, creditors are not prevented from post-discharge enforcement of a valid pre-bankruptcy lien on the property provided that the lien was not avoided or set aside under other provisions of the Bankruptcy Code.[1] Thus, a mortgagee's lien is not affected by and survives the entry of the discharge order and the secured creditor is permitted to proceed with post-discharge foreclosure proceedings without any prior application to the bankruptcy court.[2]

Because of the foregoing, it is not *per se* improper for a secured creditor post-discharge to contact a debtor, to send payment coupons, to determine whether payments will be made on a secured debt or to inform the debtor of a possible foreclosure or repossession, **as long as it is clear** that the creditor is not attempting to collect the debt as a personal liability of the debtor.[3]

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[1] *Chase Automotive Finance Inc. v. Kinion (Matter of Kinion)*, 207 F.3d 751, 757 (5th Cir. 2000).
[2] *Id.*; *Waterfield Mortg. Co. v. Cassi (In re Cassi)*, 24 B.R. 619, 626-27 (Bankr. N.D. Ind. 1982). See below regarding *ipso facto* bankruptcy filing default clause enforcement post-discharge.
[3] *Garske v. Arcadia Fin., Ltd. (In re Garske)*, 287 B.R. 537, 544-45 (BAP 9th Cir. 2002); *Ramirez v. GMAC. (In re Ramirez)*, 280 B.R. 252, 258 (C.D. Cal. 2002).

Proactive Loan Modification Terms as Incentives for Reaffirmation Agreements

Some lenders have explored whether they could institute a program to offer debtors favorable modified terms (such as a lower interest rate or debt reduction) as an inducement to obtain a reaffirmation agreement. Such a program is permissible as long as the reaffirmation agreements comply with the requirements of § 524.[4]

However, a creditor cannot compel a debtor to reaffirm and cannot move the court proactively for approval of a reaffirmation agreement without the debtor's consent.[5] Even if a debtor states his intention to reaffirm a debt and signs a reaffirmation agreement with the creditor, § 524(c)(4) and the disclosures included in the Official Reaffirmation Agreement pursuant to § 524(c)(2) and (k) allow a debtor the right to rescind or cancel their reaffirmation agreement at any time before the bankruptcy court enters a discharge order or within 60 days after such reaffirmation agreement is filed with the court, whichever is later, by giving notice of rescission to the creditor.

The Fourth Option, Retain and Pay or Ride Through

The courts are split as to whether the "retain and pay", "ride through" or "fourth option" is available for debts secured by real property after the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005. *Compare In re Hart*, 402 B.R. 78 (Bankr. D. Del. 2009) (debtor's loan secured by real property can "pass through" the bankruptcy case unaffected if the debtors declare their intention to retain collateral and continue to make regular payments), with *In re Linderman*, 435 B.R. 715 (Bankr. M.D. Fla. 2009) (a debtor does not have the ability to "ride through" and cannot keep real property securing a mortgage loan simply by making payment and not reaffirming the debt after the enactment of BAPCPA in 2005"); *see also* Holliday, *Availability and Use of Bankruptcy "Ride Through" Option After Enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BACPA)*, 68 A.L.R. Fed. 2nd 513 at §§ 8-9 (2012).

However, in the event the debtor has not reaffirmed or surrendered the property, there are no legal impediments to using the bankruptcy filing itself as a contractual event of default to initiate foreclosure, even in the absence of payment default. Such an event of default can be used once the property is no longer property of the bankruptcy estate, either through abandonment or the closing of the bankruptcy case.[6]

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[4] *Kinion, supra,* 207 F.3d at 756.
[5] *Id.; Whitehouse v. LaRoche,* 277 F.3d 568, 571 n.1 (1st Cir. 2002); *Peoples Bank of Pound v. Newsome (In re Newsome),* 3 B.R. 626, 628 (Bankr. W.D. Va. 1980). This is made clear by the Official Forms concerning reaffirmation agreements, which require a certification and signature by the debtor.
[6] *See Bell, supra,* 700 F.2d at 1058.

Post-Discharge Loans to "Current" Debtors who have not Reaffirmed

Other lenders may want to consider offering new loans to debtors who are "current" on their mortgage payments but did not reaffirm the debt. But will offering a new loan product, even with more favorable terms (such as a lower interest rate, debt forgiveness and lower payment), violate the discharge injunction? Does the timing of the offer after bankruptcy have any bearing on the analysis?

There is nothing in the Bankruptcy Code which prevents a debtor from entering into new financing post-discharge. In addition, § 524(f) specifically permits the voluntary repayment of a discharged debt, provided that (as noted above) the creditor is not attempting to coerce the debtor to pay a discharged debt. Thus, the issue which is dispositive in this regard is whether, under the particular facts, payment on a discharged debt "such as through a new loan" is truly voluntarily or is made as a result of pressure or coercion by the creditor. *E.g., compare DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1023 (8th Cir. 2002) (debtors voluntarily agreed to roll excess usage charges incurred during the use of first leased vehicle into lease of second vehicle and, thus, agreement did not violate the discharge requirement), *with Watkins v. Guardian Loan Co. (In re Watkins)*, 240 B.R. 668, 675-78 (Bankr. E.D. N.Y. 1999) (collecting cases) (A new loan agreement offered under "take it or leave it" terms to the debtors, to repay discharged debt in order to receive additional new funds, was not voluntary) and 4 *Collier on Bankruptcy* ¶¶ 524.04 and 524.06 (Alan N. Resnick and Henry J. Sommer eds., 16th ed. 2017).

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Modifications and the Discharged Mortgage Loan Dilemma

From the Experts

Scott J. Kelly

Mortgage borrowers who are granted Chapter 7 bankruptcy discharges and do not reaffirm their mortgages present unique issues for their lenders and mortgage servicers (collectively, mortgage lenders). When a loan secured by a mortgage on the borrower's principal residence (the mortgage loan) is discharged in bankruptcy, the borrower's personal liability on that loan is removed. The discharge injunction prohibits the mortgage lender from engaging in any act that constitutes an attempt to collect the mortgage loan as a personal obligation. 11 U.S.C. § 524. Under certain circumstances, routine servicing correspondence is perceived as pressuring discharged borrowers to make payments on their mortgage loans. This may be considered a discharge violation and expose the lender to damages and attorney fees.

Although the discharge removes a borrower's personal liability, it does not affect the mortgage lender's lien, which remains intact. After discharge, the mortgage lender may still proceed *in rem* (against the property only), and it may foreclose upon the mortgaged home after a default under the mortgage loan.

In 2005, Congress enacted § 524(j) of the U.S. Bankruptcy Code to exclude from the discharge injunction "act[s]" by mortgage lenders whose mortgage loans are secured by the borrower's principal residence, as long as those acts are "in the ordinary course of business between the creditor and the debtor" and are "limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien." This created a limited "safe harbor" that permits

acts to collect payments that are due under discharged mortgage loans. However, the contours of this "safe harbor" are not yet well-defined. Mortgage lenders must therefore exercise caution when communicating with discharged borrowers.

Here's the dilemma for mortgage lenders. Sometimes they face a discharged borrower who did not reaffirm the mortgage loan, continued to make payments and stayed in possession, but then became delinquent post-discharge. The borrower then requests a loan modification (the post-discharge mortgage modification). Under § 524(c) of the Bankruptcy Code, an agreement *(e.g.,* mortgage loan modification) between the holder of claim *(e.g.,* the mortgage lender) and the debtor *(e.g.,* the borrower), the consideration for which, in *whole or in part,* is based on a debt *(e.g.,* the mortgage loan) that is dischargeable "is enforceable only if [the agreement complies with certain very specific reaffirmation requirements] and is made before the granting of the discharge." Post-discharge mortgage modifications are "agreements," so if a bankruptcy court concludes (1) that the consideration for a modification is based at least in part of the discharged debt, and (2) entering into a modification agreement is not within the § 524(j) "safe harbor," then the modification will likely be found to be unenforceable, and the lender may be exposed to damages for violating the discharge.

Although it does not appear that any court has concluded that non-recourse post-discharge mortgage modifications are unenforceable under § 524(c), the issue

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is not chimerical. At least one bankruptcy court has suggested, albeit *in dicta*, that if a Borrower enters into such an agreement, "its effect would be to revive all, or at least a portion, of [the] discharged debt to the bank." *In re Culpepper* (Bankr. D. Ore. 2012) And there are many bankruptcy professionals who believe that, after the filing of a Chapter 7 bankruptcy case, reaffirmation under § 524(c) is the *only* way debtors can enter into a legally enforceable agreement to fulfill their desire to retain possession of their mortgaged home.

On the other hand, there are bankruptcy cases that expressly permit post-discharge mortgage modifications. *In re Bates* (Bankr. D. N.H. 2014) There, the court approved a post-discharge home affordable modification program (HAMP) modification that "by its express terms did not revive any personal liability for the mortgage debt." The agreement was a standard form of HAMP loan modification with a rider that acknowledged the effect of the bankruptcy discharge. The court held that entering into the agreement was within the scope of § 524(j). Likewise, another bankruptcy court in Florida held (with little analysis) that neither the automatic stay nor the Chapter 7 discharge provisions prevent post-discharge mortgage modifications. *In re Hairel*, 2012 WL 2090435

In March 2010, in connection with administering HAMP, the U.S. Treasury Department issued Supplemental Directive 10-02, which makes it clear that (in its view) discharged borrowers are eligible for HAMP as long as the borrowers understand they are not personally liable for the modified debt. Several bankruptcy courts have cited this directive in denying motions to allow debtors to enter into post-discharge reaffirmation agreements. These cases suggest that those courts believe that post-discharge mortgage modifications are possible as long there is no attempt to revive personal liability. In fact, those cases may be read as an advisory to discharged borrowers to enter into post-discharge mortgage modifications instead of reaffirmation agreements.

This conflicting authority poses a problem. There is a legitimate concern that, under the plain language of § 524(c), post-discharge mortgage modifications are unenforceable if not formally submitted to the reaffirmation process. On the other hand, there are cases that specifically authorize them. Indeed, some courts have refused to allow reaffirmation because post-discharge mortgage modifications are a better option for discharged borrowers. So, what are mortgage lenders supposed to do?

Arguably, the safest thing is to refuse to modify non-reaffirmed mortgage loans. But that is contrary to the HAMP directive. Moreover, that position may be inconsistent with the CFPB's proposed rules, which will (if enacted as proposed) require mortgage lenders to communicate with at least some discharged borrowers about loss mitigation options. Further, refusing to modify eliminates the possibility of converting discharged mortgage loans that are in default into performing *"in rem"* loans. For these reasons and others, some mortgage lenders have made the business decision to offer post-discharge mortgage modifications to discharged borrowers, despite the risks.

The case law is still developing. Lenders who decide to offer post-discharge modifications must actively monitor developments. It is not clear that § 524(j), standing alone, authorizes the execution of modifications. *In re Bates* seems to conclude that it does. But there is a legitimate question whether entering into a post-default mortgage modification (which is, at least, related to discharged debt, implicating § 524(c)) is an "act" that is "limited to seeking or obtaining periodic payments" in lieu of foreclosure. The "ordinary course of business between the creditor and the debtor" requirement in §524(j) is also concerning, because a non-recourse post-discharge mortgage modification is arguably outside of the ordinary course. Accordingly, one cannot assume blindly that such modifications are within the § 524(j) safe harbor.

There is nothing in the bankruptcy code that prevents a debtor from entering into new financing post-discharge. In addition, § 524(f) specifically permits voluntary repayment of discharged debt. Bankruptcy cases directly or indirectly supporting post-discharge modifications often highlight the fact that discharged borrowers voluntarily entered into those agreements. The dispositive issue is whether a payment made under these conditions is truly voluntary, or is the result of pressure or coercion by the creditor. Mortgage lenders who pressure discharged borrowers to modify are at risk of violating the discharge injunction. It should be made clear to discharged borrowers that they are not obligated to enter into any post-discharge modifications.

Further, borrowers should be clearly and routinely reminded in all documents and related communications that they are not personally liable for the discharged mortgage loan, and that the mortgage lender's only recourse is *"in rem."* It is questionable whether the existing HAMP forms for discharged borrowers (which essentially adds a bankruptcy disclaimer to an otherwise standard form of loan modification) does enough in this regard. The language of any proposed modification should be drafted carefully to reduce the risk of a discharge violation. Even then, under the current state of the law, there is no guarantee that the agreement will be enforceable, and that it will not violate the discharge injunction.

Finally, mortgage lenders who choose to enter into post-discharge mortgage modifications must pay special attention and care to loan servicing. Many cases that find discharge violations also rule that a lender's communications (whether oral or written) with discharged borrowers were too harsh, or did not contain appropriate bankruptcy disclaimers. Even appropriately tailored communications can cause trouble depending on context. Any mortgage lender that is engaged in post-discharge loan servicing should take a very hard and careful look at its entire servicing program, and consult with knowledgeable legal professionals.

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Underwater Asset Disposition/Vesting:

3. Getting Rid of Encumbered Property in Consumer Cases.
4. Underwater Houses in Bankruptcy: Lien Stripping, Vesting & 363 Sales
5. Samples of a Vesting Title Motion and an Order Confirming Chapter 13 Plan.

Getting Rid of Encumbered Property in Consumer Cases

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Getting Rid of Encumbered Property

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 doesn't 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 doesn't 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.

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.

1. Sale free and clear?

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

1. Sale free and clear?

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- First reason, § 363(f): "The [debtor] may sell property . . . free and clear of [liens], only if—
  - (3) the [sale] price . . . is greater than the aggregate value of all liens on such property . . .
  - (5) [the sale] could be compelled, in a legal or equitable proceeding . . . .

Andrea Boyack and Judge Robert Berger, Bankruptcy Weapons to Terminate a Zombie Mortgage, 54 Washburn L.J. 451 (2015) .

1. Sale free and clear?

- Second 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.

2. Simple surrender to the mortgagee?

- Probably 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 transfer ownership.

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?

- This works in some courts.
- § 1322(b)(9): a plan may "provide for the vesting of property of the estate . . . in . . . any . . . entity."
- So far, there are eight published 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 eight 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 eight 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 eight 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 eight decisions.
- 4. *Bank of New York Mellon v. Watt*, 2015 WL 1879680 (D. Or. Apr. 22, 2015), reverses 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 eight 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*.
- 6. *In re Zair*, 2015 WL 4776250 (Bankr. E.D.N.Y. Aug 13, 2015), agrees on all points with *Sagendorph*.

3. Surrender plus vesting?

- The eight 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."

3. Surrender plus vesting?

- The eight decisions.
- 8. *In re Williams*, 2015 WL 7776552 (Bankr. W.D. Kan. Dec. 2, 2015): "Section 1322(b)(9) includes vesting as a discretionary term of a plan, but it does not assure confirmation of a plan providing for vesting."
- Current score: Vesting only with creditor consent: 4
  Vesting without creditor consent: 4

4. Transfer in payment of the claim?

- Largely untested.
- § 1322(b)(8): a plan may "provide for the payment of . . . a claim . . . from property of the estate . . . ."
- "Dirt for debt" allowed in Chapter 11 and 12; but—
- *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."

5. Sale subject to the lien?

- May work; no case law.
- § 363(b): sale may be made on notice; no § 363(f) limits.
- Mortgagee's rights are not modified; no § 1322(b)(2) violation.
- Buyers may be available.
- Good faith may be demonstrated by providing a short sale alternative to the mortgagee.

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 $150,000.
- The home is valued at $125,000—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 vesting in the mortgagee, 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?

Underwater Houses in Bankruptcy: Lien Stripping, Vesting & 363 Sales

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A. Lien Stripping Case Law Updates

Section 1322(b)(2) provides that the debtor's plan may modify the rights of holders of secured claims. In determining the allowed amount of a secured claim, § 506(a) provides that the claim is secured only to the extent of the value of the collateral, and that any amount of the claim in excess of the value of the collateral will be treated as an unsecured claim. This bifurcation or "stripdown" of the creditor's claim means that the unsecured portion of the claim will be paid with other unsecured claims, based on the plan's treatment of unsecured claims, often providing payment of less than one-hundred percent. In addition to claim bifurcation, § 1322(b)(2) permits the plan to modify the rights of holders of secured claims, such as by extending the payment term or adjusting the installment payment amount under the underlying contract.

Although § 1322(b)(2) generally authorizes the modification of allowed secured claims by a chapter 13 plan, an exception preventing modification is provided for those claims secured only by a security interest in real property that is the debtor's principal residence.[1] However, most courts have held that *Nobleman* does not apply when (1) a junior mortgage is totally undersecured because senior liens equal or exceed the value of the property (referred to as "stripoff"), or (2) when the mortgage is not secured only by the debtor's home but also by other valuable collateral, such as rental units the debtor does not occupy in a multifamily dwelling (referred to as "stripdown"). In addition, § 1322(c)(2) provides that short-term, balloon payment or other mortgages having a final payment that comes due during the life of a chapter 13 plan may be modified.

1. Impact of *Bank of America, N. A. v. Caulkett*

The Supreme Court held in *Bank of America, N. A. v. Caulkett*[2] that a wholly underwater mortgage cannot be stripped off and voided using Code § 506(d) in a chapter 7 bankruptcy case. The decision should have little impact on consumer bankruptcy cases, since most courts (except those in the Eleventh Circuit) had previously held that mortgage strip off in chapter 7 was not possible, based on the Supreme

[1] *See* Nobleman v. American Savings Bank, 508 U.S. 324 (1993).
[2] Bank of America, N.A. v. Caulkett, 2015 WL 2464049 (U.S. Jun 01, 2015).

Court's earlier decision involving a partially secured mortgage in *Dewsnup v. Timm*.[3]

The *Caulkett* holding is limited to chapter 7 cases, and the reasoning of the Court should not prevent consumer debtors from continuing to strip off wholly unsecured mortgages in chapter 13 cases. The vast majority of courts, and all Circuit Courts that have ruled on the matter (including the Ninth Circuit), have concluded that a wholly underwater mortgage may be provided for in a chapter 13 plan as an unsecured claim based on the application of § 506(a) and § 1322(b)(2).[4] These courts have relied on the language in in *Nobelman v. American Sav. Bank*,[5] that in determining whether creditors are "holders of secured claims" that are entitled to protection from modification under § 1322(b)(2), a court must first look to § 506(a) for a valuation of the claim's secured and unsecured components. With no value supporting its claim based on the § 506(a) analysis, the holder of an underwater lien does not have a secured claim, and therefore the lien may be modified under § 1322(b)(2). The actual strip off and avoidance of the mortgage in chapter 13 cases is not based upon § 506(d), but rather through the application of § 1322(b)(2) alone or in combination with § 1327(c).

Nothing in *Caulkett* undermines the reasoning supporting chapter 13 strip offs. The Court was careful to limit its discussion to the application of § 506(d), which again is not used in chapter 13 strip offs. Specifically, the limited holding in *Caulkett* is that "a debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral."[6]

The Court also distinguished its decision in *Nobelman*, stating that: "Nobelman said nothing about the meaning of the term 'secured claim' in § 506(d). Instead, it addressed the interaction between the meaning of the term 'secured claim' in § 506(a) and an entirely separate provision, § 1322(b)(2)."[7] This makes clear that the interplay between § 506(a) and § 1322(b)(2) in chapter 13 cases remains viable and will continue to support strip offs in chapter 13 cases. The Supreme Court was made aware in the briefing in *Caulkett* of the unanimous Circuit Court decisions permitting chapter 13 strip

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[3] 502 U.S. 410 (1992). The earlier *Dewsnup* decision and its impact on the modification of home secured mortgages in chapter 7 cases is discussed in NCLC's Consumer Bankruptcy Law & Practice § 11.2.1.2 (10th ed. 2012 with online updated revision).

[4] *In re* Schmidt, 765 F.3d 877 (8th Cir. 2014); *In re* Davis, 716 F.3d 331 (4th Cir. 2013); *In re* Zimmer, 313 F.3d 1220 (9th Cir. 2003); *In re* Lane, 280 F.3d 663 (6th Cir. 2002); *In re* Pond, 252 F.3d 122 (2d Cir. 2001); *In re* Dickerson, 222 F.3d 924 (11th Cir. 2000); *In re* Tanner, 217 F.3d 1357 (11th Cir. 2000); *In re* Bartee, 212 F.3d 277 (5th Cir. 2000); *In re* McDonald, 205 F.3d 606 (3d Cir. 2000); *see also* NCLC Consumer Bankruptcy Law & Practice § 11.6.1.2.2.2.

[5] 508 U.S. 324 (1993).

[6] Bank of America, N.A. v. Caulkett, 2015 WL 2464049, *6 (U.S. Jun 01, 2015).

[7] *Id.* at *5.

offs, and yet did not include dicta or any suggestion that these decisions were wrongly decided.

In rejecting the debtor's argument that the *Dewsnup* holding should be limited to partially secured liens, the Court stated that this distinction could result in some "arbitrary results" as only one dollar difference in value might prevent a strip off. However, the Court in *Caulkett* also noted that there are many provisions in the Bankruptcy Code that provide for this kind of "line-drawing," where a dollar difference can have a significant impact. The Court stated that it was appropriate for Congress to draw such lines in specific Code provisions, but not for the Court itself to do so in a provision such as § 506(d) that does not by its express terms refer to valuation or line-drawing. Again, chapter 13 strip offs rely upon § 506(a), where the line-drawing between a secured and unsecured claim based on the value of the collateral was clearly done by Congress in the specific words of the statute. Thus, *Caulkett* suggests that the potential dollar difference result in chapter 13 strip offs is appropriate, because the line-drawing was done by Congress.

2. Timing for Determining Debtor's Principal Residence

If a creditor's mortgage claim is not secured by a security interest in real property that is the debtor's principal residence, the anti-modification provision in § 1322(b)(2) does not apply and the mortgage may be stripped down.[8] In cases in which there has been a change in the use of the property, the question may arise as to what should be the applicable time period for determining whether the property is the debtor's principal residence. For example, if the debtor moves to another state for employment purposes, and rents the home that formerly had been the debtor's residence, does the anti-modification provision apply to the mortgage on the home in a subsequent chapter 13 case filed by the debtor?

Some courts have held that the relevant period should be the time when the mortgage transaction was entered into.[9] By considering the use of the collateral at the time of the loan transaction, or the intent of the parties in entering into the transaction, courts that favor this approach believe it is more consistent with the policy objectives of the anti-modification provision. If the goal of the anti-modification provision is to favor and encourage the flow of credit into the home lending market, they reason, the parties' understanding as of the date of the loan transaction should control.[10] These

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[8] *See* NCLC *Consumer Bankruptcy Law & Practice*, § 11.6.1.2.2.5 (10th edit. 2012).

[9] *In re* Scarborough, 461 F.3d 406 (3d Cir. 2006); *In re* Abrego, 2014 WL 1257138 (Bankr. N.D. Ill. Mar. 25, 2014); *In re* Moore, 441 B.R. 732 (Bankr. N.D. N.Y. 2010); *In re S*mart, 214 B.R. 63, 67 (Bankr. D. Conn.1997).

[10] *See In re* Proctor, 494 B.R. 833, 840 (Bankr. E.D.N.C. 2013) (siding with the "loan documents control" approach over the "petition date controls" school of thought, focusing on what the parties originally bargained for and understood their rights to be);

courts also contend that the looking to the transaction date avoids potential gamesmanship, such as a debtor who might rent out the property just before filing in order to avoid the anti-modification provision.

According to the Ninth Circuit BAP, however, the better view and majority position is that the use of the property on the date of the petition should control.[11] Courts adopting this position in part rely upon the statutory phrase "that is" in § 1322(b)(2), which is cast in the present tense. That argument may have been bolstered by a 2010 technical amendment to the Bankruptcy Code, which added to the definition of "debtor's principal residence" the requirement that the structure be "used as the principal residence by the debtor." This reference to the present use of the property by the debtor supports the petition date rather than the loan transaction date as the relevant time period.[12] Courts have also focused on the use of the word "claim" in § 1322(b)(2), noting that a claim is determined as of the petition date.[13] Finally, these courts have pointed out that using the petition date as the determinative point in time avoids potential gamesmanship by creditors, who might attempt to disavow a security interest in other property after the debtor files bankruptcy in order to benefit from the protection of § 1322(b)(2).[14]

Although the majority position appears to be that the status of the property as of the petition date should control, a significant number of courts have relied upon the loan documents or a combination of factors. Some courts have attempted to fashion a sort of "hybrid" approach, looking at the status of the loan documents on the date the petition was filed.[15] One court has adopted a prospective view, considering whether the debtor intends to reside in the property during and after the bankruptcy, applying a

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In re Zaldivar, 441 B.R. 389 (Bankr. S.D. Fla. 2011) ("character of the transaction" and what the lender bargained for are paramount).

[11] *In re* Benafel, 461 B.R. 581, 589 (B.A.P. 9th Cir. 2011) ("we find that the majority of cases interpreting § 1322(b)(2) favor use of the petition date to determine principal residence"). *See also* E. Savings Bank, FSB v. LaFata, 483 F.3d 13, 21 (1st Cir. 2007) ("the statute is silent as to intent and as to type of mortgage; it asks only the objective question of whether the mortgaged property 'is the debtor's principal residence'"); *In re* Christopherson, 446 B.R. 831, 835 (Bankr. N.D. Ohio 2011); *In re* Jordan, 330 B.R. 857, 860 (Bankr. M.D. Ga. 2005); *In re* Leigh, 307 B.R. 324, 331 (Bankr. D. Mass. 2004); *In re* Bosch, 287 B.R. 222, 226 (Bankr. E.D. Mo. 2002); *In re* Schultz, 2001 WL 1757060 (Bankr. D. N.H. 2001); *In re* Larios, 259 B.R. 675 (Bankr. N.D. Ill. 2001); *In re* Churchill, 150 B.R. 288 (Bankr. D. Maine 1993); *In re* Dinsmore, 141 B.R. 499 (Bankr. W.D. Mich.1992).

[12] *See* 8 Collier on Bankruptcy, § 1322.06[1][a] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2011).

[13] *In re* Brinkley, 2013 Bankr. LEXIS 4627 (Bankr. E.D. Mich. Nov. 5, 2013).

[14] *In re* Howard, 220 B.R. 716 (Bankr. S.D. Ga. 1998).

[15] *In re* Baker, 398 B.R. 198 (Bankr. N.D. Ohio 2008); *In re* Howard, 220 B.R. 716 (Bankr. S.D. Ga. 1998).

multi-factor analysis much like the state law determination of domicile.[16] Still another court stated that regardless of what test it applied, the debtor would be estopped from denying the home was his principal residence, for he had already participated in the court's mediation program for owner-occupants.[17] Debtor's attorneys are well advised to conduct a thorough search for local precedent. It is not unheard of to find courts within the same circuit, state, or even district taking different positions on this question.[18]

3. Timing for Valuation

Section 506(a) states that "value shall be determined in light of the purpose of the valuation and of the proposed use or disposition of such property ...." Because this language does not explicitly set a valuation date, courts are divided on this issue. Some courts make this determination for lien strip-off purposes based on the value of the property at the time of the bankruptcy filing.[19] These courts conclude that the petition date is appropriate because debtors typically have used the property as their principal residence throughout the bankruptcy case beginning with the petition date.

Other courts use the effective date of the chapter 13 plan as the valuation date, which is usually the date of the confirmation hearing (or 14 days after entry of the confirmation order), unless the plan states otherwise.[20] These courts find that because the valuation is being done in the context of determining the amount of the creditor's allowed secured claim for purposes of plan confirmation, the appropriate date of valuation should be the confirmation hearing.

Finally, because § 506(a) does not refer to the "effective date of the plan," and based on legislative history for the provision, some courts have adopted a "flexible approach to valuations, rather than a single, fixed method."[21]

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[16] *In re* Kelly, 486 B.R. 882, 885-86 (Bankr. E.D. Mich. 2013).
[17] *In re* Laycock, 497 B.R. 396, 401 (Bankr. S.D.N.Y. 2013).
[18] *Compare Kelly*, note 13, *to Brinkley*, note 10; *compare* United States Dep't of Agric. v. Jackson, 2005 U.S. Dist. LEXIS 15877, 9 (M.D. Ga. July 1, 2005) to *Howard*, note 11.
[19] *In re* Gutierrez, 503 B.R. 458 (Bankr. C.D. Cal. 2013); *TD Bank, N.A. v. Landry*, 479 B.R. 1 (D. Mass. 2012) (petition date is appropriate date to determine value of property; listing cases and describing this as the majority view); *In re* Vallejo, 2010 WL 520698 (Bankr. N.D. Cal. Feb. 9, 2010); *In re* Dean, 319 B.R. 474 (Bankr. E.D. Va. 2004). *See also In re* Wade, 354 B.R. 876 (Bankr. N.D. Iowa 2006).
[20] *In re* Roach, 2010 WL 234959 (Bankr. W.D. Mo. Jan. 15, 2010); *In re* Crain, 243 B.R. 75 (Bankr. C.D. Cal. 1999).
[21] *In re* Cahill, 503 B.R. 535 (Bankr. D.N.H. 2013) (applying flexible approach and using valuation date near confirmation); *In re* Kelly, 2013 WL 6536539 (Bankr. D. Mass. Dec. 13, 2013); *In re* Aubain, 296 B.R. 624, 636 (Bankr. E.D.N.Y. 2003).

Depending upon whether the real estate market is declining or improving, and the length of time it takes to get to confirmation in a particular district, there may be an advantage for debtors to argue for an earlier or later valuation date.

B. The Zombie Mortgage Problem

Homeowners who vacate their homes in response to a pending foreclosure often hope the foreclosure sale will put an end to certain of their financial problems. Until the property is sold at a foreclosure sale, they remain responsible as owner for the property taxes and homeowners' association (HOA) fees. They are also responsible for maintenance of the property, and can face potential liability for local housing code violations and any personal injuries occurring on the property.

Simply filing bankruptcy may not speed up a foreclosure sale or eliminate the homeowner's continued liability for various fees and expenses. Although the debtor's mortgage debt (but not the lien on the home) may be discharged, as well as any prepetition HOA fees, an exception to the discharge obtained in a chapter 7 case provides that the debtor remains liable for any postpetition HOA fees that come due until the property is sold.[22]

HOA fees also place a considerable burden on chapter 13 debtors. So long as a debtor retains the title to a condominium unit, some courts find that the debtor remains liable for postpetition HOA fees even though the discharge exception for postpetition HOA fees does not apply to chapter 13 cases.[23] This is sometimes the case even if a debtor vacates the property.[24] Despite having filed bankruptcy, debtors also face the possibility of open-ended liability beyond simply HOA fees. For example, debtors may be subject to real estate taxes, insurance fees, and civil and criminal penalties for failure to maintain the property.[25]

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[22] 11 U.S.C. § 523(a)(16). *See* NCLC's *Consumer Bankruptcy Law and Practice*, § 15.4.3.15.

