Strange (but True) Collateral Disposition Issues

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I. INTRODUCTION

Consumer debtors often file bankruptcy with a goal of keeping a mortgaged house or a car they have not fully paid off, and both chapters 7 and 13 of the Bankruptcy Code provide a number of options that can allow them to do this. However, sometimes consumer debtors find that it is in their best interest to divest themselves of encumbered property. As owners of junk cars or severely damaged homes who are liable for homeowner's association fees sometimes find out, this may be surprisingly difficult to do.

II. CASE LAW ON COLLATERAL ISSUES

A. Chapter 7

A chapter 7 debtor must file a statement "of his intention with respect to the retention or surrender of [secured] property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property."[1] The debtor must then perform this intention within thirty days after the first date set for the Section 341 meeting of creditors.[2] Depending on the jurisdiction, debtors have three or four options.

1. *Reaffirmation*

Reaffirmation of a debt under 11 U.S.C. § 524(c) is the "only manner in which a debtor's personal liability on a pre-petition debt can survive a discharge." *In re Cruz*, 254 B.R. 801, 813 (Bankr. S.D.N.Y. 2000) (citing *In re Moore*, 50 B.R. 301, 302 (Bankr. S.D. Ohio 1985)). The Bankruptcy Code provides a number of requirements that debtors and creditors must comply with for a reaffirmation agreement to be enforceable.[3]

Complications may arise in cases where debtors have multiple secured loans from the same lender and, as is the case with many loans from credit unions, the agreements contain cross-collateralization clauses. Consumer debtors may not fully understand that subsequent loans from a credit union grant the credit union a security interest in collateral that secures other loans with the credit union. The validity of liens created by these clauses is a matter of state law,[4] and they are usually valid under state law.[5]

Because reaffirmation is voluntary on the part of the creditor,[6] a number of bankruptcy courts have held "[p]artial reaffirmations are not permitted where multiple loans are secured by the same collateral by virtue of a pre-petition security interest or a security agreement containing a cross-collateralization clause."[7]

2. *Surrender*

Section 521(a)(2) simply provides that a debtor must "file with the clerk a statement of his intention with respect to the retention or surrender" of secured property and perform that intention. However, no Code provision provides a process for accomplishing such a surrender, leaving open a basic question of what a debtor needs to do to accomplish a surrender. This question will be discussed below.

3. *Redemption*

If the debtor's interest in the collateral is exempt, or if the trustee has abandoned the collateral, the debtor has the option of paying the creditor the amount of the allowed secured claim that the collateral secures and redeeming the collateral.[8]

4. *Ride Through: The Disputed Fourth Option*

There is a split of authority as to whether chapter 7 debtors may retain collateral and continue to make payments on it without reaffirming the debt, although even courts allowing this option have limited it.[9] The Seventh Circuit Court of Appeals has rejected this option.[10] The court reasoned that the language of section 521 compels the debtor to choose between reaffirmation, redemption, or surrender. Moreover, Congress intended to "protect creditors from the risks of quickly depreciating assets and to keep credit costs from escalating because of the too-ready availability of discharge." From a practical perspective, few debtors would choose to reaffirm personal liability if they could retain collateral without doing so. The statute contemplates creditors having a say in whether to enter into a reaffirmation agreement, not allowing debtors to force new agreements on creditors.

B. Chapter 13: Section 1325(a)(5)(A)-(C)

Chapter 13 provides more flexibility for consumer debtors who want to keep their encumbered property. However, the structure of chapter 13 also means that more complicated legal issues arise as to whether a debtor can surrender property after the confirmation of a plan. In all, chapter 13 provides three ways that a plan may treat secured creditors.

1. *Creditor accepts plan: No modification of claim, or creditor agrees to modification*

Any treatment that a creditor accepts satisfies 11 U.S.C. § 1325(a)(5)(A). A creditor might be willing to accept a plan that provides the debtor will

continue to make a regular monthly payment. A creditor might also agree to a modification for various reasons.

2. *Cram down: Modification without creditor consent - Section 1325(a)(5)(B)*

This option allows the debtor to modify a secured creditor's claim to a format that the debtor can pay off, within the statutory limitations. A debtor cannot cram down mortgages on a principal residence.[11]

Chapter 13 also allows debtors to bifurcate most[12] over-secured claims into secured and unsecured portions and treat each portion accordingly.

