AMERICAN BANKRUPTCY INSTITUTE

2017 Northeast Consumer Forum

Reaffirmation and Surrender: A Debtor's Dilemma Demystified

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1. *Reaffirmation Agreements*

a. What is the Significance of a Reaffirmation Agreement

A reaffirmation agreement is a post-petition agreement between and individual chapter 7 debtor and a creditor whereby the debtor agrees to continue to make payments on a pre-petition debt in order to retain the collateral. Most people take out loans to purchase homes and automobiles. Because of the discharge afforded by chapter 7, these debts become non-recourse obligations once a debtor filed for chapter 7 relief. That means that in the event of a post-petition default, the bank could repossess the car or foreclose on the home, but could not pursue the debtor for any deficiency remaining afterwards – the lender's only recourse is against its collateral. Sounds like a win-win for the Debtor. They get to keep the collateral provided they keep making payments, but they can also walk away from the collateral at any time (or force the bank to collect it) without any downside obligation.

b. Renewal of Personal Liability

A reaffirmation upsets the apple cart of this nice state of affairs and puts the Debtor back on the hook for the obligation. So, while this debt was discharged by the bankruptcy, now the creditor is asking the debtor to reaffirm the debt and make it recourse once again. This means that if the Debtor later defaults on the obligation and the creditor forecloses on their home or repossesses their car, the debtor is once again liable for the deficiency as if the bankruptcy never occurred. Why would a debtor agree to this? The simple answer is that most folks in today's society need a place to live and a car to drive, and reaffirming these obligations may be the only way to keep these essential.

c. The Ride Through Option

As recently as ten years ago, the general consensus among practitioners was to never recommend that their clients sign reaffirmation agreements. The typical practice was the so-called "ride-through" option. This was simply to ignore the provisions of 11 U.S.C. §521(a)(2). That section, embodied in Official Form B8, requires a debtor to select the treatment for collateral secured by claims. The choices are: (1) surrender the property; (2) retain the property and claim it as exempt (only with respect to real property); (3) redeem the property; or (4) reaffirm the obligation and keep the property. Noticeably absent is the option to "just keep paying and retain use of the property," yet for the last couple decades, that was the path most folks chose, and for good reason. Why would you get your client off the hook for a debt, only to have them sign back up for the same debt, especially if they could just keep paying the obligation and retain the collateral? So the standard became to not select anything under §521 and the courts and secured lenders were generally OK with this.

But even with the enactment of §521(a)(2) the ride-through option is still viable in a number of situations, including, among other, the following:

i. Where the debtor has discharged its obligation to make an election under §521, but the court refuses to approve the agreement. In such a case, the stay termination under §§362(H), 521(a)(6) and 521(d) do not apply. See e.g. In re: Chim, 381 B.R. 191(Bankr. D. Md. 2008).

ii. Where the debtor makes its election, but the creditor refuses to agree to reaffirmation.

iii. Where the debtor elects to retain the collateral, but fails to agree to reaffirm the debt and resides in a state where *ipso facto* clauses are not enforceable under applicable state law. In that case even though the stay will have ended, the creditor will be prohibited from exercising its rights to repossess if there is no payment default.

iv. Where the debtor remains current and the credit agreement has no *ipso facto* clause.

v. Where the creditor agrees – expressly or by inaction – to allow a ride through.

2. *The Pros and Cons of Reaffirming*

The answer as to why one would consider reaffirmation lies in the changes in the code and adaptation of policies of lenders since BAPCPA was enacted. One of the many pro-creditor amendments to the code under BAPCPA was the addition of §521(d). That section provides that nothing in the Code prevents or limits the operation of a so-called *ipso facto* clause if the debtor fails to timely surrender or redeem collateral, or reaffirm the debt, if such clause is enforceable under state law. Virtually all security agreements and mortgages provide for an acceleration of the obligation upon the filing of bankruptcy – a/k/a an *ipso facto* clause.

So now, in the absence of a redemption, surrender or reaffirmation, a bank can legally exercise its security interest in its collateral post-petition, even in the absence of a payment default. Do banks exercise these rights? Anecdotal evidence suggests they do

not do so regularly, despite the code authority. Why would a lender wish to repossess an automobile where the Debtor is making payments and is, by definition, insolvent, just for lack of a reaffirmation? Typically, a lender recovers only about 40-60 percent of the loan balance when a vehicle is repossessed. See The Grip Repo: Record Defaults in '08, Motortrend Forums (Oct. 2008). Likewise, state courts are often ready and willing to enjoin a foreclosure of a residence where the mortgagee is making his or her payments. Banks want repayment on their debt, they generally don't want the collateral back. However, we occasionally see banks become a bit more aggressive on these agreements and compelling debtors to sign.

But there is an even more compelling reason to sign reaffirmations than merely to comply with the Code and/or keep your lender happy. Rather, reaffirmation can be a good way for your client to begin rebuilding post-petition credit. Payments made on reaffirmed debt are generally reported to the credit rating agencies, whereas payments on discharge debts generally are not reported. Therefore, if one is making payments over a long period of time, these payments can have a marked effect on debtor's credit. Moreover, many lenders refuse to send monthly statements where a debt has been discharged, so the process of making these payments is facilitated by a reaffirmation. Many lenders are also unwilling to modify a mortgage that has not been reaffirmed. So, your client could lose out on a later opportunity to modify his or her mortgage if they don't reaffirm.

Another major advantage to a reaffirmation is that it gives you the opportunity to renegotiate the credit. The terms of the reaffirmation are not required to be the same as the original and creditors are often willing to renegotiate interest rates, amortization or

the reduction or elimination of fees or penalties as an incentive to sign the agreement. In some jurisdictions, courts have shown a reluctance to sign reaffirmation agreements for pro se debtors, or where there is a presumption of undue hardship, if the creditor has not offered more favorable terms in the agreement. See generally, Austin & Lassman, Reaffirmation Agreements in Consumer Bankruptcy Cases, 2d Ed. American Bankruptcy Institute, p. 9 (2010).

The obvious downside of reaffirmation is that your client is now back on the hook for debt you just had discharged in the case. If they later default on their payment obligations, they will be liable for any deficiency following either a repossession or foreclosure.

a. Importance of Counseling the Client

The attorney's role in reviewing in the reaffirmation process should begin early in the case and somewhat behind the scenes. Throughout the petition preparation, you should critically assess your client's ability to manage their financial affairs. In many cases, clients enter into these secured transactions at a time when their income justified the debt. But a later change of circumstances that may have been unforeseeable brought them into your office. In other instances, it was just bad credit decisions that led to bankruptcy. Is your client unlucky or reckless? That's not a question you can ask, but a conclusion you have to draw from an analysis of their total situation, and let that conclusion inform your advice on reaffirmation. In addition to handicapping whether your client can make the payments required by the reaffirmed debt, you should look at the value of the collateral compared to the debt they are reaffirming. Is the house or car under water? If so, it might be time to get an apartment or turn in the car. I often tell my clients there is no better time to dump a car or house than in a chapter 7. If a house or car loan is

a bad deal, and you "allow" them to reaffirm it, you might be looking at a suit down the road if there's a deficiency action.

According to the BAPCPA Report of 2014, in the first circuit there were 2,271 reaffirmation agreements filed in the 20,669 consumer cases filed in 2014, or **roughly 11% of the cases**. See 2014 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. If you are going to recommend to your client they sign a reaffirmation, you are in the distinct minority among lawyers (at least you were in 2014) to make that recommendation. Does that put you in the cross hairs later? Perhaps so. That is why an open and forthright communication with your client about all the ramifications of reaffirmation needs to be held, preferably in writing.

b. Mechanics of the Reaffirmation Agreement

As noted above, a debtor has 30 days from the meeting of creditors to perform the intentions stated under §521(a)(2)(B). If your client's goal is to reaffirm, the agreement must be filed before the court grants a discharge. Note that you might be required to seek an extension of the discharge deadline to complete a reaffirmation, but you should make that request before the discharge is granted pursuant to Fed. R. Bank. P. 4004(c)(2). Note also that once a discharge is granted, it may be difficult, or impossible, to pursue reaffirmation.

Section 524(c)(1) governs the specifics of reaffirmation agreements and is reproduced in **Appendix A** attached hereto. Fortunately, the official form 2400A is fairly thorough and walks one through the statutory requirements. A copy of this form is attached hereto as **Appendix B.** In addition, the reaffirmation agreement must be accompanied by Official Form 427, the Reaffirmation Cover Sheet, a copy of which is attached hereto as **Appendix C**. **Make sure your jurisdiction does not have its own local forms.** Lenders will typically complete these forms

and forward them to counsel for completion and signing, but not always. If your client is willing and capable of reaffirming a debt, don't wait for the bank to do the legwork or assume they will do so. Also, don't be shy about pestering the bank to get you a draft of reaffirmation – really it's in the bank's better interest, so I don't mind asking them to take the laboring oar.

Note also that some states, such as New Hampshire, require that the reaffirmation agreement be accompanied by the best available evidence of the claim and, as appropriate, copies of the underlying contractual documents. See N.H. AO 4008-1.

The official forms contain everything you should need to get the reaffirmation approved, including all of the disclosures in §524(k). NOTE, however, that in Massachusetts, there has been added language in the local attorney certification form as follows:

> "I do not warrant the ability of the debtor to perform the terms of this reaffirmation agreement, and the execution of this declaration by me shall in no way be construed as a guaranty by me of the debtor's obligations under this reaffirmation agreement."

