



Dennis LeVine & Associates
Secured Creditor & Bankruptcy News

Volume 4 Issue 1

Winter 2007

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DOES FLORIDA LAW REQUIRE NOTICE TO A CUSTOMER PRIOR TO REPOSSESSING AUTOMOBILE

Car lenders often inquire whether there is a legal requirement in Florida to provide notice to a customer (either orally or in writing) prior to repossessing an automobile after a default in the contract.

The Uniform Commercial Code, as adopted in Florida, does not have a specific provision requiring notice be given as a prerequisite to repossessing collateral. Nevertheless, Florida courts have found that, in certain circumstances, notice is required prior to repossession.

For example, consider a situation where a lender regularly accepts late payments, or otherwise does not enforce continuing defaults in the contract. Such a pattern may give rise to a **legal obligation** of the lender to give notice prior to repossession. The legal theory is estoppel – the customer’s pattern of late payments and the lender’s continual acceptance of those late payments acts as a de facto modification of the contract. As one Florida court noted:

“The seller after default on the part of the buyer may extend the time of payment and waive his right to retake possession for such default, and his promise to do so, even though no additional consideration is given therefor aside from the buyer’s promise to make payment at the time extended, will preclude him from exercising his right to retake possession before the expiration of the extended time. And if the purchase money is payable in installments, a large

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FLORIDA BANKRUPTCY JUDGE RULES THAT EVEN IF CONTRACT HAS ZERO PERCENT INTEREST, PAYMENTS TO LENDER THROUGH A CHAPTER 13 PLAN MUST INCLUDE INTEREST

Some national lenders finance vehicle loans at 0% interest. When a customer with a 0% interest loan files Chapter 13 and proposes to pay the secured claim inside the Plan, the issue is what interest rate, if any, the Chapter 13 Trustee must pay on the secured claim.

In a recent case in the Middle District of Florida, **Dennis LeVine & Associates** argued that **any** secured claim paid over time through a Chapter 13 Plan must be paid with interest, citing Till v. SCS Credit Corp., 541 U.S. 465 (2004) (interest must be paid on cramdown loans at the prime rate plus a factor that may vary, but is frequently between 1 and 3%, based on the risk to the objecting creditor). In In re Grunau, (06-2573, M.D. Tampa Div., Judge Paskay), GMAC’s original contract had a 0% interest rate. The Debtor’s Chapter 13 Plan offered to pay the secured claim in full at 4% interest. The creditor objected to confirmation.

In this case, the Debtor was not attempting to cramdown the value of the secured claim. Nevertheless, the Plan modified the payment stream by extending the repayment term to the duration of the Plan. The Bankruptcy Court found that Till is applicable in all Chapter 13 cases involving secured claims paid through the Chapter 13 Plan, and not just cramdown cases. The Court found that, “A plan that

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portion of which has been paid, and the seller accepts partial payments, after the day when payment should have been completed, he cannot retake the goods without notice, and without demand for the unpaid balance of the price and, in such case, a tender of the amount remaining due is sufficient to retain in the buyer the right of possession."

Commercial Credit Co. v. Willis, 126 Fla. 444 (Fla. 1936).

Many contracts contain a provision providing that the waiver of a default by the lender shall not be deemed a waiver of any other default. Notwithstanding such a provision, a court may find the issue to be the right of the customer to rely upon the prior dealings between the parties, and the customer's right to be notified of a modification of such conduct on the part of the lender. Ford Motor Credit Co. v. Waters, 273 So.2d 96 (Fla. 4th DCA 1973) (facts led customer to believe that late payments would be accepted by the lender and that customer would be allowed to catch up in his payment arrearage; therefore, notification of a change in this pattern should have been given to the customer by the lender prior to repossession of the automobile).

The above cases lead to the really sticky issue – how many late payments does a lender have to accept to constitute a change in the course of dealing between the parties. In Kelly Tractor Co., v. R. J. Canfield Contracting, Inc., 579 So.2d 261 (Fla. 4th DCA 1991), the court distinguished the Ford Motor Co. and Commercial Credit Co. cases. In Kelly Tractor Co., the court found that there was not a "sufficient pattern of acceptance of late payments and forbearance" to support the customer's estoppel argument. Kelly Tractor accepted only two late payments on a twelve month lease. Moreover, Kelly Tractor contacted the customers and notified them that they were in arrears. As such, the District Court found that Kelly Tractor had acted in good faith in exercising its right to replevin the collateral without notice.

As the above illustrates, there is no bright line which a lender can rely on in the foregoing situation. Therefore, we recommend that in cases where late payments have been accepted, the creditor should provide written notice to the customer that late payments will no longer be accepted, and that the collateral will be repossessed in the event the contract again goes into default. The lender should then follow through in the event of another default.



modifies a secured creditor's rights over the creditor's objection is, in fact, a cramdown that triggers the Till requirement." Under Till, of course, the original contract rate is irrelevant. Therefore, the Plan had to provide for payment of interest in accordance with Till. The Court cited In re Pryor, 341 B.R. 640, 650 (Bankr. C.D. Ill. 2006) (payment of full secured claim in Chapter 13 Plan is a cramdown, and secured creditor is entitled to interest under Till) and In re Scruggs, 342 B.R. 571, 575 (Bankr. E.D. Ark. 2006). The Court required the Debtor to file a modified Chapter 13 Plan to pay the secured claim in full, with interest at the prime rate plus 2%.



Dennis took part on a panel at the ABI Winter meeting in Arizona this past December.

Dennis J. LeVine is Board Certified in both business and consumer bankruptcy law by the American Board of Certification. Mr. LeVine was admitted to the Florida Bar in 1983, and practices in the federal courts of all three Florida districts. He has concentrated his practice in bankruptcy and collection law for 22 years.

