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BY ANDREW C. HELMAN AND NATHANIEL R. HULL

You Take It: Force-Vesting under a Chapter 13 Plan

Andrew C. Helman
Marcus, Clegg & Mistretta, PA
Portland, Maine

Coordinating Editor Nathaniel R. Hull
Verrill Dana, LLP
Portland, Maine

Andrew Helman is an attorney with Marcus, Clegg & Mistretta, PA, and Nathaniel Hull is an attorney with Verrill Dana, LLP. Both are based in Portland, Maine.

A recent decision from the U.S. Bankruptcy Court for the District of Massachusetts highlights a deepening split of authority on whether chapter 13 debtors may use plan-confirmation orders to transfer ownership of property to a secured creditor without that creditor's consent. This tactic has become known as "force-vesting," picking up on language in § 1322(b)(a) of the Bankruptcy Code that permits a chapter 13 plan to "provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity." In *In re Weller*, the bankruptcy court canvassed a number of recent decisions before ultimately denying a motion to amend a chapter 13 plan. The amended plan sought to "force vest" a title to the debtors' former home in the secured creditor. The court held that "vesting" is not the same as the permissable "surrender" of collateral under § 1325(a)(5)(C).[1]

However, what makes *Weller* and the cases it discusses striking is that they highlight a tension in chapter 13 that is more pronounced today than before the Great Recession: An increasing number of debtors are turning to chapter 13 to *shed* the burdens of property ownership rather than *save* their homes. However, force-vesting plans are problematic in light of certain circuit-level authority in the chapter 7 context interpreting the related concept of "surrender" and holding that a secured creditor generally cannot be compelled to foreclose or take title to its collateral.[2]

The Typical Fact Pattern

The facts of *Weller* are remarkable only because they are presumably consistent with many cases across the nation: a single-family home (which in this case was estimated to be worth $139,000) was encumbered by a mortgage far exceeding its value ($258,083.97).[3] The debtors left this house soon after they commenced their bankruptcy case.[4]

It is what happened next that begins to distinguish *Weller* and ultimately raised the question of whether force-vesting is permitted. Shortly after filing their bankruptcy petition, the court confirmed the debtors' chapter 13 plan. The debtors' original plan provided, in pertinent part, that the debtors would be surrendering the house to their mortgagee and that the mortgagee would "foreclose" on the property[5] — but that never happened. The mortgagee did not seek relief from the automatic stay in order to foreclose its mortgage or otherwise take title to the property.[6]

Meanwhile, for the next three years, the debtors worked toward the completion of their chapter 13 plan in order to, among other things, be discharged of all personal liability related to the debt secured by their former home (which they had abandoned). The rub was — discharge or not — that the debtors remained liable for claims or liabilities resulting from their *post-petition* ownership of the home. For example, imagine that a person attempting to deliver a package on a cold February day slipped on an icy walkway and was injured — something that is not improbable in Massachusetts. Or consider even more mundane situations like building code violations that one can easily imagine are attendant to prolonged periods of neglect. The point is that confirmation of the debtors' chapter 13 plan, which provided that the secured creditor would "foreclose," failed to relieve the debtors from the yoke

1 *In re Weller*, No. 12-40418-HJB, 2016 WL 164645, at *1 (Bankr. D. Mass. Jan. 13, 2016).
2 *See In re Pratt*, 462 F.3d 14 (1st Cir. 2006); *see also In re Canning*, 706 F.3d 64, 69-70 (1st Cir. 2013) ("Surrendering in this context means that the debtor agrees to make the collateral available to the secured creditor — *viz.*, to cede his possessory rights in the collateral. The secured creditor, however, has the prerogative to decide whether to accept or reject the surrendered collateral." (internal quotations and citations omitted).
3 *In re Weller*, No. 12-40418-HJB, 2016 WL 164645, at *1.
4 *Id.*
5 *Id.*
6 *Id.*

and mantle of home ownership due to creditor inaction. Yet that was apparently one of their goals in filing the chapter 13 case in the first place.[7]

As a result, when financial strains from health complications left the debtors unable to continue to pay to insure or maintain the property, they returned to the bankruptcy court seeking to amend their plan. Had it been approved, the amendment would have vested the title to the property in the mortgagee upon confirmation.[8] To accomplish this feat, the amended plan provided that "title to the property ... *shall vest* in [the mortgagee], and *the Confirmation Order shall constitute a deed of conveyance* of the property when recorded at the registry of Deeds."[9] Predictably, the mortgagee objected.[10]

The *Weller* Decision and Related Cases

The *Weller* court determined that the debtors could not use plan confirmation to force-vest the title to their former home in the mortgagee over its objection. The court's analysis turned on two different provisions applicable to chapter 13 cases, §§ 1322(b) and 1325(a)(5), and surveyed two other recent decisions on force-vesting from the U.S. Bankruptcy Court for the District of Massachusetts.

