Surrender of Property in Chapter 13

Concurrent Session

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I. Surrendering property – Dynamics between the debtor and secured creditor

I. Statutory Context

A. 11 USC §1325(a)(5) provides debtors with three options for the treatment of secured claims under a Chapter 13 plan. Subsection (A) allows confirmation if "the holder of such claim has accepted the plan" and, absent such acceptance, subsection (C) allows confirmation if the plan provides for surrender of the collateral to the secured creditor. 11 U.S.C. § 1325(a)(5)(C).

B. 11 USC §506(a) provides that an allowed claim of a creditor secured by a lien on property is a secured claim to the extent of the value of the collateral (or the estate's interest in the collateral) and is an unsecured claim to the extent the value of the collateral is less than the amount of the allowed claim.

C. 11 USC §1327(b) states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor.

D. The bankruptcy code does not define the term "surrender."

II. Case Law Context -- What is the meaning of "surrender" as used in the Code and specifically in 11 USC §1325(a)(5)(C) and a Chapter 13 Plan

A. Courts have consistently agreed that, generally speaking, and at a minimum, that when a debtor surrenders property pursuant to § 1325(a)(5)(C), the debtor relinquishes his or her rights to the collateral in favor of the creditor and makes the collateral available to the creditor to allow the creditor to pursue its non-bankruptcy rights (i.e., foreclosure). See, e.g., *In re Cornejo*, 342 B.R. 834, 836 (Bankr. M.D. Fla. 2005) (The Code, pursuant to 11 U.S.C. § 101, does not define the parameters of the term surrender. The term "surrender," in the context of a Chapter 13 plan, means the relinquishment of any rights a debtor has in the collateral. The Bankruptcy Code provides a Chapter 13 debtor the option to surrender property to a secured creditor. 11 U.S.C. § 1325(a)(5)(C)). See also, *White v. Logan (In re White),* 487 F.3d 199, 205 (4th Cir. 2007); *In re Cope*, 2010 Bankr. LEXIS 2302, 2010 WL 376380, *6 (Bankr. E.D. Pa. Jan. 26, 2010); *Gelibert v. United States* (In re Gelibert), 2010 Bankr. LEXIS 1160, 2010 WL 2026520, *1 (Bankr. N.D. Ga. February 26, 2010); *In re Carter*, 390 B.R. 648, 652 (Bankr. W.D. Mo. 2008); *In re White*, 282 B.R. 418, 421-22 (Bankr. N.D. Ohio 2002); *In re Anderson*, 316 B.R. 321, 323 (Bankr. W.D. Ark. 2004); *Providian Nat'l Bank v. Vitt (In re Vitt)*, 250 B.R. 711, 719 (Bankr. D. Colo. 2000); *In re Stone*, 166 B.R. 621, 623 (Bankr. S.D. Tex. 1993); accord *In re Gray-Bailey*, 427 B.R. 536, 539-40 (Bankr. D. Idaho 2010) (surrender in context of Chapter 12 plan); *In re Kiklis*, 352 B.R. 355, 359 (Bankr. D. Mass. 2006) (surrender in context of Chapter 11 plan).

B. Further, in cases where a creditor objects to the debtor's continued control and possession of surrendered property (continuing to possess the property while the creditor forecloses, etc.), courts often find that relinquishing possession and control is required. See, e.g.,

White v. Logan (In re White), 487 F.3d 199, 205 (4th Cir. 2007) (in depth discussion of the meaning of the word "surrender" in the context of the bankruptcy code). See also, *Collier on Bankruptcy* which has defined "surrender" in the § 1325(a) context as the "relinquishment of any rights in the collateral," including the right to possess the collateral. 8 *Collier on Bankruptcy* P 1325.06 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2005).

i. Practically speaking, creditors seldom object to a debtor retaining control and possession of property while the creditor pursues its state law remedies, i.e., foreclosure. However, in the event a creditor did object, the case law seems to support requiring the debtor to relinquish control of the property, i.e., move out. See *In re Gray-Bailey*, 427 B.R. 536, 539-40 (Bankr. D. Idaho 2010) (surrender in context of 11 USC §1225(a)(5)(C) which uses the exact language of §1325(a)(5)(C)).

