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Who Gets the Car?

Honorable Jeffrey P. Norman, U.S. Bankruptcy Judge
David G. Peake, Chapter 13 Trustee

WHO GETS THE CAR?

In a common scenario, a debtor will lose a car or other assets to a repossession only to demand the property be returned after filing a Chapter 13 bankruptcy. A recent circuit court opinion and other pending litigation may mean that the "automatic stay" is not so automatic.

Background

Chapter 13 debtors often file bankruptcy after creditors with liens or security interests have repossessed an asset. In Chapter 13 practice, what is the extent of a debtor's power to recover property that was the subject of repossession before the petition? The issue typically arises in the contest of a motion for turnover, or as an adversary proceeding for violating the automatic stay. Either way, courts must first determine whether the property in question is property of the estate.

11 U.S.C. § 362(a)(3) states that the automatic stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." There is some debate as to the meaning of the words "any act," which will be discussed later, but it is clear that this section applies only to property of the estate. Likewise, 11 U.S.C. § 542 generally requires entities to turn over to the trustee "property that the trustee may use, sell, or lease under section 363…" Section 363 concerns the use, sale, or lease of estate property. So, in short, the § 542 turnover provisions concern property of the estate. This is the reason courts must determine whether the subject property is property of the estate regardless of whether the analysis is under § 362 or § 542.

Typically, courts have determined if the property is "property of the estate" pursuant to 11 U.S.C. § 541 and § 1306 by applying state law to determine if the debtor had an interest in the property as of the date of filing. The Fifth Circuit has held "[t]o determine whether something is property of the bankruptcy estate, a court must look to both state and federal law. Specifically, a

debtor's property rights are determined by state law, while federal bankruptcy law applies to establish the extent to which those rights are property of the estate." *Mitchell v. BankIllinois*, 316 B.R. 891, 896 (S.D. Tex. 2004); *see also Butner v. United States*, 440 U.S. 48, 55 (1979) (holding that "[p]roperty interests are created and defined by state law"); *Stanley v. Trinchard*, 500 F.3d 411, 418 (5th Cir. 2007) (holding that while a debtor's pre-petition rights in property are determined according to state law, federal bankruptcy law determines the extent of a debtor's bankruptcy estate); *Croft v. Lowry (In re Croft)*, 737 F.3d 372, 374-75 (5th Cir. 2013). Generally, if the debtor has an interest under state law, bankruptcy courts in Texas will order the property returned under 11 U.S.C. § 542, sometimes subject to adequate protection.

Burden of Proof

A preliminary question in each of these cases involving requests for turnover pursuant to 11 U.S.C. § 542 is the burden of proof. Courts have consistently held that the party seeking turnover has the burden of proof. *See Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991); *see also In re Donnell*, 357 B.R. 386 (Bankr. W.D. Tex. 2006); *Spradlin v. Khouri (In re Bruner)*, 561 B.R. 397 (B.A.P. 6th Cir. 2017); *In re Hunt*, 540 B.R. 438 (Bankr. D. Idaho 2015); *In re Millette*, 539 B.R. 396 (Bankr. D. N.H. 2015); . Therefore, in cases where debtors are seeking creditors turn over vehicles in the creditors' possession, it is the debtor's burden to prove the vehicle was property of the estate and that the creditor is in possession of the vehicle.

It is also important to note the standard of proof. The growing majority of courts, including courts in the Fifth Circuit, are applying the preponderance of evidence standard in turnover actions. *See In re Crescent Resources, LLC*, 457 B.R. 506 (Bankr. W.D. Tex. 2011). One bankruptcy court explained why a preponderance of the evidence standard is appropriate. In *United States v. Krause (In re Krause)*, the U.S. Bankruptcy Court for the District of Kansas stated that a preponderance

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