3. *Surrender: 11 U.S.C. § 1325(a)(5)(C)*

a. Can a debtor pick and choose among a creditor's collateral?

Courts are split as to whether a debtor can surrender part of a creditor's collateral. In *In re Williams*, 168 F.3d 845, 847 (5th Cir. 1999), the court noted the Supreme Court in *Rash* said, "[T]he debtor has two options for handling allowed secured claims: surrender the collateral to the creditor . . . or, under the cram down option, keep the collateral over the creditor's objection and provide the creditor with the equivalent present value of the collateral." The Fifth Circuit Court of Appeals found that the "language strongly indicates that a debtor cannot combine subsections (B) and (C) to create a fourth option." In *In re McCommons*, 288 B.R. 594 (Bankr. M.D. Ga. 2002), by contrast, the debtor could surrender part of a creditor's collateral but retain a pick up truck and welder. According to this court, based on section 102(5)'s definition of "or" as inclusive, a debtor may choose to combine the options in sections 1325(a)(5)(B) and (C). From a policy perspective, "[t]o force surrender of those items could torpedo Debtor's efforts to reorganize. On the other hand, to require Debtor to retain unneeded collateral would reduce the 40 percent dividend Debtor has proposed to pay the unsecured creditors."

b. 910 Car Loans

A creditor still has an unsecured deficiency claim after surrendering the collateral, even though this means that the definition of "allowed secured claim" is different for different paragraphs of 1325. *In re Wright*, 492 F.3d 829 (7th Cir. 2007); *AmeriCredit Fin. Servs. v. Tompkins*, 604 F.3d 753 (2d Cir. N.Y. 2010).

III. SURRENDER OF COLLATERAL AFTER CONFIRMATION OF A CHAPTER 13 PLAN

A. Relevant Statutes: Sections 1325(a)(5)(C) and 1329

Courts are split as to whether a debtor may surrender collateral as part of modification under 1329(a)(1). The view forbidding it is that allowing a debtor to surrender collateral and reclassify the deficiency as unsecured would impermissibly change the amount of the allowed claim and classification of the claim. Additionally, the creditor would be at risk of depreciation. *See Chrysler Financial Corp. v. Nolan (In re Nolan)*, 232 F.3d 528 (6th Cir. 2000).

Other courts disagree. This "proposed modification does not fall outside the express terms of section 1329 merely because it affects the creditor's claim, i.e., its right to payment. The modification proposed by the debtors is expressly permitted by the terms of section 1329(a)(1). The debtors' modification, though it affected the creditor's secured claim, did so by reducing the amount of payments on the creditor's secured claim from the amount stated in the original plan down to zero, after surrender of the collateral." *See Bank One, NA v. Leuellen (In re Leuellen)*, 322 B.R. 648 (S.D. Ind. 2005) (citations omitted).

B. Practice Tips

If the court will not allow the debtor to surrender as part of a modification, the debtor could still work with the creditor to have the collateral sold. Then the parties would apply the proceeds to reduce the secured claim.

IV. INTERESTING ISSUES REGARDING SURRENDERING COLLATERAL

A. What does a debtor need to do to surrender collateral?

1. *There are differing views on whether debtor must actively hand over property as part of a surrender*

   See Personal Property, *infra.*

2. *A debtor generally cannot force secured creditor to accept possession of the collateral.*

   - "[S]urrender [of property] under a Chapter 13 plan does not require the creditor to take affirmative action to foreclose on property." *Moore v. BAC Home Loan Servicing LP (In re Moore)*, 477 B.R. 918, 920 (Bankr. S.D. Ga. 2012).

   - "[N]othing in subsection 521(a)(2) remotely suggests that the secured creditor is *required* to accept possession . . . ." *Pratt v. Gen. Motors Acceptance Corp. (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006).

- "Debtors may not compel this creditor to accept surrender nor enforce its rights and take title to the realty. In this case, Security Pacific has been given the remedy of receiving its collateral in satisfaction of its secured claim pursuant to § 1325(a)(5)(C). Additionally, Security Pacific has obtained relief from the automatic stay to pursue any other remedies it has under its note and deed of trust. Whether to proceed with its remedies is within the sole discretion of Security Pacific, and Debtors may not compel Security Pacific [to] enforce its rights." *In re Service*, 155 B.R. 512, 514 (Bankr. E.D. Mo. 1993).

