STATE OF MAINE

Supreme Judicial Court

SITTING AS THE LAW COURT

LAW DOCKET NO. HAN-24-170

WELLS FARGO BANK, N.A.,

Plaintiff/Appellant,

v.

LINDA C. BENOIT ET AL.

Defendants/Appellees.

ON APPEAL FROM THE
HANCOCK COUNTY SUPERIOR COURT

BRIEF OF APPELLEES LINDA AND TODD BENOIT

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Appellant's statement of facts adequately describes the procedural and factual history of the action. The Appellee notes certain other relevant facts.

1) When the Benoits filed their bankruptcy petition and listed the Property and its associated debt in their schedules, they surrendered the Property to the trustee, pursuant to 11 U.S.C. § 521(a)(4), by operation of law.
2) The record of the Benoits' bankruptcy shows no specific action that the Bankruptcy Court took based on the Benoits' statement that they intended to surrender the Property. See A. 51-94.
3) There is nothing in the record to suggest that the Property was administered, that is sold, by the bankruptcy trustee. *Id.*
4) At the end of the bankruptcy case, on August 29, 2006, the Property was abandoned to the Benoits, by the trustee, pursuant to 11 U.S.C. § 554, by operation of law. See A. 90-94.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the trial court err in finding that stating an intent to surrender real property in a past bankruptcy bars a foreclosure defendant from raising defenses in a later foreclosure action related to that real property?

III. SUMMARY OF THE ARGUMENT

The Superior Court erred in applying judicial estoppel to this case. Surrender in bankruptcy is turning property over to the trustee for administration under section 521(a)(4). The Statement of intention to surrender, redeem or reaffirm, under 521(a)(2), due shortly after the initial petition is filed, merely gives notice that a debtor does not intend to redeem or reaffirm. An asset surrendered under section 521(a)(4) is turned over to the trustee for administration, come what may. If it is not sold or otherwise administered by the trustee, it is abandoned back to the debtor, with all rights intact, under section 554(c). Lest there be any confusion, the drafters of section 521(a)(2), perhaps anticipating that "surrender" might be interpreted as giving up rights, included a savings clause saying that a statement of intention under section 521(a)(2) "shall [not] alter the debtor's or the trustee's rights with regard to such property." Notwithstanding that savings clause, the Appellants ask that a debtor be forced to acquiesce to a foreclosure without so much as the right to challenge how much money is owed or if the purported creditor has standing.

Here, the Benoits surrendered the Property to the trustee at the outset of their bankruptcy, under section 521(a)(4), by including it in their schedules, and indicated under 521(a)(2) that they did not intend to redeem, reaffirm, or exempt the Property. The trustee chose not to administer or sell the Property, and the Property was abandoned back to the Benoits when the bankruptcy was closed. At no point did the Benoits, or the trustee, take a "position" about their substantive rights in the Property

as that term is used in judicial estoppel jurisprudence. To the extent that they did, that position is easily reconciled with, 17 years later, the Benoits asserting legal defenses to a foreclosure brought to determine and enforce a creditor's rights in the Property. There is also nothing unfair about the mortgagee having to prove its case, or face defenses.

IV. ARGUMENT

A. Judicial Estoppel Prevents the Assertion of Irreconcilable Positions.

Judicial estoppel is a doctrine designed to protect the integrity of the judicial process by preventing a party from unfairly taking one legal position and later taking an opposite position in the same or different proceeding. The doctrine, as articulated by the U.S. Supreme Court in *New Hampshire*, applies only when the positions are 'clearly inconsistent' and the party has persuaded the court to accept the earlier position. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (*New Hampshire).* Further, the party must derive an unfair advantage if not estopped. *Id.* The Benoits' intent to surrender the property in bankruptcy, and then subsequent defense of a lawsuit, does not meet these criteria. The First Circuit, following *New Hampshire,* says that:

> the doctrine's primary utility is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system. *United States v. Levasseur,* 846 F.2d 786, 792 (1st Cir. 1988). In line with this prophylactic purpose, courts typically

> invoke judicial estoppel when a litigant is "playing fast and loose with the courts." *Patriot Cinemas, Inc. v. Gen. Cinema Corp.,*834 F.2d 208, 212 (1st Cir. 1987) (quoting *Scarano v. Cent. R. Co.,* 203 F.2d 510, 513 (3d Cir. 1953)).

Alternative System Concepts, Inc. v. Synopsys, 374 F.3d 23, 33 (1st Cir. 2004).

