

Mortgage Lender Insights: Exploring the Impact of Surrendering Collateral in Bankruptcy on Foreclosure Litigation

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A debtor's statement of intention to surrender collateral under [11 U.S.C. 521\(a\)\(2\)](#) in bankruptcy may impact their ability to contest foreclosure, primarily due to the application of judicial estoppel. This blog post explores key federal and state decisions that provide guidance on this issue for mortgage lenders, including practical implications.

Key Arguments for Mortgage Lenders Post-Surrender

Mortgage lenders have two key arguments to dispose of contested foreclosure suits once a borrower has filed a statement of intent to surrender the mortgaged collateral in a bankruptcy petition:

1. First, surrender under 11 USC § 521(a)(2) gives up rights to the collateral.
2. Second, after entry of a bankruptcy discharge, judicial estoppel bars the debtor from contesting the foreclosure or pursuing claims related to the foreclosure.

Mortgage lenders and servicers with knowledge of the legal precedent in this area can accelerate their foreclosure timelines and minimize legal fees by seeking to dismiss special defenses and counterclaims.

Filing Requirements for a Statement of Intention

Under 11 USC § 521(a)(2), a debtor is required to file a Statement of Intention about what they intend to do with collateral for their debts.[\[1\]](#) A Statement of Intention must do one of the following:

1. claim the collateral is exempt;
2. note that the debtor will surrender the collateral; and
3. note that the debtor will redeem the collateral or reaffirm the debt.

Differing Court Opinions Over Enforcement of Surrendered Mortgage Properties

When a debtor states their intention to surrender the mortgaged property and then a discharge is entered, some courts have held that challenges to the enforcement of the mortgage are barred:

- **The Eleventh Circuit Court of Appeals** held that surrender “requires debtors to drop their opposition to a foreclosure action”^[2], because surrender means giving up a claim or right. The opinion further holds that bankruptcy courts may order debtors to withdraw their defenses and counterclaims to a foreclosure.
- **The First Circuit Court of Appeals** held that “the most sensible connotation of ‘surrender’ in the [Chapter 7] context is that the debtor agreed to make the collateral available to the secured creditor-viz., to cede his possessory right in the collateral-within 30 days of the filing of the notice of intention to surrender possession of the collateral...”^[3]

However, not all courts agree:

- **A Hawaii bankruptcy court** held that the Congressional mandate of 11 USC 521 involving surrender is simply a notice provision, and is not binding on a debtor.^[4] The opinion relies on the notion that a debtor is not obligated to surrender property to obtain a discharge. A debtor is only required to file a statement of intention as part of their bankruptcy filing.
- **A Massachusetts court** held that conduct occurring post-surrender can modify or withdraw a statement of intention to surrender, citing the Hawaii opinion discussed above.^[5]

Three Factors Courts Consider When Applying Judicial Estoppel

Other courts apply judicial estoppel to reach the conclusion that a debtor may no longer contest a foreclosure once they have filed a statement of intention to surrender the mortgaged property. Courts consider three factors when determining whether to apply judicial estoppel:

1. a “party’s later position must be clearly inconsistent with its earlier position”;
2. “whether the party has succeeded in persuading a court to accept the party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled”; and
3. “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped”.^[6]

Some Massachusetts^[7] and Rhode Island^[8] decisions hold that surrender in the Chapter 7 context bars defenses to a foreclosure under judicial estoppel.

The effect of a debtor’s statement of intention to surrender collateral in bankruptcy on pending or subsequent foreclosure proceedings remains a nuanced and evolving area of the law. Hinshaw will continue to monitor developments in these defenses.

[1] Fed. R. Bankr. 1007(b)(2).

[2] *Failla v. Citibank, N.A.*, 838 F.3d 1170 (11th Cir.) (2016).

[3] *In Re Pratt*, 462 F.3d 14, 18-19 (1st Cir. 2006).

[4] *In Re Ryan*, 560 B.R. 339 (2016), vacated on mootness grounds, 2018 Bankr. Lexis 17.

[5] *Giannasca v. Deutsche Bank Nat’l Trust Co.*, 2020 Mass. App. Unpub Lexis 672.

[6] *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

[7] *Ibanez v. U.S. Bank Nat’l Ass’n*, 856 F. Supp. 2d 273 (2012); *Melo v. Villarcon*, 2015 Mass. App. Div. Lexis 8 (2015).

[8] *Colon v. Bayview Loan Servicing, LLC*, 2020 U.S. Dist. Lexis 99925; *Pacia v. Deutsche Bank Nat’l Trust Co.*, 2022 U.S. Dist. Lexis 207720, appeal dismissed 2023 U.S. App. LEXIS 14771.

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