Moreover, under state law, the debtor generally bears responsibility for collateral until the creditor takes some action.

- "Massachusetts courts have been . . . consistent in holding that a mortgagor, and not the mortgagee, bears the responsibilities and holds the rights incident to ownership until the mortgagee obtains possession or forecloses." *In re Cormier*, 434 B.R. 222, 227-28 (Bankr. D. Mass. 2010).

- "Because the Debtor remains the equitable owner of the property [under Georgia law], I find, he is not divested of his ownership obligations until the actual foreclosure occurs or until the lender takes affirmative steps of ownership." *Brown v. Branch Banking & Trust Co. (In re Brown)*, 477 B.R. 915, 917 (Bankr. S.D. Ga. 2012).

3. *Exceptions*

The First Circuit Court of Appeals and some bankruptcy courts have held that it can be a violation of the discharge injunction for a creditor to refuse to take possession of collateral or release its lien. *See Pratt v. General Motors Acceptance Corp. (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006) (citations omitted).

- "[W]e find no record evidence that it acted in bad faith, in these circumstances its actions were objectively coercive. Maine law unqualifiedly entitled GMAC to refuse to release its lien unless and until the outstanding loan balance was paid, but state law governs in a bankruptcy proceeding 'unless some federal interest requires a different result.' 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."

Further, the creditor's refusal "effectively amounted to a demand for a reaffirmation." As the debtors "could not junk the vehicle without a release of the GMAC lien, they were confronted with the grim prospect of retaining indefinite possession of a worthless vehicle unless they paid the GMAC loan balance, together with all the attendant costs of possessing, maintaining, insuring, and/or garaging the vehicle. Therefore, the GMAC refusal had the *practical effect* of eliminating the Pratts' 'surrender' option under § 521(a)(2)."

4. *Can a debtor surrender in full or partial satisfaction of the underlying debt?*

- "[T]he surrender of the Property may not have fully satisfied Wachovia's claim [as a junior mortgage holder]. Wachovia, to the extent its claim is undersecured, is entitled to file a general unsecured deficiency claim pursuant to 11 U.S.C. Section 506(a)(1). Such deficiency claim would share pro rata in any distributions to other unsecured creditors." *In re Hughes*, 402 B.R. 404, 407 (Bankr. M.D. Fla. 2008). *See In re Finley*, 408 B.R. 111, 114 (Bankr. E.D. Mich. 2009) (citing *In re Long*, 519 F.3d 288, 290-98 (6th Cir. 2009) ("a secured creditor was entitled to a deficiency claim following the debtor's surrender of the creditor's collateral, a vehicle purchased within 910 days of the debtor's bankruptcy filing" and finding "no meaningful distinction, for purposes of determining the secured status of a creditor's claim, between the surrender of real property and the surrender of a vehicle")).

5. *Practice Tips*

Attorneys have come up with creative solutions in chapter 13 cases to ensure a debtor can surrender property in an effective manner that relieves her of responsibility.[13] Section 1322(9) states that plans can "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*" (emphasis added). In *In re Rosa*,495 B.R. 522 (Bankr. D. Haw. 2013), the chapter 13 plan included this provision:

> 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 [address], 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.

The creditor did not object, and the court confirmed the plan over the trustee's objection to the quoted provision. Perhaps the result would have been different had the creditor objected. At least one subsequent case has declined to adopt an interpretation of section 1322(b)(9) that would allow a debtor to require a creditor to accept title. *See In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014). However, the extent to which attorneys may utilize section 1322(b)(9) remains an open question.

B. Real Estate

1. *Options requiring another party's cooperation*

a. Deed in lieu of foreclosure at the request of the creditor

Here, "after defaulting on a loan, the borrower agrees to deliver to the lender a deed to the property previously pledged as security for the debt. Delivery of such a deed in lieu of foreclosure of a previously executed mortgage encumbering the same property is given in compromise of the parties' rights and obligations under the mortgage and note (often, but not exclusively, in exchange for release of the lender's claim to any deficiency between the value of the property and the obligation due under the note)."[14]

b. Short sale

A creditor may also agree to a short sale. However, this option is likely off the table if more than one mortgage encumbers the property. First mortgagees are unlikely to take subject to the second mortgage, and second mortgagees are unlikely to accept the short sale.