C. However, the Code does not appear to mandate "delivery" or transference of title to the collateral by the debtor to the creditor. Stated otherwise, the debtor is not required to execute a quit claim deed in favor of the creditor. *See*, *In re Pratt*, 462 F.3d 14, 18-19 (1st Cir. 2007) "[s]ince Congress did not use the term "deliver,". . . one reasonably may assume that "surrender" does not necessarily contemplate that the debtor physically have transferred the collateral to the secured creditor. . . Thus, the most sensible connotation of "surrender" in the present context is that the debtor agreed to make the collateral *available* to the secured creditor…" (Citing, *e.g.*, *In re Cornejo*, 342 B.R. 834, 836-37 (Bankr. M.D. Fla. 2005).

III. Practical Context:

A. The two primary objectives of a debtor in proposing to "surrender" real property in a Chapter 13 Plan are to:

i. **Resolve or discharge the outstanding indebtedness**. In general, 11 USC §506(a) permits a creditor to file a general unsecured claim to the extent the creditor's claim is undersecured (i.e., the value of the collateral is less than the amount of the claim). See *In re Finley*, 408 B.R. 111, 114 (Bankr. E.D. Mich. 2009). The component is to ensure that the "debt" is "provided for by the plan" such that a discharge pursuant to 11 USC §1328 is effective to extinguish the indebtedness. A plan that is silent as to the potential unsecured claim or classifies the creditor/claim in a section of the plan preserved for §1322(b)(5) claims (i.e., "continuing claims") is insufficient and creates an ambiguity. See *In re Nicholson*, 2011 Bankr. LEXIS 2842 (Bankr. D.D.C. July 25, 2011), discussed at length below.

ii. **Divest themselves of the responsibility for the property** (although in some instances debtors will seek to stay in the property for an extended period of time). Many debtors are under the impression that filing a Chapter 13 which offers to "surrender" property "washes their hands" of the responsibilities inherent in

property ownership such as maintenance, insurance, and condominium association dues. A proposed or confirmed Chapter 13 Plan which offers to "surrender" collateral to a creditor or creditors does not effectuate a legal transfer of ownership and the responsibility for the property remains that of the debtor post-confirmation. Surrender as used in a Chapter 13 Plan merely states an intention on behalf the debtor to make the property available to the creditor to pursue its state law remedies. Further, although the bankruptcy may be pending, pursuant to 11 USC §1327(b), confirmation of the case vests all of the property of the estate in the debtor. See above II. "Case Law Context" for applicable authority.

B. Does "surrender" treatment effectuate any change in the legal ownership of property, thus negating the debtor's responsibilities to maintain the property? Does the debtor have any options to compel a creditor to accept a transfer of ownership and the corresponding legal and financial responsibilities of maintaining the property?

    i. Increasingly, courts have been struggling with the consideration of the interests of an insolvent debtor obtaining the fresh start contemplated by the bankruptcy code balanced against the rights of secured creditors.

        1. *In re Cormier*, 434 B.R. 222 (Bankr. D. Mass. 2010) – In depth discussion of the "important questions regarding the interplay between the rights of mortgage holders and those of financially-strapped property owners seeking relief under the Bankruptcy Code." The court recognized the difficulties in dealing with these issues "[a]t a time when the soaring foreclosure rate has left a backlog of bank-owned properties, and both owners and banks often choose to simply walk away -- leaving abandoned homes and buildings to blight and burden their neighborhoods, cities, and towns -- the inadequacy of existing state and federal laws to provide meaningful, responsible solutions becomes distressingly obvious. Yet, judges are interpreters and not architects of the law." The case involved debtors filing a Chapter 13 Plan and "surrendering" an investment property to the mortgage holder. The debtors subsequently filed a "Motion to Require American Home Mortgage Servicing, Inc. to Acknowledge the Debtor's Surrender of the Property and to Allow an Administrative Claim for the Debtors' Post-Petition Expenses for Insuring and Preserving that Property." In short, the debtors wanted legal ownership and financial responsibility for the rental property to fall to the mortgage holder creditor. The debtors argued several theories supported this relief, including that §1325(a)(5)(C) allows for the surrender of collateral in satisfaction of a secured claim and this preempts Massachusetts state law which requires acceptance of a deed by the creditor. The debtors argued that because their ability to surrender the collateral was integral to their reorganization effort, they should be entitled to unilaterally surrender the property. The

creditor argued that while it has the option to do a number of things pursuant to state law, it could not be compelled to do anything. The court determined that while indeed a creditor had the option to pursue state law remedies and foreclose on the property, the court had no authority to compel them to do so.

ii. Courts have at times granted equitable relief to debtors in these circumstances. However, the reported instances appear to be few and far between and courts have been very reluctant to compel creditors to take action that is not required or supported by state law.

