



Dennis LeVine & Associates
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**11TH CIRCUIT AFFIRMS IN RE
 KALTER – YOU DON'T HAVE TO
 GIVE THE CAR BACK WHEN REPO
 OCCURS PRE-PETITION!**

In the Spring, 2002 edition of the Firm's Newsletter, "Secured Creditor & Bankruptcy News", we reported the recent line of Florida cases holding that a secured creditor which repossessed an automobile pre-petition did not have to return it when the customer later filed bankruptcy. These cases recently were upheld on appeal!

On June 7, 2002, the 11th Circuit affirmed the District Court in *In Bell-Tel Federal Credit Union (In re Kalter)*, 292 F.3d 1350 (11th Cir. 2002). The Court found that the debtor's mere right to redeem, without evidence that the debtor intended to exercise the right to redeem (which would require the debtor to pay its secured obligation in full, plus expenses), was insufficient to render the automobile property of the estate subject to turnover. The Court followed an earlier decision applying Alabama law, *In re Lewis*, 137 F.3d 1280 (11th Cir. 1998)(holding under Alabama law that an automobile repossessed pre-petition did not constitute property of the estate subject to turnover). The 11th Circuit held that under Florida law, an automobile repossessed pre-petition does not constitute property of the bankruptcy estate under 11 U.S.C. § 541(a). Since the automobile repossessed pre-petition was not property of the estate, the debtor had no right to compel turnover of the automobile from the secured creditor.

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**REPLACEMENT COST OR
 LIQUIDATION VALUE —
 WHAT IS THE APPROPRIATE
 STANDARD FOR
 REDEMPTION IN A
 CHAPTER 7 CASE?**

An increasing number of debtors are obtaining loans to "redeem" collateral in Chapter 7 cases. Under Section 722 of the Bankruptcy Code, a debtor may redeem collateral from a lien on consumer goods (and thereby extinguish the lien) by paying the secured creditor, in a lump sum, the value of the collateral. This article examines whether courts use "replacement value" or "liquidation value" to determine the value of the asset which the debtor seeks to redeem.

Section 722 of the Bankruptcy Code provides:
 "An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the **allowed secured claim** of such holder that is secured by such lien."

While the statute contains several prerequisites to entitle a debtor to redeem, the primary issue is whether or not the a secured claim in a Chapter 7 redemption is valued at "replacement value" (i.e. what the debtor would pay to obtain like property for the same proposed use) or "liquidation value" (i.e. what the creditor would receive by selling the collateral).

In 1997, the U.S. Supreme Court held that "the appropriate valuation

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The 11th Circuit first noted that the Florida UCC grants secured creditors the right to repossess collateral, but contains no language addressing title, transfer of title, or ownership of the repossessed collateral. The debtor argued that the provisions of the Florida UCC (e.g. the requirement to give notice to the debtor after repossession, right to redeem, etc.) show that repossession does not by itself transfer ownership from the debtor to the creditor. The 11th Circuit rejected the debtor's argument, finding that the UCC did not apply to the title issue.

The Court then turned its attention to Fla. Stat. § 319, the statute covering automobile titles. Fla. Stat. § 319.28 provides an exception to the general rule that a certificate of title is required in order to obtain marketable title to sell an automobile. The applicable exception provides that where an automobile has been repossessed or otherwise transferred by operation of law, the party in possession may obtain a certificate of title from the

Florida Dept. of Highway Safety and Motor Vehicles. In this situation, the creditor can submit an affidavit setting forth the repossession as "proof of ownership."

The 11th Circuit concluded that the provisions of Fla. Stat. § 319.28 recognize that "ownership transfers upon repossession". Thus, a transfer of ownership by operation of law did not have to meet the certificate of title requirement. In rejecting the bankruptcy court's conclusion that a certificate of title was required for the creditor to be deemed the owner, the Court stated that Florida case law holds that a certificate of title is merely evidence of, but not a requirement of, establishing ownership. Therefore, the fact that the creditor had not obtained a certificate of title in its name by the time the debtor filed bankruptcy did not render the repossessed automobile property of the estate subject to turnover.



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standard in a Chapter 13 case, in which a debtor wishes to retain and use collateral pursuant to his plan over the objection of a secure creditor, is replacement value." Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879, 138 LE.2d 148 (1997). After Rash, creditors argued that Rash (which interpreted Section 506 of the Bankruptcy Code dealing with the value of a secured claim) supported "replacement value" as the standard for redemption in Chapter 7 cases. Unfortunately, the Bankruptcy Courts interpreting Section 722 have not agreed, and have concluded that the standard for valuation for redemption is the "liquidation value" of the collateral.

The leading case holding liquidation value as the appropriate standard is In Re Donley, 217 B.R. 1004 (Bankr. S.D. Ohio 1998). In Donley, the Court found support for the debtor's argument in the Legislative history of §722 (redemption under §722 "amounts to a right of first refusal on a foreclosure sale of the property involved. It allows the debtor to retain his necessary property and avoid high replacement costs, and does not prevent the creditor from obtaining what he is entitled to under the terms of his contract." H.R.Rep. No 95-595, at 127 (1977), 1978 U.S. Code Cong. & Admin. News at 6088 (cited by Rash, at 217 B.R., at 1007). The 6th Circuit in Donley found that a creditor's allowed secured claim "should be valued by a standard which measures what the [creditor] would receive if the redemption did not occur and it were forced to repossess and to sell the [collateral] in the most beneficial manner it could". 217 B.R. at 1007. In other words, the value of collateral should be determined by assessing what the creditor could receive at a foreclosure sale, and not by what the debtor

would pay to replace the collateral.

