

# DEALING WITH SECURED CREDITORS

(If you have loans with collateral – Autos / Mortgages, etc)  
*(NOTE THAT ALL CREDITORS MUST BE LISTED / NOTIFIED IN YOUR CASE  
REGARDLESS OF WHETHER OR NOT YOU WILL BE  
CONTINUING TO PAY THEM!)*

Bankruptcy law requires that we provide notice to your secured creditors about what you intend to do with your secured property. Generally, you have several options: 1) do nothing; 2) surrender the secured property; 3) continue to pay the loan as agreed; 4) redeem the property for its current worth; or 5) reaffirm the debt. These are each discussed below:

## OPTION #1: DO NOTHING

If the loan is secured by small purchases (electronics, furniture, housewares, etc.) or by minor improvements done to real property (flooring, windows, siding, etc.) you may be able to simply “do nothing.” Your bankruptcy will have discharged the debt, however the lender’s security interest remains. The question becomes how much your creditor is willing to spend to obtain the return of their collateral. In most cases, they would be required to bring a court “replevin” case to get permission for a sheriff to force the return of the collateral. In this event, you would have no obligation but to cooperate in returning the collateral, however the replevin case often costs \$1,000 or more to complete and few creditors are willing to do so. They will likely simply do nothing ... especially if the collateral is not worth much or has depreciated in value. In the event that the secured property cannot be easily removed from real estate (eg. Flooring, carpet, plumbing, siding), the creditor will get little of value after the removal (used flooring??). We cannot advise you whether or not to take this option, but the chance that the creditor will pursue recovery of the collateral may be small.

## OPTION #2: SURRENDER THE PROPERTY

You may **return** the collateral to the creditor and discharge your obligation to pay any of the remaining debt. Generally this requires either physically returning the items to the offices of the creditor or calling and arranging a time when you will be home to have the creditor drop by to pick the item(s) up. Remember that this may be difficult if the items are no longer in your possession (ie. sold, lost, stolen, or given to others as a gift).

## OPTION #3: SIMPLY CONTINUE TO PAY THE LOAN (“Retain and Pay”)

In many cases, provided that you keep making timely payments on the loan that secures the property, the lender will simply allow you to “retain” the property as long as they are getting paid and you are meeting the other terms of your original agreement (such as keeping vehicles property insured).

This is generally the best option if the lender allows you to do so. However, you need to be aware that after filing your bankruptcy, many creditors may:

- Stop sending monthly statements or invoices to you;
- Stop any automatic payroll deductions that you have authorized;
- Stop any pre-authorized electronic funds transfers;
- Stop notifying or reminding you of overdue payments;
- Refuse you access to your account through their online web site;
- Stop sending you reminder notices or late payment notices; and
- May also stop reporting your payments to the credit reporting agencies *(Note: even if they are not reporting to the credit reporting agencies, they must acknowledge that you have made your payments on time if requested by a future potential lender)*

Therefore, it is up to you to continue to make regular timely payments. If you do not (or forget), the creditor will have their normal rights to repossess the property. Retain and pay is the normal option for continuing real estate mortgages. It almost never makes sense to reaffirm a mortgage (see Option 5, below) just so that you can start getting monthly statements again or so that your payments are being reported to the credit reporting agencies.

**NOTE:** There are a few (fewer every day...) automobile lenders who will not allow you to “retain and pay” for your vehicle. They will either require you to sign a reaffirmation agreement (see Option 5, below) or they will repossess it. These lenders are becoming fewer as they realize that they would rather have the payments (even without a reaffirmation of the debt) than have the car back. If your lender insists on a reaffirmation and you wish to keep the car, you may have to sign it. However, it is often worth your while in many cases to refuse to sign the reaffirmation and take your chances. This is an area where you may want to discuss the issue with us first. If you sign, both you and the creditor may have to appear for a court hearing where the court determines whether or not the reaffirmation is “in your best interest” and often will refuse to approve the agreement. Generally, we won’t sign off on them unless there is an agreed upon change of terms in the agreement (interest rate, principal balance, payment, etc) that is in your benefit.