1. *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14 (1st Cir. Me. 2006) – Pratt provides an analogous Chapter 7 matter from the First Circuit Court of Appeals dealing with personal property. The debtors indicated their intent, pursuant to § 521(a)(2), to surrender their car to creditor GMAC (rather than reaffirm/redeem). The vehicle was inoperable. Debtors received their discharge and creditor refused to take possession of the vehicle. The debtors were left with an inoperable vehicle that the secured creditor had no interest in taking and that salvage dealers would not accept because of the lien on the title. The creditor refused to take possession unless the claim was paid in full. The court concluded that the debtors had surrendered the vehicle within the meaning of § 521(a)(2) of the Code by making it available to the secured creditor. The court also held – consistent with well established law that a creditor cannot be forced to take possession of collateral merely because a debtor has surrendered it -- that nothing in § 521(a)(2) required a secured creditor to accept possession, "as such a reading would be at odds with well-established laws that a creditor's decision whether to foreclose on and/or repossess collateral is purely voluntary and discretionary." But then the court considered the equities. Although the creditor couldn't be forced to repossess the property, its actions in effect denied the debtors the right to surrender the property. And since it was clear that the creditor would not foreclose on the collateral, its refusal to release the lien was solely for the purpose of collecting the discharged debt. Thus, the practical effect was to prevent the debtors from surrendering the collateral and coerce them into paying the debt in violation of the discharge injunction. The court found that under those circumstances, the provisions of the Bankruptcy Code preempted the creditor's state law rights. The court held that a secured creditor is free to deal with surrendered property in its discretion and pursuant to non-bankruptcy law, but if the creditor's actions have the practical effect of preventing relief provided by the Code, those state law rights may be overridden. ("Thus, even legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction, which is to ensure that debtors receive a 'fresh start'

and are not unfairly coerced into repaying discharged prepetition debts.") The court found the creditor's reliance on their bare right of refusal under state law was insufficient to justify their inaction.

2. *Pigg v. BAC Home Loans Servicing LP (In re Pigg)*, 2011 Bankr. LEXIS 3573 (Bankr. M.D. Tenn. June 23, 2011) – In another Chapter 7 matter, the bankruptcy court relied on 11 USC §105(a) and 11 USC § 363 in requiring a Chapter 7 Trustee to sell a condominium which the debtor had vacated and the lien holders had failed to act on. The debtor's condominium was badly damaged in flood. The debtor vacated the condo and filed a Chapter 7. Neither the association nor mortgage creditor pursued foreclosure against the unit. Association dues continued to accrue post-petition and were rendered non-dischargeable pursuant to 11 USC §523(a)(16) (as they may be non-dischargeable in a Chapter 13 as a "covenant that runs with the land." See *Maple Forest Condo. Ass'n v. Spencer (In re Spencer)*, 2011 U.S. Dist. LEXIS 96219 (E.D. Mich. Aug. 22, 2011)). The court went on to find that the debtor "suffer[ed] a wrong without a remedy" and ordered the sale of the condominium, with the proceeds of the sale being paid to the association and the mortgage holder. In the absence of the equitable remedy the association dues could continue in perpetuity thus inhibiting the debtor from obtaining a true "fresh start."

iii. What are the debtors' options when faced with the veritable albatross of a worthless piece of property which inhibits their ability to obtain a fresh start or impedes their ability to reorganize?

1. If the creditor cannot identify any reason whatsoever (other than "we don't have to") for refusing to retake the collateral, their action may be construed as coercive or punitive in nature, giving the bankruptcy court authority to compel action from the creditor.