This language provides potential cover to lawyers who agree to sign reaffirmation agreements – and not all do – with respect to their client's ability to perform thereunder. Make certain you are using the most up-to-date form and if you have a local form, like Massachusetts, be certain to use that one rather than the official form 2400A.

Once the agreement is filed, the Court may or may not hold a hearing. The Court will typically not hold a hearing if there is no presumption of undue hardship under §524(m) if the debtor was represented by an attorney during the course of negotiations or the debt is a consumer debt secured by a mortgage or other lien on real property. This suggests a strong bias in favor of representation by counsel.

Under section 524(d), the court is required to hold a hearing on a reaffirmation if the Debtor is not represented by counsel in the reaffirmation agreement, at which hearing the debtor is required to appear and be informed by the court that he or she is not required to reaffirm the debt, and the legal consequence of the agreement and a potential default thereunder. The court must also determine whether the agreement complies with requirements of the code. Of course, the court may also hold a hearing even if the debtor is represented by counsel where the income and expense information do not support enough disposable income to make the reaffirmation affordable and it will cause the debtor undue hardship. It is important that you review your local rules to ensure they do not differ with respect to these requirements.

Although section 524(c) requires that a reaffirmation agreement be made before the granting of a discharge, one may, in some instances, move for a reopening of a case to seek entry of a reaffirmation agreement. See Manning v. CitiMortgage (in re Manning), 505 B.R. 383 Bkrtcy D.N.H. 2014).

Appendix A

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

When and Whether to Reaffirm

Recent Reaffirmation Cases, and the Benefits and Risks of Not (Timely) Reaffirming Debts

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The decision to reaffirm is a difficult one for a debtor, because the concept of reaffirmation—which is effected through a formal agreement that the reaffirmed debt will survive the bankruptcy and thus will *not* be discharged through the bankruptcy process—is contrary to the notion that bankruptcy provides a "fresh start" from which a debtor can emerge unburdened by discharged debt. Indeed, debtors may be inclined to reaffirm debts for large-ticket items that, on a percentage basis, often comprise the largest and most financially burdensome portion of their total debt load, such as houses or vehicles.

Debtor's counsel may be asked to sign off on each debt reaffirmation and, if counsel does so, he or she certifies to the bankruptcy court that the debtor is voluntarily entering into the agreement after being fully informed about the effects and consequences of such agreements, and that entering into the agreement will not give rise to an "undue hardship" for the debtor. *In re Griffin,* 563 B.R. 171 (Bankr. M.D.N.C., 2017) (before signing off on reaffirmation agreement, an attorney has a duty to independently verify the creditor's security interest and determine that the lien is unavoidable, apprise the debtor of other options, and be cognizant of their duty to the Court). This is an exercise that debtor's counsel must approach very seriously, both because the failure to do so is at odds with counsel's obligations to the bankruptcy court, and because the

decision to reaffirm (or not) will have broad and long-lasting implications for a debtor, with markedly different implications depending on the debtor's chosen path.

A. The Benefits of Reaffirmation and the Risks of Not Doing So

As an initial matter, it is important to remember that the decision of whether or not to reaffirm is rarely a clear-cut "yes" or "no" decision, and is one which must be guided—because of the required hardship analysis—by the present and reasonably foreseeable financial condition of the debtor. Debtor's counsel can, and should, use the reaffirmation question as an opportunity to sit down with his or her clients and determine what the client can realistically afford to pay on a consistent basis and still maintain a minimal standard of living. *See In re Melendez*, 224 B.R. 258, 261 (Bankr. D. Ma. 1998) (while the bankruptcy code does not define the phrase "undue hardship", it is "logical that counsel for a debtor, called upon to make the determination that the reaffirmation of debt will not cause an undue hardship to the debtor and the debtor's dependents, will be fully apprised of various facts—including the amount and terms of the debt to be reaffirmed, whether the goods to be retained are necessaries of the debtor and the debtor's dependents, whether there is real risk of replevin if the debtor opts to not reaffirm, and what would be revealed by a comparison of the replacement value of the subject goods with the amount of reaffirmed debt"). It may be that, after undertaking that analysis, it is apparent that a debtor cannot reaffirm one or more debt obligations as those debts are currently structured. In those instances particularly, but also in the reaffirmation context generally, debtors and their counsel can use the possibility of reaffirmation as an opportunity to negotiate with willing creditors regarding any aspect of the loan at issue, including the interest rate, payment term, payment structure, or even the scope of the creditor's remedies in the event of a future default. Indeed, a core requirement for reaffirmation is that the debtor and creditor enter into a

reaffirmation *agreement* reflecting the outcome of the reaffirmation negotiation process. Through that negotiation process, a debtor and his or her counsel may be able to negotiate changes in loan terms that could transform a loan that would be an undue hardship for the debtor to reaffirm absent modification, into one where the reaffirmed-as-modified debt is sustainable for the debtor.

Reaffirming offers other benefits to debtors. For reaffirmed debts with lenders that routinely make reports to credit reporting agencies, a debtor's post-reaffirmation timely performance of his or her reaffirmed payment obligations will help to improve a debtor's credit score, thereby maximizing the possibility that a debtor will be able to obtain future credit on favorable terms to meet (for example) the debtor's future housing and transportation needs. In contrast, if a debtor does not reaffirm a debt but nevertheless continues to pay on a mortgage or car loan, those timely post-discharge payments will almost certainly *not* be reported by the creditor to any credit reporting agency, thereby depriving a debtor of the credit-enhancing benefits of making timely post-bankruptcy loan payments. *See* Daniel A. Austin & Donald AR. Lassman, *Reaffirmation Agreements in Consumer Bankruptcy Cases*, at 5 (2nd ed. 2010) ("Moreover, making payments on a reaffirmed debt may help rebuild the debtor's credit rating, since payments on the debt are reported to credit reporting agencies, whereas payments on a discharged debt generally are not.").

Also, a lender will likely be unwilling to explore debt restructuring or refinancing options with a debtor post bankruptcy for debts that have not been reaffirmed. This is due, in large measure, to the practical effects of the discharge injunction imposed by 11 U.S.C. § 524(a)(2). A lender that negotiates with a debtor on discharged debt may run afoul of that injunction, thereby exposing the lender to both (i) liability and risk in the form of contempt or other

sanctions, and (ii) the risk that the modified or refinanced debt terms are unenforceable as a matter of law. *See In re Goldston*, Case No. 13-50438, 2016 WL 1238220 (Bankr. S.D. Ohio March 29, 2016); *Venture Bank v. Lapides*, 800 F.3d 442 (8th Cir. 2015) (affirming lower court judgment that bank violated the discharge injunction when it entered into a post-discharge payment agreement with the debtor as means of avoiding foreclosure). That risk can extend beyond the individual bankruptcy context, and may implicate the financial affairs of even non-bankrupt businesses with which a debtor is affiliated. For example, in *Americorp Fin. L.L.C. v. Schwarz (In re Schwarz)*, Case No. 15-00044-9-SWH-AP, 2016 WL 7413478 (Bankr. E.D.N.C. Dec. 22, 2016), the court held that a lender to business entity with which a former debtor was associated violated the discharge injunction when it asked the debtor (which had received a discharge as to guaranteed debt during the bankruptcy) to sign a new guaranty of the business entity's obligations to the lender as part of and in consideration for the lender's entry into the forbearance agreement. The *In re Schwartz* court held that the forbearance agreement was invalid and unenforceable as to the debtor. *Id.* at *4

Those holdings have implications for both lender and debtors. Lenders, on the one hand, should be extremely wary of engaging in any discussions with discharged debtors respecting forbearance or restructuring of non-reaffirmed debt, and would be well advised to keep abreast of bankruptcy proceedings involving both borrowers and persons obligated on business debt through personal guarantees. From a debtor's perspective, counsel should assume that the best and safest opportunity to discuss debt restructuring is in the reaffirmation context, and that one beneficial effect of reaffirmation is that it preserves the possibility of a subsequent refinancing or loan modification with the current lender. Debtor's counsel should also advise the clients, prior to a bankruptcy filing, of the collateral consequences that the bankruptcy could have on their

non-debtor businesses, including negatively impacting the businesses' ability to obtain otherwise-routine forbearance arrangements on commercial loans for which the debtor, prior to the bankruptcy filing, was a guarantor.

B. Recent Cases

The remainder of this memo will canvas, in bullet summary format, recent cases (since 2015) relating to debt reaffirmation, broken down by the subject matter of their core holding or more salient conclusion as related to reaffirmation.

i. Timing of Deadline to Enter into Reaffirmation Agreements.

- *In re Sallad,* Case No. 15-50911, 2016 WL 1442364 (Bankr. M.D. Ga. Feb. 29, 2016) (denying motion to reopen case to seek reaffirmation after discharge was entered and case was closed; ruling is premised on notion that, under 11 USC § 524(c)(1), reaffirmation agreements are unenforceable unless the agreement was made before the granting of a discharge).

- *In re Easter*, 562 BR 783 (Bankr. W.D. Ok. 2017) (rejecting minority rule that case can be reopened and reaffirmation approved in "special circumstances" under Fed. R. Civ. P. 60(b)(6) and the court's equitable powers, instead adopting strict rule that any reaffirmation agreement made post discharge is unenforceable as a matter of law).

- *In re Schuller*, Case No. 15-41336 (Bankr. N.D. Ohio January 5, 2016) (statutory requirements under 524(c) cannot be waived or extended after discharge occurs; because reaffirmation agreement was not executed before the discharge entered, extending the deadline to file a reaffirmation agreement would be futile).