This Court, following the guidelines in *New Hampshire,* has articulated three factors courts should consider in deciding on judicial estoppel:

> [t]o judicially estop an entity from asserting a position in a subsequent legal action (1) the position asserted in the subsequent legal action must be clearly inconsistent with a previous position asserted; (2) the party in the previous action must have successfully convinced the court to accept the inconsistent position; and (3) the party must gain an unfair advantage as a result of their change of position in the subsequent action

Linnehan Leasing v. State Tax Assessor, 2006 Me. 33, ¶ 25, 898 A.2d 408 (Linnehan) (citing *New Hampshire. v. Maine*, 532 U.S. 742, 750-51 (2001).

Before parsing these elements, this brief will discuss relevant parts of the United States Bankruptcy Code, (11 U.S.C. §§ 101 et seq.) (the Code) to support the Appellees' arguments, below, that stating an intention to surrender, 17 years ago, does not now prohibit them from putting this new mortgagee to its proof.

B. Surrender in Bankruptcy: Surrender to the Trustee, Not a Waiver of Defenses.

In bankruptcy law, 'surrender' refers to the debtor's obligation to turn over property to the trustee for administration as part of the bankruptcy estate, as outlined in 11 U.S.C. § 521(a)(4) (outlining the debtor's obligations at the initial filing of a

bankruptcy petition). This required action does not imply a waiver of the debtor's right to defend against future claims on that property. The property, once surrendered, is managed by the trustee, who may sell or abandon it. *Frostbaum v. Ochs*, 277 B.R. 470, 475 (E.D.N.Y. 2002) ("the trustee is allowed to use his best business judgment in deciding when to use valuable property of the estate and [when] to renounce title to and abandon burden.")

The Code requires that a debtor commencing a case under the Code, "shall," in addition to other basics like scheduling assets and debts, "surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate." 11 U.S.C. 521(a)(4) (emphasis added). So, surrender of assets to the trustee is a required default action after filing a bankruptcy petition. *Id.* The Chapter 7 estate includes "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). This includes potential claims and defenses to any lawsuit. 11 U.S.C. § 502(b)(1); see *B-Bar Tavern Inc. v. Prairie Mountain Bank (In re B-Bar Tavern Inc.)*, 506 B.R. 879, 910 (Bankr. D. Mont. 2013) ("any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy"). So, upon the filing of the Benoits' bankruptcy petition, the Property became part of the bankruptcy estate and all claims and defenses to any listed lawsuit or potential claim accrued to the trustee. At no point were any rights in the Property given up.

The trustee is then obliged to "administer" the estate. That means, essentially, taking inventory of the estate's assets and obligations, selling off the assets, and applying the proceeds to the debts as outlined by the bankruptcy code. See 11 U.S.C § 704(a)(outlining the Chapter 7 trustee's duties). To help with administration, the debtor has affirmative duties to list assets and state his or her intentions—either surrender, reaffirm, or redeem—as to those assets. 11 U.S.C. 521(a)(2). Although Section 521(a)(4) provides that all assets shall be surrendered to the trustee, elsewhere, the Code allows certain exceptions that let a debtor elect to hold onto certain assets: redemption and reaffirmation. See 11 U.S.C. § 722 and 11 U.S.C. § 524.

1. Redemption and Reaffirmation are the Alternatives to the Default Option of Surrender.

Redemption is a procedure by which a debtor may pay the creditor the current value—the "allowable secured claim" on the asset—even if the current balance of the loan on the secured debt is higher than the current value, and then discharge the remaining balance owed. 11 U.S.C. § 722. Redemption is not available, however, for real property secured by a mortgage. *In re Douthart*, 123 B.R. 1, 3 (Bankr. D.N.H. 1990).

Reaffirmation is a contract between the debtor and a creditor where the debtor agrees to pay a dischargeable debt. 11 U.S.C. § 524(k). When a debt is reaffirmed, the debtor, essentially, takes back the otherwise dischargeable debt and agrees to pay it on either the same terms as before the bankruptcy or subject to modified terms. *In re*

Pratt, 462 F.3d 14, 18 (1st Cir. 2006). Under this statutory scheme surrender of an asset to the trustee is the default action with redemption and reaffirmation being electives allowed by the Code.

Section 521(a)(2)(A), is where the requirement to provide notice of an intent to surrender, redeem or reaffirm comes from. Under that Section, debtors must, within 30 days of filing a bankruptcy petition:

> file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property

11 U.S.C. § 521(a)(2). Surrender is not defined in Section 521(a)(2) or anywhere else in the Code. From Section 521(a)(4) it appears to mean "turn over to the trustee for administration."

There is no conflict in reading Section 521(a)(2)'s use of surrender as consistent with its use in section 521(a)(4). As discussed below, section 521(a)(2) was created and serves to require debtors to give notice of whether they intended to redeem, reaffirm or "surrender" a secured asset. Surrender in section 521(a)(2) reads easily as "agree to turn over to the trustee for administration without electing to redeem or reaffirm." Regardless, surrender under section 521(a)(2) cannot mean that the debtor, or the trustee, is giving up any rights in the surrendered property, because section 521(a)(2),

says that "nothing in . . . this paragraph shall alter the debtor's or the trustee's rights with regard to [listed property] under this title, except as provided in section 362(h).[1]"

2. Pratt's discussion of Surrender is Limited and is Not Instructive to the Question before the Court – the Seemingly Useful Language for the Plaintiff's Argument is Taken Out of Context.