2. Plan language compelling a creditor to accept a deed-in-lieu of foreclosure

a. It is doubtful that language in a Chapter 13 Plan compelling a creditor to accept a deed-in-lieu of foreclosure is confirmable if objected to by a creditor. There doesn't appear to be any authority under the Code to order the compulsory take-back of a property. Arguably, § 1322(b)(2) supports the right to modify the rights of holders of secured claims and § 1325(a)(5)(A) permits treatment for a secured claim if the holder of the claim has accepted the Plan. Clearly, if a creditor is objecting it hasn't "accepted the plan." Again, the creditor has the right under state law to do so, but is not required to do so.

b. Absent an objection from a creditor and clear notice of the proposed treatment, the plan may be confirmable pursuant to § 1322(b)(2) and § 1325(a)(5)(A) (creditor has accepted the Plan) so long as the property is not the principal residence of the debtor. See Shaw v. Aurgroup Fin. Credit Union, 552 F.3d 447 (6th Cir. Ohio 2009) ("As we have previously indicated, however, if a secured creditor fails to object to confirmation, the creditor will be bound by the confirmed plan's treatment of its secured claim under § 1325(a)(5). This is because the failure to object constitutes acceptance of the plan. And a creditor's acceptance of a chapter 13 plan is one way to satisfy the requirements of § 1325(a)(5) with respect to that creditor's allowed secured claim."

c. However, if the property/collateral is the debtor's principal residence it would not appear to be confirmable as the Plan would run afoul of § 1322(b)(2) by seeking to modify the rights of the holder of a secured claim which is secured by the debtor's principal residence.

3. Separate motion or adversary proceeding to compel the retaking of the collateral or in the alternative the release of its lien.

a. A motion or adversary seeking to compel the creditor to retake collateral (i.e., foreclose or accept a deed-in-lieu of foreclosure) or alternatively release its lien may help accomplish a debtor's objectives.

b. You must be able to make a good faith argument that the creditor's inaction rises to the level of coercive or punitive in nature or alternatively is impeding the debtor's ability to reorganize.

c. Impeding a debtor's ability to reorganize. If the debtor is expending funds insuring and maintaining (utilities and property upkeep) a property this will clearly affect their ability to fund their Chapter 13.

d. Coercive. By refusing to foreclose or repossess, advising a debtor that they do not intend to take action against the collateral at this time, and advising the debtor that they do hold a mortgage that they can enforce at any time could be construed as coercing the debtor to pay the debt.

e. Punitive. Again, when a creditor advises a debtor that they have no intention of proceeding against the collateral yet refuse to

release their lien/mortgage to allow the debtor to dispose of the property, one inference is that it must be punitive in nature. If the creditor doesn't want the collateral yet insist that it remain a responsibility of the insolvent debtor, the practical effect is that the debtor is punished and they are impeding the debtor's ability to reorganize.

f. Prior to filing a motion or an adversary proceeding, a debtor should exhaust all efforts to convey title to the creditor and document such efforts. At a minimum, the debtor should formally offer the creditor a deed-in-lieu of foreclosure. To the extent a creditor objects to the relief sought, the court will certainly scrutinize the efforts of the debtor prior to seeking the equitable relief from the bankruptcy court.

g. From a practical perspective, the creditor may make a business decision not to object to the relief sought and simply consent to the entry of an order requiring them to retake the collateral or alternatively, and more likely, to release their lien (or record a discharge of their mortgage, allowing the debtor to sell/donate/dispose of the collateral). A creditor who has abandoned collateral may choose not to litigate the issue. Further, the filing of a motion or an adversary may result in a negotiated settlement with the creditor (whereby the creditor agrees to accept a nominal lump sum to release their mortgage).

C. Alternatively, can a debtor be compelled to immediately vacate a property and relinquish possession and control of property "surrendered" in a Chapter 13 Plan? Can a debtor be required to execute and deliver a deed to a creditor? Likely not.

i. *Main St. Bank v. Hull*, 2008 U.S. Dist. LEXIS 21815 (E.D. Mich. Mar. 20, 2008) – Chapter 7 case finding that the statement of intention indicating an intent to "surrender" did not affect the debtor's substantive rights with respect to the property and the debtor did not have to execute a quit claim deed in favor of the creditor. The creditor must pursue its state law remedies to retake the collateral.

ii. See also *Green Tree Fin. Servicing Corp. v. Theobald (In re Theobald)*, 218 B.R. 133 (B.A.P. 10th Cir. 1998)

iii. But see *In re Gray-Bailey*, 427 B.R. 536, 539-40 (Bankr. D. Idaho 2010).

