DEBTORS CANNOT RETAIN REAL PROPERTY POST DISCHARGE WITHOUT REAFFIRMING THE MORTGAGE DEBT

Last year, Burr & Forman lawyers won a decisive victory in the Eleventh Circuit, in the case of *In re Failla*, 838 F.3d 1170 (11th Cir. 2016). In *Failla*, the Eleventh Circuit held that **a debtor who files a statement of intention to "surrender" his or her house in bankruptcy may not oppose the secured creditor's foreclosure proceeding in state court**. *Failla* is a significant victory for secured creditors for two primary reasons. First, the Eleventh Circuit interpreted the meaning of "surrender," as used in 11 U.S.C. § 521(a)(2), and concluded that **a debtor who says he will "surrender" collateral must relinquish his rights in the property, including the right to possess and use it and the right to defend a foreclosure proceeding.** Second, while **secured creditors can ask state court judges to enforce a debtor's statement of intention to surrender through the doctrine of judicial estoppel, the *Failla* opinion confirms that secured creditors may also seek to reopen bankruptcy cases to compel a debtor to surrender based, in part, on the bankruptcy court's statutory authority to remedy abuses of the bankruptcy system.** A more detailed discussion of the court's legal analysis in *Failla* is available at burr.com by clicking here.

About a month after the *Failla* opinion was issued, Burr & Forman lawyers were again on the prevailing side of an Eleventh Circuit decision, in *Jones v. CitiMortgage, Inc.*, 666 F. App'x 766 (11th Cir. 2016). In *Jones*, the debtor filed a statement of intention to reaffirm the secured debt on his home during bankruptcy, but a reaffirmation agreement was never actually filed. Years after the close of the bankruptcy case, the secured creditor began foreclosure proceedings, and the debtor subsequently sued the secured creditor to oppose the foreclosure process and to assert other related claims. The Eleventh Circuit affirmed, in part, the district court's dismissal of the debtor's claims by considering, among other factors, the debtor's failure to actually reaffirm the mortgage debt in bankruptcy. The court reasoned that **because the debtor did not reaffirm the secured debt or redeem the property in bankruptcy, "it does not appear he has any basis to challenge a foreclosure action."** *Jones v. CitiMortgage, Inc.*, 666 Fed. Appx. 766, 776–77 (11th Cir. 2016) (citing *Failla*). **"WITHOUT REAFFIRMING THE DEBT OR REDEEMING THE COLLATERAL, THE DEBTOR HAS NO RIGHT TO RETAIN THE COLLATERAL**, id. at 1516 (referencing *Failla*), though the debtor can continue to maintain mortgage payments on a

principal residence after discharge without reaffirming the debt, and a creditor can take such payments rather than pursue an *in rem* foreclosure, see 11 U.S.C. § 524(j)." *Id*. at 770. Although this statement is arguably dicta, the Eleventh Circuit telegraphs in *Jones* its belief that **a debtor loses the right to retain collateral and defend foreclosure, absent reaffirmation or redemption in bankruptcy.**

Jones is consistent with an earlier district court decision, *Bank of America, N.A. v. Rodriguez*, 558 B.R. 945, 949 (S.D. Fla. 2016), in which the district court reversed the bankruptcy court's denial of a motion to reopen the bankruptcy case to compel surrender. In *Rodriguez*, the debtor stated her intention to reaffirm the mortgage debt, but failed to actually file a reaffirmation agreement during her bankruptcy case. Years later, the creditor moved to reopen the bankruptcy case, which was denied by the bankruptcy court partly because the secured creditor sat on its rights and failed to show the court that the debtor failed to perform her statement of intention. On appeal, the district court reversed and determined that, **despite the delay, the debtor's failure to reaffirm the secured debt was a compelling enough reason to reopen the case, and that, without an enforceable reaffirmation agreement, the debtor had no choice but to surrender the property.** The court further reasoned that the debtor was not prejudiced by the creditor's delay in seeking to enforce the debtor's duties under § 521(a)(2), and that, to the contrary, the debtor only benefitted by enjoying the free use of the property for years.