Appellant relies on *Pratt*, in the First Circuit, and *In re Failla* , 838 F.3d 1170 (11th Cir. 2016) in the Eleventh Circuit, to make the argument that a debtor cannot contest a foreclosure action by a creditor after that debtor indicated an intention to surrender the asset in bankruptcy. Turning first to *Pratt*, its unique facts are of little help in understanding surrender in the present context. But also, even if this Court expanded the use *Pratt's* "make available during the bankruptcy" construction of surrender (applied to personal property in *Pratt*) to real property, that would have little impact in an action on the Property 17 years later.

The question in *Pratt* was whether GMAC violated the discharge injunction "by declining to discharge its lien on the debtors' automobile until they paid the remaining balance due on their prepetition car loan." *In re Pratt* 462 F.3d 14, 15 (1st Cir. 2006). A look at the facts and reasoning of *Pratt* shows it has limited application here.

[1] Section 362(h) addresses circumstances under which the automatic stay may be lifted or will no longer apply for failure to comply with Section 521.

a. Pratt Procedural and Factual Background

In 1999 the Pratts began a Chapter 7 proceeding and "gave notice that they intended to 'surrender' their 1994 Chevrolet Cavalier"; the underlying debt was discharged. *Id.* at 15-16. GMAC, the creditor, decided not to repossess the car because it was worthless. *Id.* at 16. GMAC's lien, however, remained intact and GMAC refused to release the lien unless the Pratts paid their debt in full. *Id.* Without a release of the lien, the Pratts could not sell, give away, or junk the car. *Id.* The Pratts sued "alleging that GMAC's refusal either to repossess the vehicle or to release the lien, absent full payment of the discharged loan balance, violated the Chapter 7 discharge injunction prescribed by Bankruptcy Code § 524(a)(2), as their debt had been discharged." *Id.*; see 11 U.S.C. § 524(a)(2) ("A [bankruptcy] discharge . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or to act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived"). The Pratts argued, in one part, that their stated intention to surrender obliged GMAC to take possession of the car. It is in response to this argument that the Court in *Pratt* discussed "surrender."

b. The Pratt Court's Discussion of Surrender

The *Pratt* Court's entire discussion of surrender, follows:

> [s]ubsection 521(a)(2) does not, however, define the term "surrender." Since Congress did not use the term "deliver," however, one reasonably may assume that "surrender" does not necessarily contemplate that the debtor physically have transferred

> the collateral to the secured creditor. See, e.g., *In re Cornejo*, 342 B.R. 834, 836-37 (Bankr.M.D.Fla. 2005). Thus the most sensible connotation of "surrender" in the present context is that the debtor agreed to make the collateral *available* to the secured creditor –*viz.*, to cede his possessory rights in the collateral—within 30 days of the filing of the notice of intention to surrender possession of the collateral. Similarly, nothing in subsection 521(a)(2) remotely suggests that the secured creditor is required to accept possession of the vehicle at the end of the 30-day period, as such a reading would be at odds with well-established law that a creditor's decision whether to foreclose on and/or repossess collateral is purely voluntary and discretionary. Thus, we agree with the GMAC contention that the Pratts' surrender did not require that it repossess the vehicle if GMAC deemed such repossession cost ineffective.

Id. at 19 (emphasis added). Appellants also cite *In re Canning,* 706 F.3d 64 (1st Cir. 2013), which was another case where a secured debtor was suing to force a secured creditor to release a lien on the same theory rejected in *Pratt.*

Pratt, would seem to stand for the notion that a debtor may have some duty, during a bankruptcy, to make personal property, secured by a lien, available to a creditor if that creditor, during the pendency of the bankruptcy, desires to take possession. This is supported by express language in the Code that obliges debtors to make surrendered personal property, available to creditors. See 11 U.S.C. § 521(a)(6) (requiring debtors to make personal property (but not real property) available to

secured creditors, and, if not, possibly losing the debtor's right to a discharge of the underlying debt within the bankruptcy).[2]

Pratt is not instructive here. The legal question before the *Pratt* Court, in its discussion of "surrender," was whether a debtor's stated intention to surrender secured *personal* property obligated a creditor to take possession of it, and the Court said that "in the present context [surrender means that] the debtor agreed to make the collateral *available*." *Id.* at 19 (emphasis added). Here the parties are addressing real property 17 years after a bankruptcy estate was closed, and the Code's requirements for personal property have little import.

