



Eleventh Circuit Affirms That a Debtor's Surrender in Bankruptcy Means Just That—You Must Surrender

By Christine Irwin Parrish

October 2016

Burr & Forman lawyers won a significant victory in the Eleventh Circuit earlier this month. In the case *In re: David A. Failla*, --- F.3d --- (2016), the U.S. Court of Appeals for the Eleventh Circuit affirmed that a person who agrees to "surrender" his house in bankruptcy pursuant to 11 U.S.C. § 521(a)(2) may not oppose the creditor's foreclosure action in state court. Our firm was one of the first to advance this argument, and many, but not all, of the bankruptcy judges in Florida agreed with our interpretation of surrender under the bankruptcy code and related case law. This opinion from the Eleventh Circuit provides much-needed guidance to bankruptcy judges, trial judges, and debtors regarding the significance of surrender in bankruptcy and its effect on the rights of both the debtor and the creditor.

In *Failla*, the creditor filed a foreclosure action against the borrowers, who responded with a litany of defenses to foreclosure. The borrowers then filed a chapter 7 bankruptcy case in which they scheduled the mortgage loan on their home as undisputed and stated their intent to surrender the property pursuant to § 521(a)(2). The borrowers quickly received their discharge of personal liability on the debt and the bankruptcy case concluded. But, when the creditor resumed the foreclosure action, the borrowers continued their vigorous opposition to foreclosure. This is a fact pattern that repeats itself over and over, thousands of times a year. The cost to creditors and the judicial system at large is substantial.

In this case, the creditor moved to reopen the borrower's bankruptcy case and asked the bankruptcy court to compel the borrower to perform the surrender by withdrawing all opposition to the foreclosure action. That is the order that was appealed and affirmed by both the U.S. District Court for the Southern District of Florida and the Eleventh Circuit. Both courts affirmed that by the plain language of § 521(a)(2), debtors who surrender their property in bankruptcy "must get out of the creditor's way" and "can no longer contest a foreclosure action." *Id.*

A more detailed discussion of the court's legal analysis in *Failla* is available at burr.com [here](#).

What Does This Mean For Creditors Going Forward? The Eleventh Circuit's affirmance should make it easier for creditors in this jurisdiction to ask the state court judge to enforce surrender by applying the judicial estoppel doctrine. And in bankruptcy proceedings, secured creditors should include a request for this relief in their motions for relief from stay.

What Issues Remain Unresolved? Whether a debtor must surrender the home absent reaffirmation or redemption, regardless of the debtor's stated intention during the bankruptcy. There is a split among bankruptcy judges on this issue. While *Failla* is helpful in explaining the mandatory nature of § 521(a)(2), further litigation on related issues will likely continue.

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