- *In re Rich,* 544 B.R. 436 (Bankr. E.D. Ca. 2016) (while 11 U.S.C. § 524(c) authorizes entry into a reaffirmation agreement only prior to entry of discharge, the Court relied upon Fed. Rule Bankr. P. 4004(c)(2) to defer the discharge during the negotiation of a reaffirmation agreement).

- *In re Seigal*, 535 BR 5 (Bankr. D. Mass. 2015) (allowing reopening of case to permit evidentiary hearing as to whether settlement agreement could be approved as reaffirmation agreement; premise is that if parties can prove that settlement agreement was *entered into* pre-discharge, then it could be approved as a pre-discharge reaffirmation agreement even if the actual Court approval came post-discharge. Strict discharge-based deadline is premised on entry into reaffirmation agreement, rather than approval thereof.).

ii. Timing of Deadline to File Reaffirmation Agreements with the Court.

- *In re Richards*, Case No. 16-20571 (Bankr. D. Me. Jan. 9, 2017) (court granted motion under Fed. R. Bankr. P. 4008(a) to extend deadline by which reaffirmation agreements must be filed, but cautioned that such an extension, which was given at the Court's discretion with likely not be granted in the future. Such motions are appropriate if the Debtor and his or her counsel have been reasonably diligent in trying to negotiate a reaffirmation agreement but have not completed the negotiation process. "Waiting nearly two months after the petition date to start a process that frequently takes some amount of time is not reasonable diligence."

- *In re Smith*, Case No. 14-32433, 2015 WL 3455356 (Bankr. N.D. Ohio May 28, 2015) (rule 4008(a) allowance that the time for filing reaffirmation agreements may be enlarged "at any time" cannot overcome requirement that reaffirmation agreements must be entered into before the debtor's discharge).

iii. Timing of Deadline to Rescind Reaffirmation Agreements

- *In re Galloway-O'Connor,* 539 BR 404 (Bankr. E.D. N.Y. 2015) (right to rescind reaffirmation extends for 60 days from the date the reaffirmation agreement is filed with the Court, and the bankruptcy Court has no authority to provide a remedy to a debtor who simply changes his or her mind after that 60 day period has run).

iv. ***Reaffirmation Hearings; Rebutting the Presumption of Undue Hardship***

- *In re Nielsen,* Case No. 15-01596, 2016 WL 589504 (Bankr. N.D. Iowa Feb. 12, 2016) (denying reaffirmation because presumption of hardship arose (debts on Schedule J exceeded income on Schedule I) and debtors had not rebutted presumption of undue hardship. Mere assertion from debtors that they could, essentially, find a way to make it work, combined with the fact that there are less expensive transportation options available to the Debtors" does not rebut the presumption."

- *In re Freeman*, Case No. 16-11756, 2017 WL 2062871 (Bankr. M.D. Ala. May 11, 2017 (reaffirmation of lavish debts not a basis for bad faith finding that warrants dismissal of debtor's case).

v. ***What Constitutes an Enforceable Reaffirmation Agreement***

- *In re Jenerette*¸ 558 B.R. 189 (Bankr. E.D. Mich. 2016) (reaffirmation agreements must be in writing, and a written agreement is not made until both parties sign it. An oral reaffirmation is not enforceable under section 524(c)).

vi. ***The Role of Counsel in the Reaffirmation Process***

- *In re Griffin,* 563 B.R. 171 (Bankr. M.D.N.C. 2017) (before signing off on a reaffirmation agreement, an attorney has a duty to independently verify the creditor's security interest and: (i) determine that the lien is unavoidable; (ii) apprise the debtor of other options; and (iii) be cognizant of counsel's duty to the court; requiring the debtor's attorney to appear and show cause as to why he should not be sanctioned under Fed. R. Bank. P. 9011).

v. ***Risks for Creditors With Respect to Post-Discharge Negotiations Regarding Non-Reaffirmed Debts***

- *Boyd v. New People's Bank, Inc.* (*In re Boyd*), Bankr. W.D. VA 2016 (bank held liable for discharge injunction in doing post-bankruptcy loan where one component was refinancing of prepetition debt, on premise that *where any part of the consideration for a post-petition agreement is based upon a discharged debt, the agreement must comply with 524(c),"* Summary judgment on liability for the Debtor, hearing to be held on damages with court expressing doubt that there is any damage).

- *Americorp Fin. L.L.C. v. Schwarz (In re Schwarz)*, No. 15-00044-9-SWH-AP, 2016 WL 7413478 (Bankr. E.D.N.C. Dec. 22, 2016) (lender to business entity with which former debtor was associated violated the discharge injunction when it asked the debtor (which had received a discharge as to guaranteed debt during the bankruptcy) to sign a new guaranty of the business entity's obligations to the lender as part of and in consideration for the lender's entry into the forbearance agreement).

- *Venture Bank v. Lapides*, 800 F.3d 442 (8th Cir. 2015) (affirming lower court judgment that bank violated the discharge injunction when it entered into a post-discharge payment agreement with the debtor as means of avoiding foreclosure).

vii. Differences for Reaffirmation/Surrender as Between Real and Personal Property

- *In re Elkouby*, 561 BR 551 (Bankr. S.D. Fla. 2016) (as to real property, surrender is only as to C7 Trustee and does not bar a debtor from contesting foreclosure if that property is later abandoned by the C7 Trustee, and rejecting cases that hold otherwise; in contrast, for personal property, abandonment means that the debtor cannot retain possession).

- *But see Bank of America, N.A. v. Rodriguez*, 558 B.R. 945 (S.D. Fla. 2016) (district court rejected *Elkouby* holding, and reopened case at the request of the creditor to allow the creditor to compel the debtor to surrender real property for which the debtor had not filed a reaffirmation agreement prior to discharge).

viii. Reaffirmation versus Lease Assumption

- Reaffirmation is for debt transactions, not leases, and the proper method by which a debtor can assume a lease as to personal property is under section 365(p)(2), which does not require any Court approval. *In re Allmond,* Bankr. S.D. GA 2015 (case no. 15-40953); 11 U.S.C. § 365(p)(2) (allowing for reaffirmation of personal property leases by debtors simply through a notice-driven process).

ix. The Interplay Between Reaffirmation and Statutory Exemptions

- *In re Traverse,* 753 F.3d 19 (1st Cir. 2014) (trustee could not sell real property free of the debtor's homestead exemption even in instances where the trustee had avoided and preserved for the estate a consensual mortgage lien on the property where the debtor was current on her payment obligations to her mortgage lender; notably, it appears from the docket that the debtor did *not* reaffirm her debt, but the First Circuit glossed over that fact by noting that the Chapter 7 Trustee made "no claim to Traverse's property based on his position as mortgagee [so] we find no reason to challenge her reaffirmation in this case).

APPENDIX B

Form 2400A (12/15)

Check one.
☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
See Debtor's Statement in Support of Reaffirmation, Part II below, to determine which box to check.

UNITED STATES BANKRUPTCY COURT

In re _____, Case No. _____
Debtor

Chapter _____

REAFFIRMATION DOCUMENTS

Name of Creditor: _____

☐ Check this box if Creditor is a Credit Union

PART I. REAFFIRMATION AGREEMENT

Reaffirming a debt is a serious financial decision. Before entering into this Reaffirmation Agreement, you must review the important disclosures, instructions, and definitions found in Part V of this form.

A. Brief description of the original agreement being reaffirmed: _____
For example, auto loan

B. ***AMOUNT REAFFIRMED***: $_____

The Amount Reaffirmed is the entire amount that you are agreeing to pay. This may include unpaid principal, interest, and fees and costs (if any) arising on or before _____, which is the date of the Disclosure Statement portion of this form (Part V).

See the definition of "Amount Reaffirmed" in Part V, Section C below.

C. The ***ANNUAL PERCENTAGE RATE*** applicable to the Amount Reaffirmed is _____%.

See definition of "Annual Percentage Rate" in Part V, Section C below.

This is a *(check one)* ☐ Fixed rate ☐ Variable rate

If the loan has a variable rate, the future interest rate may increase or decrease from the Annual Percentage Rate disclosed here.

D. Reaffirmation Agreement Repayment Terms *(check and complete one)*:

☐ $_____ per month for _____ months starting on_____.

☐ Describe repayment terms, including whether future payment amount(s) may be different from the initial payment amount.

E. Describe the collateral, if any, securing the debt:

Description: _____
Current Market Value $_____

F. Did the debt that is being reaffirmed arise from the purchase of the collateral described above?

☐ Yes. What was the purchase price for the collateral? $_____

☐ No. What was the amount of the original loan? $_____

G. Specify the changes made by this Reaffirmation Agreement to the most recent credit terms on the reaffirmed debt and any related agreement:

	Terms as of the Date of Bankruptcy	Terms After Reaffirmation
Balance due *(including fees and costs)*	$_____	$_____
Annual Percentage Rate	_____%	_____%
Monthly Payment	$_____	$_____

H. ☐ Check this box if the creditor is agreeing to provide you with additional future credit in connection with this Reaffirmation Agreement. Describe the credit limit, the Annual Percentage Rate that applies to future credit and any other terms on future purchases and advances using such credit:

PART II. DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

A. Were you represented by an attorney during the course of negotiating this agreement?

Check one. ☐ Yes ☐ No

B. Is the creditor a credit union?

Check one. ☐ Yes ☐ No

C. If your answer to EITHER question A. or B. above is "No," complete 1. and 2. below.

1. Your present monthly income and expenses are:

   a. Monthly income from all sources after payroll deductions (take-home pay plus any other income) $_____

   b. Monthly expenses (including all reaffirmed debts except this one) $_____

   c. Amount available to pay this reaffirmed debt (subtract b. from a.) $_____

   d. Amount of monthly payment required for this reaffirmed debt $_____

   If the monthly payment on this reaffirmed debt (line d.) ***is greater than*** *the amount you have available to pay this reaffirmed debt (line c.), you must check the box at the top of page one that says "Presumption of Undue Hardship." Otherwise, you must check the box at the top of page one that says "No Presumption of Undue Hardship."*

2. You believe that this reaffirmation agreement will not impose an undue hardship on you or your dependents because:

   Check one of the two statements below, if applicable:

   ☐ You can afford to make the payments on the reaffirmed debt because your monthly income is greater than your monthly expenses even after you include in your expenses the monthly payments on all debts you are reaffirming, including this one.