Homeowners also need to carefully consider tax consequences in deciding whether this is an attractive option.

If debtors complete a short sale and the creditor does not waive a deficiency, there is a possibility that the deficiency would be found nondischargeable in a subsequent bankruptcy.

- 11 U.S.C. § 523(a)(2)(A) still requires proof of knowing and fraudulent representations by the debtors. *See Sandia Lab. Fed. Credit Union v. Torrez (In re Torrez)*, 415 B.R. 842, 846 (Bankr. D.N.M. 2009) (creditor failed to state a claim in nondischargeability complaint even though the mortgage holder agreed to a short sale, debtors then hired a bankruptcy attorney and filed their bankruptcy petition the day after the closing). "The only representations of fact alleged concern

> Defendants' dire financial condition which were true, and their failure to warn the Plaintiff that they intended to file a bankruptcy. Plaintiff alleges no intent to deceive, nor does it allege it relied on any representations. Plaintiff fails to allege it suffered damages as a proximate result of any representation by Defendants."

c. Letting real estate get sold for unpaid real estate taxes

Assuming the taxing authority takes action, letting the real estate get sold for unpaid real estate taxes is another way debtors could proceed if the bank does not foreclose. However, this is not a surefire way for a debtor to get rid of real estate, as the taxing authority may not want to sell the property and the debtor cannot compel it to do so.

In one case, a chapter 13 debtor inserted language in his plan stating that the county treasurer "shall sell according to law the real estate of the debtor . . . in strict foreclosure and shall not be paid by either the chapter 13 trustee or by the debtor as the debtor has no personal liability on this claim."[15] The treasurer objected, arguing in part that the debtor could not direct a governmental entity to sell the property. The court agreed with the treasurer. Although the debtor did not need the treasurer's consent to surrender collateral, the debtor could not use the plan to force the treasurer to sell the real estate.

2. *Bank walkaways: the debtor's options when the bank doesn't want to foreclose and the debtor is still liable for code violations and hates to mow the grass*

One court sums up the problem debtors face: "With the real estate collapse, lenders, who otherwise have the right to do so, are choosing not to foreclose on their collateral leaving homeowners in limbo. In the case of a chapter 7 debtor who has surrendered her home in bankruptcy and been relieved of any personal liability on the mortgage, she cannot truly be given a fresh start because HOA fees are still accumulating until a lender chooses to foreclose. If the lender never forecloses, that homeowner's liability for the HOA fees continues in perpetuity."[16]

a. Most courts will not require the bank to foreclose or accept title.

Most courts have refused to compel creditors to accept title to property that the debtor wishes to surrender.[17] However, a few bankruptcy courts have forced the bank to accept title. In response to the debtor's unopposed motion, the court in *In re Perry* issued an order stating that if the creditor did not institute foreclosure

proceedings, the debtor was "authorized to execute, deliver and record a quitclaim deed of the property."[18]

In one case[19] where the debtor had significantly worse problems than hating to mow the grass, a bankruptcy court even construed its equitable power under section 105 to allow it to deem the homeowner's association and bank to have consented to a sale of a condominium by the trustee under section 363. Calamitous flooding had severely damaged the unit, and the debtor did not have flood insurance. She continued to accumulate taxes and homeowner's association fees. Other courts[20] have sharply criticized the reasoning that section 105(a) allows a court to force a creditor to "consent" to a sale under section 363(f)(2), stating that it is in direct contravention of the Bankruptcy Code. The language of section 362(d) provides that the court shall terminate "[o]n request of a party in interest and after notice and a hearing," making no provision for the court to unilaterally terminate the stay.[21] Section 362(f) does not contain an applicable provision either.

b. Unilateral actions a debtor could take

1) Transferring title to a third party shell entity which takes responsibility for the upkeep

Commentators have suggested this as a possible option, albeit an untested one.[22] Such an attempt could potentially be subject to a successful attempt to pierce the corporate veil.[23]

2) Seeking Rule 9011 sanction vs. creditor if a motion for relief was filed but creditor never completes a foreclosure

Under Rule 9011(b), someone who files a paper or later advocates its position certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the position "(1) is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . ; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ." The bankruptcy court may sanction violators.