[23] *See* Foster v. Double R. Ranch Ass'n (*In re* Foster), 435 B.R. 650, 661 (B.A.P. 9th Cir. 2010) (holding the debtor personally liable for post-petition HOA dues even after discharge "as long as he maintains his legal, equitable or possessory interest in the property"). In *Foster*, the debtor opted to remain in his home.

[24] *E.g., In re* Khan, 504 B.R. 409, 414 (Bankr. D. Md. 2014) (holding that debtor's condominium assessments would continue post-discharge as an *in rem* obligation). *But see In re* Colon, 465 B.R. 657 (Bankr. D. Utah 2011) (holding post-petition HOA assessments dischargeable where debtors vacated the property and surrendered the property to the secured creditor).

[25] *See, e.g., In re* Ricketts, 2013 WL 6858941 (Bankr. D.N.H. Dec. 23, 2013) (debtor faced major expenses to remedy an easement violation); *In re* Ogunfiditimi, 2011 WL 2652371 (Bankr. D. Md. July 6, 2011) (debtor faced criminal prosecution for failure to maintain

Given these possible outcomes, it comes as no surprise that debtors in bankruptcy often seek to transfer the title to property they have vacated. Although the debtor may wish to relinquish title to the property, a debtor ordinarily cannot compel a mortgagee to accept a conveyance or to foreclose on the property.[26] Debtors have the option under § 1325 of the Bankruptcy Code to surrender property to a creditor, but surrendering property does not by itself convey title. Thus, a debtor cannot avoid HOA fees or other ownership liabilities merely by surrendering real property in the bankruptcy.

Consumer advocates have struggled with finding ways to force mortgage holders to foreclose on property that their clients no longer wish to keep and in fact may have vacated. Homeowners having vacated a home may be better off expediting a foreclosure to stop the accumulation of fees and other expenses for which the homeowner continues to bear responsibility until the foreclosure. One option is to sell the property free and clear of liens under section 363(f) of the Bankruptcy Code. Another possibility is that the chapter 13 plan confirmation process might be used to obtain an order conveying the property to the mortgage holder. The sections that follow discuss these two options.

C. 363 Sales

Section 363 of the Bankruptcy Code permits the trustee to sell estate property either subject to existing liens, § 363(b), or free and clear of liens and interests of any party other than the estate in certain circumstances, 363(f). In consumer cases, section 363 can be a powerful tool for dealing with underwater property that the debtor no longer wants.

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the property); *In re* Pigg, 453 B.R. 728 (Bankr. M.D. Tenn. 2011) (HOA fees and real estate taxes continued to accrue even after debtor was forced to move out of her home due to natural disaster).

[26] *See, e.g., In re* Canning, 706 F.3d 64 (1st Cir. 2013); *In re* Khan, 504 B.R. 409, 410 (Bankr. D. Md. 2014) ("[N]one of the secured creditors has gone forward with foreclosure, and Debtor cannot compel them to accept his surrender pursuant to 11 U.S.C. § 1325(a)(5)(C)."); *In re* Arsenault, 456 B.R. 627, 629 (holding that the act of surrender does not require "the affirmative action of transferring title"); *In re* White, 282 B.R. 418 (Bankr. N.D. Ohio 2002) (finding that neither the court nor the debtor may "direct the means by which the secured creditor deals with the surrendered property"); *In re* Service, 155 B.R. 512, 514 (Bankr. E.D. Mo. 1993) (holding that absent the secured creditor's consent, the debtors could not force the creditor to accept surrender to take title).

1. Debtor's Power to Invoke Section 363

Section 363 reserves to the trustee the power to sell property of the estate. In chapter 13, however, section 1303 gives the debtor, exclusive of the trustee, the power to sell property under section 363(b) or 363(f). Consequently, section 363 sales are conducted pursuant to a motion to sell property filed by the chapter 13 debtor or under the terms of a confirmed chapter 13 plan.

Unfortunately, chapter 7 debtors do not enjoy the same power as chapter 13 debtors to initiate a sale under section 363. Nevertheless, at least one court has used its equitable powers under section 105 to direct a chapter 7 trustee to sell debtor's unwanted property. [27] In that case, *In re Pigg*, the chapter 7 debtor had surrendered her condominium in her bankruptcy proceeding and vacated the property. She had also attempted to deliver a deed in lieu of foreclosure to her lender. Though the bank had changed the locks on the property (and thereby taken physical possession), it did not foreclose. As a result, debtor was saddled with on-going homeowners' association fees. The court relying on its equitable powers and finding the debtor's fresh start significantly impaired by accruing post-petition fees directed the chapter 7 trustee to sell the property under section 363(f).

2. Free and Clear Sales

While chapter 13 debtors may generally sell property under 363(b) subject to existing liens, underwater homes burdened by mortgages and HOA fees may generate any buyers. As a result, sales under section 363(f), which are free and clear of liens and other interests, may be preferable.

Section 363(f) allows sales of property so long as one of the five enumerated conditions are met: (1) non-bankruptcy law permits sale of the property free and clear of such interest; (2) the entity holding the interest consent; (3) the interest is a lien and the price exceeds the aggregate value of all liens; (4) the interest is in bona fide dispute; or (5) the interest holder could be compelled to accept a money satisfaction of such interest. The conditions most likely satisfied in the case of unwanted and underwater real property are subsections (2) and (3). Secured lenders are generally permitted to credit bid in 363 sales.

With respect to subsection (2), most courts held that consent may be implied if the holder of the interest (in this case, the lienholder) receives notice of the sale[28] and fails to object.[29] Lenders may also benefit from free and clear 363 sales because it will

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[27] In re Pigg, 453 B.R. 728 (Bankr. M.D. Tenn 2011).

[28] Note that service of a motion to sell under section 363(f) must be served on the lienholders or interested parties in the same manner provided for service of a summons and complaint. Fed. R. Bankr. P. 6004(c), 9014. If the lienholder is an insured depository institution Fed. R .Bankr. P. 7004(f) applies.

[29] *See, e.g.,* **FutureSource, LLC v. Reuters Ltd., 312 F.3d 281 (7th Cir. 2002).**

provide clear title—something that may be more problematic in a traditional state foreclosure sale due to assignment or other document problems.

With respect to subsection (3), courts have disagreed as to the meaning of "value of all liens on such property." The majority of courts hold that "value" means the economic value of the liens as determined under 506(a), not the face amount of the debt.[30] Other courts have held that the sales price must exceed the face amount of all liens.[31] This later holding would preclude debtors from using 363(f)(3) as the mechanism for selling underwater property.

D. Vesting Property in the Mortgage Holder

In *In re Rosa*,[32] the debtor owned property in which there was no equity and which was subject to HOA fees. Ms. Rosa proposed in her chapter 13 plan to surrender her real property to the holders of the first and second mortgage claims on the property. The nonstandard provision included in the debtor's plan proposed not only to surrender the property, but to *vest* the property in—or transfer ownership of the property to—the holder of the first mortgage pursuant to § 1322(b)(9) of the Bankruptcy Code. The chapter 13 plan provision read:

> All collateral surrendered for Class 3 claims is surrendered in full satisfaction of the underlying claim. Pursuant to §§ 1322(b)(8) and (9), title to the property located at 91-1849 Luahoana Street, Ewa Beach, Hawaii 96707, shall vest in City National Bank/ OCWEN Loan Service upon confirmation, and the Confirmation Order shall constitute a deed of conveyance of the property when recorded at the Bureau of Conveyances. All secured claims secured by the Debtor's property in Ewa Beach will be paid by surrender of the collateral and foreclosure of the security interests.[33]

Section 1322(b)(9) states that a chapter 13 plan may "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*."[34] The chapter 13 trustee objected to this plan on the basis that it did not conform to the requirements of the Bankruptcy Code.

The court confirmed the plan over the trustee's objection. With regard to a secured claim, a chapter 13 plan needs to satisfy one of three requirements under §

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[30] *See* In re Boston Generating, LLC, 440 B.R. 302 (Bankr. S.D.N.Y 2010); In re Terrace Gardens park P'ship, 96 B.R. 707 (Bankr. W.D. Tex. 1989).
[31] *See* Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008).
[32] 495 B.R. 522 (Bankr. D. Haw. 2013).
[33] *In re* Rosa, 495 B.R. 522, 523 (Bankr. D. Haw. 2013)
[34] 11 U.S.C. § 1322(b)(9) (*emphasis added*).

1325(a)(5). The plan is confirmable if (1) the secured creditor accepts the plan (§ 1325(a)(5)(A)); (2) the debtor's payments comply with the requirements for a "cramdown" (§ 1325(a)(5)(B)); or (3) the debtor surrenders the property (§ 1325(a)(5)(C)). Here, the cramdown scenario did not apply. Because the debtor sought to vest the property in the first mortgagee in addition to surrendering the property, the *Rosa* court held that the surrender option did not apply either. The plan needed to satisfy the acceptance requirement under the first option, § 1325(a)(5)(A), to be confirmed by the court.

While the Bankruptcy Code does not define acceptance, the bankruptcy court found that "the overwhelming majority of courts hold that a secured creditor's failure to object to a chapter 13 plan constitutes acceptance."[35] Where a creditor receives adequate notice of the plan, acceptance may be inferred from a failure to object.[36] In this case, the court noted that the vesting provision "[would] not obviate a foreclosure" and that the first mortgagee would become liable for the HOA fees. However, these considerations were insufficient to overcome the mortgagee's lack of objection. The court proceeded to confirm the plan with the vesting provision proposed by the debtor.

3. What About Vesting Over the Creditor's Objection?

The *Rosa* court correctly concluded that a chapter 13 plan which provides for the vesting of property in the mortgage holder under § 1322(b)(9) must nevertheless provide for proper treatment of the holder's secured claim under one of the three options found in § 1325(a)(5). In *Rosa* the court found the secured creditor's lack of objection satisfied the first option, but in other cases the secured creditor may object.

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[35] *In re* Rosa, 495 B.R. at 524; *see also* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 276 (2010) (a party that is notified of a plan's contents and that fails to object is bound by the plan); *In re* Jones, 530 F.3d 1284, 1291 (10th Cir. 2008); Andrews v. Loheit (*In re* Andrews), 49 F.3d 1404, 1409 (9th Cir. 1995); *In re* Szostek, 886 F.2d 1405, 1413 (3d Cir. 1989); *In re* James, 260 B.R. 498, 503 (Bankr. D. Idaho 2001); *In re* Duggins, 263 B.R. 233, 236 (Bankr. C.D. Ill. 2001) ("[T]he debtor's plan is an offer that is deemed accepted unless objected to prior confirmation."); *In re* Walker, 128 B.R. 465, 468 (Bankr. D. Idaho 1991) ("The rule is, simply, that the acceptance of the provisions of a plan by a creditor is inferred from the absence of a timely objection.").

[36] *In re* Rosa, 495 B.R. at 524; *see also In re* Harvey, 213 F.3d 318, 321 (7th Cir. 2000) ("It is a well-established principle of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan."); Great Lakes Higher Educ. Corp. v. Pardee (*In re* Pardee), 193 F.3d 1083, 1086 (9th Cir. 1999) (confirmation order final where secured creditor with notice of the plan failed to file an objection); *In re* Flynn, 402 B.R. 437, 444 (B.A.P 1st Cir. 2009) ("A secured creditor's failure to object . . . will create a presumption of acceptance under § 1325(a)(5)(A) upon a showing of adequate notice . . . .").

In that case, the debtor is best served by arguing that the third option applies, that the debtor has surrendered the property. The *Rosa* court rejected application of this option because the debtor also proposed to vest the property in the holder. This part of the court's decision is not supported by the plain language of § 1325(a)(5), which deals only with the treatment of the secured creditor's *claim*. The vesting provision under § 1322(b)(9) dealt with the property and should not have had any effect on whether the plan was confirmable with respect to the holder's secured claim by providing for surrender under § 1325(a)(5)(C). In other words, the debtor's plan in *Rosa* should have been confirmed even without a finding that the creditor had accepted the plan. Several courts have accepted the view that a plan with vesting provision can be conformed over the creditor's objection.[37]

A chapter 13 plan provision under § 1322(b)(9) providing for the vesting of the property in the mortgage holder can be a workable solution to the zombie mortgage problem. Under *Rosa*, it can be done if the secured creditor consents or if there is implied acceptance of the provisions based on the creditor's failure to object. Good arguments also can be made that such a plan can be confirmed over the creditor's objection. As in *Rosa*, the plan should propose that the property will vest in the mortgage holder upon confirmation of the plan and that the confirmation order (or a separate order) will provide for conveyance of the property to the holder. This will provide the debtor with an order that can be recorded in the local land records office.

[37] *In re* Stewart, 2015 WL 5138196 (Bankr. D. Minn. Sept. 1, 2015); *In re* Zair, 535 B.R. 15 (Bankr. E.D.N.Y. 2015); *In re* Sagendorph, 2015 WL 3867955 (Bankr. D. Mass. June 22, 2015) ("surrender" provision of § 1325(a)(5)(C) can be used in conjunction with the "vesting" provision of § 1322(b)(9)). *But see* Bank of New York Mellon v. Watt, 2015 WL 1879680 (D. Or. Apr. 22, 2015); *In re* Rose, 512 B.R. 790 (Bankr. W.D. N.C.2014) (court noted in *dicta* that section 1322(b)(9) could not be used to compel creditor to accept title, but entered an order setting conditions based on creditor response for when debtor could execute and record a quitclaim deed to creditor).

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FOR COURT USE ONLY

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☒ Attorney for: DEBTORS

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:
Eric Matthew Von Poppen
Kelly Lynn Von Poppen
Debtor.

CASE NO.: 6:14-bk-12972-MH
CHAPTER: 13

NOTICE OF MOTION FOR ORDER CONFIRMING DEBTOR'S CHAPTER 13 PLAN AS PROPOSED TO VEST TITLE OF SURRENDERED PROPERTY IN THE NAME OF MORTGAGEE PURSUANT TO TERMS OF DEBTORS' CHAPTER 13 PLAN AND U.S.C. 1322(b)(9)

DATE: 6/19/14
TIME: 1:30pm
COURTROOM: 303
PLACE: Riverside Division

1. TO (specify name): **ROD DANIELSON, CHAPTER 13 TRUSTEE; and SECURED CREDITOR OCWEN LOAN SERVICING, LLC.**
2. NOTICE IS HEREBY GIVEN that on the following date and time and in the indicated courtroom, Movant in the above-captioned matter will move this court for an Order granting the relief sought as set forth in the Motion and accompanying supporting documents served and filed herewith. Said Motion is based upon the grounds set forth in the attached Motion and accompanying documents.
3. **Your rights may be affected.** You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)
4. **Deadline for Opposition Papers:** This Motion is being heard on regular notice pursuant to LBR 9013-1. If you wish to oppose this Motion, you must file a written response with the court and serve a copy of it upon the Movant or Movant's attorney at the address set forth above no less than fourteen (14) days prior to the above hearing date. If you fail to file a written response to this Motion within such time period, the court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief.
5. **Hearing Date Obtained Pursuant to Judge's Self-Calendaring Procedure:** The undersigned hereby verifies that the above hearing date and time were available for this type of Motion according to the judge's self-calendaring procedures.

Date: 5/23/14

Law Offices of Jenny L. Doling, A Prof. Law Corp.
Printed name of law firm

Signature
Jenny L. Doling, Esq. 207033

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Eric & Kelly Von Poppen

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA -- RIVERSIDE

In re: Eric Von Poppen Kelly Von Poppen	Case No. 6:14-bk-12972-MH Chapter 13 **MOTION FOR ORDER CONFIRMING DEBTORS' CHAPTER 13 PLAN AS PROPOSED TO VEST TITLE OF SURRENDERED PROPERTY IN NAME OF MORTGAGEE PURSUANT TO TERMS OF DEBTORS' CHAPTER 13 PLAN AND U.S.C. §1322(b)(8) and (b)(9).** Date: June 19, 2014 Time: 1:30 p.m. Ctrm: 303 Judge: Hon. Mark D. Houle

TO THE HONORABLE MARK D. HOULE, UNITED STATES BANKRUPTCY JUDGE, ROD DANIELSON, CHAPTER 13 TRUSTEE, UNITED STATES TRUSTEE, OCWEN LOAN SERVICING, LLC (SECURED CREDITOR), AND ALL INTERESTED PARTIES:

Eric and Kelly Von Poppen ("Debtors") hereby move this Court for an Order Confirming Debtors' Chapter 13 Plan as proposed, which provides that the surrendered real property located at 57547 Onaga Trail, Yucca Valley, CA 92284[1] shall vest in Ocwen Loan Servicing, LLC upon plan confirmation pursuant to 11 U.SC. §1322(b)(8) and (b)(9). This Motion is based on the attached

[1] APN: 0587-261-28 and legally described as: THE WEST ½ OF LOT 44, TRACT NO. 3498 TRACT NO 3498, YUCCA CORRAL ACRES NO. 2, AS PER MAP RECORDED IN BOOK 46, PAGE 39, OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER.

Memorandum of Points and Authorities with exhibits thereto, and the attached Declaration of Jenny L Doling, Debtors' counsel. There was and has been no timely objections made by any party to the Confirmation of Debtors' Chapter 13 Plan.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

JURISDICTION

1. Jurisdiction is conferred on this Court pursuant to the provisions of 28 U.S.C. §1334 in that this proceeding arises from and is related to the above-captioned bankruptcy case under Title 11.

2. This Court has both personal and subject matter jurisdiction to hear this case pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(b)(2), respectively.

3. This is a core proceeding.

4. Venue lies in this District pursuant to 28 U.S.C. §1391(b).

II.

PROCEDURAL FACTS

5. On March 10, 2014 ("Petition Date"), Debtors filed a voluntary petition for relief under Chapter 13 of the United State Bankruptcy Code known as Case No. 6:14-bk-12972-MH. (See Docket #1).

6. On March 11, 2014 Debtors filed their chapter 13 plan. (See Court Docket #8 and copy of plan as part of Exhibit A).

7. On March 12, 2014 Debtors filed and served the Notice of Section 341(a) Meeting and Hearing on Confirmation of Plan with Copy of Chapter 13 Plan. (See Exhibit A and Court Docket #10).

8. It should be noted that although it is not required, Debtors served Ocwen Loan Servicing, LLC ("OCWEN") with a copy of the plan to the attention of its President, Ronald Faris. OCWEN did not timely object to the confirmation of the plan, nor did it appear in the matter.

9. At the Confirmation Hearing held on April 17, 2014, the chapter 13 trustee was prepared to recommend confirmation on the terms proposed in Debtors' plan if the Court would allow provision 4 of the plan to be confirmed.

10. The Court, the Honorable Mark D. Houle presiding, indicated the provision proposed was one that created an of first impression. Before ruling on the provision and confirmation of the plan the court requested a motion with supporting authority and argument. The Court further indicated it was not opposed to allowing the proposed provision to be completed via plan confirmation without a motion in the future, but would reserve further comment on that until after the motion in this case had been ruled upon.

III.

FACTS

11. Debtors hold title to the property commonly known as 57547 Onaga Trail, Yucca Valley, CA 92284. The debtors have vacated the property and stated their intention to voluntarily surrender the property to the secured lienholder in the instant bankruptcy.

12. Debtors proposed the following language in provision V.F.4 of the their chapter 13 plan to vest title in OCWEN:

> "Debtors have surrendered and vacated the real property located at 57547 Onaga Trail, Yucca Valley, ca 92284. Pursuant to §§1322(b)(8) and (9), title to the subject property shall vest in Ocwen Loan Servicing, LLC upon confirmation, and the confirmation order shall constitute a deed of conveyance of the property when recorded at the office of the county recorder. All secured claims secured by the debtor's property will be paid by surrender of the collateral and foreclosure of the security interest. To the extent creditor claims a deficiency balance, creditor shall have to timely file a proof of claim for the same and sufficient evidence to support the validity of the claim in light of California's anti-deficiency statutes."

13. To date, no foreclosure proceedings have been initiated. OCWEN has not recorded a Notice of Default or taken any other action to secure the property or to exercise any remedies, i.e. foreclosure. The property remains titled in the name of the Debtors, subjecting them to municipal regulation regarding maintenance and upkeep, which may include fines, penalties and other liabilities, including contempt of court for failure to comply with local ordinances. These risks and liabilities defeat the core purpose of the Bankruptcy Code to provide the honest but unfortunate debtor with a fresh start.

///

///

IV.

ARGUMENT

Nationwide there are perplexing problem facing debtors who have voluntarily surrendered real property. The secured lienholders fail to timely foreclose the surrendered properties or to secure the surrendered properties, leaving many homes and neighborhoods exposed to vandalism, theft, destruction of real property or worse, thereby further diminishing the value of the surrendered property and harming neighborhood values as a whole.

In addition, many debtors have been denied their fresh start for many years after successfully completing their bankruptcies and obtaining discharges because the secured lienholders did not timely foreclose on surrendered property. This impacts debtors greatly because most banks require a one to three year waiting period to qualify for new home loan financing after there has been a bankruptcy or foreclosure. If a debtor establishes he or she is able to qualify for the purchase of a new home and meets the waiting period post-discharge, that qualification will be rescinded if it is discovered that a surrendered property is still in the name of the debtor or that the foreclosure on the surrendered property had only recently occurred. For example, an honest debtor, who has worked hard to reestablish a good credit rating three years after his or her bankruptcy would be denied financing if the secured lienholder of the surrendered property failed to foreclose until 2 or three years after the bankruptcy discharge, meaning some debtors can be denied access to funding for up to six years or longer after a successful bankruptcy. The detrimental effect of leaving surrendered property in the name of the debtor goes against public policy and the purpose of the fresh start bankruptcy provides.

In this case, the Debtors' proposed chapter 13 plan provision is consistent with the plain language of 11 U.S.C. §§1322(b)(8) and (b)(9), which state that a plan may provide for vesting of property in the estate or in ***any other entity*** upon confirmation or at any other time. *(Emphasis added)*. Such vesting gives effect and meaning to chapter 13's permissive option of surrender of collateral, see *In re Bryant, 323 BR 635, 645 (Bkrtcy.E.D. PA., 2005),* and to the broader principal purpose of the Bankruptcy Code, which is to grant a "fresh start to the honest but unfortunate debtor," *Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367 (2007); see also Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).* It also gives effect to §1325(a)(5)©. The vesting of property was specifically

contemplated by Congress and codified in 11 U.S.C. § 1322(b)(8) and (9), as such there is no legal basis to thwart the intent of the statute.

While the Code is clear that a plan may provide for vesting of property in any other entity and that the plan may provide for payment of all or part of a claim against the debtor from property of the estate or property of the debtor, see §1322(b)(8), very few plans included this language over the years, partly because no one imagined foreclosures would take 2 to 3 years or longer. Many courts are now embracing the vesting language of §1322 in plans and motions to modify plans under §1329. For example, the following courts have ruled in favor of the vesting language, although the rulings are not binding on this Court, they are presented for their persuasive value:

a. *In re Sumano* - U.S. Bankruptcy Court, Northern District of California - San Jose Division, Bankruptcy Case No. 10-58999 ASW. The Court granted debtor's motion to modify chapter 13 plan to vest property via Quit Claim deed to the Creditor and ordered that the claim will be paid by surrender of the collateral and foreclosure of the security interests, and allowing the secured creditor to file a general unsecured non-priority claim in the debtor's case. (See Copy of Order dated and entered on April 10, 2014 as Exhibit C).

b. *In re Ames* - U.S. Bankruptcy Court, District of Massachusetts, Bankruptcy Case No. 11-40020-MSH. The Court granted debtor's motion to amend Chapter 13 Plan to vest title of surrendered real property in Bank of America upon confirmation and the Confirmation Order shall constitute a deed of conveyance of the property when recorded at the Registry of Deeds. The Court further ordered that all secured claims by the debtor's property will be paid by surrender of the collateral and foreclosure of the security interest. To the extent a deficiency existed, the creditor must file a timely proof of claim. (See Copy of Order dated and entered on January 8, 2013 as Exhibit D).

c. *In re Locascio* - U.S. Bankruptcy Court, District of Kansas, Bankruptcy Case No. 12-23159. The Court granted debtor's motion to amend the plan post-confirmation to vest title of surrendered property in Bank of America in full satisfaction of the underlying secured claim pursuant to 11 U.S.C. §§1322(b)(8) and (b)(9). The court further ordered

that the Order approving the modification shall constitute a deed of conveyance to the Property when recorded in the Jackson County Register of Deeds. Debtors were permitted to take all reasonable and necessary steps to affect the transfers of property. (See Copy of Order dated and entered on December 30, 2013 as Exhibit E).

d. *In re Rosa* - U.S. Bankruptcy Court, District of Hawaii, Bankruptcy Case No. 13-00630 (Citation 495 B.R. 522 U.S. Bankruptcy Court, D. Hawaii). (See Copy of Case attached as Exhibit F). In this case, the debtor's plan proposed surrender and vesting of the property in Ocwen, similar to the instant case. The Court held that, while proposed vesting of mortgaged property in which Chapter 13 debtor-mortgagor lacked any equity in first mortgagee could not be justified as permissible "surrender" of property to mortgagee, the court could nonetheless confirm the plan that provided for such vesting over objection of Chapter 13 trustee based on first mortgagee's failure to object. The Court further recognized debtor's decision to surrender the property as a wise decision. Similar to the instant case, the secured lender did not timely object to the confirmation of Debtors' Chapter 13 plan, nor did it appear. In the *Rosa* case, the chapter 13 trustee objected. However, in this case, no objection has been made by *any* party. Based on secured creditor's default, alone, Debtors' plan should be confirmed. Failure to object constitutes acceptance. *See Andrews v. Loheit (In re Andrews), 49 F.3d 1404, 1409 (9th Cir. 1995).* In *In re Rosa,* the court recognized the fact that the vesting provision may be one in which the mortgagee would be happy with, because the vesting provision may help to avoid the expense of foreclosure.

To deny confirmation of debtors' plan as proposed the court would have to find that it was not proposed in good faith under §1325 or that the plan provisions proposed under §1322 did not comply with the Code. In this case, Debtors have proposed a 100% plan, with no objecting parties. The language proposed in Debtors' plan at provision V.F.4 are within the plain language of the code allowing vesting in any other entity. Debtors are not proposing to vest the property in an entity that has no interest in this property, but rather to THE only other entity with an interest in the property and that

entity did not object. Here, § 1325(a)(5) is fulfilled because subsection (A) was satisfied when the holders of the secured claim failed to object.

Furthermore, the vesting of Debtors' property in the name of secured creditor at Confirmation promotes efficiency, effectuates the furtherance of the fresh start of an honest debtor as intended by the Code, it may help to prevent the destruction of the secured property and preservation of the surrounding neighborhoods, and it helps ward off unnecessary risk, and/or liabilities that may impact Debtors' ability to make their plan payments to all of the other creditors who have timely elected to participate in Debtors' 100% chapter 13 plan.

V.

CONCLUSION

Debtors respectfully request this Court grant Debtors' Motion for Order Confirming debtors' chapter 13 plan as proposed to vest title of surrendered property in name of MORTGAGEE pursuant to terms of 11 U.S.C. §§1322(b)(8) and (b)(9). Further, Debtors request an Order allowing Debtors to either record a copy of the Order Confirmation Plan with the County Recorder or an Order allowing Debtors to simply quit claim the property to secured creditor pursuant to confirmation of the plan.

DATED: 5/20/14

Respectfully submitted,

LAW OFFICES OF JENNY L. DOLING
A PROFESSIONAL LAW CORPORATION

By: _____
JENNY L. DOLING
Attorney for Debtors
Eric & Kelly Von Poppen

DECLARATION OF JENNY L. DOLING

1. I, JENNY L. DOLING, Esq., am an attorney duly licensed to practice law before the State of California and before this Court. All the information contained herein is within my personal knowledge, except where otherwise indicated, and I could and would competently testify thereto.

2. Attached as Exhibit A is a true and correct copy of Debtors' filed and served Notice of Section 341 Meeting and Hearing on Confirmation of plan with Copy of Chapter 13 Plan.

4. Attached as Exhibit B is a true and correct copy of Debtors' Grant Deed.

5. Attached as Exhibit C is a true and correct copy of Order of U.S. Bankruptcy Court, Northern District of California in *In re Sumano.*

6. Attached as Exhibit D is a true and correct copy of Order of U.S. Bankruptcy Court, District of Massachusetts in *In re Ames.*

7. Attached as Exhibit E is a true and correct copy of Order of U.S. Bankruptcy Court, District of Kansas in *In re Locascio.*

8. Attached as Exhibit F is a true and correct copy of Order of U.S. Bankruptcy Court, District of Hawaii in *In re Rosa.*

9. Attached as Exhibit G is a true and correct copy of the Notice of Default recorded on February 10, 2014.

10. Attached as Exhibit H is a true and correct copy of the Assignment of Deed of Trust recorded on February 18, 2009.

11. Attached as Exhibit I is a true and correct copy of the Deed of Trust recorded on July 3, 2006.

12. On March 10, 2014 ("Petition Date"), I filed Debtors' voluntary petition for relief under Chapter 13 of the United State Bankruptcy Code known as Case No. 6:14-bk-12972-MH. (See Docket #1).

13. On March 11, 2014 I filed Debtors' filed chapter 13 plan. (See Court Docket #8)

14. On March 12, 2014 my office caused to be served Debtors' Notice of Section 341(a) Meeting and Hearing on Confirmation of Plan with Copy of Chapter 13 Plan. (See Court Docket #10).

15. My office served Ocwen Loan Servicing, LLC ("OCWEN") with a copy of the plan pursuant to the attention of its President, Ronald Faris. OCWEN did not timely object to the confirmation of the plan, nor did it appear in the matter.

16. At the Confirmation Hearing held on April 17, 2014, the chapter 13 trustee was prepared to recommend confirmation on the terms proposed in Debtors' plan if the Court would allow provision 4 of the plan to be confirmed. This Court indicated it may confirm the plan as proposed after the opportunity to review the authority and argument, as this was an issue of first impression.

17. I have researched the status of loan with regard to foreclosure proceedings. To date, I have found no information to indicate foreclosure sale date has been recorded. OCWEN has not taken any action to secure the property or to exercise any remedies, i.e. foreclosure. The property remains titled in the name of the Debtors, subjecting them to municipal regulation regarding maintenance and upkeep, which may include fines, penalties and other liabilities, including contempt of court for failure to comply with local ordinances.