   ☐ You can afford to make the payments on the reaffirmed debt even though your monthly income is less than your monthly expenses after you include in your expenses the monthly payments on all debts you are reaffirming, including this one, because:

   Use an additional page if needed for a full explanation.

D. If your answers to BOTH questions A. and B. above were "Yes," check the following statement, if applicable:

☐ You believe this Reaffirmation Agreement is in your financial interest and you can afford to make the payments on the reaffirmed debt.

Also, check the box at the top of page one that says "No Presumption of Undue Hardship."

PART III. CERTIFICATION BY DEBTOR(S) AND SIGNATURES OF PARTIES

I hereby certify that:

(1) I agree to reaffirm the debt described above.

(2) Before signing this Reaffirmation Agreement, I read the terms disclosed in this Reaffirmation Agreement (Part I) and the Disclosure Statement, Instructions and Definitions included in Part V below;

(3) The Debtor's Statement in Support of Reaffirmation Agreement (Part II above) is true and complete;

(4) I am entering into this agreement voluntarily and am fully informed of my rights and responsibilities; and

(5) I have received a copy of this completed and signed Reaffirmation Documents form.

SIGNATURE(S) (If this is a joint Reaffirmation Agreement, both debtors must sign.):

Date _____ Signature _____
Debtor

Date _____ Signature _____
Joint Debtor, if any

Reaffirmation Agreement Terms Accepted by Creditor:

Creditor _____ _____
Print Name *Address*

_____ _____ _____
Print Name of Representative *Signature* *Date*

PART IV. CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY)

To be filed only if the attorney represented the debtor during the course of negotiating this agreement.

I hereby certify that: (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Check box, if the presumption of undue hardship box is checked on page 1 and the creditor is not a Credit Union.

Date _____ Signature of Debtor's Attorney_____

Print Name of Debtor's Attorney _____

Reset Save As... Print

PART V. DISCLOSURE STATEMENT AND INSTRUCTIONS TO DEBTOR(S)

Before agreeing to reaffirm a debt, review the terms disclosed in the Reaffirmation Agreement (Part I above) and these additional important disclosures and instructions.

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps, which are detailed in the Instructions provided in Part V, Section B below, are not completed, the Reaffirmation Agreement is not effective, even though you have signed it.

A. DISCLOSURE STATEMENT

1. **What are your obligations if you reaffirm a debt?** A reaffirmed debt remains your personal legal obligation to pay. Your reaffirmed debt is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Your obligations will be determined by the Reaffirmation Agreement, which may have changed the terms of the original agreement. If you are reaffirming an open end credit agreement, that agreement or applicable law may permit the creditor to change the terms of that agreement in the future under certain conditions.

2. **Are you required to enter into a reaffirmation agreement by any law?** No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments that you agree to make.

3. **What if your creditor has a security interest or lien?** Your bankruptcy discharge does not eliminate any lien on your property. A ''lien'' is often referred to as a security interest, deed of trust, mortgage, or security deed. The property subject to a lien is often referred to as collateral. Even if you do not reaffirm and your personal liability on the debt is discharged, your creditor may still have a right under the lien to take the collateral if you do not pay or default on the debt. If the collateral is personal property that is exempt or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the collateral, as the parties agree or the court determines.

4. **How soon do you need to enter into and file a reaffirmation agreement?** If you decide to enter into a reaffirmation agreement, you must do so before you receive your discharge. After you have entered into a reaffirmation agreement and all parts of this form that require a signature have been signed, either you or the creditor should file it as soon as possible. The signed agreement must be filed with the court no later than 60 days after the first date set for the meeting of creditors, so that the court will have time to schedule a hearing to approve the agreement if approval is required. However, the court may extend the time for filing, even after the 60-day period has ended.

5. **Can you cancel the agreement?** You may rescind (cancel) your Reaffirmation Agreement at any time before the bankruptcy court enters your discharge, or during the 60-day period that begins on the date your Reaffirmation Agreement is filed with the court, whichever occurs later. To rescind (cancel) your Reaffirmation Agreement, you must notify the creditor that your Reaffirmation Agreement is rescinded (or canceled). Remember that you can rescind the agreement, even if the court approves it, as long as you rescind within the time allowed.

6. **When will this Reaffirmation Agreement be effective?**

   a. **If you *were* represented by an attorney during the negotiation of your Reaffirmation Agreement and**

      i. **if the creditor is not a Credit Union**, your Reaffirmation Agreement becomes effective when it is filed with the court unless the reaffirmation is presumed to be an undue hardship. If the Reaffirmation Agreement is presumed to be an undue hardship, the court must review it and may set a hearing to determine whether you have rebutted the presumption of undue hardship.

      ii. **if the creditor is a Credit Union**, your Reaffirmation Agreement becomes effective when it is filed with the court.

   b. **If you *were not* represented by an attorney during the negotiation of your Reaffirmation Agreement**, the Reaffirmation Agreement will not be effective unless the court approves it. To have the court approve your agreement, you must file a motion. See Instruction 5, below. The court will notify you and the creditor of the hearing on your Reaffirmation Agreement. You must attend this hearing, at which time the judge will review your Reaffirmation Agreement. If the judge decides that the Reaffirmation Agreement is in your best interest, the agreement will be approved and will become effective. However, if your Reaffirmation Agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home, you do not need to file a motion or get court approval of your Reaffirmation Agreement.

7. **What if you have questions about what a creditor can do?** If you have questions about reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement. If you do not have an attorney helping you, you may ask the judge to explain the effect of this agreement to you at the hearing to approve the Reaffirmation Agreement. When this disclosure refers to what a creditor "may" do, it is not giving any creditor permission to do anything. The word "may" is used to tell you what might occur if the law permits the creditor to take the action.

B. INSTRUCTIONS

1. Review these Disclosures and carefully consider your decision to reaffirm. If you want to reaffirm, review and complete the information contained in the Reaffirmation Agreement (Part I above). If your case is a joint case, both spouses must sign the agreement if both are reaffirming the debt.

2. Complete the Debtor's Statement in Support of Reaffirmation Agreement (Part II above). Be sure that you can afford to make the payments that you are agreeing to make and that you have received a copy of the Disclosure Statement and a completed and signed Reaffirmation Agreement.

3. If you were represented by an attorney during the negotiation of your Reaffirmation Agreement, your attorney must sign and date the Certification By Debtor's Attorney (Part IV above).

4. You or your creditor must file with the court the original of this Reaffirmation Documents packet and a completed Reaffirmation Agreement Cover Sheet (Official Bankruptcy Form 427).

5. *If you are not represented by an attorney, you must also complete and file with the court a separate document entitled "Motion for Court Approval of Reaffirmation Agreement" unless your Reaffirmation Agreement is for a consumer debt secured by a lien on your real property, such as your home.* You can use Form 2400B to do this.

C. DEFINITIONS

1. **"Amount Reaffirmed"** means the total amount of debt that you are agreeing to pay (reaffirm) by entering into this agreement. The total amount of debt includes any unpaid fees and costs that you are agreeing to pay that arose on or before the date of disclosure, which is the date specified in the Reaffirmation Agreement (Part I, Section B above). Your credit agreement may obligate you to pay additional amounts that arise after the date of this disclosure. You should consult your credit agreement to determine whether you are obligated to pay additional amounts that may arise after the date of this disclosure.

2. **"Annual Percentage Rate"** means the interest rate on a loan expressed under the rules required by federal law. The annual percentage rate (as opposed to the "stated interest rate") tells you the full cost of your credit including many of the creditor's fees and charges. You will find the annual percentage rate for your original agreement on the disclosure statement that was given to you when the loan papers were signed or on the monthly statements sent to you for an open end credit account such as a credit card.

3. "**Credit Union"** means a financial institution as defined in 12 U.S.C. § 461(b)(1)(A)(iv). It is owned and controlled by and provides financial services to its members and typically uses words like "Credit Union" or initials like "C.U." or "F.C.U." in its name.