D. If the Debtor's Chapter 13 Plan provides for "surrender" pursuant to § 1325(a)(5)(C) as the treatment for a secured claimant but fails to specifically state in the Plan how the potential unsecured claim, if any, will be provided for, is the debt discharged? Ambiguities in language will be construed against the debtor-drafter.

i. Example of poor drafting resulting in prejudice to the debtor:

1. *In re Nicholson*, 2011 Bankr. LEXIS 2842 (Bankr. D.D.C. July 25, 2011). Claim of wholly unsecured 2nd mortgage claimant treated in Plan as "to be paid via surrender" in the "Direct Payments" section of the Plan. Initial claim of 2nd mortgage creditor reflected that the claim was fully secured. Post-confirmation, the proof of claim was amended asserting a full unsecured claim. Debtor objected to the claim and asserted that the Plan treatment fully satisfied the claim. The trustee sought to modify the plan to increase payments to account for the previously unaccounted for unsecured claim. The court denied both requests. The court discusses various implications related to the treatment and placement in the Plan of a claim relating to a surrendered property and language used by the debtor to describe the surrender. Ultimately, the court denied debtor's objection to the amended claim setting forth an unsecured deficiency but also ruled that the unsecured deficiency claim was not even provided for by the Plan and was thus not subject to discharge. "When a plan provides for a claim to be paid via surrender, without limiting such surrender to surrender of collateral, the reasonable interpretation is that the claim's payment is being subjected to whatever processes of nonbankruptcy law are available to the creditor." "The language 'to be paid by surrender' permitted foreclosure (a meaningless remedy in the case of Real Time's worthless lien) but did not limit payment to payment via foreclosure. Under nonbankruptcy law, a result of a foreclosure sale is that any amounts owed to the foreclosing creditor or junior lienors that remain unpaid after the foreclosure sale can be pursued via nonbankruptcy law processes applicable to unsecured claims. By providing for the claim 'to be paid by surrender,' [the debtor] surrendered to all nonbankruptcy law processes available for payment of the debt." The court denied modification because creditor's claim was a long term debt when the plan was confirmed and treated as such in the plan. "If a debtor makes that election in a confirmed plan, the treatment of the claim is not altered by the debtor's later being unable to continue maintaining contractually-due payments to the creditor, and by the creditor's accelerating the debt. Instead, the creditor can seek relief from the automatic stay to enforce its claim based on the debtor's default in maintaining payments. Such a creditor's amended proof of claim, showing an accelerated debt now due, would not, and cannot, alter the long term character that the debt embodied when the plan was confirmed, a character that allowed the debtor to provide under the confirmed plan that the claim would be paid directly and not via payments from the Chapter 13 Trustee."

2. In summary, the debtor not only failed to accomplish restricting the junior lien holder's rights to seek a deficiency, but also failed to address the resulting indebtedness as the debt will survive discharge.

3. Upshot: a Chapter 13 Plan which seeks to surrender property and discharge the indebtedness should specifically state such. Further, the claim should not be treated in the continuing or direct pay claim section of the Plan.

ii. For an example of effective drafting

1. *In re Stansbury*, 403 B.R. 741 (Bankr. M.D. Fla. 2009) - Before the debtors petitioned for bankruptcy relief, the bank extended a loan to the debtors, two other individuals, and to a corporation. The loan was for the purchase of land and was secured by certain real property owned by the corporation. The debtors' chapter 13 plan provided for surrender of the property in full satisfaction of the bank's claim in the debtor's case, and the plan was confirmed without objection. The bank subsequently filed a second unsecured claim in the amount of $197,260. The bank asserted in the proof of claim that the debt was secured by a mortgage on real estate owned by the co-debtor corporation, but that the debtors did not actually own property that secured the claim. Although the bank was not a secured creditor of the debtors, the court found that the bank was bound by the order confirming the plan pursuant to 11 U.S.C.S. § 1327. The bank had adequate notice of the case and the proposed plan, but did not object to confirmation or appear at the hearing. The treatment of the bank's claim under the debtors' plan was properly resolved as a confirmation issue and the bank was bound by the confirmation order. The court relied primarily on the clarity of the language set forth in the Plan which provided a section in the Plan for “"Property to Be Surrendered to Secured Creditor in full satisfaction of claim” and below listed the name of the creditor and a specific description of the collateral. Further, the court relied on the *res judicata* effect of the confirmed Plan and 11 USC § 1327.

iii. The debtor has the luxury of drafting the Plan. The debtor should take advantage of this luxury and be as specific as possible about the meaning of the Plan and the impact of the “surrender” treatment. The Plan should be clear as to intent of the debtor and the Plan’s impact on creditors and claims.