One bankruptcy court sanctioned a law firm for filing relief from stay motions but was reversed by the district court.[24] The bankruptcy court found that the attorney violated Rule

9011(b)(1) by filing "twenty-one relief from stay motions with no intent to proceed to a hearing on the merits . . . . [law firm] Pite's repeated filings of needless motions led to delays in the resolution of debtors' chapter 7 cases, increased costs to the debtors and creditors, and a substantially increased burden on the court." The court also found that the attorney violated Rule 9011(b)(3) by "knowingly or recklessly fil[ing] the motions without adequate evidentiary support in violation . . . , because the declarations filed with these motions were not competent to show that relief from stay was warranted." The court also found that the attorney's actions amounted to bad faith conduct in violation of section 105(a).

The district court held that the bankruptcy court had abused its discretion. It found that the law firm presented sufficient evidence that its clients intended to prosecute their relief from stay motions at the time of filing. The clients withdrew the motions only after the court ordered declarants to testify and authenticate business records, deciding that it would not be cost-effective to continue.[25] The court explicitly rejected "the notion that a business decision to withdraw a motion is a legitimate basis for imposing sanctions."[26]

Accordingly, it may be difficult to succeed in obtaining sanctions against a creditor who does not follow through with a foreclosure. Debtors may be more likely to succeed on the grounds of harassment if the motion indicates the foreclosure or foreclosure sale is pending or imminent, or that the creditor is in a hurry to foreclose and requests that the stay of the order granting relief per Bankruptcy Rule 4001(a)(3) be waived. Still, debtors would have to successfully argue that the motion was presented for the purpose of harassment.

C. Personal Property

1. *What are the debtor's obligations to accomplish a surrender of personal property?*

As above, the Bankruptcy Code does not provide explicit instructions on how to surrender collateral in the same way it provides instructions on the reaffirmation of debt or redemption of collateral for chapter 7 debtors.

a. One position is that the term "surrender" requires the giving or turning over of property

At issue in *In re Robertson* was a chapter 13 debtor's intention to surrender a vehicle pursuant to section 1325(a)(5)(C). *In re Robertson*, 72 B.R. 2, 4 (Bankr. D. Colo. 1985). The debtor maintained that his wife was in possession of the vehicle and it was the creditor's duty to discover its whereabouts. In reasoning that the debtor's declaration of surrender was inconsistent with the meaning of the term as it is used in section 1325, the court held that surrender meant the debtor had to provide the secured creditor with possession of the vehicle. *Id.* The court stated further that since the plan did not actually provide for treatment of the secured debt, either by way of payment or surrender of the security, and the debt was not disallowed under section 502 of the Code, the debt was not subject to discharge. *Id.*

In the *White* case, the district court, on appeal, found that by proposing to surrender the property, and not actually making the property available to the secured creditor, the debtors did not surrender their property under section 1325(a)(5)(C). *IRS v. White (In re White)*, 487 F.3d 199 at 203-04 (4th Cir. 2007). The court of appeals affirmed, stating, "[T]he fact that the IRS can potentially collect the value of the property only through judicial enforcement underscores why, in the absence of actual physical turnover of the property, the Whites' proposal is not a 'surrender' under the statute. By insisting that the IRS is not foreclosed from obtaining the property by way of adversarial litigation, the Whites are all but conceding that their proposed surrender would not result in their relinquishment of all of their legal rights to the property, including the rights to possess and use it." *Id.* at 206.

The view that a "surrender" can occur only upon tendering physical possession appears commonplace in state court. In an opinion touching upon the importance of physical possession of a vehicle for the sake of enforcing a lien, one court opined, "[O]nce a defendant stops payment on his check he must restore plaintiff's possession and put him in the position to enforce his mechanic's lien for the amount due . . . . [H]aving obtained possession of his car under a promise to pay cash, on refusal, he is estopped to resist enforcement of the mechanic's lien by reason of the possession thus acquired." *Leavitt v. Charles R. Hearn, Inc.*, 19 Ill. App. 3d 980, 984 (1st Dist. 1974). Similarly, the court in *General Motors Acceptance Corp. v. Allen* affirmed a conversion judgment against a repairman, holding that the repairman failed to surrender the vehicle, and thus was liable for conversion when he failed to tender its physical possession to the lienholder. *General Motors Acceptance Corp. v. Allen*, 52 Ill. App. 2d 114 (1st Dist. 1964).