In a more recent bankruptcy court decision, *In re Thomas*, 12-38513-EPK, 2017 WL 3309719 (Bankr. S.D. Fla. Feb. 10, 2017), a secured creditor filed a motion to reopen a bankruptcy case to compel surrender of real property where the debtors did not file a statement of intention to either surrender or reaffirm with respect to the secured creditor's collateral. Relying upon *Failla* and *Rodriguez*, the bankruptcy court concluded that **the debtors were deemed to have surrendered their property because they did not redeem the property or reaffirm the secured debt during the bankruptcy case, without regard to any statement of intention.** 2017 WL 3309719, at *1. However, the bankruptcy court permitted the debtors to defend the foreclosure on the sole ground that the secured creditor allegedly lacked standing (an issue that was not contested in *Failla* or *Jones*), reasoning that **"*Failla* does not require a debtor to surrender his or her property to just any creditor, but to the creditor or creditors with standing to pursue rights in the subject property**." Id. at *2. The court in *Thomas*

correctly points out that, according to the Eleventh Circuit's opinion in ***Failla*, the duty to surrender property is owed to the secured creditor, rather than a stranger to the mortgage**.

Distinguishing *Failla* on its facts, the bankruptcy court in *In re Ayala*, 568 B.R. 870, 871 (Bankr. M.D. Fla. 2017), denied a secured creditor's motion to reopen the bankruptcy case to compel surrender, where the motion was filed after trial in the state court foreclosure action, where the debtor defended on the basis that the debtor was not in default. Notably, the court in *Ayala* does not mention *Jones* or *Rodriguez*. Even so, the Eleventh Circuit's reference in Jones to § 524(j) indicates that even the Eleventh Circuit may not condone the foreclosure of a mortgage loan that is not in default, where the secured creditor continues to accept post-discharge mortgage payments in lieu of foreclosure.

While the decisions in *Thomas* and *Ayala* may present reasonable limits to the Eleventh Circuit's opinion in *Failla*, the Eleventh Circuit's statements in *Jones*, which are not addressed in *Thomas* or *Ayala*, are broad enough to infer that the Eleventh Circuit intends to move to a bright-line rule that debtors who do not reaffirm mortgage debt in bankruptcy lose the right to retain the property and defend a subsequent foreclosure action, presumably on any ground whatsoever.

Conclusion

Together, *Failla* and *Jones* are powerful tools for secured creditors. *Failla* confirms the mandatory nature of § 521(a)(2), and according to *Jones*, **when a debtor fails to actually reaffirm secured debt on real property, the debtor must still surrender and loses the right to retain the property**. A third case, *In re Woide*, is now pending before the Eleventh Circuit, and may provide the context for the Court to further clarify, and either expand or limit, the scope of a debtor's duty to surrender real property in bankruptcy.

In *In re Woide*, 551 B.R. 865 (Bankr. M.D. Fla. 2016), the secured creditor prevailed on a motion to reopen the bankruptcy case to compel surrender of real property. The debtors filed a chapter 13 bankruptcy petition, but the case was later converted to chapter 7. The debtors did not file a statement of intention with respect to the property, but indicated in their schedules that they would surrender the property. After the close of the debtors' bankruptcy case, the secured creditor initiated a foreclosure proceeding, which the

debtors vigorously defended. The debtors also filed multiple lawsuits in state and federal court seeking to invalidate the note and mortgage, and even attempted to rescind the note and mortgage under TILA. The bankruptcy court entered an order reopening the bankruptcy case and compelling surrender of the real property, specifically prohibiting the debtors from taking "any action to impede, contest, or dispute the validity or enforceability of the note and mortgage . . . including, but not limited to, any action to rescind the note and mortgage pursuant to the Truth in Lending Act, 15 U.S.C. 1635 . . . ."

After the bankruptcy court ordered the debtors to surrender the property, the debtors appealed the bankruptcy court's order to the district court, and the district court affirmed. *In re Woide*, 2017 WL 78798 (M.D. Fla. Jan. 9, 2017). The debtors then appealed to the Eleventh Circuit. In *re Woide*, No. 17- 10776 (11th Cir. 2017). The primary issue on appeal is whether the debtors, who did not file a statement of intention regarding their property, but who did not otherwise reaffirm the mortgage or redeem the property during the course of their bankruptcy case, must still surrender the property. The case is now fully briefed on appeal. Although the *Woide* case presents an extreme set of circumstances, the Eleventh Circuit will have an opportunity, in the context of post-*Failla* decisions that question the limits of *Failla*, to move towards the bright-line rule that the Court seems to suggest in *Jones*.