

# **KEEPING THE DEBTOR ROLLING**

A car creditor gives their perspective on how the Debtor can retain their vehicle throughout the bankruptcy, including dealing with lower values and higher interest rates.

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## KEEPING THE DEBTOR ROLLING

Other than a home, the most valuable and important asset most consumer debtors have is their vehicle. For most debtors, a vehicle is necessary to go to work, run errands, and take the kids to school. Indeed, in arguing that a debtor's vehicle is necessary to an effective reorganization, debtor's attorneys and courts often simply state that the debtor's vehicle is necessary "because it is the debtor's vehicle."

On the flip side, vehicle lenders are nervous because, unlike a house, a vehicle is a mobile asset which generally depreciates quickly, can disappear, and is much more likely to be severely damaged than a house.<sup>1</sup>

Unlike most houses, the debtor can often keep a vehicle in the bankruptcy without paying the full contractual balance at the contractual interest rate. In other words, unlike home mortgages which are generally protected from cram-down by 11 U.S.C. §1322(b)(2), debtors generally can cram down vehicles.<sup>2</sup> This often means debtors can pay the actual value of the vehicle rather than the contractual balance at filing; can lower or extend payments; and usually lower the interest rate.

Until recently, the interest rate the debtor had to pay in a Chapter 13 Plan was invariably less than the contractual rate of interest. With rising interest rates, however, debtors' attorneys are often finding that the interest rate debtors must pay under the plan - the so-called *Till* rate, can be higher than the contractual rate.

Since the debtor needs transportation, it is important in both Chapter 7 and Chapter 13 cases to keep in mind what the debtor needs to do in order to keep their vehicles.

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<sup>1</sup> According to the National Highway Traffic Safety Administration, there were 6,756,000 motor vehicle traffic crashes in 2019. According to statistica.com, there were approximately 280 million vehicles operating on the roads in the United States in the fourth quarter of 2019. Thus, the average vehicle had approximately a 1 in 41 chance of being in a car wreck. This doesn't include damage to vehicles from non-traffic sources like floods, fire, or hail.

<sup>2</sup> As will be noted later in the discussion on interest rates, when bankruptcy attorneys say "cram down" they often mean paying the value of the collateral rather than the contractual balance. But as the U.S. Supreme Court noted in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), cram down actually means paying the secured creditor other than under the terms and conditions of the contract over the secured creditor's objection.

## CHAPTER 7

With regard to the debtor's vehicles in a Chapter 7, 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 strangers<sup>3</sup> (the infamous "fourth option") - although the Bankruptcy Code since BAPCPA<sup>4</sup> 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.

## CHAPTER 13

As noted by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the debtor has three options for a vehicle in a Chapter 13:

1. Obtaining the creditor's acceptance of the plan;
2. Surrendering the property securing the claim;
3. Providing the creditor both a lien securing the claim and a promise of future property distributions (such as deferred cash payments) whose total "value, as of the effective date of the plan, . . . is not less than the allowed amount of such claim."

*Id.* at 468.

In practice, this means that in a Chapter 13, a debtor wishing to keep their vehicle can:

1. "Pay direct" - make payments directly to the creditor pursuant to the terms and conditions of the contract;
2. "Cure and maintain" - pay any pre-petition arrears "through the plan" (by the trustee out of the payments required by 11 U.S.C. §1326(a)(1)(C)) and resume post-petition payments under the terms and conditions of the contract; or

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<sup>3</sup> With apologies to Blanche DuBois.

<sup>4</sup> The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act.

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