1. Placing a creditor in the section of the Plan preserved for § 1322(b)(5) claims (“Class Two” of the Plan many local practitioners use) and simply stating “surrender” in the “monthly payments” column is not sufficient. This may satisfy compliance with § 1325(a)(5)(C), but it doesn’t address the underlying indebtedness, secured or unsecured.

2. If the debtor is seeking to discharge the indebtedness, why would the debtor treat the debt in a section of the Plan preserved for debts that are not subject to discharge pursuant to § 1328(a)(1)?

iv. Effective Drafting Suggestions:

1. Consider creating a separate section or classification in the Plan for "Property to Be Surrendered to Secured Creditor" and name the Creditor and the collateral and detail the proposed treatment of the indebtedness.

2. For example: "Property/collateral shall be surrendered to creditor in satisfaction of their secured claim. To the extent an unsecured claim exists, creditor shall be treated as a general unsecured creditor" See Branch Banking & Trust Co. v. Coffia (In re Coffia), 2010 Bankr. LEXIS 1563 (Bankr. S.D. Ga. Mar. 22, 2010) (confirming a Plan which proposes to surrender collateral in full satisfaction of creditor's "secured claim" over creditor's objection as court ruled that creditor retained right to seek reconsideration of its claim pursuant to § 502(j) to assert a deficiency) (also, finding that "surrender" treatment pursuant to § 1325(a)(5)(C) necessarily satisfies a creditor's allowed secured claim)

3. "Property/Collateral shall be surrendered to Creditor. Any deficiency allowed pursuant to creditor's non-bankruptcy rights shall be treated as a general unsecured claim and shall be subject to discharge pursuant to 11 USC § 1328."

4. "Property/Collateral shall be surrendered to Creditor in full satisfaction of the outstanding debt" (this language can be used to the extent the debtor asserts that the claim is fully secured or the creditor's non-bankruptcy rights restrict the collection of a deficiency). Of course, this language may solicit an objection from a creditor that asserts a non-bankruptcy right to a deficiency. Or the language may not draw an objection in which case the creditor will likely be deemed to have "accepted" the Plan pursuant to §1325(a)(5)(A) and any effort to collect a deficiency would be objectionable.

II. Surrendering property – the dynamics between the debtor and the estate

A. Who is responsible for ownership costs before Plan confirmation?

1. Types of real property ownership costs

a. Property Taxes – unpaid property become a lien on the property and must be paid by foreclosing creditor in order to convey clear title. If mortgage creditor fails to foreclose, property can ultimately be foreclosed on by County Treasurer for the unpaid taxes.

b. Hazard Insurance – if no hazard insurance carried by debtor, mortgage creditor can 'force place' insurance on a property and tack it on to their secured claim. Debtors should note that this only covers the creditor's interest in the property (i.e. the

structure) and does not cover any of debtor's possessions. It also does not cover liability for injury on the real property.

c. Water bill – unpaid water bills become a lien on the property much like unpaid property taxes. City/county can foreclose for unpaid water bill.

d. Utilities (i.e. gas, electric) – pre-petition amounts owed are general unsecured claims, do not attach as liens to the property. Post-petition amounts owed could survive Chapter 13 Discharge.

e. Association dues – see §523(a)(16). Pre-petition dues are dischargeable. However, post-petition dues that accrue up until the property is fully foreclosed are non-dischargeable. But, in order for the foreclosing creditor to convey clear title, unpaid association dues must be cleared up (since unpaid association dues also run with the property). Thus, most Chapter 13 debtors won't have these debts waiting for them upon receiving their Discharge.

f. Maintenance – who has to cut the grass? "Owner"? Until property foreclosure complete, isn't the debtor responsible? As such, could potentially be liable to nuisance fines, etc. if post-petition. Expenses proper on Schedule J? Best way to advise debtors?

2. Types of personal property (i.e. motor vehicles) ownership costs

a. Insurance – Debtor has contractual duty to insure. However, if surrendering collateral, can't be forced to. Debtor cannot operate motor vehicle without insurance.

b. Hypothetical – what happens if creditor won't repossess car? How does debtor dispose of collateral? Title issues?

