CONSUMER BANKRUPTCY

'I Surrender!' What Does That Mean?

By Craig D. Robins

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Exploring recent bankruptcy cases and their implications was the subject of a well-attended seminar on Oct. 3, at the Nassau County Bar Association, which was jointly presented with the Suffolk Academy of Law and the NCBA Bankruptcy Law Committee.

Key presenter and national bankruptcy celebrity, Bill Rochelle, Editor at Large for the American Bankruptcy Institute, addressed a crowd of about a hundred, rapidly firing out his commentary on several dozen recent bankruptcy decisions. Rounding out the panel and providing their own input were Central Islip Bankruptcy Judge Alan S. Trust, and practitioners Adam P. Wofse and Matthew V. Spero.

One of the many issues that Bill Rochelle highlighted was the situation where a Chapter 7 consumer debtor declares in the Statement of Intention schedule to the petition his or her intention to surrender their home, and what that declaration means. Some debtors have later discovered to their dismay, that declaring an intention to surrender their home precluded their ability to defend a state court foreclosure case.

One of the arguments that mortgagees make is that the doctrines of waiver and judicial estoppel bar a debtor from taking a later, supposedly contrary position, even if that is many years after the bankruptcy case is over.

Does indicating an intention to surrender property in a bankruptcy proceeding prevent a debtor from contesting the validity of the mortgagee's right to foreclose? Courts around the country are split, and the law regarding this issue is certainly a mess.

The most recent court to analyze this issue used variations of "muddy" no fewer than three times in its decision. The Massachusetts Appeals Court was asked to weigh into "a particularly muddy area of bankruptcy law," noting that there has been a considerable dispute among the bankruptcy courts and other federal courts, which has yet to be definitively resolved. *Everbank v. Chacon*, 92 Mass. App. Ct. 1101 (Mass. App. Ct., July 28, 2017) (unpublished table opinion; text found at 2017 WL 3198222).

At the seminar at the Nassau County Bar Association were from far left, Bill Rochelle, Judge Alan S. Trust, Adam P. Wofse and Matthew V. Spero.

Much of the disagreement grows out of an effort to explain what the term "surrender" means and how it should be interpreted by Bankruptcy Code 521(a). "The legislative history simply confirms that the statue is a muddle," the Massachusetts court commented.

Ultimately, that court concluded that in view of the continuing debate among the federal courts, it would accomplish little "to wade into these muddy waters and make any definitive ruling regarding the correct interpretation of "surrender." The court stated that it could not say that the debtor, by electing to surrender, "intentionally" waived the right to raise his nonbankruptcy-law challenge to foreclosure, or that his current and prior positions were "clearly inconsistent."

The court actually focused on the significant split of authority and disagree-

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ment among courts that have extensively analyzed the term, "surrender." "If the courts themselves could not agree on whether "surrender" means that a debtor gives up such arguments, then the effect of [the debtor's] surrender is insufficiently clear to give rise to a waiver of such arguments, or to judicial estoppel that barred raising them in a later proceeding."

In one of the decisions that Mr. Rochelle highlighted, the 11th Circuit reached the opposite conclusion. That court held that an election to surrender means that "debtors relinquish their rights to possess the property." The court ruled that enjoining the debtors from opposing foreclosure was proper because they "must honor that decision." *Failla v. Citibank NA (In re Failla)*, 838 F.3d 1170 (11th Cir. Oct. 4, 2016).

Yet, another court reached a totally different conclusion in interpreting the concept of "surrender" and held for the debtor. A chapter 7 debtors' election to "surrender" real property does not preclude the debtors from defending against a foreclosure action or asserting claims for allegedly improper foreclosure. *In re Ryan*, 560 B.R. 339 (Bankr. D. Hawaii Oct. 19, 2016).

Bankruptcy Judge Robert J. Farris, sitting in the Hawaiian Bankruptcy Court, stated that, even if "surrender" did preclude the debtors from defending their foreclosure, the debtors were entitled to seek relief from the Bankruptcy Court to amend their statement of intentions.

Judge Farris went on to say that the 11th Circuit's reasoning in *Failla* was "flawed." He determined that there should be a narrow reading of "surrender," and that an intention to surrender waives only the right to redeem the collateral, reaffirm the secured debt, or exempt the property. He permitted the debtors to reopen their case and assert a claim against the mortgagee, thereby giving the debtors a reason to litigate against the mortgagee in state court.

Although many courts have issued decisions analyzing the meaning of "surrender," it appears that the Second Circuit is devoid of any case law on this issue, nor has it surfaced in any our local Bankruptcy courts.

Mr. Rochelle suggested that debtors list mortgage debts as disputed and include as an asset, a claim against the mortgagee. That would mean that the debtor would have a claim or dispute against the mortgagee that could survive the bankruptcy case and be litigated as part of the foreclosure proceeding.

Note: Craig D. Robins, Esq., a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past thirty-three years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.