18. I have practiced in the area of bankruptcy since 2000. In 2006, I limited my practice exclusively to consumer bankruptcy matters. I also speak nationally on consumer bankruptcy issues for NACBA, NACTT, and NCBJ. I am also a licensed real estate broker in California and very familiar with the foreclosure crisis that has plagued the real estate market for the past eight years. It is has been my personal experience, as well as that of many consumer bankruptcy attorneys nationwide that the surrender of real property poses a serious and perplexing problem to debtors. The secured lienholders fail to timely foreclose the surrendered properties or to secure the surrendered properties, leaving many homes and neighborhoods exposed to vandalism, theft, destruction of real property or worse, thereby further diminishing the value of the surrendered property and harming neighborhood values as a whole.

19. In addition, many debtors have been denied their fresh start years after successfully completing their bankruptcies and obtaining discharges because the secured lienholder did not timely foreclose on the surrendered property. This impacts debtors greatly because most banks require a one to three year waiting period to qualify for new home loan financing after there has been

a bankruptcy or foreclosure. If a debtor establishes he or she is able to qualify for the purchase of a new home and meets the waiting period post-discharge, that qualification will be rescinded if it is discovered that a surrendered property is still in the name of the debtor or that the foreclosure on the surrendered property had only recently occurred. For example, an honest debtor, who has worked hard to reestablish a good credit rating three years after his or her bankruptcy would be denied financing if the secured lienholder of the surrendered property failed to foreclose until 2 or three years after the bankruptcy discharge, meaning some debtors can be denied access to funding for up to six years or longer after a successful bankruptcy. The detrimental effect of leaving surrendered property in the name of the debtor goes against public policy and the purpose of the fresh start bankruptcy is intended to provide.

Executed this 23rd day of May, 2014, under the penalty of perjury pursuant to laws of the United States of America, at Palm Desert, California.

JENNY L. DOLING
Attorney for Debtors

RECORDING REQUESTED BY Law Offices of Jenny L. Doling, APLC 36-915 Cook Street, Suite 101 Palm Desert, CA 92211
AND WHEN RECORDED MAIL DOCUMENT TO:

NAME Eric + Kelly Von Poppen
STREET ADDRESS PO Box 22160
CITY, STATE & ZIP CODE Yucca Valley, CA 92286

Recorded in Official Records, County of San Bernardino
BOB DUTTON
ASSESSOR – RECORDER – CLERK
P Counter

8/24/2015
8:54 AM
JC
SAN

Doc#: 2015-0360560

Titles: 1 Pages: 4

Fees	24.00
Taxes	0.00
Other	0.00
PAID	$24.00

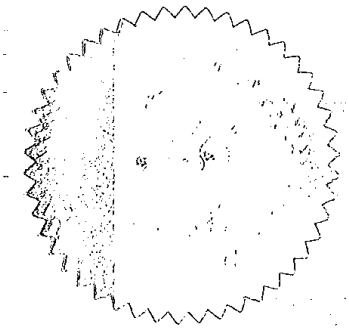
SPACE ABOVE FOR RECORDER'S USE ONLY

U.S. Bankruptcy Court Order Confirming Chapter 13 plan vesting title of property to ocwen loan Servicing, LLC

Title of Document

THIS AREA FOR RECORDER'S USE ONLY

THIS COVER SHEET ADDED TO PROVIDE ADEQUATE SPACE FOR RECORDING INFORMATION
($3.00 Additional Recording Fee Applies)



UNITED STATES BANKRUPTCY COURT
Central District of California

I hereby attest and certify that on **November 4, 2014** the attached reproduction(s), containing **2** pages, is a full, true and correct copy of the complete document entitled: **Order Confirming Chapter 13 Plan**

Case #: **6:14-BK-12972-MH** Doc #: **25**

which includes: ☐ Exhibits ☐ Attachments

on file in my office and in my legal custody at the marked location:

☐ 255 E. Temple Street, Suite 940
Los Angeles, CA 90012

☒ 3420 Twelfth Street, Suite 125
Riverside, CA 92501-3819

☐ 411 West 4th Street, Suite 2074
Santa Ana, CA 92701-4593

☐ 1415 State Street
Santa Barbara, CA 93101-2511

☐ 21041 Burbank Boulevard
Woodland Hills, CA 91367

KATHLEEN J. CAMPBELL
Clerk of Court

By: _____
Deputy Clerk

THIS CERTIFICATION IS VALID ONLY WITH THE UNITED STATES BANKRUPTCY COURT SEAL.

Revised August 2010

Attorney or Party Name, Address, Telephone & FAX No., State Bar No. & Email Address

Rod Danielson
Chapter 13 Trustee
3787 University Avenue
Riverside, CA 92501
Tel (951) 826-8000
Fax (951) 826-8090

Chapter 13 Trustee

FOR COURT USE ONLY

FILED & ENTERED

JUN 26 2014

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY cargill DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - RIVERSIDE DIVISION

In re:
ERIC MATTHEW VON POPPEN

KELLY LYNN VON POPPEN

Debtor(s).

CASE NO.: **6:14-bk-12972-MH**

CHAPTER: 13

ORDER CONFIRMING CHAPTER 13 PLAN

DATE: June 19, 2014
TIME: 1:30 PM
COURTROOM: 303
PLACE: 3420 Twelfth St
Riverside, CA 92501

The Chapter 13 Plan or last amended plan, if any (the "Plan") of debtor(s), was filed on 03/11/2014.

The Plan was served on the creditors pursuant to Rule 3015 of the Federal Rules of Bankruptcy Procedure. The debtor(s) appeared and was/were examined at a meeting conducted pursuant to 11 U.S.C. § 341(a). The court finding that the Plan meets the requirements of 11 U.S.C. §1325, IT IS ORDERED AS FOLLOWS:

The Plan is hereby confirmed, with the following provisions:

1. Plan Payments:
   a. [X] The amount of each monthly plan payment is $810.00. The due date is the 10th day of each month for 18 months. The Plan provides for the payment of 100.00% of allowed claims for general unsecured creditors.

   b. [ ] The amount of each monthly plan payment is $_____ for months _____. For months _____, the monthly plan payment is $_____. The due date is _____ day of each month. The Plan provides for the payment of _____% of allowed claims for general unsecured creditors.

2. Confirmation of the Plan is without prejudice to the rights of secured creditors with respect to the post-petition defaults by the debtor(s).
3. Other provisions:
   a. [X] This is a base plan with the debtor(s) paying at least $14,580.00 of disposable income into the Plan. The debtor(s) shall submit statements of income on an annual basis to the Trustee, which income shall be reviewed by the Trustee who may petition the court to increase the monthly plan payment for cause until such time as all allowed unsecured creditors, to the extent they are to be paid during the term of the Plan, are paid 100%. The Trustee may increase the dividend paid allowed claims until the full amount of the plan base stated in this paragraph has been paid by the debtor(s) or the claims have been paid in full without further notice or order from the court.

ORDER CONFIRMING CHAPTER 13 PLAN Page 2 of 2	CASE NO.: **6:14-bk-12972-MH** CHAPTER: 13

b. [X] The Trustee is authorized to make payment to holders of secured claims based on the plan. However, a filed claim will control the amount owed the creditor, unless an objection is filed, whether that amount is more or less than the amount provided by the Plan.

c. [X] Counsel for debtor(s) is awarded fees of $4,000.00; having previously received $3,000.00 , counsel is entitled to $1,000.00 payment of from the estate. Fees will be paid in an amount of not more than 50% of each plan payment until paid in full.

d. [X] Additional provisions incorporated in this Order:
1. Debtor(s) must pay the base plan amount or the percentage to unsecured creditors, whichever is greater.
2. In addition to the monthly plan payments, tax refunds received during the term of the plan are pledged to the plan.
3. The plan is modified to comply with the requirements of the court's approved plan form.
4. Debtor(s) reserve the right to object to any claim notwithstanding any plan interlineations.

e. [X] Interlineations:

- THE INTERNAL REVENUE SERVICE SHALL BE PAID $142.74 PER MONTH ON ITS PRIORITY CLAIM OF $2,569.38. PURSUANT TO §§1322(B)(8) AND (B)(9), TITLE TO THE PROPERTY LOCATED AT 57547 ONAGA TRAIL, YUCCA VALLEY, CALIFORNIA 92284 (APN: 0587-261-28 AND LEGALLY DESCRIBED AS: THE WEST 1/2 OF LOT 44, TRACT NO. 3498 TRACT NO 3498, YUCCA CORRAL ACRES NO. 2, AS PER MAP RECORDED IN BOOK 46, PAGE 39, OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER) SHALL VEST IN OCWEN LOAN SERVICING, LLC UPON CONFIRMATION, AND THE CONFIRMATION ORDER SHALL CONSTITUTE A DEED OF CONVEYANCE OF THE PROPERTY WHEN RECORDED AT THE OFFICE OF THE COUNTY RECORDER. ALL SECURED CLAIMS SECURED BY THE SUBJECT PROPERTY WILL BE PAID BY SURRENDER OF THE COLLATERAL AND FORECLOSURE OF THE SECURITY INTEREST. TO THE EXTENT THE SECURED CREDITOR CLAIMS A DEFICIENCY BALANCE, THAT SECURED CREDITOR SHALL HAVE TO TIMELY FILE A PROOF OF CLAIM FOR THE SAME AND SUFFICIENT EVIDENCE TO SUPPORT THE VALIDITY OF THE CLAIM IN LIGHT OF CALIFORNIA'S ANTI-DEFICIENCY STATUTES.

Date: June 26, 2014

Mark Houle
United States Bankruptcy Judge

ABI 2017 WINTER LEADERSHIP CONFERENCE

December 1, 2017
LaQuinta Resort & Club
LaQuinta, CA

Recent Decisions on Retention and Surrender of Secured Property in Consumer Cases

Surrender:

6. Memorandum Opinion, *In re Gregory*, USBC, WD Mo. No. 10-50237 (Jun. 14, 2017).

7. *Failla v. Citibank, N.A.* (*In re Failla*), No. 15-15626, 838 F.3d 1170 (11th Cir. Oct. 4, 2016)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

IN RE:	)	
	)	
RUBY AUDEEN GREGORY,	)	Case No. 10-50237
Debtor.	)	
	)	

MEMORANDUM OPINION DENYING WELLS FARGO'S MOTION TO ORDER DEBTOR TO DISMISS STATE COURT ACTION AND TO ENFORCE SWORN PROMISE TO SURRENDER PROPERTY TO WELLS FARGO OR OTHERWISE REAFFIRM OR REDEEM COLLATERAL

The court is asked to consider the meaning of the word "surrender" in § 521(a)(2)(A)[1] in an unusual context: where a secured creditor obtains stay relief, fails to timely foreclose, and mistakenly releases its lien, and the debtor who stated she would surrender the real estate attempts to leverage that mistake into a possible windfall. For the reasons stated below, the court denies the creditor's motion to compel the debtor to "surrender" her real estate and to dismiss her state court case against the lender.

Findings of Fact

The court makes the following findings of fact based on stipulated facts and exhibits.[2]

Description of the Real Estate Involved

At the time Ruby Gregory filed a chapter 13 bankruptcy in 2010, she owned a home in Stanberry, Missouri, known as 317 N. Willow Street, with her daughter, Rita.[3] The property at

[1] All statutory references are to the United States Bankruptcy Code, Title 11, unless otherwise noted. All references to "Rules" are to the Federal Rules of Bankruptcy Procedure, unless otherwise noted.
[2] There are some factual disputes not addressed in the stipulation, and several discrepancies between the record and the stipulated facts, but none of the disputes or discrepancies is material or prevents the court from ruling on the motion as a matter of law. The court takes judicial notice of the existence of certain items in the record for the purpose of accurately setting forth the procedural background. *See, e.g., In re James*, 300 B.R. 890, 894 (Bankr. W.D. Tex. 2003).
[3] The Schedule A filed in 2010 does not disclose that Rita has any interest in 317 N. Willow, but an examination of the deeds of trusts and other information in the record reveals that Rita's name is on the deeds.

317 N. Willow is legally described in part as "Tract B."[4] Ruby and Rita also owned the adjoining property, 313 N. Willow Street, legally described in part as "Tract A."[5] The property at 313 N. Willow is a lot with an abandoned structure.

Both properties were encumbered by deeds of trust securing a note Ruby executed in favor of Wells Fargo Financial Missouri several years earlier. Rita was not a signatory to the note, although she did sign both deeds of trust. The deeds of trust were properly recorded with the Gentry County, Missouri Recorder of Deeds. But here is where the trouble begins: apparently unbeknownst either to Ruby or to Wells Fargo at the time, the legal descriptions in the deeds of trust had been switched. The deed of trust for 317 N. Willow (Tract B, Ruby's home) listed the legal description for 313 N. Willow (Tract A, the lot); the deed of trust for 313 N. Willow (Tract A, the lot) listed the legal description for 317 N. Willow (Tract B, Ruby's home).

Treatment of the Real Estate in the Chapter 13 Case

In Ruby's chapter 13 bankruptcy case, she listed 317 N. Willow as her street address and claimed the property as her partially exempt homestead.[6] She valued 317 N. Willow at $95,000, with a mortgage of approximately $100,000 owed to Wells Fargo. She did not list Rita as a co-owner of 317 N. Willow.

Ruby did not specifically schedule any property known as the lot at 313 N. Willow. Ruby did schedule a half-interest with her daughter Rita in property described as "Highway 169 1 Acre." Ruby scheduled the value of this property at $20,000, with a mortgage of $9,900 owed to U.S. Bank. It is not clear whether this second property is actually supposed to be the lot, 313 N.

[4] The full legal description of 317 N. Willow is "TRACT B: THE EAST ONE HALF (1/2) OF LOTS FOURTEEN (14), FIFTEEN (15), SIXTEEN (16) AND SEVENTEEN (17) ALL IN BLOCK FIFTEEN (15), STANBERRY, GENTRY COUNTY, MISSOURI."

[5] The full legal description of 313 N. Willow is "TRACT A: LOTS TWENTY (20) AND TWENTY-ONE (21), BLOCK FIFTEEN (15), CITY OF STANBERRY, GENTRY COUNTY, MISSOURI."

[6] Under Missouri law, a debtor may claim a homestead exemption of $15,000. MO. REV. STAT. § 513.475.

Willow, or whether the reference to U.S. Bank was intended to be Wells Fargo, and the parties unfortunately do not address this discrepancy in their stipulated facts.

In any event, Ruby's chapter 13 plan proposed to retain the property at 317 N. Willow and to cure Wells Fargo's mortgage arrears. With respect to the "Highway 169 1 Acre" property, the plan stated she would surrender it "in lieu of entire debt." The 313 N. Willow property was not addressed in the plan. After several plan amendments[7] without objection by any creditor or party in interest save the chapter 13 trustee, Ruby's plan was eventually confirmed.[8]

Events Post-Confirmation

Ruby did not complete her plan. After several suspensions of plan payments and motions to dismiss for default,[9] Ruby's chapter 13 case was dismissed for default in plan payments about two years after the case was filed.

Pending at the time of dismissal was Wells Fargo's motion for relief to lift the stay for cause under § 362(d)(1) as against both 313 and 317 N. Willow.[10] In the motion, Wells Fargo sought a waiver of the Rule 4001(a)(3) stay of execution. Specifically, Wells Fargo alleged it was not adequately protected and would be irreparably harmed if the stay were not lifted to allow it to "seek the return of [the] property." Only the chapter 13 trustee filed a timely response to

[7] Ruby filed six plans in total, each increasing the payment, to address both the higher-than-anticipated Wells Fargo arrears and the effect of the numerous suspensions and defaults on the plan length.

[8] U.S. Bank, purportedly the holder of a deed of trust on the "Highway 169 1 Acre" property, did not file a proof of claim except with respect to an unsecured credit card; Wells Fargo's secured proof of claim included as exhibits the deeds of trust for both of the N. Willow properties.

[9] Ruby suspended more than $21,000 in plan payments in response to three motions to dismiss filed by the chapter 13 trustee for default in plan payments. At the time Wells Fargo's motion for relief was filed in March 2012, the last mortgage payment the trustee had paid Wells Fargo was for the April 2011 payment.

[10] The parties do not address the specifics of the motion for relief in the stipulated facts, but, interestingly, Wells Fargo alleged it held a first deed of trust on 313 N. Willow (the lot), and a second deed of trust on 317 N. Willow (the home). Wells Fargo alleged that its deeds of trust were recorded, but did not allege that its liens were "properly recorded" or "perfected" or constituted a "first and prior lien," as is typical in motions for relief from stay. Wells Fargo also failed to request relief from the co-debtor stay protecting Rita under § 1301, and did not serve either Ruby or Rita with the motion. *See* FED. R. BANKR. P. 9014(b) (contested matters to be served in accordance with Rule 7004).

Wells Fargo's motion, but the court did not rule on the motion since the case was dismissed before Wells Fargo's motion for relief could be heard.

Three weeks after the dismissal, new counsel entered an appearance for Ruby and filed a motion to reinstate the case for the purpose of converting it to a chapter 7. The motion to convert alleged that Ruby had decided to surrender her "home"[11] since the payments were higher than she could afford.[12] The court[13] granted the motion to reinstate ex parte pursuant to local rule[14] and ordered conversion of the case to a chapter 7. The court also set a new deadline for parties to object to Wells Fargo's motion for relief.

Ruby then filed an amended petition and conversion schedules. The amended petition lists a street address of "3526 Highway 169 South, Stanberry, Missouri." Schedule A describes "3526 Highway 169 S." as one acre worth $20,000 secured by a lien of $9,900, owned one-half with daughter Rita. 317 N. Willow and 313 N. Willow are scheduled together with the description as "Lot with Abandoned Structure," valued in aggregate at $30,000, and secured by a lien of approximately $100,000.[15] Ruby claimed "3526 Highway 169 S." as her homestead;[16] no party objected. Rita's interest in the N. Willow properties was not disclosed.

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[11] The motion did not specify which piece of property was the "home." The motion to convert also does not appear to have been served on Wells Fargo or other creditors; the certificate of service stated that the motion was served "upon all appropriate parties electronically by the U.S. Bankruptcy Court's ECF System."

[12] Wells Fargo's brief seizes upon the language in the motion to convert, arguing that the statement that the property would be surrendered was misleading and yet another "promise" the court should enforce. Ruby alleged in the motion she intended to surrender her "home," but given that she used a different address for her residence and claimed property other than the 317 N. Willow property as exempt, it is not at all clear what property was being surrendered. But even assuming that her counsel's statements in the motion to convert were misleading to Wells Fargo, those statements are not grounds for the relief Wells Fargo seeks. The statements in the motion are governed by Rule 9011, and Wells Fargo did not seek sanctions under Rule 9011 or comply with the safe-harbor provisions of the Rule. Statements by counsel in a motion should be distinguished from statements in a statement of intention signed by the debtor under penalty of perjury. *See* 28 U.S.C. § 1746; Rule 1007(b)(2); Rule 1008.

[13] The Honorable Jerry W. Venters, now retired.

[14] W.D. Mo. L.B.R. 9060-1.J.

[15] The description in the conversion schedules suggests that the "Highway 169 1 Acre" property is not 313 N. Willow, the lot with abandoned structure, and that Ruby actually owned three pieces of real estate. Again, the discrepancies between the original and amended Schedule A in terms of what real property Ruby owned has not been addressed by the parties, but is not material given that it is only 313 N. Willow and 317 N. Willow that are at issue in the motion.

It is Ruby's statement of intention, however, that has become important in the context of this dispute. With respect to 317 N. Willow and 313 N. Willow ("Lot with Abandoned Structure"), Ruby checked the box that said "Property will be . . . Surrendered." The separate verification form states: "I declare under penalty of perjury that the above indicates my intention as to any property of my estate securing a debt and/or personal property subject to an unexpired lease."[17]

In the meantime, the court entered an order granting Wells Fargo's motion for relief after no party objected. Wells Fargo's counsel filed a certificate of service stating he served the order on First National Bank of Omaha and a mortgage servicer in Florida (neither of whom appear to have any connection with the case); Ruby and Rita were not served. Ruby's chapter 7 trustee[18] filed a no-asset report, and Ruby received her discharge order in due course. In late September 2012, the case was closed.

Events Post Chapter 7

It is not clear from the record how long Ruby continued to live in the home at 317 N. Willow. The parties stipulated that "Ruby maintains" she has not regularly resided at 317 N. Willow since December 2015;[19] inspection records by Wells Fargo's agent attached to the

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[16] There is nothing in the record or the parties' stipulated facts to indicate whether there was a structure that allowed Ruby to live on the one acre as the Missouri homestead exemption would require. *See* MO. REV. STAT. § 513.475.1 (requiring a "dwelling house").

[17] Ruby also stated she intended to surrender her claimed homestead, 3526 Highway 169 South.

[18] The stipulation states that the chapter 13 case was filed on March 18, 2010, and that Bruce E. Strauss was appointed as trustee. Richard Fink was appointed as the chapter 13 trustee; Mr. Strauss is the chapter 7 trustee.

[19] The court is not clear whether this stipulation is intended to mean that Ruby lived regularly at 317 N. Willow until December 2015. Ruby argues in her brief that she lived at 317 N. Willow until December 17, 2015, but that is not what she stipulated to, and she presented no other evidence. Also, although the parties stipulated Ruby listed her "primary residence" as 3526 Highway 169 South in the amended conversion petition, that is, strictly speaking, not what the petition states: it lists 3526 Highway 169 South as a "street address" and a P.O. box as the address for mailing. In sum, the court is left to surmise that Ruby lived at 317 N. Willow during the chapter 13; moved out when she converted the case to chapter 7 (since she claimed 3526 Highway 169 South as her homestead as of the date of conversion to chapter 7); and may have moved back to 317 N. Willow later, based on the vague stipulation. Likewise, the parties' stipulation that Ruby did not list any other prior addresses for the three years preceding the filing of the amended petition is also not strictly true, since the chapter 13 petition listed 317 N. Willow as her

stipulation reflect the house was vacant during inspections conducted in 2014 through sometime in 2015.

In any event, in July 2014, Wells Fargo sent a letter to Ruby addressed to 317 N. Willow with the subject line: "Release of secondary collateral used to secure your loan." The letter stated that Wells Fargo was releasing its lien on its secondary collateral, 313 N. Willow, but retaining its interest in the primary collateral, 317 N. Willow.

Wells Fargo had in fact recorded a "full deed of release" with the Gentry County Recorder of Deeds earlier in June 2014, before it sent the letter. The release states in the header that the property address of the deed of trust being released is 313 N. Willow; the body of the release directs the county recorder to "cancel of record said security instrument" and lists thereafter the legal description of Tract B (the description of 317 N. Willow).[20] Notwithstanding the release, many more months passed, during which Wells Fargo appears to have done nothing else to foreclose whatever interest it retained in either N. Willow property.[21] It is not clear when Wells Fargo discovered the errors in the deeds of trust and deed of release.

Ruby's State Court Action against Wells Fargo

In March 2016, Ruby filed a four-count petition against Wells Fargo and its agent in Gentry County Circuit Court, Case No. GE-CC00033 (the "State Court Action"). The petition alleges generally that Wells Fargo, through its agent, broke into Ruby's home at 317 N. Willow,

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"street address." In any event, it is not necessary for resolution of this motion to decide when or if Ruby vacated 317 N. Willow, since the court's task is to decide the legal import of her statement of intention filed in April 2012, and when or if she vacated the property is not a fact necessary to decide that legal dispute.

[20] Ruby, then 81 years old, filed a mortgage complaint with the Consumer Financial Protection Bureau, stating in essence her belief that she had received a full deed of release, but that Wells Fargo had not released the lien on 317 N. Willow. She also complained that Wells Fargo's loan had been predatory. Wells Fargo's response to the CFPB stated it had released its interest in the "secondary property," but that its lien on 317 N. Willow was not released and the loan and lien remained "active." The parties do not address the status of Ruby's CFPB complaint.

[21] Under Missouri law, a secured lender may foreclose without a judicial foreclosure by merely noticing the foreclosure with a 20 day notice. *See generally AgriBank FCB v. Cross Timbers Ranch, Inc.*, 919 S.W.2d 263 (Mo. Ct. App. 1996); MO. REV. STAT. § 443.325.

changed the locks, and damaged the property. Ruby seeks actual and punitive damages, attorney fees, and pre- and post-judgment interest for alleged trespass to land, trespass against chattels, and violations of the Missouri Merchandising Practices Act.[22] Ruby also requested a declaratory judgment that she owns 317 N. Willow (and all personal property inside) free and clear of Wells Fargo's interest. She also demanded a jury trial.

Wells Fargo's answer generally denied Ruby's allegations, and asserted thirty-one separately-enumerated affirmative defenses. Wells Fargo also counterclaimed against Ruby and third-party "defendant" Rita.[23] Wells Fargo's counterclaim sought reformation of the legal description in the deeds of trust and deed of release or in the alternative an equitable lien. Notably, Wells Fargo did not request foreclosure of its interest.

The Motion before this Court

It is unclear what transpired in the State Court Action after the counterclaim was filed, but some six months later and more than four years after the bankruptcy case was closed, Wells Fargo moved to reopen the bankruptcy case for the purpose of filing a motion to compel (the "Motion to Compel").[24]

The Motion to Compel requests various forms of relief. It requests orders (1) requiring Ruby to dismiss the State Court Action; (2) ordering Ruby to refrain from filing any further claims against Wells Fargo relating to the N. Willow properties; (3) ordering Ruby to refrain

[22] MO. REV. STAT. § 407.010 *et seq.*

[23] It is not clear if Wells Fargo actually joined Rita as a third-party defendant; she is not a co-plaintiff with Ruby in the State Court Action, although she is a party to both deeds of trust, and has not been made a party to the motion to compel. *See* MO. REV. STAT. § 509.470.

[24] Before the time ran on Wells Fargo's motion to reopen, the Office of the U.S. Trustee filed its own motion to reopen under § 350 to allow the Chapter 7 trustee to administer newly discovered assets (the State Court Action and potential avoidance of Wells Fargo's liens). The court granted the motion ex parte pursuant to local rule, which mooted Wells Fargo's motion. Wells Fargo then filed the instant Motion to Compel. In addition to contesting Wells Fargo's Motion to Compel, Ruby filed a motion to "enjoin" Wells Fargo from filing any further motions in state court; Wells Fargo has agreed in essence to stand down pending this court's ruling. In the interim, after having had an opportunity to investigate the State Court Action, the chapter 7 trustee has abandoned any interest and filed a second no-asset report. He therefore does not participate in this motion.

from taking any other action to interfere with Wells Fargo's rights to foreclose the N. Willow properties; (4) enforcing Ruby's "sworn promise" to surrender 317 N. Willow to Wells Fargo; and (5) in the alternative, ordering Ruby to reaffirm Wells Fargo's debt or to redeem the property.[25] Ruby responded with an objection and a cross-motion to enjoin Wells Fargo from filing pleadings in the State Court Action pending the chapter 7 trustee's determination of whether the State Court Action is an asset of the bankruptcy estate.[26] The parties agreed to submit both motions to the court based on stipulated facts and briefs.[27] For the reasons stated below, the court denies Wells Fargo's Motion.

Discussion

Wells Fargo argues that when a chapter 7 debtor signs a statement of her intention to surrender property, the debtor is effectuating a relinquishment of control and possession of the property *to* the secured creditor. Wells Fargo argues that for a debtor to later take any action in state court asserting ownership of the property is contrary to her representation to the bankruptcy court in the statement of intention. Wells Fargo argues a debtor's failure to relinquish possession and control of the surrendered property is an abuse of the bankruptcy system, and that this court has authority in effect to enforce the surrender. Finally, Wells Fargo argues that the overwhelming majority of courts, including courts in this district, follow its interpretation of the law.

Ruby counters that she did not surrender the property and cannot be compelled to do so when there is a non-debtor party (daughter Rita) who is not before the court, and that Ruby is not

[25] It should be noted that redemption under § 722 only applies to personal property.
[26] Ruby originally objected to the motion to compel, raising solely a procedural defense that the motion to compel needed to be in the form of an adversary complaint. The court overruled that objection, and granted Ruby additional time to submit a substantive response.
[27] At a status conference, Wells Fargo agreed voluntarily not to take further action in state court pending this court's determination. In the interim, the chapter 7 trustee filed an abandonment of any interest in the State Court Action. Ruby's motion to enjoin will therefore be denied as moot in a separate order to be issued by the court.

contesting a foreclosure action but seeking to enforce her rights in the properties in light of Wells Fargo's errors in the legal description and lien release. She also argues that § 521(a)(2) is a notice provision only, and that nothing in § 521 prevents her from exercising her state law rights to sue Wells Fargo for trespass and other theories. The court agrees with Ruby.

Introduction: Section 521(a)(2)

The court starts with the language of the Code.

Section 521(a)(2)(A) provides in relevant part that an individual debtor whose schedules include debts secured by property of the estate shall "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, the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property."[28] Section 521(a)(2)(B) also requires the debtor to "perform his intention with respect to such property" within a certain time. But in what has been described as another BAPCPA "hanging paragraph,"[29] and in essence a savings clause, § 521(a)(2) goes on to provide: "[E]xcept 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)." The Code also expressly tasks the chapter 7 trustee with "ensur[ing] that the debtor shall perform his intention as specified in section 521(a)(2)(B)."[30]

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[28] 11 U.S.C. § 521(a)(2)(A) (emphasis added).

[29] So-called because it "hangs" after a separately enumerated part or section. *See, e.g.*, § 1325(a) (treatment of 910 car claims); § 523(a)(18) (definition of a return).

[30] 11 U.S.C. § 704(a)(3). As the leading bankruptcy treatise notes, Congress also vested chapter 13 trustees with a § 704(a)(3) duty, and provided that a chapter 13 case be dismissed for a debtor's failure "to timely file the information required by paragraph (2) of section 521(a)." 11 U.S.C. §§ 1302(b)(1), 1307(c)(10). Chapter 13 debtors are not required to file statements of intention since § 521(a)(2)(A) expressly applies only to chapter 7 debtors. Thus, these provisions are meaningless in a chapter 13. 4 COLLIER ON BANKRUPTCY ¶ 521.14[2] n.3 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

Redemption of certain personal property is governed by § 722; reaffirmation of debts by § 524. The Code does not contain a separate section for surrender, however. Nor does the Code define the phrase "retention or surrender," specify what is required for a debtor "to perform his intention," or specify how a chapter 7 trustee should ensure performance of the intention. Given that Congressional intent is not apparent from the plain language of these sections, the court must turn to other sources to determine what "surrender" means in the context of § 521.

At the Threshold, a Discussion of the History of § 521(a)(2)

Courts have expended much ink and brain power on § 521(a)(2) and its predecessor, § 521(2). A discussion of what Congress meant when it used the term "surrender" must therefore begin with this history.