Fill in this information to identify your case:
Debtor 1 _____ (First Name / Middle Name / Last Name)
Debtor 2 (Spouse, if filing) _____ (First Name / Middle Name / Last Name)
United States Bankruptcy Court for the: _____ District of _____
Case number (If known) _____

Appendix C

Official Form 427

Cover Sheet for Reaffirmation Agreement

12/15

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?**
   _____
   Name of the creditor

2. **How much is the debt?**
   On the date that the bankruptcy case is filed $_____
   To be paid under the reaffirmation agreement $_____
   $_____ per month for _____ months (if fixed interest rate)

3. **What is the Annual Percentage Rate (APR) of interest? (See Bankruptcy Code § 524(k)(3)(E).)**
   Before the bankruptcy case was filed _____%
   Under the reaffirmation agreement _____% ❑ Fixed rate ❑ Adjustable rate

4. **Does collateral secure the debt?**
   ❑ No
   ❑ Yes. Describe the collateral. _____
   Current market value $_____

5. **Does the creditor assert that the debt is nondischargeable?**
   ❑ No
   ❑ Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. **Using information from *Schedule I: Your Income*** (Official Form 106I) **and *Schedule J: Your Expenses*** (Official Form 106J)**, fill in the amounts.**

Income and expenses reported on Schedules I and J		Income and expenses stated on the reaffirmation agreement	
6a. Combined monthly income from line 12 of Schedule I	$ _____	6e. Monthly income from all sources after payroll deductions	$ _____
6b. Monthly expenses from line 22c of Schedule J	− $ _____	6f. Monthly expenses	− $ _____
6c. Monthly payments on all reaffirmed debts not listed on Schedule J	− $ _____	6g. Monthly payments on all reaffirmed debts not included in monthly expenses	− $ _____
6d. **Scheduled net monthly income** Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.	$ _____	6h. **Present net monthly income** Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.	$ _____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

7. **Are the income amounts on lines 6a and 6e different?**	❑ No ❑ Yes.	Explain why they are different and complete line 10._____
8. **Are the expense amounts on lines 6b and 6f different?**	❑ No ❑ Yes.	Explain why they are different and complete line 10._____
9. **Is the net monthly income in line 6h less than 0?**	❑ No ❑ Yes.	A presumption of hardship arises (unless the creditor is a credit union). Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses. Complete line 10.
10. **Debtor's certification about lines 7-9** If any answer on lines 7-9 is *Yes*, the debtor must sign here. If all the answers on lines 7-9 are *No*, go to line 11.	I certify that each explanation on lines 7-9 is true and correct. ✘ _____ Signature of Debtor 1 ✘ _____ Signature of Debtor 2 (Spouse Only in a Joint Case)	
11. **Did an attorney represent the debtor in negotiating the reaffirmation agreement?**	❑ No ❑ Yes.	Has the attorney executed a declaration or an affidavit to support the reaffirmation agreement? ❑ No ❑ Yes

Part 2: Sign Here

Whoever fills out this form must sign here.

I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this *Cover Sheet for Reaffirmation Agreement*.

✘ _____ Date _____
Signature MM / DD / YYYY

_____
Printed Name

Check one:

❑ Debtor or Debtor's Attorney
❑ Creditor or Creditor's Attorney

Print Save As... Add Attachment Reset

Is Surrender Just a State of Mind?:
The Subtleties of Surrender in Chapter 7 and Chapter 13

Kate E. Nicholson
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Cambridge, MA

A debtor's ability to surrender property is an integral part of both chapter 7 and chapter 13. In a chapter 7 case, a debtor can indicate their intent to surrender property on the statement of intention pursuant to § 521(a)(2). In a chapter 13 case, providing for surrender of property to a secured creditor through a chapter 13 plan is one of the three permissible ways to treat a secured claim pursuant to § 1325(a)(5)(C).

But what does it mean to surrender property? How is surrender accomplished? What are the implications of surrendering property? After surrender, can a debtor escape liability for post-surrender taxes, insurance, condo fees, and other property-related charges? Can a creditor be forced to title to surrendered property? Can a debtor do nothing, instead?

What Does Surrender (Really) Mean?

The Bankruptcy Code does not define surrender. Instead, courts around the country have been called upon to determine its meaning. In the First Circuit, the court's decision in *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14 (1st Cir. 2006) has given courts a starting point.

In *In re Pratt*, the First Circuit provided a common-sense definition of surrender for purposes of a chapter 7 debtor's statement of intention under § 521(a)(2).[1] The court

[1] The issue in *In re Pratt* was whether a secured creditor violated the discharge injunction when it refused to release its lien on a valueless vehicle (so that the vehicle could be

found that "the most sensible connotation of 'surrender' in the present context is that the debtor agreed to make the collateral *available* to the secured creditor - *viz.*, to cede his possessory rights in the collateral - within 30 days of the filing of the notice of intention to surrender possession of the collateral." *Id.* at 18-19.

The court determined that declaring an intention to surrender property in a chapter 7 case does not mean that the debtor is required to turnover the property to the secured creditor. The court explained: "Since Congress did not use the term 'deliver,' however, one reasonably may assume that 'surrender' does not necessarily contemplate that the debtor physically have transferred the collateral to the secured creditor. *See*, *e.g.*, *In re Cornejo*, 342 B.R. 834, 836-37 (Bankr. M.D. Fla. 2005)." *Id.* at 18.

Likewise, the First Circuit found that the debtor's statement of intention to surrender property does not translate into an obligation on the creditor's part to accept the property. The court explained, "nothing in subsection 521(a)(2) remotely suggests that the secured creditor is *required* to accept possession of the [collateral] at the end of the 30-day period, as such a reading would be at odds with well-established law that a creditor's decision whether to foreclose on and/or repossess collateral is purely voluntary and discretionary." *Id.* at 19.

Though the First Circuit noted that its definition of surrender applied to "the present context", i.e. a chapter 7 statement of intention, many courts have also applied this definition of surrender to the context of a chapter 13 plan. *See, e.g.*, *In re Tosi*, 456 B.R. 487 (Bankr. D. Mass. 2016); *Wells Fargo Bank, N.A. v. Sagendorph (In re Sagendorph)*, 562 B.R. 545 (D. Mass. 2017); *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C.

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taken to a junk yard) unless the underlying debt was paid in full. The First Circuit found that under these facts, the creditor had violated the discharge injunction.

2014); *Arsenault v. JP Morgan Chase Bank, N.A. (In re Arsenault)*, 456 B.R. 627 (Bankr. S.D. Ga. 2011); *In re Rosa*, 495 B.R. 522 (Bankr. D. Haw. 2013); *Batali v. Mira Owners Ass'n (In re Batali)*, 2015 Bankr. LEXIS 4050 (B.A.P. 9th Cir. Dec. 1, 2015); *In re Williams*, 542 B.R. 514 (Bankr. D. Kan. 2015). In so doing, these courts have all agreed that "surrender" means to cede possessory rights. However, some courts have found it means more than that.

The decision of the United States Bankruptcy Court for the District of Massachusetts in *In re Tosi* is representative of the view that surrender means more than ceding possessory rights – it also requires a complete passivity on the part of the debtor. 456 B.R. 487 (Bankr. D. Mass. 2016). In *In re Tosi*, the court denied confirmation of a plan that, *inter alia*, provided that the debtor would surrender property to the secured creditor but only if the debtor was first unable to sell the property. *Id.* at 492. Under the *Tosi* court's view, because surrender must "leave[] the rights of the creditor to its collateral unmodified and unimpaired," anything other than immediate relinquishment is insufficient. *Id.* On this reading, surrender is a complete and unmitigated letting go of any claim to the property. In rejecting the chapter 13 plan's provision for surrender at a future time, the *Tosi* court explained:

> "The retention of collateral for any length of time is inconsistent with surrender and takes the plan out of the operation of that subsection. Though the Plan provides for surrender at a later time, as a default option, still it does not solely and exclusively provide for surrender. A plan that modifies the secured creditor's rights in its collateral in any degree is not one that surrenders the property in the manner required by §1325(a)(5)(C)."

Id.[2]

For further discussion of the meaning of surrender in the chapter 13 context, see the "forced vesting" below.

What Does Surrender Look Like?

If surrender means, at the very least, ceding possessory rights in property, but at the same time does *not* mean actually delivering that property to the secured creditor, then how can a debtor demonstrate surrender? The answer seems to be: by staying out of the way.

Chapter 7

In a chapter 7 case, surrender, to the extent it is accomplished, is accomplished through the statement of intention required by § 521(a)(2). A debtor proclaims their intention to surrender the property: I surrender! But then, quite often, nothing happens. The debtor need not deliver the property and the creditor generally cannot be forced to take the property. Instead, the creditor can choose whether it wants to exercise its state law rights and foreclose or repossess the property. Furthermore, the hanging paragraph of § 521(a)(2) makes clear that the debtor's stated intention does not affect the debtor's rights in the property, at least under the Bankruptcy Code. It states, "nothing in subparagraphs (A) and (B) of this paragraph [which set out the requirement to provide a statement of intention] 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)(hanging paragraph).

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[2] The court's decision in *In re Tosi* does not address the implications of §§ 1303, 363(b), (f), or (l), i.e. a chapter 13 debtor's right to use, sell or lease estate property, including through a plan, to the propriety of surrendering property at a later date through a chapter 13 plan.

Section 362(h) provides, in turn, that if the debtor fails to perform their stated intention with respect to personal property, then the automatic stay terminates as to that property. 11 U.S.C. § 363(h). With respect to real property, even if a debtor indicates the intent to surrender, the creditor must nevertheless seek relief from the automatic stay.

Chapter 13

In a chapter 13 case, there is no statement of intention for a debtor to complete. Instead, the debtor proposes a plan that can provide for the treatment of the debtor's secured claims. Section 1325(a)(5) enumerates the three ways a secured claim provided for by a chapter 13 plan can be treated: with the consent of the secured creditor, by paying the value of the secured claim in full through the plan, or by surrender of the collateral to the secured creditor. *See*, *Assocs. Commer. Corp. v. Rash*, 520 U.S. 953, 956-957 (1997).

A chapter 13 plan that provides for surrender and nothing more is much like a debtor indicating their intent to surrender property through the statement of intention. The debtor is not required to deliver the property to the creditor and, for now at least, the creditor is still required to seek relief from the automatic stay in order to exercise its rights against the property, if it so chooses.