It is perhaps equally as instructive that the same meaning prevails in other contexts: "To 'surrender' something means to 'give up the possession of it, especially into the power of another . . . the act of redelivering the instrument to the obligor.'" *Greeling v. Abendroth*, 351 Ill. App. 3d 658, 663 (4th Dist. 2004) (dealing with certificate of deposits); "[i]n isolation, the word 'surrender' appears to mean the complete giving up of rights to a thing. It is also clear . . . that the giving up of rights to a thing (or the giving up of a thing), if the thing is property or a property right, seems to involve not only the act of giving up, but the act of giving up in favor of another or 'into the power of another.'" *In re Lair*, 235 B.R. 1, 59 (Bankr. M.D. La. 1999) (dealing with home mortgage); "[t]he 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." *In re Stone*, 166 B.R. 621, 623 (Bankr. S.D. Tex. 1993), citing *In re Robertson* at 4 (dealing with abandonment of homestead).

b. Another position is that a debtor need not deliver a vehicle, nor even supply sufficient information for a successful repossession.

One case sums this position up succinctly: "The debtor is not required to take any affirmative action to physically deliver the property. But the debtor cannot impede the creditor's efforts to take possession of its collateral by available legal means." *In re Plummer*, 513 B.R. 135, 143-44 (Bankr. M.D. Fla. 2014).

According to this view, the debtor need not deliver the vehicle to have accomplished a surrender. *See In re Gabor*, 155 B.R. 391 (Bankr. N.D. W. Va. 1993). In fact, a debtor may even be able to surrender a vehicle under chapter 13 despite having no knowledge of its whereabouts.[27] "The fact that [the debtor], through no fault of her own, cannot physically drive the vehicle to the creditor's place of business does not obviate surrender of the vehicle." *In re Alexander*, 225 B.R. 665, 667 (Bankr. E.D. Ark. 1998). The court reasoned that the creditors were not without recourse, as they still had liens on the vehicles and the right to pursue the parties in possession.

One court reasoned, "The Bankruptcy Code uses the word 'deliver' when turning over physical possession is contemplated. The Code draws a distinction between delivering and surrendering property. The term surrender in 11 U.S.C. § 521(2)(A) was not intended to mean turning over physical possession to the lien holder."[28]

2. *Vehicles*

a. What if the creditor doesn't want the vehicle or delays picking up vehicle?

Again, like with real property, a debtor cannot force a creditor to accept possession of a vehicle. Therefore, abandoning the car in a garage or letting the city tow the car does not effect a transfer of possession to the creditor.

b. Who is responsible for the care of collateral after surrender (in a plan or in a statement of intention)?

If a creditor has not taken possession or title to property the debtor wishes to surrender, the debtor remains responsible for the collateral. This is precisely the issue that the First Circuit identified in *Pratt* - the debtors were stuck with a worthless vehicle. "Moreover, as the Pratts could not junk the vehicle without a release of the GMAC lien, they were confronted with the grim prospect of retaining indefinite possession of a worthless vehicle unless they paid the GMAC loan balance, together with all the attendant costs of possessing, maintaining, insuring, and/or garaging the vehicle." *In re Pratt*, 462 F.3d 14, 20 (1st Cir. 2006).

Other courts agree. "Solely surrender of possession to [a creditor] will not accomplish a change in the state of the title. Only a foreclosure or voluntary conveyance of the property will change the title and the responsibilities of ownership. Additionally, until the title is conveyed, the Debtor is responsible for insurance and up keep of the property." *In re Perry*, Ch. 13 Case No. 12-01633-8-RDD, 2012 WL 4795675 (Bankr. E.D.N.C. Oct. 9, 2012.

D. Destruction of collateral during the term of chapter 13 plan

- Although the court in *In re Lane*, 374 B.R. 830, 831 (Bankr. D. Kan. 2007), held "that surrender under § 1325(a)(5)(C) is not available when pursuant to the confirmed plan the Debtors initially elected to retain the collateral," it nevertheless allowed the debtor to amend the plan to "terminate payments on the 910-claim as of the date of destruction of the collateral and to pay the remaining portion of Creditor's claim as an unsecured claim." The creditor could "apply the insurance proceeds to the payment of its claim and may repossess and sell the vehicle, if the circumstances warrant."