All of the reported Bankruptcy Court decisions have followed Donley. In re Ard, 280 B.R. 910 (Bankr. S.D. Ala. 2002); In re Tripplett, 256 B.R. 594 (Bankr N.D. Ill. 2000); In re Williams, 224 B.R. 873 (Bankr. S.D. Ohio 1998); In re Dunbar, 234 B.R. 895 (Bankr. E.D. Tenn. 1999); In re Henderson, 235 B.R. 425 (Bankr. C.D. Ill. 1999). In In re Tripplett, the Court analyzed the holding in Rash and pointed out the distinctions between a Chapter 13 cramdown (the action being taken in Rash) and a Chapter 7 redemption. In a Chapter 13 cramdown under §1325(a)(5)(B), a Chapter 13 debtor "keeps the collateral over the creditor's objection and provides the creditor, over the life of the plan, with the equivalent of the present value of the collateral." 256 B.R. at 597. In a Chapter 7 redemption, however, the creditor receives an immediate lump sum payment for the collateral, and does not suffer any damage from potential depreciation of the collateral or a default by debtor. The court reasoned that the Supreme Court in Rash merely intended to benefit a creditor with added protection in a cramdown under Chapter 13, but did not intend the same standard to apply in a Chapter 7 redemption, where such added protection is not needed due to the requirement of a lump sum payment.

The proposed bankruptcy reform legislation would amend Section 722 to explicitly provide for "retail replacement value". Nonetheless, under the current law liquidation value and not replacement value is the standard for determining value in a Chapter 7 redemption.



FLORIDA AMENDS CONSUMER COLLECTION PRACTICES ACT

In July, 2001, the Florida Legislature's amendments Section 559.72 of the Florida Consumer Collection Practices Act (FCCPA) went into effect. The Legislature added several additional activities in which consumer debt collectors are prohibited from engaging, including communicating with a debtor if the person collecting the debt knows that the debtor is represented by an attorney.

Section 559.77, F.S., which provides civil remedies for violation of the FCCPA, also was amended to:

- Revise the amount of recoverable damages from the greater of actual damages or \$500, to actual damages of up to \$1,000;
- Allow class action plaintiffs who are the named plaintiffs in the lawsuit to recover additional statutory damages of up to \$1,000 per named plaintiff;
- Authorize an aggregate award of damages in a class action lawsuit not to exceed the lesser of \$500,000 or 1 percent of the defendant's net worth for all plaintiffs who are not the named plaintiffs; however, no individual class member may recover additional damages in excess of \$1,000;
- Provide a defendant with a bona fide error affirmative defense;
- Provide a 2-year statute of limitations; and
- Provide that, in construing the FCCPA, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act.



NEW ATTORNEY JOINS DENNIS LEVINE & ASSOCIATES, P.A.

Walter L. Sanders, a native of Milford, Massachusetts, joined the Firm in September, 2002. In 1995, Mr. Sanders received his B.A. in Legal Studies at the University of Massachusetts, Amherst. He completed his first year of law school at the University of Connecticut School of Law, and then transferred, with advanced status, to the University of Miami School of Law. He received his J.D. degree in December, 1999, and was admitted to practice in Florida in 2000. Mr. Sanders formerly served for two years as an Assistant Public Defender. Mr. Sanders' practice areas include creditors' rights, commercial litigation and bankruptcy litigation. Walter is married to Jennifer.



DENNIS LeVINE RECEIVES PATRIOTISM AWARD

Dennis LeVine was recognized on October 17, 2002, at the Hillsborough County Bar Association's monthly luncheon with the "My Boss is a Patriot" award for his support of the National Guard and Reserves. The Employer Support of the Guard and Reserves (ESGR) sponsors an award designed to recognize deserving employers whose support and good will are important to retaining highly skilled and qualified members of the Guard and Reserves.

Chief Master Sergeant Deborah Clanton, an Air Force Reservist, has worked at the Firm since 2001. Because of her rank and position, she generally is away from the office an average of 7-8 weeks during the year. After the events of September 11th, however, she was activated by the Air Force to duty at MacDill AFB in Tampa, and was away from the office for 179 days. After returning to work for only a few weeks, she then was deployed to Prince Sultan Air Base in Saudi Arabia for 60 days. Deb's position at the Firm was always held open for her. While deployed in Saudi Arabia, she submitted Dennis for the "My Boss is a Patriot" award, and the submission was approved.

During her deployment in Saudi Arabia, Ms. Clanton had an American flag flown over the hostile skies of Iraq in an F15 enforcing United Nations' sanctions in support of Operation Southern Watch. The F15 was piloted by Brig Gen Dale C. Waters, the Commander of the 363 Air Expeditionary Wing at Prince Sultan Air Base. The flag and the certificate of authenticity, along with the ESGR Certificate of Appreciation, were presented to Dennis at the County Bar Association luncheon.



STAFF BABY UPDATE

The stork has arrived at the Firm! Janna, a paralegal who handles bankruptcy matters, recently had a little boy, her second. Jennifer, our receptionist, had a little girl, her second child, in mid-November. All are doing well.



Things You Don't Say to a Cop

- I can't reach my license unless you hold my beer.
- Sorry, Officer, I didn't realize my radar detector wasn't plugged in.
- I thought you had to be in relatively good physical condition to be a police officer.
- When the Officer says "Gee Son...Your eyes look red, have you been drinking?" You probably shouldn't respond with, "Gee, Officer your eyes look glazed, have you been eating doughnuts?"



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