Official Form 113: The new form plan

The requirement to seek relief from stay, however, is slated to change with the adoption of the new form plan. Under the new Official Form 113 Chapter 13 Plan scheduled to take effect on December 1, 2017, the plan itself provides for the self-executing termination of the automatic stay upon confirmation. Under the surrender section of the plan, the language of Official Form 113 reads:

> "The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor's claim. The debtor(s) request that upon confirmation of this plan the stay under 11 U.S.C. § 362(a) be terminated as to the collateral only and that the stay under § 1301 be terminated in all respects. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below."

Under the new form plan, then, relief from the automatic stay will be a given. Moreover, this immediate termination of the automatic stay upon plan confirmation is among the mandatory provisions for opt-out plans under new Fed. R. Bankr. P. 3015.1, so even districts that opt-out of the form plan will be required to include this language. However, keep in mind that the plan allows for nonstandard provisions, assuming certain procedures are followed, so surrender without relief from stay may still be possible after December 1, 2017.

The Risk of Judicial Estoppel

Within a chapter 7 case, indicating an intent to surrender property is rather inconsequential – the property need not be delivered, the bankruptcy rights of the debtor and the trustee remain unaffected, and a creditor must still seek relief from automatic stay to exercise its rights against the property. Surrender in this context might be seen as a way to signal "not redeem and not reaffirm" more than a way for a debtor to proclaim an affirmative desire to cede all possessory right in the collateral. If a debtor chooses not to reaffirm or redeem, the debtor can just "surrender" with impunity, right? The creditor will still need to exercise its remedies in accordance with state law and the debtor, presumably, would retain their state law defenses.

Not so fast. Many courts, including several in Massachusetts and the United States Court of Appeals for the Eleventh Circuit, have found that a debtor who

"surrenders" property in a chapter 7 case is estopped from challenging a foreclosure or bringing other claims against a mortgagee in subsequent state court proceedings.

These courts find that because the debtor indicated the intent to surrender the property, i.e. to cede their possessory right in the property, and received a discharge of underlying debt, the debtor presented a position in a judicial proceeding and prevailed. Consequently, the doctrine of judicial estoppel prevents the erstwhile debtor from presenting a contrary position, i.e. *not* ceding their possessory rights, in a subsequent proceeding. *See, e.g.*, *Failla v. Citibank, N.A. (In re Failla)*, 838 F.3d 1170 (11th Cir. 2016) (finding judicial estoppel prevented former chapter 7 debtors from challenging foreclosure or bringing claims against mortgagee because statement of intention indicated debtors would surrender subject property); *Hull v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 41929 (D. Or. Mar. 28, 2016) (same); *Ibanez v. U.S. Bank Nat'l Ass'n*, 856 F. Supp. 2d 273 (D. Mass. 2012) (same); *In re Elowitz*, 550 B.R. 603 (Bankr. S.D. Fla. 2016) (same); *Melo v. Villarcon*, 2015 Mass. App. Div. LEXIS 8 (Mass. App. Div. Mar. 10, 2015) (same); *Schiavone v. Kiah*, 24 LCR 798 (Mass. Land Ct. Dec. 20, 2016) (same); *Souza v. Bank of Am.*, 2013 U.S. Dist. LEXIS 94663 (D. Mass. July 8, 2013) (same);

In its decision in *Failla v. Citibank, N.A. (In re Failla)*, the Eleventh Circuit explains why the hanging paragraph of § 521(a)(2) does not change this result.

> "The hanging paragraph in section 521(a)(2) also does not give the debtor the right to oppose a foreclosure action…The hanging paragraph means that section 521(a)(2) does not affect the debtor's or the trustee's *bankruptcy* rights…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 [debtors] 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 [debtors] may not say one thing in bankruptcy court and another thing in state court[.]" *In re Failla*, 838 F.3d at 1177-1178.

However, this view is not universal. Some courts that have rejected the application of judicial estoppel based on a debtor's statement of intention and in so doing, have noted that the statement of intention has no effect on discharge (so the debtor did not "prevail" at anything by completing it), the surrender is to the trustee not the secured creditor, and the statement is not an enforceable contract. *See, e.g.*, *In re Ryan*, 560 B.R. 339 (Bankr. D. Haw. 2016) (statement of intent has no impact on discharge and is not enforceable; thus, because the debtor does not "prevail" on a statement of intention, judicial estoppel is not implicated); *In re Elkouby*, 561 B.R. 551 (Bankr. S.D. Fla. 2016) (finding that the "surrender" that is effected under the chapter 7 statement of intention is to the trustee not the secured creditor and thus, if the trustee abandons the property back to the debtor, the debtor is not estopped from defending against foreclosure); and *In re Gregory*, 2017 Bankr. LEXIS 1631 (Bankr. W.D. Mo. June 14, 2017) (where debtor indicated intent to surrender and lienholder mistakenly released lien, statement of intention was not an enforceable contract and debtor could not be forced to transfer property).

The decisions finding judicial estoppel seem to assume that surrender of the property was essential to the debtor obtaining a discharge of the underlying debt and therefore, that the debtor somehow benefited from the surrender. In actuality, the surrender has no role in whether the underlying debt is discharged in a chapter 7. Only if

the debt was reaffirmed, would it survive this discharge. Indeed, in a chapter 7 case, a secured debt is discharged even when a debtor indicates the intent to reaffirm or redeem but fails, for whatever reason, to realize that intention. When this happens, the hanging paragraph of § 521(a)(2) might provide for termination of the stay, but the debtor's discharge is not affected. *See*, *In re Ryan*, 560 B.R. 339, 351 (Bankr. D. Haw. 2016) ("As a matter of bankruptcy law, the [debtors'] discharge was entirely independent of the "surrender" of the Property. Section 727 says that 'the court shall grant the debtor a discharge, unless' certain conditions exist. These conditions are read strictly, narrowly, and in favor of the debtor. None of the conditions that justify denial of discharge has anything to do with the statement of intention. Thus, debtors are entitled to a chapter 7 discharge regardless of (1) whether they file a statement of intention, (2) what they say in their statement of intention, and (3) whether they carry out their stated intent.").

The Debtor Has Surrendered: Now what?

Now the waiting starts. A debtor's declared surrender of property generally does not obviate a creditor's need to exercise its state law remedies in order to repossess or foreclose on its collateral. Nor does surrender, in and of itself, create an obligation on the part of the secured creditor to act. The First Circuit has made clear that a secured creditor's decision whether "to foreclose on and/or repossess collateral is purely *voluntary and discretionary." Pratt v. GMAC (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006); *Canning v. Beneficial Maine, Inc. (In re Canning),* 706 F.3d 64, 69 (1st Cir. 2013) (same).

Post-petition taxes, condo and homeowner association fees, and other expenses

Until a creditor decides to exercise its state law rights, the debtor remains the owner of the property and as such, remains liable for all post-petition costs related to the property, including real estate taxes, condo fees, municipal charges, and the like. *See, e.g.*, *Maple Forest Condo. Ass'n v. Spencer (In re Spencer)*, 457 B.R. 601 (E.D. Mich. 2011) (Chapter 13 debtor remained liable for post-petition condo fees); *Batali v. Mira Owners Ass'n (In re Batali)*, 2015 Bankr. LEXIS 4050 (B.A.P. 9th Cir. Dec. 1, 2015) (unpublished) (same).

For a debtor trying to reorganize in a chapter 13 or seeking a fresh start though a chapter 7, these post-petition charges for unwanted property can be a burden. Unsecured creditors can also be affected – the funds a debtor has available to make plan payments may be diminished by the debtor's ongoing obligation to pay property-related expenses.

Another particularly difficult issue for debtors is property insurance. While the mortgagee will usually purchase insurance to protect its own interest in the property, this insurance does not protect the debtor should an accident occur on the property. And if the property is vacant, it may not be possible for the debtor to obtain insurance, leaving the debtor open to a wide range of potential post-petition liabilities.

Still Waiting: What (if anything) can be done?

In some cases, a secured creditor can take years to foreclose or repossess collateral. And as discussed above, during this time a debtor is incurring post-petition liability for taxes, condo or homeowners' association fees, and other property-related expenses. Moreover, if a debtor is unable to obtain insurance on a vacant property, they may also be exposed to a continued risk of liability should someone get injured on the

property. Instead of just waiting, is there anything a debtor can do to stop owning the surrendered property?

Forced Vesting

In the past several years, creative chapter 13 debtors have revived a rarely-used provision of § 1322(b) to try to force secured creditors to take title to surrendered property. These so-called "forced vesting" plans rely on § 1322(b)(9), which allows a debtor to "provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity" and the surrender provision of § 1325(a)(5)(C) to both surrender property *to* the secured creditor and vest property *in* the secured creditor. These plans have met with mixed results, with the majority of courts finding that such plans are not true surrender plans and therefore, cannot be confirmed over the objection of a secured creditor.