Congress first imposed the duty to file statements of intention and to perform the intention in the 1984 amendments.[31] The language of then § 521(2) is nearly identical to the current version, § 521(a)(2), except that § 521(2) originally applied only to debtors with secured consumer debts.[32] As courts explained at the time, secured creditors were frustrated by expending costs to file motions for relief from stay only to determine that some debtors intended to reaffirm their home mortgage or redeem their car.[33] This legislative history, and the fact that § 521(2) contained no express enforcement mechanism, led the majority of courts to conclude that § 521(2) functioned primarily as a notice provision.[34]

Yet secured creditor frustration did not abate. Creditors argued that § 521(2) afforded debtors only three options: reaffirmation, redemption, or surrender of the collateral. Seizing on

[31] Bankruptcy Amendments and Federal Judgeship Act of 1984 § 305, Pub. L. No. 98-353, H.R. 5174 (1984).
[32] Other differences between §§ 521(a)(2) and 521(2) are discussed *infra*.
[33] *E.g., In re Belanger*, 118 B.R. 368, 370–71 (Bankr. E.D.N.C. 1990).
[34] *See, e.g., In re Boodrow*, 126 F.3d 43, 50–51 (2d Cir. 1997); *In re Price*, 370 F.3d 362, 375 (3d Cir. 2004); *In re Mayton*, 208 B.R. 61, 67–68 (B.A.P. 9th Cir. 1997); *In re Irvine*, 192 B.R. 920, 921 (Bankr. N.D. Ill. 1996); *In re Parker*, 142 B.R. 327, 329 (Bankr. W.D. Ark. 1992).

the phrase "if applicable," however, debtors argued that the ambiguity in § 521(2) and lack of a plain statutory remedy offered a fourth option – that of keeping the collateral without reaffirming or redeeming, so long as they remained current on payments.[35] Under this option, the debtor – having extinguished any personal liability on the loan with his discharge – could continue to drive the car or live in the house while he was current. But if the debtor later decided to give up the car, for example, the lender was limited to repossessing the depreciated vehicle; the discharge injunction prevented the lender from suing the debtor to recover any deficiency.

This fourth option – sometimes called the option to "retain and pay" or to "pay and drive" – eventually became known as "ride-through." Ride-through derived its force from the fact that the Code as well as case law invalidated "*ipso facto*" clauses, so that a lender could not rely on the mere filing of the bankruptcy to declare default and repossess or foreclose.[36]

The courts were violently split on the issue of ride-through, resulting in "retain-and-pay"[37] and "no-retain-and-pay" [38] camps, and the pre-BAPCPA case law reflects the struggles

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[35] The Third Circuit in *In re Price*, the last circuit court to address the issue before the BAPCPA amendments of 2005, explains the statutory construction problem with § 521(2) this way:

> We begin with the pertinent text of section 521(2)(A). Congress has mandated that a debtor must file a statement of 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. 11 U.S.C. § 521(2)(A). The trouble lies with the phrase 'if applicable.' Do those words merely indicate that the three options – exemption, redemption, and reaffirmation – are relevant when a debtor intends to retain and not applicable when a debtor chooses to surrender the collateral? If so, section 521(2)(A) sets out an exhaustive set of retention options. Or, does 'if applicable' mean 'if' the debtor wishes to choose any of the three options that follow on its heels, i.e., when redemption, reaffirmation, and exemption 'apply,' that intention must be specifically stated? If the latter construction is correct, then section 521(2)(A) leaves available other methods of retention, such as by keeping the loan current.

370 F.3d 362, 370 (3d Cir. 2004) (internal quotations omitted).

[36] An *ipso facto* clause is a provision in an underlying agreement that has the effect of placing the debtor in default by reason of the occurrence, pendency or existence of a bankruptcy or insolvency proceeding. *See, e.g., In re Lopez*, 440 B.R. 447, 448 n.2 (Bankr. E.D. Va. 2010).

[37] As explained in *In re Parker*, the analysis is actually more nuanced:

many courts had with this issue. The lack of a clear enforcement mechanism in § 521(2) also complicated matters; some courts held that a creditor could not compel a debtor to surrender since the debtor's duty was limited to filing the statement of intent and a creditor could not be compelled to reaffirm.[39] Other courts said a creditor's remedy was to move to lift the stay.[40] This court is not aware of any courts during this period, however, that ordered a debtor to perform the intention to surrender property to a creditor in the way Wells Fargo seeks to do now.

Against this backdrop, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005.[41] It was widely reported that one of the abuses Congress intended to fix was the ride-through loophole. And Congress did add a number of

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The Second, Fourth, and Tenth circuits have held that debtors who are current on their loan payments on secured property may elect to retain the property and make the payments specified in the contracts with the creditor. *In re Boodrow*, 126 F.3d at 53; *Home Owners Funding Corp. v. Belanger (In re Belanger)*, 962 F.2d 345, 347 (4th Cir. 1992); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 (10th Cir. 1989). After a thorough review of the extant case law, the Second Circuit held that the statute "appears to serve primarily a notice function, not necessarily to restrict the substantive options available to a debtor who wishes to retain collateral security a debt." *In re Boodrow*, 126 F.3d at 51. The Fourth Circuit concluded that the words 'if applicable' meant that there are other options available to the debtor. *In re Belanger*, 962 F.2d at 348. The Tenth Circuit decided that the plain language of the statute was mandatory, but as the statute gives no power of enforcement, the bankruptcy court, in its discretion may allow the debtor to keep possession of the property and continue to make payments: "[A]lthough we regard as mandatory the provisions of [§ 521], we do not believe these provisions make redemption or reaffirmation the exclusive means by which a bankruptcy court can allow a debtor to retain secured property." *In re Lowry*, 882 F.2d at 1547.

139 F.3d 668, 672 (9th Cir. 1998).

[38] The Fifth, Eleventh, and Seventh circuits disagree, holding that once the debtor decides to retain rather than surrender the property, he is restricted to the 'applicable' options of claiming an exemption, redeeming the property, or reaffirming the debt. *Johnson v. Sun Fin. Co. (In re Johnson)*, 89 F.3d 249, 252 (5th Cir. 1996) (per curiam); *Taylor v. AGE Fed.Credit Union (In re Taylor)*, 3 F.3d 1512, 1516 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1382, 1387 (7th Cir. 1990). "Permitting a debtor to retain property while keeping up installment payments without a reaffirmation of personal liability allows a debtor to force a new arrangement on a creditor." *Id.* at 1386.

Parker, 139 F.3d at 672.

[39] *See, e.g., In re Turner*, 156 F.3d 713 (7th Cir. 1998).

[40] *See, e.g., In re Donnell*, 234 B.R. 567 (Bankr. D.N.H. 1999).

[41] Pub. L. No. 109-8, 119 Stat. 23 (2005).

provisions related to an individual debtor's rights and duties with respect to secured debts. Those amendments

- expanded the individual debtor's duty to file a statement of intention to all secured debts, not just consumer ones[42]
- shortened the time for the debtor to perform the intention[43]
- added a new debtor duty to "not retain possession" of certain personal property unless the debtor timely reaffirmed the debt or redeemed the property[44]
- added a "penalty" for violations of the duty not to retain possession by providing for an automatic lift of stay before the discharge[45]
- added a separate provision in § 362(h) lifting the stay when the debtor either failed to timely file the statement of intention with respect to certain personal property or failed to "take timely the action"[46]
- modified the savings clause in § 521(a)(2) to make it subject to § 362(h)[47]

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[42] § 521(a)(2)(A).

[43] From 45 days after filing the statement of intent (which was due 30 days after the bankruptcy filing) to 30 days "after the first date set for the meeting of creditors." § 521(a)(2)(B).

[44]

> In a case under chapter 7 of this title in which the debtor is an individual, [the debtor shall] not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either –
>
> (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
>
> (B) redeems such property from the security interest pursuant to section 722.

§ 521(a)(6).

[45] The hanging paragraph falling after § 521(a)(7) provides that, "[i]f the debtor fails to act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law . . . ."

[46] § 362(h).

[47] § 521(a)(2)(B). The savings clause now provides "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)."

- validated the enforcement of *ipso facto* clauses in certain circumstances related to certain personal property[48]
- authorized secured creditors with an interest in the debtor's principal residence to seek or obtain periodic payments "associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien."[49]

If Congress intended to abrogate ride-through with these changes, its efforts failed. Most courts agree that these changes, when read together, have for the most part eliminated ride-through on personal property, since a debtor's rights under the savings clause are now subject to the stay-lifting provisions of § 362(h).[50] But as far as under what circumstances the stay lifts, when it lifts, the impact of the invalidation of *ipso facto* clauses, and other issues arising out of this spaghetti-tangle of Code provisions, courts continue to disagree,[51] and for good cause: Congress did not materially change the language of former § 521(2)(A); did not remove the offending "if applicable" language; did not define "retention or surrender"; and did not specify what is required to "perform an intention."

Most importantly, the new duty "not to retain" and the new "penalties" (lift of stay and validation of the *ipso facto* clause) for retaining without reaffirming expressly apply only to a debtor's retention of personal property. Conversely, the express Congressional blessing of a

[48] § 521(d) ("If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h) . . . nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor.")
[49] § 524(j).
[50] *See, e.g., Dumont v. Ford Motor Credit Co. (In re Dumont)*, 581 F.3d 1104 (9th Cir. 2009); *In re Miller*, 443 B.R. 54 (Bankr. D. Del. 2011); *In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006). *But see Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 186 (E.D.N.C. 2008) (limited ride-through option for personal property post-BAPCPA, also known as back-door ride-through).
[51] *E.g., In re McMullen*, 443 B.R. 67 (Bankr. E.D.N.C. 2010) (discussing issues with when the stay lifts pursuant to § 362(h)). There are also splits of authority with respect to nearly all of the ride-through BAPCPA amendments.

creditor's ability to accept mortgage payments appears to codify ride-through for a debtor's home mortgage.[52]

Turning Back to the Parties' Arguments in this Case

It is somewhat difficult to follow Wells Fargo's arguments about surrender. Wells Fargo both argues that Ruby has no ownership in the Willow properties because she already "surrendered" the properties (as though Wells Fargo now owns the properties), and also argues that that she should be compelled to surrender them. These verbal gymnastics do not help the court determine what § 521(a)(2) means. So the court will take each of Wells Fargo's arguments in turn.

§ 521(a)(2) Does Not Effectuate a Surrender; § 521(a)(2) is a Notice Statute

Wells Fargo's first argument is that § 521(a)(2) substantively effectuated a surrender of the N. Willow Properties, because Congress intended § 521(a)(2) to operate as something more than a notice statute. The court disagrees.

Returning to the interpretation of § 521(a)(2) and the meaning of the phrase "retention or surrender," the only logical way to interpret the word "surrender" is in contrast to what Congress thought was its opposite – "retention." The plain meaning of "retention" is to retain or keep as opposed to relinquishing or giving up. So when Ruby filed a statement of intention that she was surrendering the N. Willow properties, she expressed her intention to relinquish or to give up – as opposed to keeping – those properties.

But nothing in § 521(a)(2)(A) accomplished transferring 313 and 317 N. Willow *to* Wells Fargo, for multiple reasons. First, if § 521(a)(2)(A) effectuated a surrender upon the filing of the statement of intention, then § 521(a)(2)(B) would be superfluous – there would be no reason for

[52] *E.g., In re Lopez*, 440 B.R. 447 (Bankr. E.D. Va. 2010); *In re Carabello*, 386 B.R. 398, 402 (Bankr. D. Conn. 2008); *but see In re Harris*, 421 B.R. 597 (Bankr. S.D. Ga. 2010).

the Code to set a deadline for the debtor's performance of the intention. Second, there would also be no need to vest chapter 7 trustees with a duty to ensure performance of debtors' intentions. And third, the savings clause preserving debtors' and trustees' rights would be unnecessary, since neither would have any rights in the "surrendered" property. Wells Fargo's argument that § 521(a)(2) effectuated a surrender also ignores Missouri law requirements for transferring real estate.

Interpreting § 521(a)(2) to effectuate a real estate transfer would in fact deprive trustees of their statutory rights to administer property of the estate and avoid liens. And when Congress intended that a party surrender property "to" another party, it knew how to do so: § 521(a)(4) imposes a duty on the debtor to "surrender *to the trustee* all property of the estate . . . ." (emphasis added).[53]

For all these reasons, "surrender" in the phrase "retention or surrender" cannot mean surrender *to* Wells Fargo; indeed, both parties here ultimately reach a similar definition of surrender as being merely a relinquishment, which is consistent with the definition reached by the majority of courts.[54]

The focus then must be on what it means for a debtor to "perform the intention," and what happens when a debtor does not perform, a nuance both parties have overlooked. Here is where the BAPCPA amendments and the pre-BAPCPA case law must be viewed together, and the obvious question asked: given that a majority of courts and the leading commentator[55]

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[53] *Compare* § 521(a)(2)(A) with § 1325(a)(5)(C) (with respect to treatment of secured claims in a chapter 13 plan, authorizing a plan treatment option that allows the debtor to surrender "the property securing such claim to such holder").

[54] *See, e.g., In re Corter*, 390 B.R. 648, 652 (Bankr. W.D. Mo. 2008 (*quoting In re Stone*, 166 B.R. 621, 623 (Bankr. S.D. Tex. 1993)).

[55] 4 COLLIER ON BANKRUPTCY ¶ 521.14[5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). COLLIER still takes the view that § 521 (a)(2) operates as a notice statute, even after the passage of BAPCPA.

viewed § 521(a)(2) as a notice statute, did Congress intend for the BAPCPA amendments to change § 521's interpretation with respect to home mortgages? The logical answer is no.

First, the amendments related to ride-through did not change other provisions of the Code governing Ruby's and Wells Fargo's respective rights in the N. Willow properties throughout the bankruptcy case. All legal and equitable interests Ruby had with respect to the N. Willow properties became property of the estate under § 541(a) and Wells Fargo was automatically stayed from enforcing its liens under § 362(a). The Code also vested Ruby with certain limited avoidance powers with respect to these properties under § 522(f) and (g). Ruby timely filed a statement of intention to surrender, and did not oppose Wells Fargo's motion to lift the stay to allow Wells Fargo, as it put it, to "seek the return of [the] property." Ruby received a discharge, extinguishing her personal liability under § 524. When the trustee abandoned his interests in the N. Willow properties, all of Ruby's legal and equitable interests were abandoned back to her under § 554(c) and § 521(a)(2)'s savings clause. These rights included any equitable rights Ruby might have had under Missouri law to challenge the switched legal descriptions.

Second, the reason Ruby had a fourth option to "retain" notwithstanding her stated intention to surrender is that Congress provided that option in § 524(j), when it authorized Wells Fargo to accept periodic payments in lieu of foreclosing its in rem interest. In other words, as explained above, § 524(j) codified the ride-through option that the majority of courts recognized pre-BAPCPA with respect to home mortgages such as Ruby's.

The Code thus sets up a dichotomy in treatment between creditors with liens in personal property and creditors with liens in real estate, particularly home mortgages. Yet, the Code has long drawn distinctions between secured creditors depending on the nature of their security.[56]

[56] *See, e.g.*, § 522(f) (allowing for avoidance of only certain types of liens).

The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially-created concept, it makes that intent specific. Courts have followed this rule with particular care in construing the Bankruptcy Code.[57] The court therefore rejects Wells Fargo's argument that § 521(a)(2) effectuated a surrender of the N. Willow properties to Wells Fargo. The court also rejects Wells Fargo's argument that the Code required Ruby to do anything other than file a statement of intention with respect to the N. Willow properties and to "perform." Wells Fargo's remedy for Ruby's failure to perform was the remedy it chose, to move from relief from stay. The court therefore concludes that § 521(a)(2) continues to operate as a notice statute with respect to home mortgages.[58]

Wells Fargo's Argument that Ruby has Asserted a Contrary Position in State Court

Wells Fargo next asserts that by making a "sworn promise" to surrender the N. Willow properties in the bankruptcy court, Ruby cannot take a contrary position in the State Court Action and this court should therefore "enforce" the sworn promise. Wells Fargo appears to suggest that the statement of intention is a contract, the breach of which entitles it to the contractual remedy of specific performance. For the reasons set forth below, the court rejects Wells Fargo's argument in part, and on its own motion abstains in part.

First, the court rejects Wells Fargo's argument that Ruby's statement of intention was a "sworn promise" to surrender the N. Willow properties. The statement of intention itself belies the notion that it created an enforceable contract. A filed statement of intention (Official Form 108) is indeed executed under penalty of perjury,[59] but here states literally that Ruby's *intent* as

[57] *In re Montoya*, 333 B.R. 449, 457 (Bankr. D. Utah 2005).
[58] The court need not decide whether § 521(a)(2) operates as a notice statute with respect to secured personal property.
[59] Rule 1008; 28 U.S.C. § 1746.

of April 25, 2012 was to surrender 317 N. Willow and 313 N. Willow ("Lot with Abandoned Structure").

Second, statements of intention are just that – of intent. Debtors have limited rights to amend their statements of intention.[60] It is hornbook law that expressions of intent, which by definition may be changed, do not give rise to an enforceable contract.[61] Thus, the argument that the statement of intention is somehow a "promise" which gives rise to some right to damages for breach or enforcement in the nature of a contract right is not supported by the Official Form itself or by the statement Ruby actually signed.[62]

What Wells Fargo is in essence arguing is that Ruby – having converted her case on a representation she was surrendering her home and signing a statement of intention to that effect – should be judicially estopped from taking a contrary position in the State Court Action.

Judicial estoppel is an equitable doctrine created to protect the integrity of the judicial process.[63] Judicial estoppel prevents a party from taking a position in one court that is contrary to a position taken in another court.[64] A court applying judicial estoppel considers three factors: whether a party's later position is "clearly inconsistent with its earlier position"; "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the

[60] The Code expressly references amendments of statements of intention with respect to personal property. *See* § 362(h)(1)(B) (referencing that statement "as it may be amended . . ."). And Rule 1009(b) expressly grants a debtor a limited right to amend the statement within the time period provided in § 521(a).
[61] *See, e.g., Matthews v. City of Memphis*, 14-cv-2094, 2014 WL 3049906, at *5 (W.D. Tenn. July 3, 2014).
[62] Judicial estoppel may be appropriate based on actions that are inconsistent with a statement of intent. However, to the extent Wells Fargo could make this argument, the proper place to do so is in the State Court Action, and not here. *See In re Guerra*, 544 B.R. 707, 711 (Bankr. M.D. Fla. 2016).
[63] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).
[64] *Id.* at 749.

opposing party if not estopped."[65] The determination of whether to apply judicial estoppel is an equitable one, however, and possible defenses include inadvertence and mistake.[66]

Here, this court cannot determine based on the stipulated facts whether Ruby should be judicially estopped in the State Court Action from challenging Wells Fargo's liens. Yes, Ruby through counsel represented she was converting to chapter 7 to surrender her "home," but Ruby claimed different properties at different times as her homestead and did not describe which property she was referring to in the motion to convert. There is no evidence before this court that Wells Fargo relied on the statement in the conversion motion or was even served with the motion.

Second, there is likewise no evidence Wells Fargo relied on the statement of intention. There is no certificate of service in the court record that shows Ruby gave notice of the statement to Wells Fargo as required by Rule 1007(b)(2). And, Wells Fargo's motion for relief was already pending when the statement of intention showing surrender was filed and Wells Fargo did not amend its motion for relief to reference the statement.

Finally, and most importantly, this court cannot say it was misled by Ruby's statements in the conversion motion or the statement of intention. Other cases have found it appropriate to judicially estop a debtor where the debtor obtained a discharge notwithstanding a failure to disclose assets, for example, on the grounds the bankruptcy court in granting the chapter 13 debtors a discharge had accepted the debtors' representation that they had no undisclosed assets.[67] But performing the intention in a statement of intention is not a prerequisite to obtaining a discharge under § 727.

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[65] *Id.* at 750-51.
[66] *Id.* at 743.
[67] *E.g., Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1033–34 (8th Cir. 2016).

That being said, there are certainly inconsistencies – by both parties – in their statements to this court: Ruby's discrepancies in which property or properties constituted Ruby's homestead and which properties she owned with Rita, and Wells Fargo's inaccurate recitation of the nature of liens, failure to serve Rita with the motion for relief, and later release of its lien. But the parties have presented no evidence regarding these inconsistencies and whether the inconsistencies were caused by inadvertence or mistake. They have presented no evidence about whether Ruby's apparent change of mind about keeping the home was inspired by Wells Fargo's lien release or something else. The court therefore believes that it is the state court that is in the best position to determine whether either party should be judicially estopped with respect to their respective positions, particularly given that this court has no jurisdiction over the parties' state law claims.[68]

In sum, the court denies Wells Fargo's request to compel Ruby to surrender or to otherwise comply with the statement of intention, and abstains[69] from any determination about whether either party should be judicially estopped with respect to positions taken in the State Court Action.

Ruby's Failure to Relinquish Possession and Control of the N. Willow Properties is Not an Abuse of the Bankruptcy System

Wells Fargo argues that Ruby's failure to relinquish possession and control of the N. Willow properties is an abuse of the bankruptcy system, such that this court should employ its equitable powers to require her to reaffirm its debt, redeem the properties, or, in the alternative, vacate her discharge and enjoin her from pursuing the State Court Action. The court disagrees.

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[68] 28 U.S.C. § 1334(b); *Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773-74 (8th Cir. 1995)(discussing when a matter is sufficiently related to the bankruptcy proceeding to be a "related to" proceeding for purposes of "related to" jurisdiction; adopting the so-called *Pacor* test, from *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d. Cir. 1984)). *See also In re Kourogenis*, 539 B.R. 625, 631 (Bankr. S.D. Fla. 2015) ("Federal courts simply cannot intervene" to tell a state court how to use its judicial discretion).

[69] 28 U.S.C. § 1334(c)(1).

Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 105(a) powers are not, however, to be employed in contravention of express provisions of the Bankruptcy Code.[70]

Section 524(c)(1) requires that any reaffirmation agreement be entered "before the granting of the discharge." Rule 4008 sets a deadline to file a reaffirmation agreement "no later than 60 days after the first date set for the meeting of creditors . . . ." Many courts recognize authority to vacate a discharge order for the purpose of filing reaffirmation agreements.[71] Regardless of that authority, however, Wells Fargo cites no authority requiring a debtor whose debt has been discharged some seven years hence to now reaffirm a debt; to do so would contravene § 524(c)(3)(A)'s requirement that reaffirmation agreements be voluntary.[72]

Likewise, the court has no authority to require a debtor to redeem real property under § 722 since that section applies solely to personal, not real, property. And, there is certainly no authority to vacate or even deny a discharge for an alleged "failure to surrender"; the grounds to deny or revoke a discharge are expressly set forth in § 727 and none of the grounds even refer to filing or performing a statement of intention.[73]

The court, in sum, does not have the equitable power to compel Ruby to reaffirm Wells Fargo's debt, to order her to redeem, or to vacate her discharge, since all of those requests contravene express provisions of the Code. The court likewise does not have authority to enjoin Ruby from pursuing her State Court Action, since § 105(a) powers are limited to those necessary

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[70] *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014).
[71] *See, e.g., In re Edwards*, 236 B.R. 124, 127 (Bankr. D.N.H. 1999) (motions to vacate discharge for purposes of filing a reaffirmation agreement allowed upon showing of special circumstances). *But see In re Rigal*, 254 B.R. 145 (Bankr. S.D. Tex. 2000) (no authority to vacate discharge to allow for filing of a reaffirmation agreement).
[72] A reaffirmation agreement, to be enforceable, must be a "fully informed and voluntary agreement by the debtor." A creditor likewise cannot be compelled to accept a reaffirmation agreement from a debtor. *E.g., Matter of Turner*, 156 F.3d 713 (7th Cir. 1998).
[73] *In re Ryan*, 560 B.R. 339, 351 (Bankr. D. Haw. 2016), appeal docketed, No. HI-16-1391 (B.A.P. 9th Cir. Nov. 2, 2016).

to carry out the provisions of title 11, and Ruby's actions in state court do not implicate any Code provisions.

As a final matter, even if this court had such equitable powers, it would not employ them in this case. Ruby signed a statement indicating her intention to surrender the N. Willow properties five years ago; Wells Fargo in turn obtained relief from stay on the grounds it intended to seek return of the property. Yet Wells Fargo has still not foreclosed and in fact released a portion of its lien. After the release and seeming inaction on the part of Wells Fargo, Ruby seeks a declaration of her rights and other damages arising out of that lien release. For her to do so in no way abuses the bankruptcy system.

The Majority of Courts and Previous Cases in This District do not Support Wells Fargo's Position

Wells Fargo's final argument is that by reason of the overwhelming weight of authority, this court should grant its motion. Wells Fargo has not accurately reported the state of the law.

First, the majority of cases do not support Wells Fargo's interpretation of the meaning of "surrender." The term is used in many provisions of the Code and in many contexts, and citing cases interpreting whether a debtor may surrender property to a creditor in the context of a chapter 13 plan, for example,[74] is not necessarily determinative of the effect of a debtor's intention to surrender in a chapter 7 and pursuant to § 521(a)(2).

Second, Wells Fargo's argument that the Western District of Missouri has decided this issue is disingenuous. It is true that two bankruptcy judges in this district rejected ride-through pre-BAPCPA.[75] But Wells Fargo neglects to note that a third judge expressly disagreed with his

[74] *See* § 1325(a)(5)(c) ("surrender . . . to" a creditor).
[75] *In re Gerling*, 175 B.R. 295 (Bankr. W.D. Mo. 1994) (Federman, J.); *In re Podnar*, 307 B.R. 667, 670 n.3 (Bankr. W.D. Mo. 2003) (Venters, J.).

colleagues and determined ride-through was permissible.[76] In any event, those fraternal disagreements are irrelevant – Congress changed the law.

Next, Wells Fargo cites a post-BAPCPA case, *In re Carter*,[77] for the proposition that § 521(a)(2) means that a debtor must surrender collateral "to" the secured creditor. Wells Fargo's reliance on this case is, again, misplaced.

Carter, another case by my esteemed colleague Judge Federman, is a chapter 13 case. In *Carter*, the debtor proposed a plan to surrender certain real property "in lieu" of the first and second lienholder's claims. The plan was confirmed without objection. Later, the second lienholder objected to the chapter 13 trustee's notice to allow claims, arguing that it was entitled to file an unsecured deficiency claim once the first lienholder foreclosed.[78] The court disagreed.

In discussing the effect of the confirmed plan, *Carter* reasons that "the term 'surrender' was contemplated by Congress to be a return of property and a relinquishing of possession or control to the holder of the claim."[79] Yet *Carter* goes on to say something important that Wells Fargo conveniently omits: that "[t]he statute does not require a debtor to transfer title by executing and delivering a deed in order to effectuate surrender."[80] *Carter* correctly held that the effect of a confirmed plan under § 1327 appropriately bound the creditor from asserting an unsecured deficiency claim.[81] That is far from Wells Fargo's proposition that a statement of intention filed in a chapter 7 case must be "enforced" by an injunction years later under the circumstances of this case, in which a debtor is pursuing state court remedies arising from an

[76] *In re Canady-Houston*, 281 B.R. 286 (Bankr. W.D. Mo. 2002) (Koger, J.).
[77] *In re Carter*, 390 B.R. 648 (Bankr. W.D. Mo. 2008).
[78] *Id.* at 650.
[79] *Carter*, 390 B.R. at 652 (citation omitted).
[80] *Id.* (citations and internal quotations omitted).
[81] *Id.* at 654.

admitted release of lien and alleged trespass. In sum, the court agrees with the result in *Carter,* but that result is simply inapposite to this case.

Finally, Wells Fargo relies most heavily on the Eleventh Circuit's recent *Failla* case.[82] For several reasons, the court declines to follow *Failla* and concludes its reasoning does not apply in the context of this case.

Superficially, *Failla* would seem to have great appeal.

In *Failla*, the debtors' lender had commenced a judicial foreclosure action against the debtors' Florida home before they filed their chapter 7 bankruptcy. The debtors' chapter 7 bankruptcy filing automatically stayed the state court foreclosure action. According to the Eleventh Circuit, the debtors admitted in the bankruptcy proceeding that they owned the home, that the house was collateral for a mortgage, and that the balance of the mortgage exceeded the value of the home.[83] The debtors' statement of intention indicated that they intended to surrender the home, and, based on the negative value, the chapter 7 trustee abandoned his interest. After their discharge and the abandonment, however, the debtors continued to live in the house while opposing the judicial foreclosure.

The lender filed a motion with the bankruptcy court to compel surrender of the home, and the bankruptcy court granted the motion.[84] The bankruptcy court also ordered the debtors to stop opposing the foreclosure action. The district court affirmed the bankruptcy court's ruling,[85] and debtors appealed to the Eleventh Circuit. The Eleventh Circuit likewise affirmed.

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[82] *In re Failla*, 838 F.3d 1170 (11th Cir. 2016). Wells Fargo cites several other Florida bankruptcy cases, but they are all from bankruptcy courts that are bound to follow *Failla* and therefore do not independently carry any persuasive weight.

[83] *Failla,* 838 F.3d at 1173.

[84] 529 B.R. 786 (Bankr. S.D. Fla. 2014).

[85] 542 B.R. 606 (S.D. Fla. 2015).

The Eleventh Circuit divided its discussion into two parts. It first held that § 521(a)(2) "prevents debtors who surrender their property from opposing a foreclosure action in state court."[86] Second, it found that the bankruptcy court had authority to compel the debtors to desist from opposing the lender's foreclosure action under § 105(a).[87]

The Eleventh Circuit in *Failla* held true to its pre-BAPCPA ride-through decision in *Taylor,*[88] which had determined that § 521(2) did not permit ride-through but required "surrender." The *Failla* court also upheld the bankruptcy court's authority under § 105(a) to prevent abuses in its court. The ruling in *Failla* does not, however, support Wells Fargo here, for several reasons.

First, the Eighth Circuit, unlike the Eleventh Circuit, does not have pre-BAPCPA law informing its interpretation of § 521(a)(2). Second, ride-through of home mortgages is now permitted – an argument apparently not raised in *Failla.* And third, this court has found, unlike the bankruptcy court in *Failla,* that Ruby did not abuse the bankruptcy process. Here, there was no pre-bankruptcy foreclosure. Here, Ruby originally filed a chapter 13 bankruptcy in an attempt to keep her home. Here, Wells Fargo obtained stay relief, but did not foreclose. And here, Wells Fargo has filed a deed of release.

Under the circumstances in *Failla*, the Eleventh Circuit could certainly conclude that opposing the foreclosure was in effect an impermissible ride-through in violation of the debtors' duties under *Taylor.* It follows then, that it was appropriate for the circuit court to affirm the bankruptcy court's use of equitable powers to enforce the debtors' duty to reaffirm or surrender.