#### **OPTION #4: REDEEM THE PROPERTY**

You may also elect to keep the collateral by redeeming it. This means immediately paying the creditor (in cash) for the actual fair market value of the secured items. If you could get \$200.00 for the item, you must tender \$200.00 to the creditor in cash. The problem with redemption is that you must 1) establish a fair and reasonable value for the secured item and 2) pay that value to the creditor immediately in cash. Occasionally a creditor will agree to take this payoff amount over two or three payments, but they are not required to do so. If you do make the payment and redeem the secured item, the remaining amount owed to the creditor remains discharged (bankrupted).

“Redemptions” are often done with small pieces of secured property such as furniture, appliances, electronics, etc. If your vehicle is not worth much, **and** if you have had your car loan for at least 2 ½ years, **and** you can afford to pay the value of the vehicle off in full, a redemption may also be done on a car. For example, if the car is only worth \$500 and you still owe \$5,000 on a car loan that was taken out 2 ½ years ago, you may wish to pay the creditor the \$500 value of the car and receive your title.

Note that if a creditor does not wish to cooperate, a “redemption” often involves filing a Motion to Redeem with the Bankruptcy Court and will involve the payment of some additional attorney fees (normally \$200 to \$300) to get the motion filed.

#### **OPTION #5: REAFFIRM THE DEBT**

You may also keep the collateral by agreeing to reaffirm the entire remaining debt. If this is the case, you must sign a reaffirmation agreement. This agreement indicates that you have elected to be re-obligated all over again (and despite the bankruptcy) and will pay the debt in full in accordance with the terms set forth in the agreement. This will mean that you again owe the debt and if you later fail to pay it, the creditor will again have the right to repossess the collateral, sue you for any remaining deficiency, or use any other collection methods available to it to collect the full amount. For example, if you “reaffirm” a car loan you will owe the full amount of the loan even if the car is not worth that amount. So, if a little old lady runs a stop sign and hits your car (through no fault of your own), her insurance company will only pay you the current value of the vehicle. If that is not enough to pay off the full balance on your loan, you will owe the difference. One the other hand, if you didn’t sign a reaffirmation agreement, you would simply

have to give the damaged car back to your auto loan company (along with the insurance proceeds) and you wouldn't owe the deficiency balance to your lender. Furthermore, if you didn't sign a reaffirmation agreement, you could (at any time) simply stop making the payments and give the vehicle back with no obligation to pay anything further.

Generally, this office does not approve of Reaffirmation Agreements unless the new agreement provides you with **new benefits** such as a lower monthly payment, lower interest rate, or other changes that are in your best interest. You should avoid reaffirmation agreements at all costs and **CERTAINLY DO NOT** reaffirm any unsecured debt or debt where there is no collateral that can be taken away from you. Credit Card reaffirmations are **NEVER** worthwhile and are dangerous. Also, never reaffirm a debt if you cannot pay it or if the collateral is not worth the amount owed to that creditor.

Reaffirmation Agreements need to be signed by both you and the lender AND they need to be approved by the Bankruptcy Court. The Court often refuses to approve agreements that it believes are not in your best interest (even if you want it approved)!

You need to understand that a creditor does not have to accept Option 2 and has the right to argue over the true value of the collateral if you wish to use Option 3. **Under the current law, even if you are current on your secured debt payments, the creditor has the right to either have you reaffirm the debt or to have you surrender the secured property to them.** However, most reputable lenders will allow you to continue making your payments without an agreement. They know that if they take the car/collateral back, that they are not going to sell the collateral and get as much for it as they would if they simply accepted your payments. But the decision as to whether to require the reaffirmation or to take back the asset is up to the secured creditor.