The crux of the issue is whether vesting property in a secured creditor is fundamentally at odds with the more passive stance of surrender – merely staying out of the way. Courts that have allowed forced vesting plan have found that surrender, viz. ceding possessory rights, is a necessary pre-condition to vesting property in other entity. Under this view, any vesting plan must by definition satisfy the surrender prong of § 1325(a)(5)(C). *See*, *In re Rosen*, 2015 Bankr. LEXIS 4448 (Bankr. D. Kan. Feb. 24, 2015); *see also*, *In re Sagendorph*, 2015 Bankr. LEXIS 2055 (Bankr. D. Mass. June 22, 2015), reversed by, remanded by *Wells Fargo Bank, N.A. v. Sagendorph (In re Sagendorph*, 562 B.R. 545 (D. Mass. 2017); *In re Brown*, 2016 Bankr. LEXIS 4557 (Bankr. D. Mass. Mar. 4, 2016), vacated and remanded by *Selene Fin. LP v. Brown (In re Brown)*, 563 B.R. 451 (D. Mass. 2017); *In re Zair*, 535 B.R. 15 (Bankr. E.D.N.Y. 2015),

reversed by, remanded by *HSBC Bank USA, N.A. v. Zair*, 550 B.R. 188 (E.D.N.Y. 2016); *In re Watt*, 520 B.R. 834, 837 (Bankr. D. Or. 2014) vacated by, remanded by *Bank of N.Y. Mellon v. Watt*, 2015 U.S. Dist. LEXIS 54041, 2015 WL 1879680 (D. Or. April 22, 2015).

For courts rejecting forced vesting plans, a creditor remaining free to exercise (or refrain from exercising) its state law remedies is an essential part of surrender that is impaired through forced vesting. Because forced vesting infringes upon a secured creditor's state law rights, it is not a true surrender and thus, such plans cannot be confirmed under § 1325(a)(5)(C). *See*, *Selene Fin. LP v. Brown (In re Brown)*, 563 B.R. 451 (D. Mass. 2017); *Wells Fargo Bank, N.A. v. Sagendorph (In re Sagendorph)*, 562 B.R. 545 (D. Mass. 2017); *HSBC Bank USA, N.A. v. Zair (In re Zair)*, 550 B.R. 188 (E.D.N.Y. 2016); *Bank of N.Y. Mellon v. Watt (In re Watt)*, 2015 U.S. Dist. LEXIS 54041 (D. Or. Apr. 22, 2015); *In re Tosi*, 546 B.R. 487 (Bankr. D. Mass. 2016); *In re Weller*, 548 B.R. 392 (Bankr. D. Mass. 2016); *In re Sherwood*, 2016 Bankr. LEXIS 263 (Bankr. S.D.N.Y. Jan. 28, 2016); *In re Williams*, 542 B.R. 514 (Bankr. D. Kan. 2015); *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014); and, *In re Malave*, 2014 Bankr. LEXIS 5383 (Bankr. S.D.N.Y. Apr. 11, 2014).

The trend at this point seems to be against forced vesting, though the United States District Court for the District of Massachusetts has urged debtors to keep hope. After rejecting confirmation of the forced vesting plan before the court on appeal in *Wells Fargo Bank, N.A. v. Sagendorph (In re Sagendorph)*, the court noted:

> "Bankruptcy courts are essentially courts of equity, and their proceedings inherently proceedings in equity. A bankruptcy court is therefore entitled to select the remedy it considers most just in a given case, taking into account any applicable statutory constraints, the factual record, and the broader context in which the case arises. In so doing, the bankruptcy court is able to shape . . . malleable [equitable] principles so as to accommodate the changing needs and mores of society. Forced vesting under Chapter 13 not only addresses debtors' evolving needs in the aftermath of the housing market crisis, but is also consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor—debtor relationships." 562 B.R. at 557-558.

It seems that until such time as the elusive secret to forced vesting is discovered, debtors surrendering property through a chapter 13 plan will have to keep on waiting for that foreclosure sale date. And as for a chapter 7 debtor? Never surrender.

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REAFFIRMATION AND SURRENDER: A DEBTOR'S DILEMMA DEMYSTIFIED

1. Background and Debtor's options with respect to property securing a debt.

The fundamental purpose of federal bankruptcy law is to give debtors a financial "fresh start" from burdensome debts. Local Loan Co. v. Hunt, 292 U. S. 234, 244 (1934). The goal is accomplished mainly through the automatic stay provisions, which allow the debtor a "breathing spell" upon filing a bankruptcy petition, and the discharge, which relieves debtors from personal liability. Debtors may voluntarily opt to forego a discharge. 11 U.S.C. § 727(a) (10). But a more common method of not benefitting from a discharge of a particular debt is reaffirmation agreements. Reaffirmation agreements present a dialectic dilemma with the basic bankruptcy law goals. Legislative history reveals that Congress almost banned reaffirmation agreements to be included in the 1978 Bankruptcy Reform Act. However, the same were allowed under limited and monitored conditions. There is still ongoing discussion as to whether reaffirmation agreements undermine or facilitate the consumer bankruptcy system. Charles Jordan Tabb, The Law of Bankruptcy, Third Edition, § 10.36.

Judicial concern varies from district to district. In Puerto Rico, very few reaffirmation agreements are filed, and all filed concern vehicles given as collateral to two financial institutions. Almost all reaffirmation agreements are signed by the attorney for the debtor. An excellent reference regarding reaffirmation agreements is: Daniel A. Austin and Donald R. Lassman, Reaffirmation Agreements in Consumer Cases, Second Edition, ABI (2010). Appendix A to this handbook shows that in only 2% of cases closed in the district of Puerto Rico

reaffirmation agreements were filed. Updated data shows that from 2013 to June 2017 only 665 reaffirmation agreements have been filed in the district of Puerto Rico, which translates in 1.3% of cases filed.

The two primary assets of our individuals and families are the home and a vehicle. Most people who purchase a home finance it through a mortgage and the real property serves as collateral to the loan. Likewise, when purchasing a vehicle, the personal property is given as collateral to a money security agreement. The security agreements are governed by State law. These two assets are the main subject of reaffirmation agreements.

Persons filing a bankruptcy petition must file schedules and a statement of financial affairs disclosing the debtor's assets, liabilities and financial condition. 11 U. S. C. § 521(a)(1). Among the schedules that must be filed is Schedule D, which includes all property subject to a security interest. Individuals filing a Chapter 7 petition have a special obligation to also include a "Statement of Intention", which discloses whether the debtor intends to surrender or retain the collateral. 11 U. S. C. § 521(a)(2). The "Statement of Intention" is an official form, Official Bankruptcy Form B240A/B ALT. If the debtor's intention is to retain the collateral, then the debtor must either redeem the property (See §722: Redemption) by paying the current replacement value of the collateral, or enter into a "reaffirmation agreement" with the secured creditor. See Bankruptcy Law Manual, 5th Edition, §§ 8:4,10:6. Although unsecured claims may be reaffirmed, such action is very rare and is not the subject of this panel discussion.

A reaffirmation agreement is the tool through which the individual chapter 7 debtor, who intends to keep the collateral after filing the chapter 7 petition, and the secured creditor, agree to the payment of the prepetition debt to retain the collateral given as security. This postpetition action of reaffirming a debt that may be discharged as to personal liability may seem to be

contrary to the main goal of bankruptcy of providing a "fresh start." However, there are possible reasons prompting the debtor to retain property. See Amber J. Moren, The Debtor's Dilemma: Economic Analysis of Asset Retention in Consumer Bankruptcy, Yale Law School Legal Scholarship Repository, January 1, 2012. The most common reasons for entering into reaffirmation agreements are: to keep unencumbered property, preserve a relationship with a particular creditor, settlement of dischargeability litigation and to protect a co-debtor. Charles Jordan Tabb, The Law of Bankruptcy, Third Edition, § 10.35. Also, the reaffirmation agreement may include repayment terms that are more favorable to the debtor than the original ones. See In re Strong, 203 B. R. 921 (Bankr. E.D. Tenn. 1999). We must be conscious that a creditor's right to foreclose on a lien passes through bankruptcy notwithstanding the discharge of personal liability. Johnson v. Home State Bank, 501 U. S. 78 (1991).

Most of the reaffirmation agreements that are filed concern vehicles. See: William C. Whitford, A History of the Automobile Lender Provisions of BAPCPA, University of Illinois Law Review, Vol. 2007, pg. 144.However, we must note that there are conflicting views regarding real estate mortgages concerning debtor's residence when the promissory note is not reaffirmed by the debtor. See Charles Parker, II, Conundrum of Continuing REM Payments Post-Chapter 7 Discharge, ABI Journal, December 2016; and compare with David D. MacKnight, Fear Not: Mortgages and the Non-Reaffirmed Mortgage Note, ABI Journal, March 2013.

Statement of intention

Pursuant to section 521(2) if an individual debtor schedules assets that are consumer debts and are secured by property of the estate, the debtor must surrender such property unless

the same is exempt or the debtor states his intention to redeem such property or reaffirm the debt securing such property.

The Bankruptcy Code provision governing the filing of the "Statement of Intention" is 11 U. S. C. § 521(a)(2)(A). The debtor discloses in the form how each property subject to a security interest will be treated, that is, whether each specific property will be surrendered or redeemed. There are time limitations for the filing of the "Statement of Intention" form and for action to be taken on the same. The "Statement of Intention" must be filed within 30 days from petition date and served on the chapter 7 trustee and the creditor. See Fed. R. Bankr. P. 1007(b)(2). The debtor must perform his intention 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" fixes. § 521(a)(2)(B).