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[86] *Failla,* 838 F.3d at 1174.
[87] *Id.*
[88] *In re Taylor*, 3 F.3d 1512 (11th Cir. 1993).

A more recent case, *In re Ryan*,[89] sets forth persuasive reasons under similar circumstances (and following Ninth Circuit pre-BAPCPA law allowing ride-through) why *Failla* is incorrect. But, this court need not decide whether there might be circumstances under which it might be appropriate to exercise § 105(a) powers: in this case, Ruby is not opposing a state court foreclosure action and there is another interested party (Rita) over whom this court has no authority or jurisdiction. Thus, the *Failla* case, even if correctly decided, does not apply under the facts here.

Conclusion

The court can envision rare situations, during the pendency of a chapter 7 case, in which it might be appropriate to use its § 105(a) powers to compel a debtor to do *something* in connection with a statement of intention or to somehow enforce performance of the intention in the statement, particularly with respect to personal property. In this case, however, Wells Fargo obtained relief from stay during the bankruptcy case, reciting a need for immediate relief "to prevent irreparable harm," and yet did not (and has still not) foreclosed; Wells Fargo through agents allegedly intruded upon property after arguably releasing a lien; and Wells Fargo obtained relief from stay based on arguably inaccurate facts and without service on all proper parties. Wells Fargo cites no statutory or legal authority supporting a result that would enjoin Ruby or prevent her from having her day in state court.

The court therefore denies Wells Fargo's Motion to Compel. The court abstains from determining whether either party should be judicially estopped based on positions taken in the bankruptcy court. Given that the chapter 7 trustee has been informed of the State Court Action and has abandoned any interest of the estate in such action, the court also directs the clerk to enter an order reclosing the case.

[89] 560 B.R. 339.

A separate order shall issue.

Date: 6/14/2017

/s/ Cynthia A. Norton
Cynthia A. Norton
United States Chief Bankruptcy Judge

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15626

D.C. Docket No. 9:15-cv-80328-KAM,
Bkcy No. 9:11-bkc-34324-PGH

In re:

DAVID A. FAILLA,
DONNA N. FAILLA,

Debtors.

DAVID A. FAILLA and DONNA N. FAILLA,

Plaintiffs - Appellants,

versus

CITIBANK, N.A.,

Defendant - Appellee.

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

(October 4, 2016)

Before MARCUS and WILLIAM PRYOR, Circuit Judges, and LAWSON,* District Judge.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide whether a person who agrees to "surrender" his house in bankruptcy may oppose a foreclosure action in state court. David and Donna Failla filed for bankruptcy in 2011 and agreed that they would surrender their house to discharge their mortgage debt. But the Faillas continued to oppose a foreclosure proceeding in state court. Citibank then filed a motion to compel surrender in the bankruptcy court and argued that the Faillas had breached their duty to surrender the property. The bankruptcy court granted the motion, and the district court affirmed. Because the word "surrender" in the bankruptcy code, 11 U.S.C. § 521(a)(2), requires that debtors relinquish their right to possess the property, we affirm.

I. BACKGROUND

David and Donna Failla own a house in Boca Raton, Florida. They financed their purchase with a $500,000 mortgage. The Faillas defaulted on that mortgage in 2009. Citibank, the owner of the mortgage and the promissory note, filed a foreclosure action in a Florida court. The Faillas are opposing that foreclosure action.

* Honorable Roger H. Lawson, Jr., United States District Judge for the Middle District of Georgia, sitting by designation.

The Faillas filed for bankruptcy in 2011. During the bankruptcy proceedings, the Faillas admitted that they own the house, that the house is collateral for the mortgage, that the mortgage is valid, and that the balance of the mortgage exceeds the value of the house. They also filed a statement of intention, 11 U.S.C. § 521(a)(2), to surrender the house. Because the house had a negative value, the trustee "abandoned" it back to the Faillas, 11 U.S.C. § 554. The Faillas continue to live in the house while they contest the foreclosure action.

Citibank filed a motion to compel surrender in the bankruptcy court. Citibank argued that the Faillas' opposition to the foreclosure action contradicted their statement of intention to surrender the house. The Faillas argued that their opposition to the foreclosure action is not inconsistent with surrendering the house.

The bankruptcy court granted Citibank's motion to compel surrender and ordered the Faillas to stop opposing the foreclosure action. *See In re Failla*, 529 B.R. 786, 793 (Bankr. S.D. Fla. 2014). The bankruptcy court explained that if the Faillas do not comply with its order, it may "enter an order vacating [their] discharge." *Id.* The district court affirmed on appeal. *See Failla v. Citibank, N.A.*, 542 B.R. 606, 612 (S.D. Fla. 2015).

The Faillas now appeal to this Court. After the parties filed their briefs, Citibank filed a motion to strike portions of the Faillas' briefing that were raised for the first time on appeal. The disputed sections argue that the only remedy

available to the bankruptcy court was lifting the automatic stay for Citibank, which would allow Citibank to foreclose on the house in the ordinary course. This Court ruled that the motion to strike should be carried with the case.

II. STANDARD OF REVIEW

"Because the district court functions as an appellate court in reviewing bankruptcy court decisions, this court is the second appellate court to review bankruptcy court cases." *In re Glados, Inc.*, 83 F.3d 1360, 1362 (11th Cir. 1996). We "assess the bankruptcy court's judgment anew, employing the same standard of review the district court itself used." *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1296 (11th Cir. 2009). "Thus, we review the bankruptcy court's factual findings for clear error, and its legal conclusions *de novo*." *Id.*

III. DISCUSSION

We divide our discussion in two parts. First, we explain that section 521(a)(2) prevents debtors who surrender their property from opposing a foreclosure action in state court. Second, we explain that the bankruptcy court had the authority to order the Faillas to stop opposing their foreclosure action.

A. Debtors Who Surrender Their Property in Bankruptcy May Not Oppose a Foreclosure Action in State Court.

Section 521(a)(2) states a bankruptcy debtor's responsibilities when his schedule of assets and liabilities includes mortgaged property:

> **(a)** The debtor shall . . .
>
> > **(2)** if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
> >
> > > **(A)** within 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(a)(2). Subsection (A) requires the debtor to file a statement of intention about what he plans to do with the collateral for his debts. *See* Fed. R. Bankr. P. 1007(b)(2). The statement of intention must declare one of four things: the collateral is exempt, the debtor will surrender the collateral, the debtor will redeem the collateral, or the debtor will reaffirm the debt. *See In re Taylor*, 3 F.3d 1512, 1516 (11th Cir. 1993). After the debtor issues his statement of intention, subsection (B) requires him to perform the option he declared. *Id.*

The question here is whether the Faillas satisfied their declared intention to surrender their house under section 521(a)(2)(B). To answer that question, we must decide *to whom* debtors must surrender their property and whether surrender requires debtors to acquiesce to a creditor's foreclosure action. The district court and the bankruptcy court correctly concluded that the Faillas violated section 521(a)(2) by opposing Citibank's foreclosure action after filing a statement of intention to surrender their house.

We agree with both the district court and the bankruptcy court that section 521(a)(2) requires debtors who file a statement of intent to surrender to surrender the property both to the trustee and to the creditor. Even if the trustee abandons the property, debtors' duty to surrender the property to the creditor remains. The text and the context of the statute compel this interpretation.

Reading "surrender" to refer only to the trustee of the bankruptcy estate renders section 521(a)(2) superfluous with section 521(a)(4). Under the surplusage canon, no provision "should needlessly be given an interpretation that causes it to duplicate another provision." Antonin Scalia & Bryan A. Garner, *Reading Law* 174 (2012). *See also Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute . . . ."). Section 521(a)(4) states that "[t]he debtor shall . . . surrender to the trustee all property of the estate." 11 U.S.C. § 521(a)(4). Because

section 521(a)(4) already requires the debtor to surrender all of his property to the trustee so the trustee can decide, for example, whether to liquidate it or abandon it, section 521(a)(2) must refer to some other kind of surrender.

When the bankruptcy code means a debtor must surrender his property either to the creditor or the trustee, it says so. On the one hand, section 1325(a)(5)(C) states that "the debtor surrenders the property securing such claim *to such holder*," which clearly contemplates surrender to a creditor. 11 U.S.C. § 1325(a)(5)(C) (emphasis added). Congress did not use that language here. On the other hand, section 521(a)(4) states that "[t]he debtor shall . . . surrender *to the trustee* all property of the estate," which clearly contemplates surrender to the trustee. *Id.* § 521(a)(4) (emphasis added). Congress did not use that language either.

What Congress *did* say in section 521(a)(2) is "surrender," without specifying to whom the surrender is made. But the lack of an object makes sense because a debtor who decides to surrender his collateral must surrender it to *both* the trustee and the creditor. The debtor first surrenders it to the trustee, *id.* § 521(a)(4), who decides whether to liquidate it, *id.* § 704(a)(1), or abandon it, *id.* § 554. If the trustee abandons it, then the debtor surrenders it to the creditor, *id.* § 521(a)(2).

The word "surrender" in section 521(a)(2) is used with reference to the words "redeem" and "reaffirm," and those words plainly refer to creditors. A

debtor "redeems" property by paying the creditor a particular amount, and he "reaffirms" a debt by renegotiating it with the creditor. *See Taylor*, 3 F.3d at 1514 n.2; *see also* 11 U.S.C. §§ 524(c), 722. Because "[c]ontext is a primary determinant of meaning," Scalia & Garner, *supra*, at 167, the word "surrender" likely refers to a relationship with a creditor as well. We said as much in dicta in *Taylor*. *See* 3 F.3d at 1514 n.2 ("Surrender provides that a debtor surrender the collateral *to the lienholder* who then disposes of it pursuant to the requirements of state law." (emphasis added)).

Other provisions of the bankruptcy code that provide a remedy to *creditors* when a debtor violates section 521(a)(2) suggest that the word "surrender" does not refer exclusively to the trustee. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 305, 119 Stat. 23, added two sections to the bankruptcy code that provide remedies for creditors with respect to personal property. 11 U.S.C. §§ 362(h), 521(d). Section 362(h) punishes a debtor who violates section 521(a)(2) by lifting the automatic stay which allows the creditor to pursue other remedies against the debtor immediately. 11 U.S.C. § 362(h)(1). Section 362(h) allows the trustee of the bankruptcy estate to override this remedy, but only if the trustee moves the court to "order[] appropriate adequate protection of the creditor's interest." *Id.* § 362(h)(2). And section 521(d)

allows a creditor to consider the debtor in default because he declared bankruptcy if the debtor violates section 521(a)(2). *See id.* § 521(d).

That these remedies apply only to personal property is irrelevant. Section 521(a)(2) uses the generic word "property" and draws no distinction between real and personal property. Congress provided additional remedies for creditors secured by personal property, but the contextual clue remains the same. These remedies for creditors reflect an obvious point about section 521(a)(2): it is a provision that affects and protects the rights of creditors.

We also agree with the bankruptcy court and the district court that "surrender" requires debtors to drop their opposition to a foreclosure action. The bankruptcy code does not define the word "surrender," so we give it its "contextually appropriate ordinary meaning." Scalia & Garner, *supra*, at 70; *see also In re Piazza*, 719 F.3d 1253, 1261 (11th Cir. 2013) (applying this canon to the bankruptcy code). One meaning of "surrender" is "to give or deliver up possession of (anything) upon compulsion or demand." *Surrender*, *Webster's New International Dictionary* 2539 (2d ed. 1961); *see also Surrender*, *Oxford English Dictionary* (online ed.) ("To give up (something) out of one's own possession or power into that of another who has or asserts a claim to it.") (all Internet materials as visited Sept. 15, 2016, and available in Clerk of Court's case file). But this meaning is not contextually appropriate. When the bankruptcy code means

"physically turn over property," it uses the word "deliver" instead of "surrender." *See, e.g.*, 11 U.S.C. §§ 542(a), 543(b)(1); *see also id.* § 727(d)(2) (using the phrase "deliver or surrender," which suggests they are different). The presumption of consistent usage instructs that "[a] word or phrase is presumed to bear the same meaning throughout a text" and that "a material variation in terms suggests a variation in meaning." Scalia & Garner, *supra*, at 170; s*ee also Russello v. United States*, 464 U.S. 16, 23 (1983).

Another meaning of "surrender" is "[t]he giving up of a right or claim." *Surrender*, *Black's Law Dictionary* (10th ed. 2014); *see also Surrender*, *Webster's New International Dictionary* 2539 ("To give up completely; to resign; relinquish; as, to *surrender* a right, privilege, or advantage."). This meaning describes a legal relationship, as opposed to a physical action, which makes sense in the context of section 521(a)(2)—a provision that describes other legal relationships like "reaffirmation" and "redemption." This definition is in line with existing authorities. *See In re Pratt*, 462 F.3d 14, 18–19 (1st Cir. 2006) ("[T]he most sensible connotation of 'surrender' in the . . . context [of section 521(a)(2)] is that the debtor agreed to make the collateral *available* to the secured creditor—*viz.*, to cede his possessory rights in the collateral . . . ."); *In re White*, 487 F.3d 199, 205 (4th Cir. 2007) ("[T]he word 'surrender' [in section 1325(a)(5)(C)] means 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 Plummer*, 513 B.R. 135, 143–44 (Bankr. M.D. Fla. 2014); 8 *Collier on Bankruptcy* § 1325.06[4] (16th ed.) ("Surrender in th[e] context [of section 1325(a)(5)(C)] means simply the relinquishment of any rights in the collateral.").

Because "surrender" means "giving up of a right or claim," debtors who surrender their property can no longer contest a foreclosure action. When the debtors act to preserve their rights to the property "by way of adversarial litigation," they have not "relinquish[ed] . . . all of their legal rights to the property, including the rights to possess and use it." *White*, 487 F.3d at 206 (emphasis omitted). The "retention of property that is legally insulated from collection is inconsistent with surrender." *Id.* at 207. Ordinarily, when debtors surrender property to a creditor, the creditor obtains it immediately and is free to sell it. *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997). Granted, a creditor must take *some* legal action to recover real property—namely, a foreclosure action. *See* Fla. Stat. Ann. §§ 702.01–702.11. Foreclosure proceedings ensure that debtors do not have to determine unilaterally issues of priority if there are multiple creditors or surplus if the value of the property exceeds the liability. *See Plummer*, 513 B.R. at 144. Debtors who surrender property must get out of the creditor's way. "[I]n order for surrender to mean *anything* in the context of § 521(a)(2), it has

to mean that . . . debtor[s] . . . must not contest the efforts of the lienholder to foreclose on the property." *In re Elowitz*, 550 B.R. 603, 607 (Bankr. S.D. Fla. 2016). Otherwise, debtors could obtain a discharge in bankruptcy based, in part, on their sworn statement to surrender and "enjoy possession of the collateral indefinitely while hindering and prolonging the state court process." *Id.* (quoting *In re Metzler*, 530 B.R. 894, 900 (Bankr. M.D. Fla. 2015)).

The hanging paragraph in section 521(a)(2) also does not give the debtor the right to oppose a foreclosure action. The hanging paragraph states 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(a)(2). The key words for purposes of this dispute are "under this title." The hanging paragraph means that section 521(a)(2) does not affect the debtor's or the trustee's *bankruptcy* rights. Section 521(a)(2) does not affect the trustee's bankruptcy rights because a debtor must first surrender property to the trustee—who liquidates it or abandons it—before surrendering it to the creditor. *See id.* § 521(a)(4). And section 521(a)(2) does not affect the debtor's bankruptcy rights because a creditor is still subject to the automatic stay and cannot foreclose on the property until the trustee decides to abandon it. The hanging paragraph spells out an order of operations. It does not mean that a debtor who

declares he will surrender his property can then undo his surrender after the bankruptcy is over and the creditor initiates a foreclosure action.

Concerns about fairness are not in tension with this outcome. During the bankruptcy proceedings, the Faillas declared that they would surrender the property, that the mortgage is valid, and that Citibank has the right to foreclose. Compelling them to stop opposing the foreclosure action requires them to honor that declaration. The Faillas may not say one thing in bankruptcy court and another thing in state court:

> The concern here is that the Debtor is making a mockery of the 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.

In re Guerra, 544 B.R. 707, 710 (Bankr. M.D. Fla. 2016). In bankruptcy, as in life, a person does not get to have his cake and eat it too.

Section 521(a)(2) requires a debtor to either redeem, reaffirm, or surrender collateral to the creditor. Having chosen to surrender, the debtor must drop his opposition to the creditor's subsequent foreclosure action. Because the Faillas filed a statement of intention to surrender their house, they cannot contest the foreclosure action.

B. The Bankruptcy Court Had the Authority to Order the Faillas to Stop Opposing the State Foreclosure Action.

For the first time on appeal, the Faillas argue that even if they breached their duty to surrender under section 521(a)(2), the only remedy available to the bankruptcy court was to lift the automatic stay for Citibank, which would allow Citibank to foreclose on the house in the ordinary course. Citibank asked us to strike this portion of the Faillas' briefs in their May 25 motion to strike, which was carried with the case. The Faillas concede that they did not raise this argument below. They ask us to excuse their forfeiture because their argument is an important, unsettled question of law. This argument is not forfeited, but fails on the merits, rendering Citibank's motion to strike moot.

The Faillas' new argument falls within exceptions to the general rule that a circuit court will not consider an issue not raised in the district court. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004) (quoting *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001)). It is a "pure question of law" and its "proper resolution is beyond any doubt." *Id.* Moreover, the Faillas' argument is intertwined with their other arguments. For instance, part of the reason the Faillas contend the bankruptcy court cannot order them to stop opposing the foreclosure action is that section 521(a)(2) is merely a "notice statute" that does not affect substantive property rights.

On the merits, however, bankruptcy courts are not limited to lifting the automatic stay. Bankruptcy courts have broad powers to remedy violations of the mandatory duties section 521(a)(2) imposes on debtors. *See Taylor*, 3 F.3d at 1516. Section 105(a) states that bankruptcy courts can "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a), which includes section 521(a)(2). Bankruptcy judges also have "broad authority . . . to take any action that is necessary or appropriate 'to prevent an abuse of process.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 (2007) (quoting 11 U.S.C. § 105(a)). A debtor who promises to surrender property in bankruptcy court and then, once his debts are discharged, breaks that promise by opposing a foreclosure action in state court has abused the bankruptcy process. *See Guerra*, 544 B.R. at 710.

If a bankruptcy court could only lift the automatic stay, then debtors could violate section 521(a)(2) with impunity. The automatic stay is *always* lifted at the end of the bankruptcy proceedings, *see* 2 Bankruptcy Law Manual § 10:7 (5th ed.), so this remedy does nothing to punish debtors who lie to the bankruptcy court about their intent to surrender property. While a creditor may be able to invoke the doctrine of judicial estoppel in state court to force debtors to keep a promise made in bankruptcy court, its availability does not affect the statutory authority of bankruptcy judges to remedy abuses that occur in *their* courts. And there is nothing

strange about bankruptcy judges entering orders that command a party to do something in a nonbankruptcy proceeding. Bankruptcy courts "regularly exercise jurisdiction to tell parties what they can or cannot do in a non-bankruptcy forum." *In re Lapeyre*, 544 B.R. 719, 723 (Bankr. S.D. Fla. 2016). Just as the bankruptcy court may "order[] creditors who violate the automatic stay to take corrective action in the non-bankruptcy litigation," the bankruptcy court may "order the Debtors to withdraw their affirmative defenses and dismiss their counterclaim in the Foreclosure Case." *Id.* The bankruptcy court had the authority to compel the Faillas to fulfill their mandatory duty under section 521(a)(2) not to oppose the foreclosure action in state court.

IV. CONCLUSION

We **AFFIRM** the order compelling the Faillas to surrender their home to Citibank. We **DENY AS MOOT** the motion to strike.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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October 04, 2016

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-15626-BB
Case Style: David Failla, et al v. Citibank, N.A.
District Court Docket No: 9:15-cv-80328-KAM
Secondary Case Number: 9:11-bkc-34324-PGH

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against the appellants.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, BB at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs

ABI 2017 WINTER LEADERSHIP CONFERENCE

December 1, 2017
LaQuinta Resort & Club
LaQuinta, CA

Recent Decisions on Retention and Surrender of Secured Property in Consumer Cases

Turnover:

8. *Weber v. SEFCU* (*In re Weber*), No. 12-1632, 719 F.3d 72 (2d Cir. May 8, 2013)

9. *WD Equip., L.L.C. v. Cowen* (*In re Cowen*), No. 15-1413, 849 F.3d 943 (10th Cir., Feb. 27, 2017).

10. Ralph Brubaker *Turnover, Adequate Protection and the Automatic Stay (Part I): Origins and Evolution of Turnover Power*, 33 Bankr. L. Letter No. 8, at 1 (Aug. 2013).

11. Ralph Brubaker *Turnover, Adequate Protection and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 Bankr. L. Letter No. 9, at 1 (Sep. 2013).

Case 12-1632, Document 83-1, 05/08/2013, 930662, Page1 of 24

12-1632-bk
Weber v. SEFCU

United States Court of Appeals
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: December 4, 2012 Decided: May 8, 2013)

Docket No. 12-1632-bk

IN RE: CHRISTOPHER WEBER,

Debtor.

CHRISTOPHER WEBER,

Plaintiff-Appellee,

–v.–

SEFCU,

Defendant-Appellant,

ANDREA E. CELLI, CHAPTER 13 TRUSTEE,

Trustee.

B e f o r e:

CABRANES, RAGGI, and CARNEY, *Circuit Judges.*

Appeal from a final judgment of the United States District Court for the Northern District of New York (Suddaby, *J.*) finding that defendant-appellant SEFCU violated the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362, and remanding to the Bankruptcy Court (Littlefield, *J.*) for a determination regarding sanctions. SEFCU, which held a loan secured in part by a vehicle owned by plaintiff-appellee Christopher Weber, repossessed the vehicle pursuant to the loan agreement shortly before Weber filed a petition seeking relief under Chapter 13 of

the Bankruptcy Code. Although it received notice of the petition, SEFCU refused – absent entry of a court order and provision of protection that it deemed adequate – to return Weber's vehicle to him as debtor-in-possession. Weber retained at least an equitable interest in the vehicle under New York law. Thus, under United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), the filing of Weber's bankruptcy petition transformed the equitable interest into a possessory interest held by Weber's estate. We conclude that SEFCU "exercised control" over "property" of Weber's bankruptcy estate in contravention of section 362 when it failed to relinquish the vehicle promptly after it learned that a Chapter 13 petition was filed. Consequently, under section 362(k), SEFCU is liable for Weber's actual damages resulting from the wrongful retention, costs, and attorneys' fees. The judgment of the district court is AFFIRMED.

GARY A. LEFKOWITZ (William B. Schiller, *on the brief*), Schiller & Knapp, LLP, Latham, New York, *for Defendant-Appellant.*

RICHARD CROAK, Albany, New York, *for Plaintiff-Appellee.*

Tara Twomey (Ray DiGuiseppe, *on the brief*), National Consumer Bankruptcy Rights Center, San Jose, California, *for amicus curiae* National Association of Consumer Bankruptcy Attorneys, *in support of Plaintiff-Appellee.*

SUSAN L. CARNEY, *Circuit Judge*:

Defendant SEFCU, a lender, appeals from a judgment of the United States District Court for the Northern District of New York (Suddaby, *J.*) reversing an order of the United States Bankruptcy Court for the Northern District of New York (Littlefield, *J.*) and remanding the case to the Bankruptcy Court for further proceedings. The District Court concluded that SEFCU violated the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, when, after lawfully

repossessing a vehicle belonging to the debtor, plaintiff Christopher Weber, it failed to deliver the vehicle to him notwithstanding its knowledge of the debtor's pending petition under Chapter 13 of the Bankruptcy Code. The District Court affirmed, holding that, by declining to surrender the vehicle absent a turnover order and protection SEFCU considered adequate, the lender wrongfully "exercised control" over the vehicle in contravention of section 362 and was liable for Weber's related damages, attorneys' fees, and costs.

On appeal to our Court, SEFCU challenges the District Court's interpretation of section 362 and other relevant provisions of the Bankruptcy Code, and argues that, under the authority of Manufacturers & Traders Trust Co. v. Alberto (In re Alberto), 271 B.R. 223 (N.D.N.Y. 2001), it was entitled to retain the vehicle notwithstanding the pending bankruptcy proceedings. For the reasons set forth below, we AFFIRM the judgment of the District Court and REMAND the cause to the district court for a determination of the amount of damages, costs, and attorneys' fees that SEFCU owes Weber under section 362(k), and any other proceedings consistent with this opinion.

BACKGROUND

The relevant facts are undisputed.[1]

[1] In proceedings before the Bankruptcy Court, the parties submitted a "Combined statement of facts not subject to material dispute," pursuant to Local Rule 7056 of the Bankruptcy Court for the Northern District of New York. We draw the facts presented here from that statement.

In August 2006, Weber and SEFCU (identified in Bankruptcy Court pleadings as the "State Employees Federal Credit Union")[2] entered into a loan agreement pursuant to which SEFCU obtained a security interest in Weber's vehicle, a pickup truck. The loan agreement entitled SEFCU to repossess Weber's vehicle upon default.

In 2009, SEFCU became entitled to proceed against Weber. As a result, on January 10, 2010, SEFCU took possession of Weber's vehicle pursuant to the loan agreement, and, by notices dated January 10 and 11, 2010, advised him of his right under New York law to redeem the vehicle upon payment of amounts due and certain costs. Four days after the seizure, on January 14, Weber filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 109(e), 1301-08, 1321-30, in the United States Bankruptcy Court for the Northern District of New York. Weber's attorney concurrently gave SEFCU written notice of Weber's bankruptcy filing, and, invoking the stay imposed by Bankruptcy Code section 362, 11 U.S.C. § 362(a), requested the vehicle's return.

One week later, SEFCU still had the vehicle, and accordingly, on January 22, Weber filed an adversary proceeding against SEFCU seeking its return so that, as later explained by his counsel to the Bankruptcy Court, he could "continue his construction business" during the pendency of his petition. On March 1, with the vehicle still in SEFCU's possession, the Bankruptcy Court entered an

[2] According to The Daily Gazette, which covers Schenectady and Albany, the State Employees Federal Credit Union officially changed its name to "SEFCU" in 1990. Lee Coleman, *Credit Unions Going Strong in Region*, The Daily Gazette, Apr. 29, 2012, at B1.

order requiring SEFCU to show cause why it should not return the vehicle and why the court should not grant Weber an award of damages for SEFCU's violation of section 362 and for other relief. On March 4, the court heard argument on the order to show cause, and, although the record does not reflect entry of a related order at that time, SEFCU is reported to have returned the vehicle to Weber the following day.

The proceedings in the Bankruptcy Court continued, as Weber sought damages for his inability to use the vehicle between January 14 and March 5, attorneys' fees, and sanctions. In November 2010, SEFCU moved for summary judgment, putting to the Bankruptcy Court the question of law whether SEFCU's failure to release the vehicle promptly after the petition was filed constituted a "willful" violation of the automatic stay under subsections (a) and (k)(1) of section 362 (providing for recovery of damages, costs, and attorneys' fees for "any willful violation of a stay"). SEFCU maintained that there was no violation, and that an earlier district court decision in other proceedings, Alberto, 271 B.R. 223 (N.D.N.Y. 2001), gave it a reasonable basis for declining to release the vehicle absent a court order issued pursuant to Bankruptcy Code section 542, 11 U.S.C. § 542 (relating to "Turnover of property to the estate"). Weber, for his part, argued that Alberto was wrongly decided, and that section 362 required SEFCU to release the vehicle promptly after the petition was filed. The Bankruptcy Court, in a brief Order, granted summary judgment for SEFCU.

Weber appealed to the District Court. Relying primarily on the Supreme Court's decision in United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), and rejecting the reasoning of the Alberto court, the district court concluded that SEFCU was bound to release the vehicle to Weber, the debtor-in-possession, upon learning of Weber's pending Chapter 13 proceedings. The district court further determined that, having failed to do so, SEFCU violated section 362. Because it knew of the petition and retained the vehicle, SEFCU's violation was willful, making it liable for damages and attorneys' fees. Weber v. SEFCU, 477 B.R. 308, 311 (N.D.N.Y. 2012). SEFCU timely appealed.

DISCUSSION

We conduct a "plenary review" of a decision of "a district court functioning in its capacity as an appellate court in a bankruptcy case." Mazzeo v. United States (In re Mazzeo), 131 F.3d 295, 301 (2d Cir. 1997). Thus, we review *de novo* the bankruptcy court's legal conclusions. Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.), 68 F.3d 26, 29 (2d Cir. 1995). As noted above, the relevant facts are not contested; we have no occasion to subject them to further review.

Under Bankruptcy Code section 541, governing "Property of the estate," the act of filing a petition for bankruptcy creates an estate comprised of (as relevant here) "all legal or equitable interests of the debtor in property as of the

commencement of the [bankruptcy] case." 11 U.S.C. § 541(a)(1). Section 541 gathers into the estate all such interests in property, "wherever located and by whomever held." Id. § 541(a).

To assemble the bankruptcy estate, section 542 of the Code requires that, during bankruptcy proceedings, an entity "in possession, custody, or control" of certain property in the estate "*shall deliver*" that property to the trustee, "unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a) (emphasis added). The property subject to this delivery obligation is "property that the trustee may use, sell, or lease under section 363," which grants broad powers over the estate's property to the trustee.[3] Id. In a Chapter 13 bankruptcy, the debtor "remain[s] in possession of all property of the estate"– acting in effect as trustee under section 542(a) – unless the debtor's reorganization plan provides otherwise. 11 U.S.C. § 1306(b).[4] The delivery obligation of section 542(a)

[3] Section 363, as applicable here, provides: "[U]nless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1); see also United States v. Whiting Pools, Inc., 674 F.2d 144, 149 (2d Cir. 1982) (Friendly, *J.*), aff'd, 462 U.S. 198 (1983). The trustee may also use, sell, or lease property of the estate outside the ordinary course of business, upon notice and a hearing before the bankruptcy court. 11 U.S.C. § 363(b)(1); see also Motorola, Inc. v. Official Comm. of Unsecured Creditors and JPMorgan Chase Bank, N.A. (In re Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007).

[4] The debtor-in-possession may exercise many of the rights and powers of a bankruptcy trustee, including the right to use, sell, or lease property of the estate. 11 U.S.C. §§ 1303, 1304(b) ("Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.").

thus contemplates the debtor-in-possession as the recipient of the property of the estate.