B. Does §1327(b) reversion shift responsibility back to Debtor?

1. §1327(b) states 'except as otherwise provided in the plan or the order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor'.

a. Upon filing ('commencement') of a case the 'estate' is created (see §541). It consists of all of the debtor's property wherever located and by whomever held, with certain exceptions (see §541(b)). In a Chapter 13 case, the estate also includes 'all property of the kind specified that the debtor acquires after the commencement of the case but before the case is closed, dismissed or converted' (see §1306(a)).

b. Chapter 13 Debtors need to choose between having property vest in the debtor or into the estate upon confirmation. §1327(b) indicates the 'default' provision would be that the property vests into the debtor.

1. Vests in the debtor – by default, unless otherwise provided in plan. Benefits would include giving debtors more freedom to sell or dispose of assets during their case.

2. Vests in the estate – debtors can sell or dispose of assets during their case only after obtaining a Court Order. Property acquired during case remains property of the estate and would be protected from post-petition creditors.

2. Conflict between §1306(a) and §1327(b). Is the property that is 'revested' only that property which existed at the time of confirmation, or does §1327(b) and debtors Plan provision also apply to property which they acquired after confirmation? 3 basic approaches, lines of decisions. For an interesting discussion regarding this issue see *In Re Jackson (403 B.R. 95, 2009 WL 562261 (Bkrtcy.D.Idaho).*

a. Bankruptcy estate extinguished when, by operation of a provision in a confirmed plan, property vests in debtor upon confirmation. Property acquired post-confirmation not protected by automatic stay. *In re Toth, 193 B.R. 992 (Bankr.N.D. Ga.1996); In re Mason, 45 B.R. 498 (Bankr.D.Or.1984).* Approach ignores 1306a?

b. Bankruptcy estate continues in existence until case is closed, dismissed or converted. However, if plan provides, property in existence at time of confirmation is 'emptied' from the estate and revested into the debtor. The estate is then 'refilled' with any property acquired post-confirmation. *In re Holden, 236 B.R. 156 (Bankr.D.Vt.1999); In re Waldron (536 F.3d 1239).* Consistent with language of § 1306(a) and §1327(b) – growing majority *(United States v. Harchar, 371 B.R. 254, 268 (BankrN.D.Ohio 2007).*

c. Middle ground approach says only post-confirmation property that is necessary to fund the payments under a confirmed plan is property of the estate. *In re Ziegler, 136 B.R. 497(Bankr.N.D.Ill 1992), In re Root, 61 B.R. 984 (Bankr.D.Colo.1986).* But what is necessary and not necessary?

C. Is it objectionable if debtor's Plan provides for burdened property to remain in the estate after Confirmation? Can the Trustee abandon the burdened property or is the Trustee bound by the Plan?

1. Are there any advantages to debtor in setting up a plan this way?

2. Hypothetical – condo in undesirable location surrendered in debtor's plan. If property vests into estate post-confirmation can debtor avoid issues with association dues?

D. If the debtor cannot shift ownership costs to either the mortgagee or the Trustee, can the debtor include as additional costs in budget?

1. Chapter 13 requires debtor to fund a plan with 'projected disposable income to be received in the applicable commitment period'. If debtor is legally responsible for such expenses during the commitment period, it should follow that such expenses would be appropriate on Schedule J in determining debtor's reasonable and necessary living expenses.

2. Inclusion of such expenses on 22C Means Test would not seem to be appropriate given the Supreme Court's decision in Lanning. *Hamilton v. Lanning 177 L. Ed. 2d, 2010 U.S. Lexis 4568 (2010).*

IV. Surrendering Property – Post Confirmation Claims and Plan Amendments

In re George, 426 B.R. 895 (Bankr. M.D. Fla 2010) presented the issue of the timing of an amendment to the claim of a 2nd mortgagee following the surrender of property. National City Bank held the 2nd mortgage. The initial Plan and Schedule D indicated debtors' intention to surrender the property. The Bank waited until after the 1st mortgagee foreclosed and over a year after confirmation of the Plan and the claims deadline to amend the claim from secured to unsecured. The Court reasoned that "although amendment of claims is freely permitted early in a bankruptcy case to cure a defect, describe the claim with greater particularity or to plead a new theory of recovery…amendment is less appropriate with passing milestones in the case such as the claims bar date and plan confirmation." The Court sustained the debtors' objection to the Bank's claim as untimely.