This office will as a rule (and unless you can give us extraordinarily good reasons...) **NOT APPROVE** reaffirmation agreements or sign off on them. But you can, nevertheless, do a reaffirmation agreement without our approval. If you do this on your own, the court may hold a hearing and the Judge in your bankruptcy case will have to determine whether or not you can afford to make the payments before he approves the reaffirmation agreement. Unless you are willing to pay the additional fee of \$200, we will **not** sign these agreements or attend this hearing with you and you will need to be prepared to explain to the Judge why and how you think you can afford to pay for the reaffirmed debt.

Should you decide to reaffirm a debt, you should be aware of the fact that you may rescind your agreement at any time prior to the date that you receive your "Discharge Order" pursuant to Sections 727, 1141, 1228, or 1328 of Title 11 of the United States Code (the Bankruptcy Code). You may also rescind the agreement within 60 days after the agreement is filed with the Court, whichever of these two (2) dates is later, by giving notice of rescission to the lender. This means that you must give timely written notice to that specific creditor that you are rescinding your agreement.

## **A SPECIAL NOTE ABOUT MORTGAGE COMPANIES:**

Colorado Bankruptcy Judges generally will **NOT** approve reaffirmation agreements on mortgages. So, if your mortgage company suggests that you sign (or should have signed) a reaffirmation agreement in this state, they are simply not aware of the current state of affairs. Generally, the judges will only approve these reaffirmation agreements if the principle balance, the interest rate or the monthly payments have been lowered. Even in these cases, it is generally easier for the mortgage company to simply sign a mortgage “modification” with you. This can be an issue since the mortgage company will likely tell you that “since you didn’t sign a reaffirmation,” they will no longer report your good payment record to the credit reporting agencies and may refuse you access to pay by their online or telephonic payment methods.

If you are going to continue paying your mortgage, remember that **MORTGAGE COMPANIES ARE NOT YOUR FRIEND!** You should do the following:

- a. Call your mortgage company and give them permission to start sending regular monthly statements to you again. If you give them permission, they are not violating any Court order by providing regular statements.
- b. Pay them every month **EVEN IF YOU DON’T RECEIVE A STATEMENT FROM THEM!** Send the payments to their last payment address and be sure to put your account number on the payment. If they send you a notice asking you to make your payments to a different address, do so!
- c. Keep records of anything you pay them. It is best to pay them from YOUR bank’s online Bill Pay system or by checks so that you can show that they were cashed (Your bank statements will show this). Hold on to your monthly bank statements in case you need them. **DO NOT PAY THROUGH THEIR TELEPHONE OR INTERNET PAYMENT SYSTEM!!!** If you use money orders or cashier’s checks, **KEEP ALL RECEIPTS**, and be prepared to have to later contact the place that issued the check to get proof that your mortgage company actually cashed the check.
- d. Pay the full amount that is owed. Mortgage Companies hate receiving partial payments. If they receive a partial payment, they will still hit you with every possible late fee that they can and they’ll simply put the payment in “Suspense,” meaning that you haven’t helped yourself at all by making the partial payment.
- e. Obey any Notices that they send you indicating that the payment has changed due to a modification in Escrow requirements or a change in your adjustable interest rate. Again, they don’t care a whit about you. If you send them \$1,201 and the actual payment is \$1,201.50, they will put your payment in suspense, treat your account as if you have not made your payment, and add every possible late fee they can find.
- f. Don’t get behind to them ... **EVER!** If you really care about your house, make it a priority. If you have to cut out Starbucks, do so. We hate to see you ever have to pay them late fees. These fees are what they live for and you are simply feeding the Beast! If you get behind and they file a Motion with the Court, they will add between \$800 and \$1000 in attorney (and other) fees immediately (and you’ll have to pay them). **DON’T FEED THE BEAST!**
- g. Check to see if they are reporting your timely payments to the credit reporting companies. If they are not, consider refinancing your home with another mortgage company as soon as your credit and situation allows. Be ready to show your mortgage payment history with your refinance application as this will show your payment history as well as a credit report can.