While bankruptcy proceedings are pending, the automatic stay provisions of section 362 work with sections 541 and 542 to shelter the debtor's estate from action by creditors, enabling the debtor to get the relief and fresh start that are among the goals of the bankruptcy regime.[5] Thus, under section 362, filing a bankruptcy petition automatically effects a stay of "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Those who violate section 362 are liable for related damages and costs: under section 362(k), a debtor "injured by any willful violation of a stay provided by [section 362] *shall recover* actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Id. § 362(k)(1) (emphasis added).

We first consider whether SEFCU's refusal to return the vehicle to Weber promptly upon learning of his Chapter 13 bankruptcy filing constituted an

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[5] The iconic description of the overriding purpose of section 362 is drawn directly from the section's legislative history:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 95-595, at 340-41 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97; see also United States v. Colasuonno, 697 F.3d 164, 172 (2d Cir. 2012).

unlawful "exercise [of] control" over the "property" of his estate, in violation of the automatic stay. We then examine whether SEFCU may be excused from promptly surrendering the vehicle because Weber had not provided "adequate protection" for SEFCU's security interest in the vehicle. Finally, because we conclude that SEFCU's actions did violate section 362, we then turn to the question whether, in light of its reliance on Alberto, SEFCU's violation was nonetheless "willful" under section 362(k), making it liable for Weber's actual damages, costs, and attorneys' fees under that section.

I.

As observed above, section 541(a) provides that a bankruptcy estate is comprised of "all legal or equitable interests in property as of the commencement of the case."[6] Although SEFCU's repossession of the vehicle before Weber filed his petition lawfully overrode Weber's immediate possessory rights, the parties agree that New York law afforded Weber at least a continuing equitable interest in the vehicle. See Wornick v. Gaffney, 544 F.3d 486, 490 (2d Cir. 2008) ("Whether the debtor has a legal or equitable interest in property such that it becomes property of

[6] In relevant part, section 541 provides:

> (a) The commencement of a case under [11 U.S.C. §§ 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) [Subject to exceptions not relevant here,] all legal or equitable interests of the debtor in property as of the commencement of the case.

the estate under section 541 is determined by applicable state law." (internal quotation marks omitted)). That interest arose from Weber's right pursuant to the state Uniform Commercial Code to redeem the vehicle before sale. See N.Y. U.C.C. § 9-623.[7] It was this right that SEFCU acknowledged and identified for Weber in its notice to him dated January 11. Weber's equitable interest thus constituted "property" of the bankruptcy estate under section 541. Neither party seriously challenges the scope of that definition.

Rather, Weber and SEFCU dispute whether, by failing to surrender the vehicle immediately upon receiving notice of the petition's filing, SEFCU "exercise[d] control" over Weber's equitable interest in the vehicle and thereby violated the stay imposed by section 362. The Supreme Court's decision in United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), provides important guidance for our resolution of this issue.

The dispute in Whiting Pools arose when, to satisfy a tax lien, the IRS seized all of the tangible personal property of the corporation. One day after the seizure, the corporation filed for bankruptcy. The IRS moved for relief from the automatic stay, wishing to be free to sell the personal property that it had seized in

[7] Weber retained other rights under state law consistent with his status as the equitable owner of the vehicle. These rights included a right to notification before the creditor disposed of the vehicle, N.Y. U.C.C. § 9-611, and a right to receive any surplus from the sale of the vehicle, id. § 9-615(d)(1). In addition, we observe that Weber may have retained legal title to the vehicle. See, e.g., N.Y. U.C.C. § 9-609; N.Y. Veh. & Traf. Law § 2115. But the parties have not briefed this question and we do not decide it here. That Weber has a colorable claim to have retained legal title to the truck, in addition to his acknowledged equitable interests in the vehicle, arguably serves to distinguish this case, however, from those in which legal title transferred to the creditor automatically upon repossession (or never was in the debtor to begin with). We express no view about the bearing of section 362 upon the latter situations.

satisfaction of the tax debts owed. The debtor corporation counterclaimed and, in the bankruptcy court, successfully sought an order under section 542 that required the IRS to return the property to the estate. Id. at 199-201.

The Supreme Court affirmed the bankruptcy court's turnover order. Characterizing the IRS's interest in the seized property as "its lien" – not ownership – and analogizing the Service's right to effect a seizure to the remedies available to private secured creditors, the Court described the seizure as "not determin[ing] the Service's rights to the seized property, but merely bring[ing] the property into the Service's legal custody." Id. at 210-11. It explained that "[i]n effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings," id. at 207, and "requires an entity . . . holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee." Id. at 205-06.

The Court underscored the Congressional intent, in shaping the definition of "property" set forth in section 541(a), to include "a broad range" of property in the estate, and indeed, to capture "any property made available to the estate by other provisions of the Bankruptcy Code." Id. at 204-05. Section 542(a) is such a provision. It requires delivery to the trustee of "any property of the debtor that the trustee can use under § 363," including property repossessed by a secured creditor. Id. at 205-06. "Any other interpretation of § 542(a)," the Court declared, "would deprive the bankruptcy estate of the assets and property essential to its

rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions." Id. at 208.

For these reasons, the Court restricted the IRS – like any other creditor seizing property in which it held a security interest – to seeking protection of its interests "according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." Id. at 212.

Similarly, here, SEFCU seized Weber's vehicle before Weber filed for bankruptcy, but under New York law, Weber retained at least an equitable interest in the property notwithstanding its repossession. SEFCU did not automatically obtain an ownership interest in the vehicle: its rights to seize and sell were subject to U.C.C. provisions of state law, including certain continuing rights held by Weber, and also subject to the rights and remedies established by the Bankruptcy Code. Whiting Pools teaches that, upon Weber's filing of his bankruptcy petition, Weber's equitable interest under state law gave the bankruptcy estate a possessory right in the secured property, as property that the trustee could use under section 363. Under section 542, that right took precedence over the state law possessory right of SEFCU. See id. at 207.

It is true that Whiting Pools involved a Chapter 11 corporate reorganization, and that the Supreme Court expressly reserved judgment as to whether its analysis would also apply to Chapter 13 personal reorganizations like

Weber's. 462 U.S. at 208 n.17. But, like other courts to have addressed the issue, we observe that the language of sections 541, 542, and 362 applies to the "estate," not just the "reorganization estate." See Austein v. Schwartz (In re Gerwer), 898 F.2d 730, 734 (9th Cir. 1990) (cited in In re Velichko, 473 B.R. 64, 67 (Bankr. S.D.N.Y. 2012)). We see no reason – and the parties have presented none – to restrict application of the reasoning of the Whiting Pools Court to corporate reorganizations: the same concerns apply fully in the Chapter 13 context as well. See, e.g., Thompson v. General Motors Acceptance Corp., 566 F.3d 699, 705-06 (7th Cir. 2009) (applying Whiting Pools in Chapter 13 setting and observing that the "purpose of reorganization bankruptcy, *be it corporate or personal*, is to allow the debtor to regain his financial foothold and repay his creditors") (emphasis added). As noted above, Weber required his vehicle to conduct his construction business; Whiting Pools required its equipment and other personal property to conduct its business. In each case, the reorganization's chances for success would seem markedly improved if operations could be maintained during the pendency of the petition and formulation of the plan.

Whiting Pools does not resolve, however, whether by demanding a turnover order of the bankruptcy court or "adequate protection" as a condition of its relinquishment, SEFCU "exercise[d] control" over the vehicle in contravention of the stay. In Whiting Pools, the IRS – unlike SEFCU – moved for relief from the stay, and did not simply wait for the debtor to initiate an adversary proceeding or

seek a turnover order under section 542. Id. at 201. Thus, the Court there held only that the bankruptcy court properly ordered the IRS to return the seized property to the estate under section 542. Id. at 212.

The district court's decision in Alberto, relied upon by SEFCU here, directly addressed the question left unanswered by Whiting Pools. The Alberto court concluded that a secured creditor did *not* violate the automatic stay when, after learning of the debtor's bankruptcy, it failed immediately to return a debtor's repossessed vehicle. 271 B.R. at 228. Rather, the court held that before such a secured creditor was obligated to surrender the collateral to the estate, the debtor must "take[ ] an affirmative step," such as obtaining a turnover order under section 542. Id. at 227. Because (as it found) a repossessed vehicle was not part of the debtor's estate until such an action had occurred, the court reasoned that a creditor that had taken possession of its security did not "exercise control" over "property" of the estate by declining to surrender the possessory interest to the estate. Id. at 228. Since the debtor no longer had a possessory interest, the court concluded, the creditor "did not 'act to obtain possession . . . or to exercise control' of the vehicle in violation of the stay, since it already lawfully possessed and controlled the vehicle when the stay went into effect." Id. at 226 (alteration in original) (quoting 11 U.S.C. § 362(a)(3)).

We find the Alberto court's reasoning unpersuasive. Section 541 expressly provides that the "property" of Weber's estate includes equitable interests,

and Weber's right to redeem and other rights catalogued above, together with his lingering claim to ownership of title, comprise such an interest. That SEFCU had already effected a repossession does not alter the conclusion that the equitable interest is property of the estate: section 541 provides further that the estate is comprised of property "wherever located and by whomever held." 11 U.S.C. § 541(a). Nor was Weber obligated to initiate an additional proceeding. Section 542 requires that any entity in possession of property of the estate deliver it to the trustees, without condition or any further action: the provision is "self-executing." Collier on Bankruptcy § 542.02 (16th ed. 2012) ("By its express terms, [section 542] is self-executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover."). And Whiting Pools teaches that the filing of a petition will generally transform a debtor's equitable interest into a bankruptcy estate's possessory right in the vehicle.

As for whether SEFCU's refusal to return the vehicle to the estate violated the stay, section 362 forbids any act to "obtain possession" or "exercise control" over the property of the estate. We need consult only an ordinary dictionary to confirm that a typical definition of "control" is: "To exercise authority over; direct; command." Webster's New World College Dictionary (4th ed. 2002). In light of that definition, we see no way to avoid the conclusion that, by keeping custody of the vehicle and refusing Weber access to or use of it, SEFCU was

"exercising control" over the object in which the estate's equitable interest lay, and its retention of the vehicle violated the stay.

The Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Amendments") confirms our conclusion. The 1984 Amendments, passed after the Whiting Pools decision in 1983, broadened the already sweeping provisions of the automatic stay even further to prohibit expressly not only "acts to obtain possession" of property of the estate, but also "any act . . . to exercise control over the property of the estate." Pub. L. No. 98-353, 98 Stat. 333, 371. This significant textual enlargement is consonant with our understanding and the Supreme Court's interpretation that Congress intended to prevent creditors from retaining property of the debtor in derogation of the bankruptcy procedure and the broad goals of debtor protection discussed above, without regard to what party was in possession of the property in question when the petition was filed. As the Seventh Circuit has pointed out, "Although Congress did not provide an explanation of that amendment, the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition." Thompson, 566 F.3d at 702 (citation omitted).

The rule adopted by the Alberto court and urged on us by SEFCU – that some additional act by the debtor is required before the creditor is obligated to surrender the property – would, in contrast, place on the debtor or trustee the

burden of undertaking a series of adversary proceedings to pull together the bankruptcy estate, and thereby increase the costs of administering the estate and decrease the assets available to effect a successful reorganization. In our view, the plain language of section 542 (directing that those in custody of assets of the estate "shall deliver" them to the trustee); the approach of the Whiting Pools Court to equitable interests and bankruptcy estates; and the broad language of the 1984 Amendments enlarging the scope of the automatic stay point unmistakably away from any Congressional desire to impose such an additional burden on debtors seeking bankruptcy protection. As the Eighth Circuit wrote,

> [I]f persons who could make no substantial adverse claim to a debtor's property in their possession could, without cost to themselves, compel the debtor or his trustee to bring suit as a prerequisite to returning the property, the powers of a bankruptcy court . . . to collect the estate for the benefit of creditors would be vastly reduced.

Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989) (internal quotation marks omitted). SEFCU has identified no basis for concluding that Congress intended this result.

The district court's decision in Alberto also runs counter to the strong trend of decisions from our sister Circuits. For example, the Seventh Circuit has bluntly ruled that "a plain reading of the Bankruptcy Code's provisions, the Supreme Court's decision in [Whiting Pools], and various practical considerations require that a creditor immediately return a seized asset in which a debtor has an equity interest to the debtor's estate upon his filing of Chapter 13 bankruptcy."

Thompson, 566 F.3d at 700; see also Knaus, 889 F.2d at 775. Bankruptcy Appellate Panels from other Circuits agree. E.g., Unified People's Fed. Credit Union v. Yates (In re Yates), 332 B.R. 1, 7 (B.A.P. 10th Cir. 2005); TranSouth Fin. Corp. v. Sharon (In re Sharon), 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999); Abrams v. Sw. Leasing & Rental Inc. (In re Abrams), 127 B.R. 239, 243 (B.A.P. 9th Cir. 1991).

Only the Eleventh Circuit has adopted a contrary approach, and those decisions have largely relied on readings of state law with regard to the relative legal property interests of debtor and secured creditor after a lawful repossession. See Bell-Tel Fed. Credit Union v. Kalter (In re Kalter), 292 F.3d 1350, 1356-60 (11th Cir. 2002) (applying Florida law); Charles R. Hall Motors, Inc. v. Lewis (In re Lewis), 137 F.3d 1280, 1284-85 (11th Cir. 1998) (applying Alabama law).

In our view, the majority rule adheres more faithfully to the text of the Bankruptcy Code and the reasoning of Whiting Pools. In addition, sound policy supports the majority's reading of the statutory text:

> The primary goal of reorganization bankruptcy is to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property lawfully seized pre-petition. An asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot.

Thompson, 566 F.3d at 702 (citations omitted) (emphasis in original).

We therefore join the majority of other Circuits to have addressed this issue and conclude that section 362 requires a creditor in possession of property

seized as security – but subject to a state-law-based residual equitable interest in the debtor – to deliver that property to the trustee or debtor-in-possession promptly after the debtor has filed a petition in bankruptcy under Chapter 13.

II.

SEFCU argues that even if the Code did not permit SEFCU to await a turnover order before relinquishing the vehicle, SEFCU was entitled to withhold the vehicle until Weber offered or the court ordered Weber to provide SEFCU "adequate protection" for SEFCU's security interest. Appellant's Br. 15. We need not pause long over this argument, for the plain text of the Bankruptcy Code contradicts this position. As we have observed, section 542(a) provides without qualification that anyone in possession of the property of the estate "shall deliver" it to the trustee. 11 U.S.C. § 542(a). The Code requires the creditor first to surrender the property. Only then or in conjunction with that surrender may it proceed to "request" from the Bankruptcy Court "adequate protection" for its interests. 11 U.S.C. §§ 362(d), 363(e).[8] The provisions authorizing imposition of such protection

[8] In relevant part, section 362(d) provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay – (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

In relevant part, section 363(e) provides:

operate only upon application of the creditor to the Bankruptcy Court. Unlike section 542(a), these are not self-executing.

SEFCU points to no provision of the Code permitting a creditor to withhold property of the estate until the debtor has offered protection that is "adequate" in the *creditor's* view, separate from any formal proceeding before the Bankruptcy Court. Rather, the Code provides for protection that the *court* deems adequate: "[O]n request of an entity that has an interest in property used . . . by the trustee, the court . . . shall prohibit or condition such use . . . as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e). See Sharon, 234 B.R. at 683 (holding that "[t]here is no 'exception' . . . that excuses [the creditor's] refusal to deliver possession of the Debtor's car based on [the creditor's] subjective opinion that adequate protection offered by the Debtor was not 'adequate'"). To hold otherwise would permit a creditor holding the debtor's property at the time of the debtor's bankruptcy filing to "negotiat[e] a better security package" than other creditors, thereby ensuring that creditor "a position above other secured creditors" and circumventing the bankruptcy court's authority to approve the debtor's plan to repay his or her debts. Thompson, 566 F.3d at 707.

SEFCU points principally to the Fourth Circuit's decision in Tidewater Finance Co. v. Moffett (In re Moffett), 356 F.3d 518 (4th Cir. 2004), in support of the

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> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased . . . by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest.

proposition that a secured creditor may await delivery of what it deems adequate protection before surrendering the debtor's property to the estate. But Moffett is inapposite. That case did not concern the creditor's assessment of whether the debtor's proffered protection was "adequate." Rather, there, the creditor moved in the bankruptcy court for relief from the stay, seeking permission to sell the previously repossessed vehicle. Id. at 520. The Fourth Circuit agreed with the bankruptcy court that the debtor's reorganization plan provided "adequate protection" to the creditor and declined to lift the stay, requiring the creditor to return the vehicle to the debtor. Id. at 523.

We easily conclude that SEFCU's belief that Weber had not provided "adequate protection" for SEFCU's security interest in the vehicle does not cure SEFCU's violation of section 362.

III.

Finally, SEFCU asserts that even if its actions violated section 362, its violation was not "willful" within the meaning of section 362(k), and therefore the court may not require it to pay Weber's damages, costs, or attorneys' fees, or to impose any sanction. SEFCU asserts primarily that, because it relied in good faith on the Alberto decision and the "rule and custom" of the Northern District of New York, any violation that it committed should not be deemed "willful" under section 362(k). Appellant's Br. at 3.

We appreciate that, since one district court rendered its decision in Alberto, a practice may have developed in the Northern District of New York under which creditors felt entitled to await a turnover order and that SEFCU may therefore have felt justified in failing to surrender Weber's vehicle absent a court order. Nothing prevented SEFCU from surrendering the vehicle in response to Weber's request, however: it always was free to do so, and free concurrently to move the Bankruptcy Court for entry of an order that would – in the *court's* view – provide "adequate protection" to SEFCU. The creditor's error in this regard does not justify placing costs related to the vehicle's retention on the debtor.

Indeed, SEFCU misconstrues the meaning of "willful" as our Circuit law has construed the term in the context of section 362. A creditor willfully violates section 362 when it knows of the filing of the petition (and hence of the automatic stay), and has the general intent simply to perform the act found to violate section 362; no specific intent to violate section 362 is necessary. As we wrote over twenty years ago, "any deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages." Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.), 902 F.2d 1098, 1105 (2d Cir. 1990); see also In re Dominguez, 312 B.R. 499, 508 (Bankr. S.D.N.Y. 2004) ("[S]o long as the violator possessed general intent in taking actions which have the effect of violating the automatic stay the intent required by § 362(h) is satisfied."); Yates, 332 B.R. at 7 ("Whether the party believes

in good faith that it had a right to the property is not relevant to whether the act was willful or whether compensation must be awarded." (internal quotation marks omitted)). Section 362(k) operates to compensate the debtor who has been injured by the violation, in line with the distribution of the procedural burden struck by the statute, as discussed above, in favor of the estate and the bankruptcy mechanism. Because it intended to retain Weber's vehicle, SEFCU acted "willfully," and is liable for damages, costs, and attorney's fees under section 362(k)(1).

Although its good faith is insufficient to excuse SEFCU from liability for Weber's actual damages, it may prevent the imposition of punitive damages, which in any event Weber's counsel has conceded he no longer seeks.[9] See Crysen/Montenay Energy Co., 902 F.2d at 1105 ("An additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of punitive damages . . . ."); see also In re Velichko, 473 B.R. at 69-70 (imposition of punitive damages premised on finding that secured creditor acted in bad faith by forcing debtors to sign reaffirmation agreement before relinquishing their vehicle).

CONCLUSION

For the foregoing reasons, we conclude that by failing to deliver the repossessed vehicle to the debtor-in-possession promptly after receiving notice of the

[9] At oral argument, Weber's counsel confirmed that Weber does not seek punitive damages.

pending petition, SEFCU willfully violated section 362(a), and is liable under section 362(k) for Weber's actual damages, costs, and attorney's fees. The order of the district court is AFFIRMED, and the cause remanded to the district court for further proceedings consistent with this opinion. The district court may, if it chooses, remand the cause to the bankruptcy court for adjudication of the remaining issues, including Weber's costs.

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United States Court of Appeals
Tenth Circuit

February 27, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JARED TRENTON COWEN,

Debtor.

WD EQUIPMENT, LLC; AARON WILLIAMS; BERT DRING,

Appellants,

v.

JARED TRENTON COWEN,

Appellee.

No. 15-1413

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:14-CV-02408-REB)

Alexander M. Musz of Cohen & Cohen, P.C., Denver, Colorado, for Defendants–Appellants.

C. Todd Morse of Morse Law, LLC, Denver, Colorado, for Plaintiff–Appellee.

Before **KELLY**, **McKAY**, and **McHUGH**, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff Jared Trent Cowen's 2000 Peterbilt 379, a commercial truck, was in need of repair. To cover the cost, Mr. Cowen borrowed money from Defendant WD Equipment, which is owned and managed by Defendant Aaron Williams, in exchange for a lien on the truck and the promise of repayment. After the Peterbilt broke down again only a few weeks after the repairs, it was towed to a local repair company, which estimated that fixing the truck again would cost $9,000—more than Mr. Cowen could afford.

Because his Peterbilt was in the shop, Mr. Cowen could not make installment payments to WD Equipment. So, in early August, 2013, Mr. Cowen began taking steps to refinance the loan; he met with his bank and with his parents in an attempt to secure refinancing, and he exchanged several text messages on August 1 and 2 with Mr. Williams about paying off the loan. During the course of that exchange, however, Mr. Williams gave Mr. Cowen several, contradictory responses as to how much Mr. Cowen would need to pay to settle the debt, and he accelerated the payoff date several times, before ultimately setting August 6 as the deadline.

Around the same time, Mr. Cowen defaulted on another loan secured by another one of his trucks, a 2006 Kenworth T600. This loan was owed to Defendant Bert Dring, the father-in-law of Mr. Williams, who held a purchase-money security interest in the truck. On July 29, Mr. Dring lured Mr. Cowen under false pretenses to his place of business to repossess the Kenworth. Mr. Dring asked Mr. Cowen, who had brought along his young son, to leave the keys in the ignition, engine running, and to step out of the truck. As Mr. Cowen exited the vehicle, Mr. Dring jumped in,

grabbed the keys, and declared the truck "repossessed." When Mr. Cowen asked what was going on, Mr. Dring told him to take his son and leave—immediately. A group of five men gathered around Mr. Dring while he brandished a can of mace above his head and threatened to use it if Mr. Cowen did not leave. Mr. Cowen pushed his young son behind him to protect him, and the two left the lot on foot. Three days later, Mr. Cowen received a letter from Mr. Dring giving him ten days to pay off the Kenworth.

Instead, Mr. Cowen filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on August 6, which was the deadline for paying off the Peterbilt, and which was within the ten-day cure period for the Kenworth. He notified Defendants of the filing and requested the immediate return of both trucks. But Defendants refused: Mr. Williams claimed that he had changed the title to his name on August 1. (At no time during the text message exchanges on August 1 and 2 did Mr. Williams ever inform Mr. Cowen of the title change.) And Mr. Dring claimed that he sold the Kenworth sometime prior to the bankruptcy filing. (Initially, he claimed he had sold the Kenworth to an unknown Mexican national for cash in an undocumented sale just days before Mr. Cowen filed for bankruptcy. Later, Mr. Dring produced bill of sale, purporting to show that he sold the Kenworth to a Mr. Garcia for $16,000 in cash on August 4.)

About a month later, Mr. Cowen moved the bankruptcy court for orders to show cause why Defendants should not be held in contempt for willful violations of the automatic stay. The bankruptcy court granted the motions and ordered

Defendants to "immediately turn over" the trucks to Mr. Cowen; "[c]ontinuing failure to turn over the Truck[s]," the bankruptcy court warned, "may result in the imposition of monetary damages against the Creditors for willful violation of the automatic stay." Order on Motion for Order to Show Cause and Order to Turnover Property of the Estate, Case No. 13-23461 (Bankr. Colo. Sept. 5, 2013).

When Defendants did not comply with the bankruptcy court's turnover order, Mr. Cowen filed an adversary proceeding for violations of the automatic stay. A few months later, the bankruptcy court dismissed the underlying bankruptcy case because, without the trucks, Mr. Cowen had no regular income, which rendered him ineligible for Chapter 13 relief. However, the bankruptcy court expressly retained jurisdiction over the adversary proceeding.

During the adversary proceeding, Defendants again asserted that Mr. Cowen's rights in the trucks had been properly terminated by Defendants *before* the bankruptcy petition was filed, and so they could not have violated the automatic stay. But the bankruptcy court "did not find the Defendants' testimony that they had transferred title before the petition date to be credible." (App. Vol. II at 248.) It went on to "find[ ] that they manufactured the paperwork . . . after the bankruptcy filing." (*Id.*) "Defendants likely forged documents and gave perjured testimony" and "coached their witnesses on what to testify to during [ ] breaks" in an "attempt to convince the Court that [Mr. Cowen's] rights in the Trucks had been terminated pre-bankruptcy." (*Id.* at 258.) Additionally, the bankruptcy court held that "even if they had taken the actions they claim to have taken before the bankruptcy filing," (*id.* at

269), such actions contravened Colorado law, and therefore did not effectively terminate Mr. Cowen's "ownership interest in the Trucks," (*id.* at 252). And so, the bankruptcy court concluded, "[f]ailing to return the Trucks violated § 362(a)(3) of the Bankruptcy Code," (*id.*), and it imposed actual and punitive damages under 11 U.S.C. § 362(k)(1).

Defendants timely appealed this decision to the district court, which reversed on the calculation of damages but otherwise affirmed the bankruptcy court's order. Defendants then appealed to this Court, arguing, among other things, that the bankruptcy court exceeded its jurisdiction, that it lacked constitutional authority to enter a final judgment in this adversary proceeding, and that the bankruptcy court misinterpreted § 362—the automatic stay provision. "[T]hough this appeal comes to us from the district court, we review a bankruptcy court's decisions independently, examining legal determinations de novo and factual findings for clear error." *FB Acquisition Prop. I, LLC v. Gentry (In re Gentry)*, 807 F.3d 1222, 1225 (10th Cir. 2015). "In doing so, we treat the bankruptcy appellate panel or district court as a subordinate appellate tribunal whose rulings are not entitled to any deference (although they may certainly be persuasive)." *Nelson v. Long (In re Long)*, 843 F.3d 871, 873 (10th Cir. 2016) (internal quotation marks omitted). "A bankruptcy court's legal conclusions are reviewed de novo, while its factual findings are reviewed for clear error." *Id.*

We address first the bankruptcy court's jurisdiction. "The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by,

statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). By statute, bankruptcy courts have jurisdiction to "enter final judgments in 'all core proceedings arising under title 11, or arising in a case under title 11.'" *Stern v. Marshall*, 564 U.S. 462, 474 (2011) (quoting 28 U.S.C. § 157(b)(1)). As we have explained, a claim for damages under § 362(k)(1) for a violation of an automatic stay is a core proceeding. *Johnson v. Smith (In re Johnson)*, 575 F.3d 1079, 1083 (10th Cir. 2009) (holding that a "§ 362(k)(1) proceeding . . . is a core proceeding because it derives directly from the Bankruptcy Code and can be brought only in the context of a bankruptcy case." (internal quotation marks and brackets omitted)). Accordingly, bankruptcy courts can exercise jurisdiction and adjudicate such claims to final judgment. *Id.*

Defendants contend, however, that the bankruptcy court erred in retaining jurisdiction over the § 362(k)(1) adversary proceeding after the underlying bankruptcy was dismissed. But this argument is foreclosed by *Johnson*. There it was argued that "dismissal of the underlying Chapter 13 case divested the bankruptcy court of jurisdiction over the § 362(k)(1) proceeding." *Id.* at 1081. We disagreed: "Nothing in the Bankruptcy Code mandates dismissal of the § 362(k)(1) proceeding when the bankruptcy case is closed," and "[n]o part of § 362(k)(1) suggests that a claim exists only while the bankruptcy case remains pending." *Id.* at 1084. We explained that "[r]equiring the dismissal of a § 362(k)(1) proceeding simply because the underlying bankruptcy case has been dismissed would not make sense. A court must have the power to compensate victims of violations of the automatic stay and

punish the violators, even after the conclusion of the underlying bankruptcy case." *Id.* at 1083.

Defendants' attempts to distinguish *Johnson* are unavailing. They argue that, unlike in *Johnson*, this § 362(k)(1) adversary proceeding is "non-core" because the bankruptcy court "had to determine the disputed possessory interests in [the] assets pursuant to state law." (Appellant's Br. at 36). But "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157(b)(3).

Defendants also seem to suggest that *Johnson* is distinguishable because there the bankruptcy court decided the automatic stay violation first, which was appealed (which, in turn, resulted in a remand), and *then* dismissed the underlying bankruptcy while the automatic stay violation appeal was pending. (*See* Appellant's Br. at 34 (citing *Johnson*, 575 F.3d at 1081, where we summarized the procedural history of the case)). But Defendants do not argue, much less persuade, why this discrepancy undermines the unequivocal holding of *Johnson*: "a § 362(k)(1) proceeding remains viable after termination of the underlying bankruptcy case." *Johnson*, 575 F.3d at 1084.

Defendants also contend that the bankruptcy court lacked constitutional authority under *Stern v. Marshall* to enter final judgment. But *Stern* dealt with claims that did not "stem[ ] from the bankruptcy itself" and would not "necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499. A claim under § 362(k)(1) for an automatic stay violation, by contrast, "derives directly from the

Bankruptcy Code and can be brought only in the context of a bankruptcy case." *Johnson*, 575 F.3d at 1083. Indeed, it necessarily "stems from the bankruptcy itself." *Stern*, 564 U.S. at 499.

A claim for violating an automatic stay is not the "stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Stern*, 564 U.S. at 484 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment)). To the contrary, "we are concerned here with the adjudication of a right created by federal statute, rather than a private, state-created right, like that of concern in *Marathon*." *Mountain America Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444, 449 (10th Cir. 1990) (holding that a bankruptcy court did not exceed its constitutional authority when it entered sanctions pursuant to 11 U.S.C. § 362(h), the precursor of § 362(k), for violating an automatic stay). And so, the bankruptcy court did not exceed its constitutional authority by entering final judgment in the § 362(k)(1) adversary proceeding.

To the merits. Mr. Cowen filed the adversary proceeding against Defendants for violating "[s]ection 362, which establishes the automatic stay." *Johnson*, 575 F.3d at 1083. "When a debtor files for bankruptcy, section 362 prevents creditors from taking further action against him except through the bankruptcy court." *Id.* (quoting *Price v. Rochford*, 947 F.2d 829, 831 (7th Cir. 1991)). To accomplish this, § 362 provides in relevant part that a bankruptcy petition "operates as a stay. . . of. . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

Below, the bankruptcy court held that "[t]he failure to return the Trucks to [Mr. Cowen] post-petition constituted a continuing violation of the stay"; specifically, Defendants "violated § 362(a)(3) of the Bankruptcy Code." (App. Vol. II at 252.) As the district court noted, the bankruptcy court applied what appears to be the majority rule: "that the act of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a)(3) of the Bankruptcy Code." *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009); *see also Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013), *California Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996), *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989), *Unified People's Fed. Credit Union v. Yates (In re Yates)*, 332 B.R. 1, 4 (B.A.P. 10th Cir. 2005); *but see United States v. Inslaw*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). Defendants disagree with this interpretation of § 362(a)(3), and we agree with Defendants.