- *In re Belcher*, 369 B.R. 465, 469 (Bankr. E.D. Ark. 2007): The "wreck in this case was an unanticipated event, a prerequisite to filing a modification under 11 U.S.C. § 1329, but as previously pointed out, 11 U.S.C. § 1329 does not

specifically permit such a modification [providing that the claim would be satisfied in full by payment of the insurance proceeds and the transfer of the wrecked vehicle] . . . . [I]f amendments such as the one proposed are permitted after a debtor destroys the creditor's collateral, regardless of how the destruction occurred, the creditors will bear all of the risk of depreciation and any uninsured casualty."

- In another case where the car was destroyed before confirmation of the plan, the court permitted the debtors "to utilize the insurance proceeds to purchase, for cash, a replacement vehicle. The vehicle must have a value of not less than $5,589, the sum of the insurance check and the withheld deductible. This will require the debtors to expend $500 from another source. [The creditor's] lien on the insurance proceeds shall transfer to and become a first priority lien on any such replacement vehicle." *In re Guthrie*, Ch. 13 Case No. 08-13000, 2009 WL 2208334, 2009 Bankr. LEXIS 2363 (Bankr. D. Kan. July 20, 2009).

E. Penalties exist for failure to turn over collateral

1. *Denial of discharge*

Under the Bankruptcy Code, transfer, removal, destruction, mutilation, or concealment of property of the estate with the intent to hinder, delay, or defraud a creditor or an officer of the estate is a ground for denial of discharge.[29]

2. *Bankruptcy fraud/crime*

The U.S. Code contains a number of bankruptcy-related crimes, starting at 18 U.S.C. § 151, et seq. Section 152 criminalizes knowing and fraudulent concealment from creditors or a court officer of estate assets.

3. *State crime*

Illinois, Indiana, and Wisconsin all have laws on the books that criminalize concealing property with intent to defraud creditors under specified circumstances.[30]

[1] 11 U.S.C. § 521(a)(2)(A)

[2] 11 U.S.C. § 521(a)(2)(B)

[3] *See* 11 U.S.C. § 524(c)

[4] *In re Watson*, 286 B.R. 594, 600 (Bankr. D.N.J. 2002); *In re Graham*, 144 B.R. 80, 81 (Bankr. N.D. Ind. 1992) (state law determines whether or not dragnet collateralization clause creates an a valid lien).

[5] *See In re Watson*, 286 B.R. at 601-02 (holding cross-collateralization provision not in violation of New Jersey's enactment of Section 9-402 of the Uniform Commercial Code). However, some state consumer debt statutes place limits on the security interests a secured party make take in certain consumer transactions. *See*, e.g., Wis. Stat. § 422.417.

[6] *See, e.g., In re Moore*, 50 B.R. 301, 302 (Bankr. S.D. Ohio 1985).

[7] *In re Casenove*, 306 B.R. 367, 371 (Bankr. M.D. Fla. 2004) (collecting cases): *In re Greer*, 189 B.R. 219 (Bankr. S.D. Fla. 1995); *In re Brady*, 171 B.R. 635, 636-37 (Bankr. N.D. Ind. 1994) (creditor had the "right to condition its acquiescence to a reaffirmation agreement upon the reaffirmation of other indebtedness" where the debtor entered into a security agreement containing a cross-collateralization clause that linked a debt on a personal line of credit to a debt incurred in connection with a car loan); *In re Briggs*, 143 B.R. 438, 445-46, 460 (Bankr. E.D. Mich. 1992) (credit union's refusal to accept a partial reaffirmation was not improper where debtor granted a credit union a security interest in his shares as a part of the security agreement he executed with the credit union in connection with a loan on a mobile home) (citing *In re James*, 120 B.R. 582, 586 (Bankr. W.D. Okla. 1990) (debtors have no right to compel a creditor to accept a partial reaffirmation of an undersecured indebtedness)).