There are consequences if the debtor fails to timely file the "Statement of Intention" regarding personal property. Section 362(h) provides for an early termination of the automatic stay if the debtor fails to timely file the form and perform in accordance with the stated intention. The automatic stay terminates as to personal property if the debtor fails to timely "(within 30 days from petition date) file the "Statement of Intention" form. The automatic stay also terminates if the debtor timely files the form but fails to specify which option is selected, that is, surrender, redeem or reaffirmation. The automatic stay also terminates if the debtor fails to perform within 30 days after the first date set for the 341 meeting of creditors. The termination of the automatic stay for these reasons allows the secured creditor to initiate or continue foreclosure proceedings in state court. Considering the interaction of section 521(a)(2) and section 362(h), the termination of the stay in § 362(h) applies only in individual chapter 7 cases. Bankruptcy Law Manual, 5th Edition, § 7:47. In this regard, the statement of intention filing requirements

and the early termination of the automatic stay appear to conflict with the basic goal of federal bankruptcy law of allowing debtors a "breathing spell."

Some courts have found that there is an exception to the latter if the debtor informs that it intends to reaffirm on the same terms as the original contract. This is so because both parties must agree to a reaffirmation agreement. Section 524(c) makes manifest that reaffirmation agreements require a meeting of the minds. In re Jamo, 283 F. 3d 392 (1st Cir. 2002). A creditor may decide to refuse to enter into a reaffirmation agreement. In re Turner, 156 F. 3d 713 (7th Cir. 1998). This scenario has been considered as a fourth option and is the subject of debate. See Special commentary: Performance and interpretation of debtor's duties regarding retention or surrender of property of bankruptcy estate encumbered by consumer debt under 11 U. S. C. § 521(2), 159 A.L.R. 521 (2000). However, there is strong argument to the position that after the 2005 BAPCPA amendments there are only three alternatives in section 521(a)(2): surrender, redemption or reaffirmation. Bankruptcy Law Manual, 5th Edition, § 3:15, pages 628 - 630. The First Circuit Court of Appeals in Pratt v. General Motors Acceptance Corp., 462 F.3d 14, 17 - 18 (1st Cir. 2006) specifically stated that § 521(a)(2) "contemplates three distinct debtor prerogatives: reaffirmation, redemption or surrender." It is strongly recommended that individual chapter 7 debtors intending to retain a collateral either exercise the right to redemption pursuant to section 722 or comply with the requirements in section 524 for filing a statement of intention and a reaffirmation agreement.

Section 521(a)(6) also provides for the early termination of the automatic stay, albeit different from section 362(h). An individual chapter 7 debtor shall not retain possession of personal property given as collateral to a creditor with an allowed claim unless the debtor within 45 days after the first meeting of creditors under section 341(a) either enters into a reaffirmation

agreement under section 524 or redeems the property under section 722. Please note that for there to be an allowed claim the creditor must file a proof of claim. 11 U. S. C. § 501 and Fed. R. Bankr. P. 3002.

A. SURRENDER

The term "surrender" is not defined in section 521(a)(2). The First Circuit in Pratt v. General Motors Acceptance Corp., 462 F.3d 14, 18 - 19 (1st Cir. 2006) analyzed the term "surrender" in § 521(A)(2). The court stated that since Congress did not use the term "deliver" it may be reasonably be assumed that "surrender" does not necessarily contemplate that the debtor must physically transfer the collateral to the secured creditor. Thus, "surrender" in the context of § 521(A)(2) means that the debtor agreed to make the collateral available to the secured creditor within 30 days from the date of filing of the notice of intention to surrender. Also, § 521(A)(2) does not require the secured creditor to accept possession of the vehicle, as such action is discretionary and voluntary. The rejection of possession may have consequences, but it is beyond the scope of my presentation. See also In re Canning, 706 F.3d 64 (1st Cir. 2013).

The bankruptcy court in In re Plummer, 513 B. R. 135 (M.D. Fla. 2014) answered the question "What Constitutes Surrender?" and made an excellent explication of the term "surrender" within § 521(A)(2) of the Bankruptcy Code. The court agreed with the First Circuit's decision in Pratt that surrender does not require turnover of physical possession. A debtor complies with the "surrender" intention for the purposes of § 521(A)(2) "when he allows the secured creditor . . . to obtain possession by available legal means without interference." Affirmative action of delivery is not required, but the debtor may not interfere with the creditor's effort to obtain possession of the collateral. Likewise, with respect to real estate, the debtor has no obligation to sign a deed to effectuate the transfer. The debtor is only obligated to allow the

creditor to obtain possession by legal means. See also In re Failla, 838 F.3d 1170 (11th Cir. 2016).

B. REDEMPTION

Redemption has been defined as the equitable right of a borrower to buy back property conveyed as a security. BFP v. Resolution Trust Corp., 511 U. S. 531, 541 (1994). The redemption right of an individual chapter 7 debtor is a limited exception to the general inability of a debtor in chapter 7 to strip down undersecured liens. Dewsnup v. Timm, 502 U. S. 410 (1992).

Section 722 provides that an individual debtor may "redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, . . . by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption. 11 U.S.C. § 722. Section 722 is broader than the rights of redemption under the Uniform Commercial Code. See § 9-623 of the UCC. The right of redemption under the Bankruptcy Code may not be waived. Redemption of property under § 722 requires a lump sum cash payment, not installment payments. In re Edwards, 901 F.2d 1383 (7th Cir. 1990); In re Carroll, 11 B.R. 725 (BAP 9th Cir. 1981). It is noted that after the 2005 BAPCPA amendments, the replacement value, not the liquidation value, may be the appropriate value to determine the amount to be paid to the secured creditor to redeem the collateral pursuant to § 722.

A debtor planning to redeem property must so state in his "Statement of Intention" as required by § 521. The procedure to redeem property is governed by Fed. R. Bankr. P. 6008, which requires a motion after hearing on notice, as such term is defined in the rules of

construction in § 102. Fed. R. Bankr. P. 1007(b)(2) requires that copy of the intention to redeem be served on the trustee and the creditor.

C. REAFFIRMATION AGREEMENT

A reaffirmation agreement must be filed no later than 60 days after the date first set for the 341 meeting of creditors, Fed. R. Bankr. P. 4008, unless the debtor asks and the court grants an extension of time to file the reaffirmation agreement or a request to delay the entry of discharge under Fed. R. Bankr. P. 4004(c)(2).

Section 524 of the Bankruptcy Code governs the general effect of a discharge and in subsection "c" provides for the special treatment given to reaffirmation agreements. The scope of discharged debts is partly determined by section 523, which governs the dischargeability of particular debts. Section 524(c) specifically provides for the enforcement of a reaffirmed debt. A reaffirmed debt is not discharged if the reaffirmation agreement is made before a discharge order is entered, contains the disclosures required in section 524(k), has not been rescinded by the debtor at any time prior to the discharge or within 60 days after it was filed with the court, whichever is later; and a declaration or affidavit by the debtor's attorney stating that the agreement represents a fully informed and voluntary agreement by the debtor, the agreement does not impose undue hardship on the debtor, and the attorney fully advised the debtor of the legal consequences of the agreement and any default under such reaffirmation agreement. See 2 Bankruptcy Law Manual § 8:4, Reaffirmation (December 2016 Update). On the other hand, it is the creditor's responsibility to provide the disclosures required by § 524(k). Failure to do so may result in the unenforceability of the reaffirmation agreement. In re Quintero, 2006 Bankr. LEXIS 906 (Bankr. N.D. Cal. May 5, 2006).

Considering the timing requirements for filing a "Statement of Intention" and a "Reaffirmation Agreement" and the consequences of doing so, or failing to take timely action, it behooves the debtor's attorney to engage in thorough and practical discussion with the debtor as to whether to reaffirm a debt. Counsel must make the debtor aware of the importance of completing schedules I (Income) and J (Expenses). The filing of the statement of intention and subsequently a reaffirmation agreement, must be done within a relatively short time after petition date. The statement or affidavit by debtor's counsel signifies that the attorney investigated and explained to the debtor the relevant facts about the reaffirmation. Failure to do so may lead to the annulment of the reaffirmation agreement. In re Melendez, 235 B.R. 173 (Bankr. D. Mass. 1999); In re Vargas, 257 B.R. 151 (Bankr. D, N.J. 2001); In re Bruzzese, 214 B.R. 444 (Bankr. E.D.N.Y. 1997). Thus, counsel may have to help debtor renegotiate the terms of the loan to be reaffirmed early in the process. In a recent decision, In re Griffin, 563 B.R. 171 (Bankr. M.D.N.C. January 4, 2017), the court imposed on debtor's attorney a heightened level of responsibility. Debtor's counsel not only has the responsibility of advising the debtor of his rights and leave the decision to the debtor, counsel must exercise independent judgment in determining whether the reaffirmation agreement imposes undue hardship and, if it does, then should decline to sign the agreement and, thus, ensure judicial review at an evidentiary hearing.

D. ROLE OF THE COURT

Section 524(m) serves as basis for the role of the bankruptcy court in approving or disapproving reaffirmation agreements. The bankruptcy court must review and approve reaffirmation agreements. Courts must review reaffirmation agreements that are presumed to impose an undue hardship on the debtor, that is, when the income and expenses disclosed in the form show that the debtor lacks sufficient funds to comply with the agreement. Bankruptcy

courts must also review reaffirmation agreements and hold an evidentiary hearing to inform the debtor of the rights and legal implications of reaffirming a debt if the debtor was not represented by counsel when making the reaffirmation agreement.

Court intervention and review reduces the possibility of a debtor making an unwise determination regarding a debt reaffirmation because the debtor may not be able to make the corresponding payments. The reaffirmation agreement cover sheet provides easy detection of undue hardship conditions. If the debtor does not adequately explain the undue hardship presumption, then the court must hold an evidentiary hearing after due notice to the debtor and the concerned creditor. This is important as courts have significant discretion in approving reaffirmation agreements.