The majority rule seems driven more by "practical considerations," *Weber*, 719 F.3d at 80, and "policy considerations," *Thompson*, 566 F.3d at 703, than a faithful adherence to the text. But "[o]ur interpretation of the Bankruptcy Code starts where all such inquiries must begin: with the language of the statute itself." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (internal quotation marks omitted). In this case, it is also where the inquiry ends, "for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its

terms." *Frieouf v. United States (In re Frieouf)*, 938 F.2d 1099, 1102–03 (10th Cir. 1991).

Here again is § 362(a)(3), in relevant part: a bankruptcy petition "operates as a stay. . . of. . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Breaking down the sentence, "any act" is the prepositive modifier of both infinitive phrases. In other words, § 362(a)(3) prohibits "any act to obtain possession of property" or "any act to exercise control over property." "Act", in turn, commonly means to "take action" or "do something." *New Oxford American Dictionary* 15 (3d ed. 2010) (primary definition of "act"). This section, then, stays entities from *doing* something to obtain possession of or to exercise control over the estate's property. It does not cover "the act of passively holding onto an asset," *Thompson*, 566 F.3d at 703, nor does it impose an affirmative obligation to turnover property to the estate. "The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate." *Inslaw*, 932 F.2d at 1474. Stay means stay, not go.

The majority rule reads too much into the section's legislative history. Prior to the Bankruptcy Amendments and Federal Judgeship Act of 1984, "the Code's stay provision only prohibited any act to obtain possession of property belonging to a bankruptcy estate." *Thompson*, 566 F.3d at 702. The 1984 Amendments "broadened the already sweeping provisions of the automatic stay even further to prohibit expressly not only 'acts to obtain possession' of property of the estate, but also 'any

act . . . to exercise control over the property of the estate.'" *Weber*, 719 F.3d at 80 (quoting Pub. L. No. 98–353, 98 Stat. 333, 371). Notwithstanding that "Congress did not provide an explanation of that amendment," the majority reads from "the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset," that Congress "intended to prevent creditors from retaining property of the debtor." *Weber*, 719 F.3d at 80. "This significant textual enlargement is consonant with [the majority rule]." *Id.*

But Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468. The amendments are equally "consonant" with another, less sweeping conclusion. "Since an act designed to change control of property could be tantamount to obtaining possession and have the same effect, it appears that § 362(a)(3) was merely tightened to obtain full protection." *In re Bernstein*, 252 B.R. 846, 848 (Bankr. D.D.C. 2000). "[U]se of the word 'control' in the 1984 amendment to § 362(a)(3) suggests that the drafters meant to distinguish the newly prohibited 'control' from the already-prohibited acts to obtain 'possession,' in order to reach nonpossessory conduct that would nonetheless interfere with the estate's authority over a particular property interest." Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 No. 9 Bankruptcy Law Letter NL 1 (September 2013).

It's not hard to come up with examples of such "acts" that "exercise control" over, but do not "obtain possession of," the estate's property, e.g., a creditor in possession who improperly sells property belonging to the estate. Similarly,

"intangible property rights that belong to the estate, such as contract rights or causes of action are incapable of real possession unless they are reified. Yet, (a)(3) preserves and guards against interference with them by staying any act to exercise control over estate property." *In re Hall*, 502 B.R. 650, 665 (Bankr. D.D.C. 2014). If Congress had meant to add an affirmative obligation—to the automatic *stay* provision no less, as opposed to the *turnover* provision—to turn over property belonging to the estate, it would have done so explicitly. The majority rule finds no support in the text or its legislative history.

In the end, the best argument for the majority rule is that § 362 should be read in conjunction with another part of the bankruptcy code—§ 542, the turnover provision, which provides that any entity "in possession, custody, or control, during the case of property that the trustee may use, sell, or lease under section 363 of this title. . . *shall* deliver" such property to the trustee "unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542 (emphasis added). According to the majority, "Section 542 requires that any entity in possession of property of the estate deliver it to the trustees, without condition or any further action: the provision is self-executing." *Weber*, 719 F.3d at 79 (internal quotation marks omitted); *but see Hall*, 502 B.R. at 654–665. Reading these two sections together ostensibly furthers "[t]he primary goal of . . . bankruptcy," *Thompson*, 566 F.3d at 702, i.e. "to group all of the debtor's property together," *id.*, because "[a]s a practical matter, there is little difference between a creditor who obtains property of the estate before bankruptcy is filed, or after bankruptcy is filed," *Yates*, 332 B.R. at

5. "The ultimate result is the same—the estate will be deprived of possession of that property," which is "precisely the result § 362 seeks to avoid." *Id.* And so, the argument goes, "§ 542 provides the right to the return of estate property, while [§ 362] provides the remedy for the failure to do so." *Abrams v. Sw. Leasing & Rental, Inc. (In re Abrams)*, 127 B.R. 239, 242–43 (B.A.P. 9th Cir. 1991).

But this policy argument, too, is simply not supported by the statute's text or its legislative history. Even if the turnover provision were "self-executing" (which we do not decide), there is still no textual link between § 542 and § 362. And, contrary to one argument for the majority rule, *see id.* at 243, bankruptcy courts do not need § 362 to enforce the turnover of property to the estate. Bankruptcy courts have "broad equitable powers" under 11 U.S.C. § 105(a), *see Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258, 1263 (10th Cir. 2008), and can provide equitable relief as "necessary or appropriate to carry out the provisions of" § 542(a), *see id.* (citing 11 U.S.C. § 105(a)). Moreover, § 105(a) "grants bankruptcy courts the power to sanction conduct abusive of the judicial process." *Id.* (internal brackets and quotation marks omitted); *see also Skinner*, 917 F.2d at 447 (holding that "section 105(a) empowers bankruptcy courts to enter civil contempt orders," including for monetary damages). And so, adhering to the text of the statute, as we must, we adopt the minority rule: only affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3).

Today's decision does not absolve Defendants of liability, however. On remand, the damages award may be sustainable under the proper application of §

362(a)(3) and under § 105(a), which "grants bankruptcy courts the power to sanction conduct abusive of the judicial process." *Scrivner*, 535 F.3d at 1263. The bankruptcy court here "found the Defendants' attitudes while testifying to be contemptuous of the bankruptcy process, the Debtor, and the Court." (App. Vol. II at 258). It also found that Defendants "manufactured the paperwork . . . after the bankruptcy filing." (*Id.* at 248.). And it noted that Defendants "likely forged documents and gave perjured testimony," and "coached their witnesses on what to testify to during [ ] breaks." (*Id.* at 258). This was all done in an "attempt to convince the Court that [Mr. Cowen's] rights in the Trucks had been terminated pre-bankruptcy." (*Id.*) These would qualify as post-petition acts to exercise control over the debtor's property in violation of the automatic stay.

We **REVERSE** the judgement of the district court and **REMAND** to the district court, which may remand the case to the bankruptcy court, for further proceedings consistent with this opinion. We **GRANT** the renewed motion to seal volume five of the appendix.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
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Elisabeth A. Shumaker
Clerk of Court

February 27, 2017

Chris Wolpert
Chief Deputy Clerk

Mr. Alexander M Musz
Cohen & Cohen
1720 South Bellaire, Suite 205
Denver, CO 80222

RE: **15-1413, WD Equipment, et al v. Cowen**
Dist/Ag docket: 1:14-CV-02408-REB

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40, any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 6 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker

Elisabeth A. Shumaker
Clerk of the Court

cc: Christopher Todd Morse

EAS/lg

33 No. 8 Bankruptcy Law Letter NL 1

Bankruptcy Law Letter August 2013
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By Ralph Brubaker

Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power

In the recent decision of *In re Weber*,[1] the Second Circuit joins a growing majority of appellate courts holding that a secured creditor who has lawfully repossessed collateral prepetition must, once the debtor files bankruptcy, immediately and unconditionally surrender that collateral to the appropriate estate representative (usually a Chapter 13 debtor) on pain of contempt for a willful violation of the automatic stay.[2] This issue of *Bankruptcy Law Letter* is the first of a two-part analysis and critique of that majority position. This month's issue will trace the origins and evolution of the turnover power through the 1984 amendments to the Bankruptcy Code, which amended the automatic stay provision of § 362(a)(3) in a manner that the majority courts believe effects a dramatic change in prior turnover practice—to wit, that a secured creditor can no longer retain collateral repossessed prepetition pending provision of court-ordered adequate protection. Next month's issue will critically examine the courts' interpretation of that amendment to § 362(a)(3).

As we shall see, the majority position is highly dubious[3] and seems driven more by certain "practical considerations" (as the courts themselves have put it) than a sound, principled interpretation of the meaning of the relevant Code provisions. Admittedly, the governing law is nuanced and opaque—thus, the appeal of a more "pragmatic" response. The facts of *Weber* are straightforward and typical, though, so that is a good place to begin.

Prepetition Repossession of Collateral and the Post-Petition Stand-Off

In 2006, the State Employees Federal Credit Union (SEFCU) obtained a security interest in Chris Weber's pickup truck to secure four loans from SEFCU to Weber. In 2009, Weber defaulted on those loans, and on January 10, 2010, SEFCU lawfully repossessed Weber's pickup truck, which he evidently used in his construction business. Unable to fully redeem the pickup truck under applicable New York law (which would require payment of all amounts owing SEFCU if those debts had been accelerated upon default, plus reasonable costs of repossession), Weber filed a Chapter 13 petition on January 14. Weber's counsel

immediately notified SEFCU of the bankruptcy filing and demanded return of Weber's pickup. SEFCU did not return the vehicle, apparently taking the position that it could retain possession pending a turnover order from the bankruptcy court that afforded SEFCU adequate protection of its lien. So on January 22, Weber filed an adversary proceeding against SEFCU seeking turnover of the pickup under Code § 542(a) and alleging a willful violation of the § 362(a)(3) automatic stay provision.

On March 1, the Bankruptcy Court entered an order to show cause why (1) the vehicle should not be returned and (2) SEFCU should not be sanctioned for a stay violation. After a hearing on the show-cause order, SEFCU evidently voluntarily surrendered the vehicle to Weber on March 5. Weber's adversary proceeding continued as to the alleged stay violation, however, for which Weber sought actual damages from inability to use the vehicle between the January 14 petition and the March 5 return date, as well as attorney's fees and punitive damages under Code § 362(k)(1).

The bankruptcy court ultimately granted SEFCU summary judgment on the authority of *In re Alberto*,[4] which held that mere retention of possession already lawfully acquired prepetition is *not* an "act to ... exercise control over property of the estate" within the meaning of Code § 362(a)(3). The district court reversed, however, and the Second Circuit affirmed the district court, holding that "by failing to deliver the repossessed vehicle to the debtor-in-possession promptly after receiving notice of the pending petition, SEFCU willfully violated section 362(a)."[5]

The History of Secured Creditor Turnover

Full understanding of the automatic stay question at issue in cases such as *Weber* requires appreciation of the proper relationship between the automatic stay provision of § 362(a)(3) and the § 542(a) turnover provision. As the Supreme Court has stated in the context of the corollary § 542(b) turnover provision, "we will not give § 362(a)(3) ... an interpretation that would proscribe what § 542(b)'s" turnover provision was "plainly intended to permit."[6]

The Supreme Court's *Whiting Pools* decision[7] is, of course, the seminal case on secured creditor turnover under the Bankruptcy Code. As the *Weber* court correctly recognized, though (and unlike many other courts), *Whiting Pools* does *not* resolve the stay violation question. And as the *Whiting Pools* Court acknowledged, § 542(a) was simply a codification of turnover powers that had developed under "judicial precedent predating the Bankruptcy Code," and "[n]othing in the legislative history evinces a congressional intent to depart from that [pre-Code] practice."[8] That pre-Code practice, therefore, remains highly relevant for interpreting the turnover power as codified in § 542(a).

Historical Common-Law Principles of In Rem Jurisdiction

Many aspects of now-codified federal bankruptcy law have their origins in common law principles of in rem jurisdiction, and turnover powers are yet another example. As Justice Jackson explained:

> The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity.[9]

The express statutory provisions of federal bankruptcy law vesting title to a bankrupt's property in a representative of the bankruptcy estate, to be administered for the benefit of the bankrupt's creditors, under the supervision and control of a federal bankruptcy court, have always been considered to give that federal court in rem jurisdiction over that property. "By operation of law, the filing of the petition in bankruptcy cause[s] all property of the debtor to pass into the custody of the bankruptcy court, under the control of a trustee or receiver, an officer of the court."[10] As Justice Fuller famously stated in *Mueller v. Nugent*, "the filing of the petition is a caveat to all the world, and in effect an attachment and injunction" pursuant to which "title to the bankrupt's property became vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court."[11]

"Such ... in rem jurisdiction is closely linked to the power to enjoin interferences with property within the control of a federal court."[12] "In fact, the essence of such ... in rem jurisdiction is in the power to enjoin collateral interference with that property and its administration."[13] As Justice Brandeis put it:

> All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that, where a court of competent jurisdiction has, through its officers, taken property into its possession, ... the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same.[14]

Of course, "[d]etermining exactly what property is within the exclusive possession and control of a federal bankruptcy court can be a nettlesome problem, especially with respect to property in the possession of a third party," and "[t]raditionally, such property has been considered within the 'constructive' possession of a federal bankruptcy court only to the extent the third party raises no substantial defenses to turnover of the property." [15]

A turnover order, then, was conceived as an incident to a bankruptcy court's in rem jurisdiction over a debtor's bankruptcy estate. It was considered in the nature of an injunctive order, the violation of which was punishable by contempt. [16] Moreover, this injunctive turnover power directly implicated the historical summary-plenary distinction that pervaded multiple dimensions of federal bankruptcy jurisdiction and procedure. [17]

> Of course, a debtor's property often included things not within the possession of the court, such as a disputed cause of action against a third party or tangible property held under a substantial claim of right by a third party, a so-called adverse claimant. A court of bankruptcy had no summary jurisdiction to adjudicate disputes with adverse claimants. Such a dispute could be resolved only by an ordinary civil action (a plenary suit) .... [18]

All other bankruptcy proceedings, however, were resolved through summary proceedings in the federal bankruptcy court, and this "procedural divide established under the early American bankruptcy statutes ... simply adopted the English practice requiring a formal plenary suit in assignee [now trustee] actions to recover money or property from an adverse claimant." [19]

To the extent a debtor's property was in the possession of a third party raising no adverse claim to retain possession, though, a federal bankruptcy court could summarily issue an injunctive turnover order against that party. Indeed, that was the holding of *Mueller v. Nugent*:

> In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, [in summary proceedings] on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the

> trustee to resort to a plenary suit in the [former trial-level] circuit court or a state court, as the case may be?
>
> If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and in many respects rendered practically inefficient.
>
> The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.
>
> * * * *
>
> [W]here property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has [the] power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed. [20]

Turnover by a Secured Creditor in Possession of Repossessed Collateral

Within the context of this framework of general principles governing common-law turnover powers, a secured creditor who had, in the enforcement of its lien rights, lawfully taken possession of its collateral before the bankruptcy filing, was (as Judge Friendly put it) "the archetypal 'adverse claimant'" [21] who was *not* subject to a turnover order. [22] Indeed, "[g]enerally, a creditor in possession of collateral could liquidate the collateral without interference" from the bankruptcy court. [23]

The Supreme Court's *Continental Illinois* decision [24] authorized a more expansive conception of bankruptcy courts' general injunctive powers in reorganization proceedings. [25] Relying upon *Continental Illinois*' generous construction of the scope of bankruptcy courts' injunctive

powers under 1898 Act § 2a(15) (the predecessor to present Code § 105(a)), as well as express codification in the statutory reorganization provisions of bankruptcy courts' in rem "jurisdiction of the debtor and its property, wherever located" (the predecessors to 28 U.S.C.A. § 1334(e)(1)),[26] the lower courts held that bankruptcy courts also had a more expansive turnover power in reorganization proceedings as well.

Thus, in reorganization proceedings "a bankruptcy court had broad power to order secured creditors in possession following the debtor's default to turn over the collateral,"[27] with the leading case being the First Circuit's decision in *Reconstruction Finance Corp. v. Kaplan*.[28] In any such turnover proceeding, though, "the bankruptcy court was required to protect the secured creditor from harm before ordering return of the property items."[29]

Code § 542(a)'s Codification of Pre-Code Turnover Powers

The legislative history of the Code § 542(a) turnover provision has been the subject of careful scholarly study, including by Judge Friendly in his Second Circuit opinion in *Whiting Pools*.[30] Indeed, the Supreme Court commented that "we find Judge Friendly's careful analysis of this history for the Court of Appeals to be unassailable,"[31] and Judge Friendly's analysis ultimately concluded that the most "natural reading of § 542 is that it was intended to codify *RFC v. Kaplan*,"[32] which was representative of the pre-Code practice pursuant to which "the bankruptcy court could order the turnover of collateral in the hands of a secured creditor."[33]

Indeed, more generally, Code § 542(a) "gives an explicit statutory basis for the traditional turnover order against persons other than the debtor."[34] As the Supreme Court explained the traditional turnover power in *Maggio v. Zeitz*, it was a use of the bankruptcy court's general equitable powers under the statutory predecessor to Code § 105(a) to enforce the debtor's statutory turnover obligation under the predecessor to Code § 521(4).[35] With codification of a correlative turnover obligation for third parties in possession of property of the estate in § 542(a), then, bankruptcy courts can use their § 105(a) equitable powers to enter an injunctive turnover order against third parties as "necessary or appropriate to carry out the provisions of" § 542(a).[36]

The most noteworthy implication of this historical perspective on the intended function of § 542(a)—the perspective that the Supreme Court itself promulgated in *Whiting Pools*—is that "§ 542(a) is *not* self-executing."[37] It simply provides an express statutory basis for a bankruptcy court to enter an injunctive order compelling turnover of identified property in the possession of a third party. Consistent with the pre-Code turnover practice that § 542(a)

was intended to codify, then, a third party's mere possession of that property, in and of itself (before entry of any turnover order), does not contravene any injunctive orders of the court; only a knowing violation of a duly entered turnover order is contemptuous conduct. Indeed, if § 542(a) were itself a self-executing injunctive order, a subsequent turnover order would be entirely unnecessary. "Injunctions ... are *not* enforced by further injunctions; injunctions are enforced by contempt citations." [38]

Whiting Pools, Code § 542(a), and Secured Creditor Turnover

While *Whiting Pools* is often considered a decision construing the scope of property of the estate under the Bankruptcy Code, in actuality, its holding only addressed the extent of a bankruptcy court's turnover powers under Code § 542(a). Its discussion of property of the estate, while largely dicta, was confusing (and somewhat confused) and is a central obstacle to properly resolving the turnover conundrum presented by cases like *Weber*.

The debtor in that case was Whiting Pools, Inc., which ran a swimming pool sales and service business, and Whiting Pools had fallen behind on its employment tax payments to the IRS. IRS assessments resulted in a tax lien attaching to all of Whiting Pools' property, and in January 1981, the IRS seized a bunch of Whiting Pools' property pursuant to the tax lien, with the intention of selling that property at a public auction and using the proceeds to pay the taxes owing. The day after the IRS seized the property, though, Whiting Pools filed Chapter 11.

Even though the IRS had a lien on and possession of the seized property on the petition date, Whiting Pools still owned the property. Whiting Pools' Chapter 11 estate, therefore, succeeded to that ownership interest under Code § 541(a)(1). Consequently, any attempt by the IRS to proceed with the tax sale post-petition would be an act to enforce a lien against property of the estate, in violation of the § 362(a)(4) automatic stay provision.

The IRS, therefore, moved for relief from stay to proceed with the tax sale, and Whiting Pools counterclaimed, seeking turnover of the seized property under Code § 542(a). The bankruptcy court denied the IRS relief from stay and ordered turnover of possession of the seized property, on the condition that Whiting Pools provide adequate protection of the value of the IRS's lien rights through retention of the lien, specified cash payments to the IRS, and lifting of the stay upon any payment default. The IRS contested the turnover order in the Supreme Court, contending that it could not be forced to turn over the property that it had seized prepetition.

The § 542(a) Turnover Power Enhances Property of the Estate

Although the Supreme Court sent conflicting signals on this point, it is abundantly clear that Whiting Pools, as DIP representative of the bankruptcy estate, had no right to regain possession of the seized property under Code § 541(a)(1) as mere successor to "all legal or equitable interests of the debtor in property as of the commencement of the case." Of course, the "interests of the debtor in property" referenced in § 541(a)(1) are those "[p]roperty interests ... created and defined by state law."[39] On the petition date, the debtor did *not* have possession of the seized property—the relevant state-law "interest in property" at stake; the IRS had possession of the seized property. Moreover, on the petition date, Whiting Pools did not have any right to regain possession of the seized property by simply promising a bunch of future cash payments to the IRS. And Code § 541(a)(1) manifestly (in the words of the legislative history) "is not intended to expand the debtor's rights against others more than they exist at the commencement of the case."[40]

So the bankruptcy estate automatically succeeds to no greater property rights on the petition date than those of the debtor, and thus, to the extent the debtor has no state-law right to possession of the property on the petition date, the estate acquires no possessory rights under Code § 541(a)(1). In *Whiting Pools*, nonbankruptcy law clearly gave the IRS rightful possession of the seized property on the petition date, so the debtor's Chapter 11 estate did *not* (and could not) succeed to possession or a right of possession under Code § 541(a)(1).

The IRS argued that the same limitation applied to turnover of property of the estate under Code § 542(a):

> The Government concludes that, at the commencement of the case, the debtor's only interests in the property seized by the IRS were those explicitly set forth in § 6331 *et seq.* of the IRC [a right to notice of the seizure and sale, a right to redemption prior to sale, and a right to any surplus proceeds from the sale], that therefore only those interests became part of the "property of the estate", and that turnover of these interests would be inappropriate since the debtor cannot "use, sell, or lease" them.[41]

The Supreme Court, however, rejected this argument as an inapt limitation on the scope of the § 542(a) turnover power, which provides, by its express terms, for the estate to obtain "possession" of property from a third party.[42] The Court thus construed the turnover provision of Code § 542(a) as augmenting property of the estate with a right of possession the debtor did *not* have on the petition date, in the same way that a trustee's avoiding powers enhance property of the estate beyond the debtor's petition-date property interests.

In the words of the Court: "In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings."[43] "Indeed, if this were not the effect, § 542(a) would be largely superfluous in light of § 541(a)(1)" because "[i]nterests in the seized property that could have been exercised by the debtor ... are already part of the estate by virtue of § 541(a)(1)."[44] "The fact that § 542(a) grants the trustee greater rights than those held by the debtor prior to the filing of the petition is consistent with [avoiding power] provisions of the Bankruptcy Code that address the scope of the estate."[45] "Several of these provisions bring into the estate property in which the debtor did not have a possessory [or other] interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision."[46] And when the estate successfully obtains possession of property pursuant to § 542(a), possession itself also becomes property of the estate under the express terms of § 541(a)(7) as an "interest in property that the estate acquires after the commencement of the case."

The Right to Adequate Protection Replaces the Right of Possession

By its express terms, though, Code § 542(a) only compels turnover of "property that the trustee [or DIP] may use, sell, or lease under section 363." Thus, the *Whiting Pools* Court also held that the secured creditor subjected to turnover, "under section 363(e), remains entitled to adequate protection for its interests."[47] Because "the right to adequate protection ... replace[s] the protection afforded by possession,"[48] then "[a]t the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor."[49] Indeed, Code § 363(e) even expressly provides that the bankruptcy "court ... shall *prohibit*" a "*proposed* ... use, sale, or lease" to the extent "necessary to provide adequate protection" of a secured creditor's lien rights.

Adequate Protection Precedes Turnover

Given the pre-Code turnover practice that § 542(a) was intended to codify (as the *Whiting Pools* Court noted), it seems clear that Congress contemplated that such adequate protection determinations would be made in the context of proceedings on a trustee's request for a turnover order, as was the case under pre-Code practice. Indeed, the legislative history notes that § 542(a) "is not intended to require an entity to deliver property to the trustee if such entity has obtained an order of the court authorizing the entity to retain possession, custody, or control of the property."[50]

Moreover, the automatic stay provision as originally enacted (and extant when *Whiting Pools* was decided) was also fully consistent with the pre-Code turnover practice, pursuant to which

a repossessing secured creditor's mere possession of the repossessed collateral, in and of itself (before entry of any turnover order), does not contravene any injunctive orders of the court; only a knowing violation of a duly entered turnover order is contemptuous conduct. The only possessory conduct (as such) enjoined by the originally enacted version of the § 362(a)(3) automatic stay provision was "any *act to obtain possession* of property of the estate or of property from the estate," and a secured creditor's mere retention of possession already obtained before the bankruptcy filing (and its imposition of the automatic stay) clearly did *not* violate this stay provision.

Extension of *Whiting Pools* to Chapter 13 Cases

Whiting Pools was decided in the context of a Chapter 11 reorganization proceeding, and the Supreme Court's reasoning expressly relied upon "the congressional goal of encouraging reorganizations" and the fact that a "reorganization effort would have small chance of success ... if property essential to running the business were excluded from the estate." [51] Thus, the *Whiting Pools* Court was careful to confine its holding to turnover of repossessed collateral in a Chapter 11 case. [52] In fact, there is some textual support for the position that a Chapter 13 debtor has no turnover rights at all under Code § 542(a), as that provision is conspicuously absent from the list of "rights and powers of a trustee" that Code § 1303 confers upon a Chapter 13 debtor. [53]

Code § 1303, however, does expressly afford a Chapter 13 debtor a trustee's right to use, sell, or lease property of the estate under Code § 363, and it is precisely such "property that the trustee may use, sell, or lease under section 363" that is subject to turnover under Code § 542(a). Moreover, while § 542(a) provides that any party in possession of such property "shall deliver *to the trustee*, and account for, such property," Code § 1306(b) provides that in a Chapter 13 case, "the debtor shall remain in possession of all property of the estate." Thus, the text of the Code can be fairly read to afford a Chapter 13 debtor turnover rights under Code § 542(a), as an incident to the debtor's right to possess and use property of the estate. And likewise, just as Chapter 11's general policy objective of encouraging reorganization over liquidation is promoted through turnover of repossessed collateral, so too is Chapter 13's general policy objective of encouraging debt repayment plans by allowing a debtor to keep all of his/her property. [54]

In both Chapter 11 and Chapter 13 cases, then, the § 542(a) turnover power works in tandem with the § 362(a)(4) automatic stay provision preventing the repossessing secured creditor from selling the collateral. The DIP is given full use of repossessed collateral in order to facilitate confirmation and consummation of a successful reorganization/repayment plan, provided that the secured creditor's lien rights are adequately protected. Consequently, most courts have concluded that *Whiting Pools*' construction of the scope of the § 542(a) turnover

power is equally applicable in Chapter 13, and the Second Circuit in *Weber* reached the same conclusion.

The 1984 Amendment to § 362(a)(3) Enjoining any Act to Exercise Control over Property of the Estate

If the above history of the § 542(a) turnover power were the end of the story, then cases like *Weber* would be easily resolved. The secured creditor clearly could retain possession of collateral repossessed prepetition pending a determination of necessary adequate protection, made by the bankruptcy court in the context of a trustee or DIP's request for turnover of the repossessed collateral.

The only thing, then, that makes these cases at all difficult is the 1984 amendment to Code § 362(a)(3), which added the following italicized language:

> (a) ... a [bankruptcy] petition ... operates as a stay, applicable to all entities, of—
>
> * * * *
>
> > (3) any act to obtain possession of property of the estate or of property from the estate *or to exercise control over property of the estate;*

Indeed, the determinative nature of this amendment is revealed by the fact that,

> under the Code, prior to the § 362(a)(3) amendment, the common [pre-Code] practice of conditioning turnover orders on proof of adequate protection continued. Courts uniformly supported the practice that "[a] secured creditor may insist upon adequate protection *as a condition precedent* to the turnover of property since the property may not be used, sold, or leased under section 363 without it." [55]

Next month's issue of *Bankruptcy Law Letter* will analyze and critique the courts' varying interpretations of the effect of the "exercise control" amendment to § 362(a)(3) as applied to a secured creditor's retention of collateral repossessed prepetition.

Footnotes

1 In re Weber, 2013 WL 1891371 (2d Cir. 2013).

2 See Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); In re Knaus, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989); In re Yates, 332 B.R. 1, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005); In re Sharon, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999); In re Abrams, 127 B.R. 239, 21 Bankr. Ct. Dec. (CRR) 1283, 25 Collier Bankr. Cas. 2d (MB) 15, Bankr. L. Rep. (CCH) P 74023 (B.A.P. 9th Cir. 1991).

3 Judges Teel, Specter, and Stosberg have written particularly thoughtful opinions challenging the majority approach. See In re Sharon, 234 B.R. 676, 688, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (Stosberg, J., dissenting); In re Bernstein, 252 B.R. 846, 36 Bankr. Ct. Dec. (CRR) 211, 45 Collier Bankr. Cas. 2d (MB) 297 (Bankr. D. D.C. 2000) (Teel, B.J.); In re Barringer, 244 B.R. 402, 43 Collier Bankr. Cas. 2d (MB) 1615 (Bankr. E.D. Mich. 1999) (Specter, B.J.); In re Young, 193 B.R. 620 (Bankr. D. D.C. 1996) (Teel, B.J.). Accord Charles J. Tabb, The Law of Bankruptcy § 3.6, at 262-64 & § 5.13, at 442 n.4, 444 (2d ed. 2009); Ralph Brubaker, Which Comes First: the Turnover or the Adequate Protection?, 20 Bankr. L. Letter No. 12, at 1 (Dec. 2000); Thomas E. Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1194, 1267-71 (1998).
The Eleventh Circuit's case law on the subject, while also departing from the majority approach, is badly misguided, as this contributing author has argued in a previous issue of Bankruptcy Law Letter. Ralph Brubaker, Turnover Rights Revisited (or Repudiated Sub Silentio?): Who "Owns" Collateral Repossessed by a Secured Creditor?, 22 Bankr. L. Letter No. 8, at 1 (Aug. 2002). See also Stephen J. Ware, Security Interests, Repossessed Collateral, and Turnover of Property to the Bankruptcy Estate, 2002 Utah L. Rev. 775.

