

ARE YOU GONNA KEEP THAT?

**REDEMPTION, REAFFIRMATION AGREEMENTS,
AND SURRENDER OF PERSONAL PROPERTY IN
CHAPTER 7 PROCEEDINGS**

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THE FOUR OPTIONS

Conceptually, Chapter 7 bankruptcy is simple. The debtor files bankruptcy, turns over all of their non-exempt property to the Chapter 7 Trustee, obtains a discharge, and then goes about their merry way. Since the debtor only has to turn over exempt property to the trustee, the debtor gets to keep all of their exempt property, right? Well, maybe.¹

The problem is those pesky secured creditors and their interests in the debtor's exempt property. Creditors still want to be paid. So, with regard to the debtor's exempt property, the debtor has four options:

1. Redemption - pay the secured creditor its allowed secured claim (in other words, the amount of the contractual claim or the value of the collateral, whichever is less) in one lump-sum payment.
2. Reaffirmation - agree to forgo the discharge with regard to the creditor's claim and continue to pay for the collateral pursuant to the terms of the original note (or such other terms as might be negotiated as part of the reaffirmation agreement).
3. Surrender - turn the collateral back over to the secured creditor in the knowledge that any deficiency will be discharged in the bankruptcy.
4. Depend on the kindness of strangers² - although the Bankruptcy Code since BAPCPA only allows for options one through three, many debtors do not do any of the three and instead simply keep the collateral and keep paying for it in the hopes the creditor wants the money more than the property.

The purpose of bankruptcy is to “provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” *Grogan v. Garner*, 498 U.S. 279, 286 (1991)(citations omitted). In other words, as is so often said, the purpose of bankruptcy is to give the debtor a ‘fresh start.’ *Id.* at

¹ This simplistic explanation of bankruptcy - that you get to “walk away from your debts but keep your house and your car” - is, based on one of the author's experiences, rather prevalent among the uninitiated. The prospective bankrupt is often rather disappointed to hear that you still have to pay for your house and your car if you want to keep them. And, oh by the way, you probably still have to pay the IRS and your student loans, too.

² With apologies to Blanche DuBois.

286-287. Many debtors do not have the funds available, unless they have help from friends or family, to make a lump-sum payment to redeem their secured property. Therefore, if they want to keep the collateral, they have no choice but to reaffirm the debt, unless the creditor will agree to allow the fourth option. But many courts look very carefully at anything which interferes with the Debtor's fresh start, the prime example being a reaffirmation agreement.

Prior to BAPCPA, the 'fourth option' (a/k/a 'drive and pay' a/k/a 'ride through') whereby debtors in bankruptcy could keep collateral without redeeming it or reaffirming the debt thereon was actually allowed by many courts as a legitimate practice under the Code. The Fifth Circuit never allowed the so-called 'fourth option' but some other courts allowed the debtor to refuse to redeem, reaffirm, or surrender and still keep personal property so long as they continued to pay (predominantly the debtor's automobile, thus 'drive and pay.') BAPCPA clearly eliminated this option. Even former "fourth option" jurisdictions now recognize that the debtor must redeem, reaffirm, or surrender, unless the creditor agrees to allow this fourth option.³ If the Creditor insists, however, the debtor will be limited to the three options listed in 11 U.S.C. §521(a)(2)(A).

³ See, *Daimler Chrysler Fin. Servs. Am., LLC v. Jones (In re Jones)*, 591 F.3d 308 (4th Cir. 2010); *Dumont v. Ford Motor Credit Co. (In re Dumont)*, 581 F.3d 1104 (9th Cir. 2009). Indeed, the First Circuit has stated that "Where the debtor decided not to reaffirm, or the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: 'surrender' the collateral." *In re Pratt*, 462 F.3d 14, 18 (1st Cir. 2006).

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