[8] 11 U.S.C. § 722

[9] *See In re Burr*, 160 F.3d 843 (1st Cir. 1998); *In re Johnson*, 89 F.3d 249 (5th Cir. 1996); *In re Taylor*, 3 F.3d 1512 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383 (7th Cir. 1990); *In re Miller*, 443 B.R. 54, 58 (Bankr. D. Del. 2011) ("the pre-BAPCPA 'ride through' option available to debtors in the Third Circuit has been narrowed").

[10] *In re Edwards*, 901 F.2d 1383, 1386 (7th Cir. 1990).

[11] 11 U.S.C. § 1322(b)(2)

[12] A debtor may not use this treatment if the creditor "has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing." 11 U.S.C. § 1325(a)(*).

[13] David G. Baker, *Putting Teeth In "Surrender" Under Chapter 13*, NACTT Q., July/August/September 2014, 25.

[14] *Levenson v. Feuer*, 60 Mass. App. Ct. 428, 437, 803 N.E.2d 341, 348 (2004), citing *Deeds in Lieu of Foreclosure: Practical and Legal Considerations*, 26 Real Prop. Prob. & Tr. J. 459, 460-472 (1991).

[15] *See In re White*, 282 B.R. 418, 423 (Bankr. N.D. Ohio 2002).

[16] *Pigg v. BAC Home Loans Servicing LP (In re Pigg)*, 453 B.R. 728, 733 (Bankr. M.D. Tenn. 2011); *see In re Colon*, 465 B.R. 657, 663 n.20 (Bankr. D. Utah 2011).

[17] *See In re Cormier*, 434 B.R. 222 (Bankr. D. Mass. 2010); *In re Heck*, 2011 WL 133015 (Bankr. N.D. Cal. 2011).

[18] *In re Perry*, 2012 Bankr. LEXIS 4731 (Bankr. E.D.N.C. Oct. 9, 2012)

[19] *In re Pigg*, 453 B.R. 728, 736-37 (Bankr. M.D. Tenn. 2011)

[20] *In re Fristoe*, Ch. 7 Case No. 10-32887, 2012 WL 4483891 (Bankr. D. Utah Sept. 27, 2012)

[21] *In re Fristoe*, Ch. 7 Case No. 10-32887, 2012 WL 4483891 (Bankr. D. Utah Sept. 27, 2012).

[22] *See* "Stuck Between a Rock and a Hard Place. The plight of the homeowner, the homeowner's association and how the discharge effects them both" by Diane L. Drain (accessed at http://materials.abi.org/sites/default/files/2013/Aug/PigsGetFatHogsGetSlaughtered.pdf).

[23] *Id.*

[24] *In re Cabrera-Mejia*, 402 B.R. 335, 348 (Bankr. C.D. Cal. 2008) *rev'd*, No. CV 09-0631 DMG, 2011 WL 6101559 (C.D. Cal. Dec. 6, 2011).

[25] *In re Cabrera-Mejia*, No. CV 09-0631 DMG, 2011 WL 6101559 (C.D. Cal. Dec. 6, 2011).

[26] *In re Cabrera-Mejia*, No. CV 09-0631 DMG, 2011 WL 6101559, at *10 (C.D. Cal. Dec. 6, 2011).

[27] *In re Anderson*, 316 B.R. 321, 323 (Bankr. W.D. Ark. 2004); In re Alexander, 225 B.R. 665, 667 (Bankr. E.D. Ark. 1998).

[28] *In re Cornejo*, 342 B.R. 834, 836-37 (Bankr. M.D. Fla. 2005).

[29] 11 U.S.C. § 727(a)(2)(A)

[30] Wis. Stat. § 943.84 Transfer of encumbered property (criminalizing concealing, removing or transferring any personal property in which one knows another has a security interest with intent to defraud; failing to pay over to the secured party the proceeds from the sale of property subject to a security interest);
Ind. Code § 35-43-5-4(8). Fraud -- Defrauding creditors (criminalizing concealing, encumbering, or transferring property with intent to defraud ones's creditor);
720 ILCS 5/17-27(a) Fraud in insolvency (criminalizing destroying, removing, concealing, encumbering, transferring any property with the intent to defeat or obstruct the claim of any creditor, if a person knows that proceedings have or are about to be instituted for the appointment of a receiver or other person entitled to administer property or that any other composition or liquidation for the benefit of creditors has been or is about to be made).