4 In re Alberto, 271 B.R. 223 (N.D. N.Y. 2001).

5 Weber, 2013 WL 1891371, at *10.

6 Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995).

7 U.S. v. Whiting Pools, Inc., 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983).

8 Whiting Pools, 462 U.S. at 208.

9 Maggio v. Zeitz, 333 U.S. 56, 61 (1948).

10 Ralph Brubaker, Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11, 1997 U. Ill. L. Rev. 959, 1043 n.314.

11 Mueller v. Nugent, 184 U.S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405 (1902). See also International Bank v. Sherman, 101 U.S. 403, 406, 25 L. Ed. 866, 1879 WL 18671 (1879) ("The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction.").

12 Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm. & Mary L. Rev. 743, 839 n.357 (2000).

13 Ralph Brubaker, Money Judgments, Governmental Police and Regulatory Powers, and the Automatic Stay, 21 Bankr. L. Letter No. 2, at 1, 5 (Feb. 2001).

14 Ex parte Baldwin, 291 U.S. 610, 615 (1934).

15 Brubaker, 21 Bankr. L. Letter No. 2, at 5. See Brubaker, 41 Wm. & Mary L. Rev. at 792.

16 See Maggio v. Zeitz, 333 U.S. 56, 68 S. Ct. 401, 92 L. Ed. 476 (1948); Oriel v. Russell, 278 U.S. 358, 363-67, 49 S. Ct. 173, 73 L. Ed. 419 (1929) (there is "no doubt that a motion to commit the bankrupt

for failure to obey an order of the court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt," and "this sort of an order of 'turnover' finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction"); Mueller v. Nugent, 184 U.S. at 13 ("if the [turnover] order ... was in itself a lawful order, the power of the district court to commit" the person in possession of the bankrupt's money "until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under ... the general jurisdiction of the court to enforce its orders in the collection of assets").

17 See generally Ralph Brubaker, A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After *Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 122-30 (2012).

18 Ralph Brubaker, Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten *Calloway v. Benton* Case, 72 Am. Bankr. L.J. 1, 23-24 (1998).

19 Brubaker, 86 Am. Bankr. L.J. at 126.

20 Mueller v. Nugent, 184 U.S. at 14.

21 U.S. v. Whiting Pools, Inc., 674 F.2d 144, 148, 8 Bankr. Ct. Dec. (CRR) 1138, 5 Collier Bankr. Cas. 2d (MB) 1584, 82-1 U.S. Tax Cas. (CCH) P 9269, 50 A.F.T.R.2d 82-6080 (2d Cir. 1982), judgment aff'd, 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983).

22 See Phelps v. U. S., 1975-1 C.B. 372, 421 U.S. 330, 95 S. Ct. 1728, 44 L. Ed. 2d 201, 75-1 U.S. Tax Cas. (CCH) P 9467, 35 A.F.T.R.2d 75-1505 (1975).

23 Thomas E. Plank, The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy, 59 Md. L. Rev. 253, 266 (2000).

24 Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110 (1935).

25 See Brubaker, 72 Am. Bankr. L.J. at 25-26.

26 See Brubaker, 72 Am. Bankr. L.J. at 31 n.130, 34 n.139, 40 n.171; Plank, 59 Md. L. Rev. at 269 n.64. It is not at all clear, however, that these provisions did anything more than simply codify accepted, traditional principles of in rem jurisdiction. Indeed, in Continental Illinois, "in its discussion of the source of the reorganization court's injunctive powers, the Supreme Court emphasized the court's jurisdiction over the debtor's reorganization, not its jurisdiction over the debtor's property." Brubaker 72 Am. Bankr. L.J. at 31 n.130. It does nicely illustrate, though, how the courts viewed the scope of their injunctive powers as ineluctably linked to and essentially coextensive with (and thus limited by) the reach of their in rem jurisdiction.

27 Whiting Pools, 674 F.2d at 150 (Friendly, C.J.). See id. at 148-49 n.7, 150-52; Plank, 59 Md. L. Rev. at 284-91; Patrick A. Murphy, Use of Collateral in Business Rehabilitations: A Suggested Redrafting of Section 7-203 of the Bankruptcy Reform Act, 63 Cal. L. Rev. 1483, 1492-95 (1975).

28 R. F. C. v. Kaplan, 185 F.2d 791 (1st Cir. 1950).

29 Plank, 59 Md. L. Rev. at 291 (footnote omitted).

30 See Whiting Pools, 674 F.2d at 152-56. See also Plank, 59 Md. L. Rev. at 292-307.

31 Whiting Pools, 462 U.S. at 207 n.16.

32 Whiting Pools, 674 F.2d at 155.

33 Whiting Pools, 462 U.S. at 208. "Nothing in the legislative history evinces a congressional intent to depart from that [pre-Code] practice." Id. Thus, "the bankruptcy court generally has power under § 542 to order the turnover of property repossessed or executed upon by a secured creditor ... following the debtor's default and prior to his bankruptcy." Whiting Pools, 674 F.2d at 156.

34 Plank, 59 Md. L. Rev. at 303 (footnotes omitted).

35 See Maggio v. Zeitz, 333 U.S. at 61-63.

36 11 U.S.C.A. § 105(a).

37 Bernstein, 252 B.R. at 849 (emphasis added).

38 Ralph Brubaker, Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex parte Young Relief, 76 Am. Bankr. L.J. 461, 555 (2002).

39 Butner v. U.S., 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

40 S. Rep. No. 95-989, at 82 (1978); H.R. Rep. No. 95-595, at 367 (1977).

41 Whiting Pools, 674 F.2d at 149-50.

42 Moreover, § 542(a) uses the general bundled term "property" to thus more colloquially refer to that which the third party must relinquish possession of, rather than the more precise bundle-of-sticks method of describing various "interests" in property used throughout § 541(a). This suggests that the *Whiting Pools* Court correctly interpreted § 542(a) as a means of affirmatively enhancing the estate with a particular property interest—possession—that the estate would not otherwise have.

43 Whiting Pools, 462 U.S. at 207.

44 Whiting Pools, 462 U.S. at 207 n.15.

45 Whiting Pools, 462 U.S. at 207 n.15.

46 Whiting Pools, 462 U.S. at 205.

47 Whiting Pools, 462 U.S. at 212-13.

48 Whiting Pools, 462 U.S. at 207.

49 Whiting Pools, 462 U.S. at 204.

50 124 Cong. Rec. S17, 413 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 Cong. Rec. H11,096 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

51 Whiting Pools, 462 U.S. at 204, 203.

52 "Our analysis in this case depends in part on the reorganization context in which the turnover order is sought. We express no view on the issue whether § 542(a) has the same broad effect in [Chapter 7] liquidation or [Chapter 13] adjustment of debt proceedings." Whiting Pools, 462 U.S. at 208 n.17.

53 See David Gray Carlson, Turnover of Collateral in Bankruptcy: Must a Secured Party-in-Possession Volunteer?, 6 J. Bankr. L. & Prac. 483, 507-08 (1997) (making this argument).

54 See generally In re Robinson, 36 B.R. 35, Bankr. L. Rep. (CCH) P 69574 (Bankr. E.D. Ark. 1983).

55 Young, 193 B.R. at 626 (quoting In re R. Purbeck & Assocs., 12 B.R. 406, 408 (Bankr. D. Conn. 1981)).

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By Ralph Brubaker

TURNOVER, ADEQUATE PROTECTION, AND THE AUTOMATIC STAY (PART II): WHO IS "EXERCISING CONTROL" OVER WHAT?

This issue of *Bankruptcy Law Letter* is the second of a two-part analysis and critique of the Second Circuit's recent decision of *In re Weber*.[1] In its *Weber* opinion, the Second Circuit joins a growing majority of appellate courts holding that a secured creditor who has lawfully repossessed collateral prepetition must, once the debtor files bankruptcy, immediately and unconditionally surrender that collateral to the appropriate estate representative (usually a Chapter 13 debtor) on pain of contempt for a willful violation of the automatic stay.[2]

The majority position is highly dubious,[3] though, and seems driven more by certain "practical considerations" (as the courts themselves have put it) than a sound, principled interpretation of the meaning of the relevant Code provisions.

Last month's issue traced the origins and evolution of the turnover power through the 1984 amendments to the Bankruptcy Code, which amended the automatic stay provision of § 362(a)(3) in a manner that the majority courts believe effects a dramatic change in prior turnover practice—to wit, that a secured creditor can no longer retain collateral repossessed prepetition pending provision of court-ordered adequate protection. This month's issue critically examines the courts' interpretation of that amendment to § 362(a)(3).

The 1984 Amendment to § 362(a)(3) Enjoining any Act to Exercise Control over Property of the Estate

If the pre-1984 history of the § 542(a) turnover power were the end of the story, then cases like *Weber* would be easily resolved. The secured creditor clearly could retain possession of collateral repossessed prepetition pending a determination of necessary adequate protection, made by the bankruptcy court in the context of a trustee or DIP's request for turnover of the repossessed collateral.

The only thing, then, that makes cases such as *Weber* at all difficult is the 1984 amendment to Code § 362(a)(3), which added the following italicized language:

> (a) ... a [bankruptcy] petition ... operates as a stay, applicable to all entities, of—
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> (3) any act to obtain possession of property of the estate or of property from the estate *or to exercise control over property of the estate*;

Indeed, the determinative nature of this amendment is revealed by the fact that,

> under the Code, prior to the § 362(a)(3) amendment, the common [pre-Code] practice of conditioning turnover orders on proof of adequate protection continued. Courts uniformly supported the practice that "[a] secured creditor may insist upon adequate protection *as a condition precedent* to the turnover of property since the property may not be used, sold, or leased under section 363 without it."[4]

Turnover First, Then Adequate Protection

Those courts finding a stay violation when a secured creditor retains possession of collateral repossessed prepetition interpret the "exercise control" language added to § 362(a)(3) as an amendment directed at precisely that situation. As the Sixth Circuit BAP stated, "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control' over" property of the estate.[5] Thus, these courts see § 362(a)(3) as a correlative enhancement of the estate's § 542(a) turnover rights:

> The duty to turn over the property is not contingent upon any predicate violation of the stay, any order of the bankruptcy court, or any demand by the creditor. Rather, the duty arises upon the filing of the bankruptcy petition. The failure to fulfill this duty, regardless of whether the original seizure was lawful, constitutes a prohibited attempt to "exercise control over the property of the estate" in violation of the automatic stay.[6]

As with any conduct stayed by § 362(a), to the extent the operation of the stay (in this case, by compelling turnover) will impair the value of the creditor's lien, the creditor's "[e]ntitlement to adequate protection in the first instance ... is triggered by a creditor's request to the bankruptcy court, and if you don't ask for it, you won't get it." [7] Under this interpretation of § 362(a)(3), then, a secured creditor cannot withhold possession of the repossessed collateral pending provision of adequate protection. Rather, the secured creditor must affirmatively request adequate protection from the bankruptcy court via, for example, a stay relief motion.

This turnover-adequate protection approach, though, is entirely dependent upon an interpretation of "exercise control" that includes mere retention of pre-existing possession, and that interpretation, while perhaps superficially appealing, is not at all compelling and, indeed, is highly problematic.

Adequate Protection Before Turnover

Pre-1984 Established Practice

The opposite minority approach resists the broader interpretation of "exercise control" because of its dramatic departure from pre-1984 practice, emphasizing the Supreme Court's interpretive canon that presumes continuity in the law and continuation of established practice, in the absence of an unambiguous statutory directive or some legislative history indicating an intention to reverse the established practice.

> When Congress amends the bankruptcy laws, it does not write "on a clean slate." Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in ... practice that is not the subject of at least some discussion in the legislative history. [8]

Some majority courts contest the notion that their interpretation is a reversal of pre-1984 practice. [9] This contention, however, simply is not credible, and of course, these courts cite *no* pre-1984 instances in which a repossessing secured creditor's mere retention of possession of its collateral (in the absence of a turnover order) was held to be contemptuous conduct, in and of itself (presumably because there are none). [10]

Moreover, the meaning of "exercise control" in amended § 362(a)(3), as a trigger for violation of an injunction, is extremely vague and has been a perennial source of difficulty in determining its scope. As the D.C. Circuit explained, the problem lies in the potentially "extraordinary" sweep of an unbounded notion of "exercise control," particularly given the indubitable breadth of the notion of "property of the estate" as including any kind of "interest" of the debtor in any kind of tangible or intangible property.

> [Section 362(a)(3)] cannot require that every party who acts in resistance to the debtor's view of its rights violates [the automatic stay] if found in error by the bankruptcy court. ... Since willful violations of the stay expose the offending party to liability for compensatory damages, costs, attorney's fees, and, in some circumstances, punitive damages, it is difficult to believe that Congress intended a violation whenever someone already in possession of property mistakenly refuses to capitulate to a bankrupt's assertion of rights in that property. [11]

What's more, there is absolutely no legislative history explaining Congress's objective in adding the intractably vague "exercise control" language to § 362(a)(3). At a minimum, then, the majority interpretation seems to run counter to the prevailing presumption *against* such a stark reversal of established practice. The problems with the majority interpretation, however, do not end there, as careful application of the statutory language seems to make the alternative, minority interpretation equally (if not more) plausible.

"Control" as Distinct from "Possession"

Adequate protection-turnover courts disagree with the notion that the language employed in the 1984 amendment to § 362(a)(3) was directly specifically at retention of possession. Indeed, use of the word "control" in the 1984 amendment to § 362(a)(3) suggests that the drafters meant to distinguish the newly prohibited "control" from the already-prohibited acts to obtain "possession," in order to reach nonpossessory conduct that would nonetheless interfere with the estate's authority over a particular property interest. Indeed, the legislative history explaining the originally enacted version of § 362(a)(3) also suggested such a distinction, although the original statutory language clearly did not address nonpossessory "control." [12]

An "Act" as Distinct from Failure to Act

The minority interpretation also reasons from the automatic stay's general function of merely preserving the petition-date status quo while parties' relative rights and obligations can be ascertained through the appropriate bankruptcy process, and preserving the petition-date

status quo in this context means permitting the creditor to remain in possession of the property pending provision of adequate protection as ordered by the bankruptcy court.

By prohibiting only an "act ... to exercise control," the 1984 amendment to § 362(a)(3) does, in fact, seem in accord with a general design of preventing affirmative conduct that would upset the petition-date status quo or otherwise interfere with the trustee's or DIP's "control" of property of the estate. "The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate." [13] By contrast, if a creditor does nothing and simply retains possession of property that the creditor already has in its possession, it seems difficult to say that the creditor has performed an "act" prohibited by the stay. Indeed, that is essentially how the Supreme Court interpreted § 362(a)(3) in the *Citizens Bank v. Strumpf* case, where the Court said that a bank's refusal to pay to the Chapter 13 DIP-depositor sums on deposit in the debtor's bank account "was neither a taking of possession of [debtor's] property nor an exercising of control over it, but merely a refusal to perform its promise" to repay deposited sums. [14]

Under this view, then, the "exercise control" amendment prohibits only affirmative conduct directed at "control" rather than "possession" of estate property. Such prohibited nonpossessory "control," in the absence of stay relief from the bankruptcy court, might include a nondebtor counter-party's unilateral postpetition termination of an executory contract, [15] or the postpetition efforts of someone other than the trustee or DIP (such as an individual shareholder or creditor of a corporate debtor or even the individual debtor in a Chapter 7 case) to prosecute a cause of action belonging to the debtor's bankruptcy estate. [16]

Thus, a § 542(a)/105(a) turnover *cause of action* to recover possession may well be a cause of action that is properly considered property of the estate, and the efforts of anyone other than the trustee or DIP to assert or otherwise interfere with the trustee or DIP's exclusive authority to assert the estate's turnover rights might well be considered a prohibited "act ... to exercise control over property of the estate" within the meaning of § 362(a)(3). But "it is difficult to believe that Congress intended a violation whenever someone already in possession of property ... refuses to capitulate to a bankrupt's assertion of rights in that property." [17]

Exceptions to a Secured Creditor's Turnover Obligation

The minority, adequate protection-turnover courts also reject the broader interpretation of § 362(a)(3) as inconsistent with, rather than complementing, the design of the turnover provisions. Unlike § 362(a)(3), the estate's turnover rights are not absolute. As the Supreme Court specifically noted in *Whiting Pools*, "there are explicit limitations on the reach of § 542(a)," [18] pursuant to which turnover is *not* required. Yet, under the broad interpretation of

"exercise control," failure to turn over property when turnover is *not* required, nonetheless, would constitute a stay violation.

For example, § 542(a) expressly provides that property is *not* subject to turnover if "such property is of inconsequential value or benefit to the estate." Determinations regarding value and benefit of property are not self-evident incorrigible propositions, particularly when one takes into account the estate's adequate protection obligations with respect to property encumbered by a lien. Thus, § 542(a) (on its face) seems to contemplate such a determination by the bankruptcy court in the context of a turnover action initiated by the estate, similar to the procedure for such value and benefit determinations in the context of abandonment of property of the estate. [19] If the court in that turnover action determines that the property is of inconsequential benefit to the estate and, thus, *not* subject to turnover, under the broad interpretation of "exercise control," the court would nonetheless be compelled to reach the absurd conclusion that the defendant violated the automatic stay by retaining possession of that property.

The *Weber* court, therefore, was simply incorrect in its assertion that § 542(a) is "self-executing" and "requires that any entity in possession of property of the estate deliver it to the trustees, *without condition*." [20] As the historical evolution of the turnover power clearly reveals, "§ 542(a) is *not* self-executing." [21] And given that truism, it seems highly unlikely that Congress would indirectly impose a self-effectuating turnover obligation via § 362(a)(3) that exceeds the scope of the § 542(a) turnover provision. Indeed, it is only by means of a post-hoc boot-strap, under the influence of the overly broad interpretation of § 362(a)(3), that the courts have misconstrued § 542(a) as somehow being self-executing when (on its face) it clearly cannot be, and its origins further confirm that conclusion.

Possession Becomes Property of the Estate Only Upon Turnover

Limiting the reach of the automatic stay in a manner compatible with the turnover provisions simply requires a modicum of care and precision in specifying the "property" protected by § 362(a)(3). By its terms, § 362(a)(3) only prohibits acts to exercise control over "property of the estate." In its definition of "property of the estate," the "Bankruptcy Code explicitly adopts the legal understanding of 'property' as interests in property," which "reflects the 'bundle of sticks' metaphor" for property interests, and "its use in the definition of property of the estate and its use throughout the Code reflect Congress's deliberate choice." [22] As Professor Plank puts it:

> The explicit use of the bundle of sticks metaphor in § 541(a)(1) shows that Congress intended to distinguish the debtor's interest in a property item and a third party's interest in the property item. To the extent that a third party has an interest in

> a property item in which the debtor has an ownership interest, that interest is excluded from the interest of the debtor in that property item.[23]

With respect to turnover, the particular property interest (the "stick" in the metaphorical property "bundle of sticks") that is at stake is, of course, the one expressly referenced in § 542(a)—"possession." When a secured creditor is in possession on the petition date, the secured creditor's continued postpetition retention of possession is not an exercise of control over "property of the estate," because as the Supreme Court indicated in *Whiting Pools*, under those circumstances possession is *not* a property interest to which the estate automatically succeeds on the filing date under § 541(a)(1).[24] Rather, possession becomes "property of the estate" under § 541(a)(7) only to the extent the estate successfully invokes turnover through § 542(a), which (as we've seen) clearly contemplates initiation of a turnover action, in which the creditor can then raise any defenses to turnover specified by § 542(a).

Of course, the most prominent among the "explicit limitations on the reach of § 542(a)" that the Supreme Court specifically highlighted in *Whiting Pools* is "that the property be usable under § 363."[25] By express incorporation of § 363, then, when the estate seeks turnover of property "*proposed* to be used, sold, or leased, by the trustee, the *court* ... *shall prohibit or condition* such use, sale, or lease as is necessary to *provide adequate protection*" of the secured creditor's lien rights.[26]

Not surprisingly, this more careful analysis of the statutory language and the relationship between § 542(a) and cognate provisions in §§ 362 and 363 ultimately reinforces the clear implications of the history of the pre-Code turnover power because, as the Supreme Court acknowledged in *Whiting Pools*, § 542(a) is simply a codification thereof. Sections 542(a) and 363(e), together, make a secured creditor's obligation to turn over repossessed collateral (for use by the trustee or DIP) contingent upon the trustee or DIP requesting a turnover order from the *court*, and in the context of that turnover proceeding, the bankruptcy *court* can then make a determination regarding what the estate must do to adequately protect the value of the secured creditor's lien rights (such as maintaining insurance and making periodic cash payments) and thus fulfill the express statutory condition (1) to the estate's right to use the property under § 363 and thus also (2) to the secured creditor's obligation to turn over the property under § 542—fully consistent with the pre-Code turnover power that § 542(a) was intended to codify.

The majority courts' contrary interpretation rests upon an overly aggressive interpretation of the 1984 amendment to § 362(a)(3) attributable to a specious understanding of the "property" protected by that provision. Regrettably, though, much of the blame for this confusion

lies with the Supreme Court's *Whiting Pools* opinion. There is one particular passage from *Whiting Pools* that seems to lend credibility to the majority courts' interpretation of § 362(a)(3) and, thus, figures prominently in their justificatory rationales. It is, at most, however, simply loose (and erroneous) dictum.

At one point the *Whiting Pools* opinion states that "§ 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code,"[27] thus implying that any possessory right granted the estate by § 542(a) is somehow immediately considered property of the estate under § 541(a)(1) "as of the commencement of the case," *before* the estate actually obtains possession via turnover. Both that statement itself, though, and the implication attributed to it are false. Indeed, the *Whiting Pools* Court itself subsequently contradicts that statement by acknowledging that the plain language of § 541(a)(1) does not and cannot "grant[] to the estate a possessory interest ... that was not held by the debtor at the commencement of the" bankruptcy case—thus, the Court's reliance on § 542(a) to do that work.[28]

Moreover, that statement entirely overlooks those subparagraphs of § 541(a), such as (a)(3) and (a)(7), that (unlike § 541(a)(1)) *are* by their express terms "intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code,"[29] such as the avoiding power provisions to which the *Whiting Pools* Court expressly likened § 542(a). And in the context of those avoiding power provisions, many lower courts (including the Second Circuit itself) have *refused* to indulge the *Whiting Pools* suggestion that property recoverable thereby should somehow be considered property of the estate "as of the commencement of the case" under § 541(a)(1), before the estate actually recovers the property at issue. For example, in *In re Colonial Realty Co.*, the Second Circuit flatly rejected the contention that "fraudulently transferred property [i]s part of the bankruptcy estate under § 541(a)(1) prior to its recovery," holding that the language and structure of § 541(a) "clearly reflects the congressional intent that such property is *not* to be considered property of the estate until it is recovered."[30]

Thus, it may well be true that "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control' *over possession*,"[31] as the majority courts repeatedly (and tellingly) emphasize. But such an exercise of control *over possession* is a violation of the § 362(a)(3) automatic stay only if possession is property of the estate. When a secured creditor is in possession on the petition date, though, possession is *not* property of the estate, and possession only becomes property of the estate once the estate actually obtains possession via turnover.

Only through reliance upon *Whiting Pools*' dangerously misleading dictum could the Second Circuit in *Weber* come to the bizarre conclusion that "*Whiting Pools* teaches that filing of a petition will generally transform a debtor's equitable [ownership] interest into a bankruptcy estate's possessory right."[32] And the Second Circuit could only conclude that SEFCU's "'exercising control' over the object in which the estate's equitable [ownership] interest lay"[33]—i.e., retaining possession of the car—was a stay violation by construing "property of the estate" in a colloquial sense (i.e., the car) rather than the legal "interest in property" bundle-of-sticks meaning expressly employed in the Bankruptcy Code's definition of "property of the estate."[34]

No Protection Is Not Adequate Protection

The majority courts' interpretation of § 362(a)(3) essentially turns that provision into a self-executing turnover provision, requiring *no* adequate protection and with *no* turnover defenses at all. That interpretation, of course, makes the "explicit limitations on the reach of § 542(a)"[35] entirely superfluous. Indeed, if failure to immediately turn over repossessed collateral once the debtor files bankruptcy is exercising control over property of the estate in violation of the stay, then § 542(a) itself seems superfluous and unnecessary—other than to fill out the circular reasoning that § 542(a) somehow makes possession property of the estate over which the creditor is exercising control—circular reasoning that then completely ignores the "explicit limitations on the reach of § 542(a)."[36] Moreover, interpreting § 362(a)(3) as an independent, self-executing turnover provision not only mandates immediate turnover for the estate's proposed use without any provision of adequate protection, it can also fully jeopardize the secured creditor's entire "right to adequate protection [that] replace[s] the protection afforded by possession."[37]

Because most courts hold that a secured creditor's right to receive adequate protection is triggered only through the filing of the creditor's request with the court, many courts have also held that the extent of adequate protection to which the creditor is entitled (i.e., the value of the creditor's lien) must be measured as of the date the secured creditor files its request with the court. If § 362(a)(3) compels immediate turnover by a secured creditor when the debtor files bankruptcy, faithful compliance with this obligation will mean that, as a practical matter, turnover will invariably precede the creditor's filing of a formal motion for adequate protection with the bankruptcy court. Consequently, in those courts measuring adequate protection as of the date of the creditor's motion, the secured creditor will be subjected to a period during which its lien is subject to wholesale dissipation with no recourse.

For example, a possessory lien (such as a service provider's lien,[38] an execution lien,[39] or a security interest perfected by possession[40]) will vanish the moment the creditor relinquishes

possession to the trustee or DIP, thus immediately terminating the creditor's right to adequate protection. Likewise, if the creditor turns over uninsured property that is promptly destroyed by fire, the creditor's right to adequate protection also goes up in smoke. The secured creditor's inevitable and entirely understandable desire to delay the turnover at least long enough to preserve the right to receive the "indubitable equivalent" specifically mandated by the Code, certainly does not suggest conduct that should be considered sanctionable contempt. Indeed, in *Citizens Bank v. Strumpf*,[41] the Supreme Court was presented with a similar conflict between a broad interpretation of the automatic stay and the express statutory protections afforded a secured creditor by the § 542(b) turnover provision, and the Court held that the former must yield to the latter.

In the *Strumpf* case, when the debtor filed Chapter 13, he was in default on a $5,000 loan debt owed Citizens Bank and also had a checking account with the Bank. In response to the debtor's bankruptcy filing, the Bank put a temporary freeze on any further withdrawals from the account while it sought permission from the bankruptcy court to exercise its setoff rights with respect to the account. Although § 542(b) mandates turnover to the estate of debt payments owing a debtor, this obligation is expressly abated "to the extent that such debt may be offset under section 553." The bankruptcy court nonetheless held the Bank in contempt for violation of the automatic stay, forcing the Bank to remove its freeze on the debtor's account. The court subsequently granted the Bank relief from stay to exercise its setoff rights, but by that point there were no more funds in the account to setoff.

The Supreme Court, however, held that the bankruptcy court erred in construing the stay in a manner that eviscerated the setoff rights expressly preserved by § 542(b)—i.e., the automatic stay should *not* be interpreted as a self-executing turnover provision that exceeds the scope of the § 542(b) turnover provision. Likewise, "[t]he right of adequate protection cannot be rendered meaningless by an interpretation of §§ 362(a)(3) and 542(a) that would compel turnover even before an opportunity for the court's granting of adequate protection."[42] Indeed, in a very recent decision from the Eighth Circuit BAP, *In re WEB2B Payment Solutions, Inc.*,[43] the court's reasoning (although dicta) implicitly acknowledges that the majority courts' interpretation of § 362(a)(3) as applied to a secured creditor's retention of possession of collateral is inconsistent with *Strumpf*.

In *WEB2B*, the court held that a secured creditor with a security interest perfected by possession did, in fact, lose its perfected lien (and thus its right to any adequate protection) upon turnover of the collateral to the Chapter 7 trustee, notwithstanding the fact that immediate turnover seemed compelled by the Eighth Circuit's early, influential, now-majority interpretation of § 362(a)(3) in *In re Knaus*.[44] The BAP, though, also suggested (without discussing or even citing *Knaus*) that "[t]aken together, *Whiting Pools* and *Strumpf*

provide a roadmap for creditors whose rights in collateral will be relinquished with possession," to wit, "that a creditor in [the] position ... where relinquishment of possession will in and of itself destroy the creditor's rights ... may withhold turning the collateral over until the bankruptcy court is able to make a determination as to whether, and to what extent, the creditor is entitled to adequate protection."[45]

Carving out an exception for a secured creditor whose "relinquishment of possession will in and of itself destroy the creditor's rights," however, cannot (by any stretch of the imagination) be wrung from the language of § 362(a)(3). If "'exercising control' over the object in which the estate's equitable [ownership] interest lay"[46]—i.e., retaining possession—violates § 362(a)(3), that is the case whether or not the secured creditor's "relinquishment of possession will in and of itself destroy the creditor's rights." As the *Sharon* majority acknowledged, "[t]here is *no* 'exception' to § 362(a)(3) that excuses ... refusal to deliver possession."[47]

And neither is it a sufficient response to suggest that "[i]f the creditor is concerned that its interest will be irreparably harmed if the property is turned over before [a] motion for relief from stay can be heard it may request an emergency hearing under § 362(f)."[48] If retaining possession, in and of itself, is a violation of § 362(a)(3), as the majority courts hold, then any such emergency hearing "would come only after a period during which the creditor is in contempt."[49] Indeed, even in the more routine case in which the mere filing of the creditor's stay relief motion will preserve the creditor's right to adequate protection of the value of its lien as of that moment (although, of course, not guarantee that the estate will or can actually provide that protection), even retaining possession of the collateral long enough to file a motion with the bankruptcy court is, under the majority interpretation of § 362(a)(3), a willful and contemptuous stay violation.

The Relative Balance of Burdens and Harms

The majority courts, of course, are not entirely oblivious to the immense difficulties surrounding their interpretation of § 362(a)(3). Rather, they choose to simply overlook or give short shrift to those problems because they believe that "a myriad of policy considerations" "militate in favor of placing the onus on the creditor, rather than on the debtor, to seek judicial relief."[50] Indeed, as a practical matter, that is all that is at stake with this interpretive issue: who should bear the burden of initiating proceedings in the bankruptcy court should the parties fail to agree on the terms for a consensual turnover, with the most significant bone of contention being what is required in the way of adequate protection of the secured creditor's lien. And these "practical considerations"[51] seem to be driving the majority courts' resolution of the interpretive issue. Indeed, majority courts fully acknowledge that the secured creditor *is* entitled to adequate protection of its lien and that the bankruptcy