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THE UNINTENDED FILING BAR – DON'T IGNORE MFR ON SURRENDERED PROPERTY

Consider if you will that your client has just filed a Chapter 13 Bankruptcy. They have intelligently chosen to surrender a luxury item – a boat or 4-wheeler or even that extra vehicle they don't need.

Because the creditor would like to preserve the value of the collateral by obtaining possession quickly, they file a Motion for Relief shortly after the case is filed.

You hardly take notice of the motion because once you glance at the Motion for Relief and realize it is for collateral your client has already surrendered, you no longer care to protect their interest.

A few months into the plan disaster hits and your client contacts you to advise that they have been in a terrible accident and incurred an additional $50,000 in medical debt. Is there anything that can be done?

"Sure" you say, we can dismiss your case and refile and include this new post-petition medical debt. As you continue to travel down that road it is only then that you are hit with the big red "THOU SHALL NOT PASS" sign. In fine print below it states "11 U.S.C. 109(g)(2)".

11 U.S.C. 109(g)(2) states:

> "Not withstanding any other provision of this section, no individual… maybe a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if- (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title"

The utter disregard of the Motion for Relief on the surrendered property has put a nail in the coffin of filing a new case for at least 180 days. A lot can happen in 180 days. Foreclosures can resume, garnishments can take place, and more importantly, this doorway to financial relief is barred all because of a surrendered collateral that was ignored. And this provision has no sunset during the plan. Whether the dire situation arises early in the case or much later towards the end your client cannot voluntarily dismiss without the immediate bar to refiling.

The purpose of this provision is to prevent repeat filers from abusing the bankruptcy process to delay the foreclosure or taking of estate collateral. This poorly drafted provision has the unintended effect of instituting a re-filing bar no matter the situation.

Some would argue that the provision prevents re-filing if a Motion for Relief is filed, even if it ultimately is withdrawn or denied. Others would argue that the withdrawal of a Motion for Relief is sufficient to prevent the consequence of this provision.

This provision is further complicated in that the courts are split between strict interpretation and discretionary interpretation. See *In re Luna*, 122 B.R. 575(1991) which states in pertinent part:

> "There are two lines of cases interpreting section 109(g)(2)'s language. One line of cases holds that the application of section 109(g)(2) is mandatory. *See generally Smith v. First Fed. Sav. & Loan Ass'n (In re Smith)*, 58 B.R. 603, 605 (W.D.Pa.1986); *In re Denson*, 56 B.R. 543, 546 (Bankr.N.D. Ala.1986).

The other line of cases holds that the application of § 109(g)(2) is discretionary. *See generally Economy Motors, Inc. v. Jones (In re Jones)*, 99 B.R. 412, 413 (Bankr.E.D.Ark.1989); *Fulton Fed. Sav. & Loan Ass'n v. Milton (In re Milton)*, 82 B.R. 637, 639 (Bankr.S.D.Ga.1988)."

In the situation presented here, one would hope the Court would adhere to the discretionary interpretation of 109(g)(2), but if not, you and your debtor's hands may be tied from refiling all because of the motion for relief.

Some solutions presented are to ask that the Motion for Relief be withdrawn and at the same time enter into an Agreed Order for Relief from stay. Perhaps if the automatic relief from stay provisions under the surrendered property provisions of the proposed Chapter 13 Plan were enhanced, clearer, and offered immediately instead of upon confirmation, secured lenders of surrendered property wouldn't feel the need to proceed on a Motion for Relief rather than wait for confirmation of the proposed plan.

Any way about it, it's a sticky situation and an unintended result. If you don't stay aware of it, your debtors could be harmed by the resulting 180 day filing bar.

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