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Florida Court Rules Borrowers Who Surrender Property in Bankruptcy Can't Later Take it Back

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Thanks to several recent United States Bankruptcy Court decisions in Florida, mortgage servicers should now expect borrowers who surrender their real property in bankruptcy to not contest foreclosure later. Since the bankruptcy code does not define the meaning of the term "surrender," and since surrendering real property does not transfer title back to the creditor, creditors and borrowers often find themselves wondering about their rights even after the borrower has filed a sworn statement in her bankruptcy case, stating that she no longer intends to keep the property. It is not uncommon for that same borrower to fight foreclosure later, leaving litigants on both side to wonder if "surrender" in bankruptcy means what the English dictionary says it means.

On May 13, 2015, Judge Michael Williamson, writing for the Bankruptcy Courts for the Middle District of Florida, gave clarity to the act of "surrender." In two cases, *In re Meltzer* 8:12-bk-16792-MGW, and *In re Patel* 8:13-bk-09736-MGW, Judge Williamson held that "at a minimum, 'surrender' under the Bankruptcy Code §§ 521 and 1325, means a debtor cannot take an overt act that impedes a secured creditor from foreclosing its interest in secured property." Importantly, *In re Meltzer* was a Chapter 7 case and *In re Patel*, a Chapter 13 case. Drawing on opinions from the First and Fourth Circuits, Judge Williamson concluded that borrowers who elect to surrender property "must relinquish secured property and make it available to the secured creditor by refraining from taking any overt act that impedes a secured creditor's ability to foreclose its interest in secured property."

Judge Williamson is not the only judge in Florida to opine on the meaning of the word "surrender." On December 19, 2014, Judge Paul G. Hyman, Jr., Chief Judge of the Bankruptcy Court for the Southern District of Florida in *In re Failla*, Case No. 11-34224-PGH, ordered the borrowers to stop defending or contesting a pending state court foreclosure action. In that case, the borrowers had filed a statement of intentions in their Chapter 7 case electing to surrender their property. Judge Hyman found that by contesting the foreclosure action, the borrowers were resisting the surrender of their property and refusal on the borrowers' part to refrain from defending against the foreclosure action could result in revocation of the borrowers' discharge. The court reasoned that the borrowers may have committed fraud on the court by stating under oath that they intended to surrender the property and then refused to do so.

On April 13, 2015, Judge Hyman, in *In re Dolan*, 10-36036-PGH, went farther and entered an order to show cause why the borrowers and their counsel should not be sanctioned for their failure to perform their stated intention, filed in their bankruptcy case, of surrendering their property. Finding that the borrowers failed to comply with their sworn statement by defending against the state court foreclosure action, Judge Hyman ordered that both the borrowers and their attorney appear before him and explain why sanctions should not be awarded against them.

While Florida bankruptcy courts have been the most active in interpreting the definition of "surrender" with respect to borrowers' interest in real property, other courts have found that surrendering real property in bankruptcy prevents affirmative acts of defending foreclosure claims.

For example, the First Circuit Court of Appeals has held: "The most sensible connotation of 'surrender' in the Chapter 7 context is that the debtor agreed to make the collateral available to the secured creditor," or, "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." *In re Pratt*, 462 F.3d 14, 18-19 (1st Cir. 2006) citing 11 U.S.C. §521(a)(2).

The surrender definition provided by the First Circuit in *Pratt* gives mortgage servicers a compelling defense against borrowers who challenge foreclosure after surrendering the property in the course of bankruptcy. If surrender means to "make the property available to creditors," then servicers have every right to expect borrowers to maintain that position.

However, if surrendering borrowers later decide to contest foreclosure, then federal courts have supplied creditors with ample ammunition for defending against the duplicitous stance in the form of judicial estoppel. The affirmative defense of judicial estoppel operates to prevent a litigant from taking a litigation position that is inconsistent with a litigation position successfully asserted by him in an earlier phase of the case or in an earlier court proceeding. The United States District Court for the District of Massachusetts held that judicial estoppel prevents a borrower from surrendering property in bankruptcy and then invoking a wrongful foreclosure suit. *Ibanez v. U.S. Bank Nat'l Ass'n*, 856 F. Supp. 2d 273 (D. Mass. 2012). The borrower who surrenders her home in bankruptcy is barred by the doctrine of judicial estoppel from challenging the foreclosure process. *Souza v. Bank of Am.*, 2013 U.S. Dist. LEXIS 94663, *8 (D. Mass. July 8, 2013).

Plaintiffs "should not be allowed to 'play fast and … loose' with the courts in order to avoid foreclosure," the Court wrote in *Richardson v. Citimortgage, Inc.*, 2010 U.S. Dist. LEXIS 123445 *12-13 (E.D. Tex. Nov. 22, 2010). In that case the borrower listed the servicer as a creditor within the bankruptcy only to allege the servicer didn't have standing in defending against foreclosure. "The Bankruptcy Court lifted the automatic stay and permitted CitiMortgage to foreclose on the loan because of the Plaintiff's representations. As a matter of law, the Plaintiffs are judicially estopped from challenging the right of CitiMortgage to foreclose on the loan."

Courts don't appreciate litigants who take contrary positions in separate cases. Given the recent enhancements to the definition of "surrender" in Florida, contesting foreclosure after bankruptcy surrender should be considered a contrary position in courts across the country, and mortgage servicers should expect borrowers who surrender property in bankruptcy to actually mean it.