*In re Stiller,*323 B.R. 199 (Bankr. E.D. Mich 2005) Is the amount of the mortgage creditor's arrearage claim a claims issue or a confirmation issue? In this case Judge Hughes addresses whether a home mortgage is a secured claim in a Chapter 13. A home mortgage claim is seldom paid through the plan. All a debtor can do through the plan is to cure the arrearage in order to avoid foreclosure. In *Stiller*, U.S. Bank did not file a claim until shortly after confirmation of the plan. The amount of the arrearage on U.S. Bank's mortgage provided for in the plan is $4,000.00. The claim filed by the Bank after confirmation indicated an arrearage of $10,510.23. The debtors objected to the claim. The Court discussed at length whether the issue presented was an issue of confirmation or of claims allowance. The Court reasoned that claims allowance is much less important in a Chapter 13 case when the claim is a home mortgage as the debtor has little choice but to continue paying the mortgage pursuant to the terms of the original contract because of §1322(b)(2). Treatment of a home mortgage in the context of plan confirmation is a crucial aspect because §1322(b)(5) allows the debtor to cure the arrears and defaults in the agreement notwithstanding §1322(b)(2). The Court equated the establishing of the arrearage amount on a mortgage to establishing the appropriate interest rate on a vehicle loan. U.S. Bank should have filed an objection to confirmation concerning the amount of the arrearage. The confirmed plan established the Bank's arrearage at $4,000.00.

*In re Nolan,*232 F.3d 528 (6th Cir. 2000) This is the case in which the Sixth Circuit determined that §1329(a) sets forth the exclusive grounds for plan modification and it does not include reclassifying claims from secured to unsecured. In *Nolan* the debtor sought to surrender her vehicle to the creditor

post confirmation leaving the creditor with an unsecured deficiency claim. The plan as confirmed provided treatment of the vehicle claim as partially secured. The Court strictly interpreted the meaning of §1329(a) and held a plan may be modified only to modify the "amount and timing of payments, not the total amount of the claim." See an in depth analysis of the *Nolan* case in *Fighting Finality and Debtor Waste in Chapter 13 Postconfirmation Collateral Surrender,*27 Emory Bankr. Dev. J. 169.

In re Nichols, 440 F.3d 850 (6th Cir. 2006) Americredit financed debtor's purchase of a vehicle. Debtor's Chapter 13 plan provided for payment in full of the secured claim over five years. Debtor defaulted in plan payments. Creditor filed a motion for relief from the automatic stay and the debtor proposed a plan modification. The amendment provided for payment of Americredit's claim but there would be a further delay before payments to the creditor resumed. The court, considering both the requirements of the Code and equity, determined that a post confirmation default may be cured by a plan modification provided the modification conforms with the requirements of §1322(a) and (b) and §1325(a).

*In re Long,*453 B.R. 283 (W.D. Mich. 2011) In this case, the debtor attempts to argue the *Nichols* rationale, of curing post confirmation default on a debt secured by a vehicle by plan modification, applies in the case of a home mortgage debt. In distinguishing this case, Judge Hughes noted that the *Nichols* plan provided for payment of the entire debt during the term of the plan. The *Long* case involved an obligation that would not be satisfied until sometime twenty years or so after the bankruptcy. The distinction is significant due to the limitations on modification in §1329 and cited to the *Nolan* decision. The debtors argued equity but the Court, in denying debtors' plan amendment, stated it "must honor its obligation to subordinate those equities to what the Code otherwise dictates."

In re Van Steele, 354 B.R. 157 (Bankr. W.D. Mich. 2006) Debtors proposed a cram down of a vehicle claim in their Chapter 13 plan to the $9,000.00 value of the vehicle. Prior to confirmation, the vehicle was totaled in an accident and an insurance proceeds were determined to be $10,763.00. The paln was confirmed without mention of the status of the vehicle or the amount of the proceeds. Debtors filed a motion to use the insurance proceeds to obtain substitute collateral. The trustee objected. The issue was "whether a debtor may, post-confirmation, compel a secured creditor to accept substitute collateral for the property that secured its claim under the terms of debtors' confirmed plan?" The decision turned on the applicability of §1303 and §363(b) and (e) and whether the insurance proceeds remained property of the estate. The plan provided that upon confirmation, all property of the estate would revest in the debtors. The Court ruled that the above cited sections do not apply as the insurance proceeds "were no longer property of the bankruptcy estate by operation of either §522(1) or §1327(b).