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CREDIT CARD LOAN DELINQUENCIES HIT RECORD

Credit card delinquencies reached a record high of 4.81% percent of accounts in 2006, according to the American Bankers Association's *Consumer Credit Delinquency Bulletin*. The survey cited higher gas prices taking chunks out of wallets. Personal loan delinquencies rose to 1.94% from 1.83%. Direct auto loans rose to 2.07% percent from 2.04%. Indirect auto loans rose to 2.08% from 1.87%.

INTEREST RATE ON FLORIDA JUDGMENTS INCREASES TO 11%

Florida law provides that each year the State sets the rate of interest payable on judgments for the following year. For the year beginning January 1, 2007, judgments will accrue interest at 11%. Last year the interest rate was 9%.

FIRST CIRCUIT HOLDS THAT CAR LENDER MUST EITHER PICK UP VEHICLE DEBTORS SURRENDER, OR RELEASE THE TITLE

In *In re Pratt*, 462 F3d 14 (1st Cir. 2006), the Chapter 7 Debtors indicated their intent to surrender the collateral. The vehicle was inoperable, and essentially worthless. The salvage dealer advised the Debtors that under Maine law, they had to obtain a release of GMAC's lien before it could be picked up. The Debtors repeatedly asked GMAC to either repossess the car, or release its lien. GMAC refused to pick up the car, and refused to release its lien unless and until the outstanding loan balance was paid in full.

The Debtors filed an adversary action, alleging GMAC's refusal to either repossess the vehicle or release the lien (absent full payment of the discharged loan balance) violated the Chapter 7 discharge injunction under §524(a)(2). The Bankruptcy Court found GMAC's refusal to release its lien did not coerce the Debtors to repay their discharged personal liability on the car loan, but simply invoked its legitimate *in rem* remedies under Maine law. The District Court affirmed.

On further appeal, however, the First Circuit Court of Appeals reversed and found in favor of the Debtors. The First Circuit focused on the term "surrender" under §521(a)(2). The Court found that GMAC's refusal to

either repossess the vehicle or release the lien was "objectively and improperly coercive" under the circumstances: "The line between forcible negotiation and improper coercion is not always easy to delineate, and each case must therefore be assessed in the context of its particular facts." The Court stated that the Debtors "were confronted with the grim prospect of retaining indefinite possession of a worthless vehicle unless they paid the GMAC loan balance, together with all the attendant costs of repossessing, maintaining, insuring and/or garaging the vehicle. Therefore, the GMAC refusal had the *practical* effect of eliminating the [Debtor's] surrender option under §521(a)(2)." The Court noted that under Maine law, a secured creditor may refuse to release its lien unless and until the outstanding loan balance has been paid. Nevertheless, the Court found that under the facts of this case GMAC had violated the discharge injunction under federal law under the Bankruptcy Code. The Court concluded "that the GMAC refusal to release its valueless lien so that the vehicle could be junked – though presumably not made in bad faith – was 'coercive' in its effect, and thus willfully violated the discharge injunction."



DEBTOR WHO SIGNED LOAN APPLICATIONS IN BLANK COMMITTED FRAUD, AND DEBT HELD NON-DISCHARGEABLE

Dennis LeVine & Associates recently obtained a nondischargeability judgment against a debtor who helped her son obtain fraudulent mortgages. After a trial, Judge Rodney May ruled in *In Home Loan Corp. v. Hall (In re Hall)*, 342 B.R. 653 (Bankr. M.D. Fla. 2006), that the Debtor could not discharge her liability for two loans obtained in her name.

The debtor had a college education and business experience. She owned a house, and had good credit. Her adult son talked her into working with him and his employer to buy homes for people with poor credit ratings. Unfortunately, the son was involved in what turned out to be mortgage fraud, which worked as follows. The real buyer (with the bad credit) paid the son's employer a fee to acquire real estate from a troubled seller. The debtor (with the good credit) posed as the buyer, signing loan applications with fictitious employment information. Each application also represented she was going to occupy the homes as her principal residence. After the closing, the real buyer would sign a one-year lease with an option to buy at the end of the lease. The lease payments were equal to the mortgage payments. The real buyer was supposed to obtain their own mortgage at the end of the year and buy the house. The debtor was paid \$2,000 for her participation in the process and the closing.

The debtor signed for five loans. A lender who made two loans to the debtor as part of this scheme objected to the discharge of the debtor's obligations on the defaulted mortgages. The debtor argued that she did not know the information provided to the

lender was false, because she signed the documents in blank, or signed them without reading them. In each case, the debtor stated she signed blank loan applications that were completed by someone else using false information. The debtor acknowledged that she allowed her identity to be used five times to obtain loans to buy the houses, and was paid for doing so. She also said she was an unwitting pawn in her son's fraudulent scheme.

The Court was not sympathetic. The Court stated that the debtor could have corrected the problem at closing by pointing out the errors in the loan application documents, but she chose to ignore it. The Court said her explanation that she did not read any of the documents that she signed is the very essence of recklessness. "The debtor may have believed that no one would be injured, but she knew that she was posing as something she was not and taking reckless actions to cause the loan to be made." The Court found that signing documents without reading them was a sufficient basis to prove intent to defraud: "The debtor would have had to know that the loan application would be materially false when submitted, since she was not filling it out; there was no one other than the debtor who could have filled it out accurately. Signing the loan application for submission, without knowing who was filling it out or what information would be inserted, is sufficient evidence of intent to deceive the lender." As a result, the Court found the debt to the bank non-dischargeable.





Timeless Wisdom of Yogi Berra

“One time, though, my wife did ask me where I should be buried. Our families are from St. Louis, where I grew up; my career was in New York; we live in New Jersey. I told [my wife], “I don’t know, just surprise me.”



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