By way of providing context to the following discussion, § 1322(b) of the Bankruptcy Code sets forth a list of provisions that *may* be included in a chapter 13 plan.[11] For example, subsection 9 permits a plan to "provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity." On the other hand, § 1325(a)(5) sets forth three alternative ways that a plan can satisfy secured claims and mandates that the bankruptcy court "shall" confirm a plan proposing any one of those treatments.[12] Section 1325(a)(5)(C), the third alternative, instructs the bankruptcy court to confirm a plan if it provides, with respect to an allowed secured claim, that "the debtor *surrenders* the property securing such claim to such holder" of the claim.[13]

Prior to *Weller*, the same court (and the same judge) held in *In re Cormier* that a secured creditor could not be compelled under § 1325 to take title to a property that the debtors intended to surrender through a chapter 13 plan.[14] In *Cormier*, the debtors argued that § 1325(a)(5)(C) permitted them to surrender the collateral and that the court had authority to compel the secured creditor to accept a deed-in-lieu of foreclosure, take immediate possession of the collateral or otherwise foreclose.[15] Relying on circuit-level authority, the *Cormier* court disagreed; surrendering collateral under § 521(a)(2) merely meant "making it available to the secured creditor" and did not effectuate a title transfer or require the creditor to take possession of the collateral.[16] There was no reason to interpret "surrender" any differently in § 1325(a)(5)(C).[17]

Thus, in light of *Cormier*, the question before the *Weller* court was "whether § 1322(b)(9) acts to, as the Debtors put it, 'trump' the limitations of § 1325(a)(5). Put another way, may a Chapter 13 debtor vest property (*i.e.*, transfer ownership) in a secured creditor or may [he/she] merely surrender property (*i.e.*, make a property available) to a secured creditor?"[18]

While the ultimate resolution of whether force-vesting is allowed under § 1325(a)(5) over the objection of a secured creditor will have to wait for another day, debtors and creditors would be well advised to look to the way that the term "surrender" is interpreted under § 521(a)(2) in their circuit as a harbinger of what is to come.

The *Weller* court began its analysis of this question by discussing a recent decision from the same court (but a different judge) that relied on § 1325(a)(5)(C) to hold that a chapter 13 plan can be used to force-vest property in a secured creditor. In *In re Sagendorph*, the debtor proposed a force-vesting plan to which a creditor objected by arguing that § 1322(b)(9)'s *vesting* provision is subservient to or pre-empted by § 1325(a)(5)(C)'s *surrender* provision. Stated another way, the creditor argued that § 1325(a)(5)(C)'s surrender provision "represents the outer limits of a chapter 13 plan's power with respect to a secured creditor's treatment because it compels the bankruptcy court to confirm a plan that provides for such treatment," but does not expressly transfer title.[19] The *Sagendorph* court disagreed:

> [The] provisions are not in conflict.... A plan [that] contains a provision for transferring or vesting in the secured creditor the property that is its collateral would be compliant with and confirmable under § 1325(a)(5)(C) because a transfer of property presupposes its surrender by the transferor. Surrendering or ceding possessory rights is a preliminary step in the process of transferring title.[20]

The court determined that confirming a force-vesting plan, subject to the creditor's right to object that the plan was proposed in bad faith, was the best way to harmonize these provisions and "is consistent with the most basic principles of bankruptcy restructuring as enunciated in the Code's reorganization provisions embodied in chapters 11, 12, and 13."[21] *Weller* noted that *Sagendorph* is on appeal.[22]

7 *Id.*
8 *Id.*
9 *Id.* at *2 (emphasis in original); *see also* Fed. R. Civ. P. 70, made applicable to adversary proceedings by Fed. R. Bankr. P. 7070, provides that the court may enter a judgment divesting the title of any party and vesting title in others whenever the real or personal property involved is within the jurisdiction of the court. *See* Fed. R. Civ. P. 70(b) ("If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.").
10 *In re Weller*, No. 12-40418-HJB, 2016 WL 164645, at *2.
11 11 U.S.C. § 1322(b).
12 11 U.S.C. § 1325.
13 11 U.S.C. § 1325(a)(5)(C) (emphasis added).
14 *In re Weller*, No. 12-40418-HJB, 2016 WL 164645, at *2 (citing *In re Cormier*, 434 B.R. 222 (Bankr. D. Mass. 2010)) (Boroff, J.).
15 *Id.* (citing *Cormier*).
16 *In re Cormier*, 434 B.R. 222, 232 (citing *In re Pratt*, 462 F.3d at 18-20).
17 *Id.* at 230.
18 *In re Weller*, No. 12-40418-HJB, 2016 WL 164645, at *2.
19 *In re Sagendorph*, No. 14-41675-MSH, 2015 WL 3867955, at *3 (Bankr. D. Mass. June 22, 2015).
20 *Id.* at *4 (internal quotations and citations omitted).
21 *Id.*
22 *In re Weller*, No. 12-40418-HJB, 2016 WL 164645, at *3, n.3.

While *Weller* ultimately disagreed with *Sagendorph* on the force-vesting issue, it agreed with *Sagendorph* that §§ 1322(b)(9) and 1325(a)(5)(C) are not in conflict, but for an entirely different reason. According to *Weller*, § 1322's "contents of plan" provision is the menu of mandatory and optional provisions that a debtor *may* propose in the plan. However, § 1325 contains the *requirements* for plan confirmation, and "[w]hat a Chapter 13 debtor may not do ... is substitute the options [that] may be proposed under § 1322 for the requirements mandated by § 1325."[23] What this means is that confirmation is only permitted when the chapter 13 plan treats a secured creditor in one of the three ways specified in § 1325(a)(5): (1) the secured creditor may accept the plan; (2) the debtor may make payments to the secured creditor sufficient to "cram down" the plan; or (3) the plan may provide for the surrender of the property to the secured creditor.[24] But, as the court held in *Cormier*, § 1325(a)(5)(C)'s "surrender" provision cannot be used to force a creditor to take title to its collateral.

Although the *Weller* court was "troubled" by the results for these debtors, the court did not believe that a plan could force-vest title (rather than provide for surrender) over a secured creditor's objection.[25] For the *Weller* court, whether to allow force-vesting under these circumstances is a policy decision to be made by a legislative body rather than the courts.[26]

Same Issue Is Playing Out Across the U.S.

The arguments (and split decisions) of the *Cormier*, *Sagendorph* and *Weller* courts are not unique to Massachusetts and the First Circuit. As those cases make clear, there are many decisions throughout the nation considering the same basic question.[27] Others are still considering similar issues under different chapters of the Bankruptcy Code.[28] While the ultimate resolution of whether force-vesting is allowed under § 1325(a)(5) over the objection of a secured creditor will have to wait for another day, debtors and creditors would be well advised to look to the way that the term "surrender" is interpreted under § 521(a)(2) in their circuit as a harbinger of what is to come. abi

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23 *Id.* at *3.
24 *Id.* at *4.
25 *Id.*
26 *Id.*
27 *Compare In re Williams*, 542 B.R. 514 (Bankr. D. Kan. 2015) (chapter 13 plan that provides for vesting of mortgaged property in secured creditor may not be confirmed over creditor's objection); *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014) (bankruptcy court refused to compel secured creditor to accept conveyance of property to secured creditor); and *Bank of New York Mellon v. Watt*, 2015 WL 1879680 (D. Ore. 2015) (same), *with In re Zair*, 535 B.R. 15 (Bankr. E.D.N.Y. 2015) ("surrender" and "vesting" can be used together to confirm force-vesting plan); *In re Rosa*, 495 B.R. 522 (Bankr. D. Haw. 2013) (force-vesting is permitted when secured creditor does not object to plan); and *In re Stewart*, 536 B.R. 273 (Bankr. D. Minn. 2015) (same).
28 For example, in one recent memorandum of a decision on a debtor's motion to enforce provisions of a chapter 11 plan, the court determined that language stating that a creditor "may foreclose" essentially "dictat[ed] the agreed final adjustment of the debtor-creditor relationship between the Debtor and the Bank at the end of the liquidation period in the event that the affected tracts of real property were unable to be sold within the designated chronological period." *In re House Nursery Ltd.*, Case No. 13-60690, Memorandum of Decision [D.E. 147] (Bankr. D. Tex. Feb. 9, 2016) (*slip op.*).