3. Failla was Wrongly Decided.

Appellant relies heavily on *In re Failla*, as have several trial courts in Maine, to support the argument that surrender in Bankruptcy involves giving up rights to a creditor. *Failla v. Citibank*, N.A. (In re Failla), 838 F.3d 1170 (11th Cir. 2016); See e.g. *Federal National Mortgage Association v. Weinber*g, RUMDC-RE-16-033 (2019).[3] In *In re Failla*, the Eleventh Circuit concluded that debtors who declare their intention to

[2] This might lend itself to a rule that, perhaps, debtors are obliged to "voluntarily surrender" an asset akin to how they may do so that is subject to repossession after a default under 9-A M.R.S. § 5-111(3), as that term is used in statute. 9-A M.R.S. § 5-111(3) ("[t]his section and the provisions on waiver, agreements to forego rights and settlement of claims, as provided in section 1-107, do not prohibit a consumer from voluntarily surrendering possession of goods which are collateral"). But a creditor who takes back collateral, either by voluntary surrender or involuntary surrender (repossession) still has to provide proper notice of sale, return excess proceeds, and otherwise follow the statutory framework that applies to taking back secured debts. See e.g. 9-A M.R.S. § 5-110; 11 M.S.R. §§ 9-1610 to 9-1616. Regardless, the Code only makes provisions for how a debtor must turn over secured personal property, not real property. 11 U.S.C. § 521(a)(6).

[3] Weinberg also relies on *In re: White*, 487 F.3d 199 (4th Cir. 2007), but White is a Chapter 13 Bankruptcy with a different definition of surrender, so its relevance is limited.

surrender property in bankruptcy cannot later contest a foreclosure in state court. The court did not hide its disdain for what it believed were delay tactics by the mortgagee, nor its sympathy for the creditor's prolonged foreclosure process in Florida. Yet, in its haste to resolve these issues, the court imposed (under color of textualism no less) an unnecessary and unwarranted judicial remedy unsupported by the bankruptcy code.

The *Failla* court interpreted section 521(a)(2) as establishing a two-step surrender process in Chapter 7 bankruptcy cases. The court posited that under section 521(a)(4), the debtor first surrenders the property to the trustee, and if the trustee abandons it, the debtor must then surrender it to the creditor under section 521(a)(2). *Failla*, 838 F.3d at 1175-76. The Court says:

> Reading "surrender" to refer only to the trustee of the bankruptcy estate renders section 521(a)(2) superfluous with section 521(a)(4). Under the surplusage canon, no provision "should needlessly be given an interpretation that causes it to duplicate another provision." Antonin Scalia & Bryan A. Garner, *Reading Law* 174 (2012). *See also Inhabitants of Montclair Twp. v. Ramsdell* , 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute...."). Section 521(a)(4) states that "[t]he debtor shall ... surrender to the trustee all property of the estate." 11 U.S.C. § 521(a)(4). Because section 521(a)(4) already requires the debtor to surrender all of his property to the trustee so the trustee can decide, for example, whether to liquidate it or abandon it, section 521(a)(2) must refer to some other kind of surrender.
>
> *Failla v. Citibank, N.A. (In re Failla)*, 838 F.3d 1170, 1175 (11th Cir. 2016).

The *Failla* court reasoned that the term "surrender" must have different meanings in sections 521(a)(2) and 521(a)(4) to avoid redundancy. *Failla*, 838 F.3d at

1175. This reasoning is flawed. Courts generally presume that identical words within a statute have the same meaning. *Robers v. U.S.*, 134 S. Ct. 1854, 1857 (2014) (internal quotations and citations omitted); see also *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Even if "surrender" in sections 521(a)(2)(A) and 521(a)(4) refers to different aspects of the surrender process, this does not justify the creation of a new creditor remedy that is not found in the Code.

First, this interpretation ignores the clear language of section 554(c), which states that property of the estate that is not administered by the trustee is abandoned to the debtor at the close of the case. 11 U.S.C. § 554(c). The court's ruling contradicts the plain language of section 554(c) and disregards the Supreme Court's instruction that courts must interpret the Bankruptcy Code based on its clear text. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Second, this interpretation ignores the explicit savings clause in section 521(a)(2) that says "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property."

The *Failla* court also argued that because the terms "redeem" and "reaffirm" in section 521(a)(2) relate to creditors, "surrender" must also refer to a debtor's relationship with the creditor. *Failla*, 838 F.3d at 1176. The court concluded that "surrender" must involve the transfer of all the debtor's rights in the property to the creditor. *Id.* However, the terms "redeem," "reaffirm," and "exempt" also pertain to the debtor's relationship with the bankruptcy estate. *In re Kasper*, 309 B.R. 82, 97-101

(Bankr. D.D.C. 2004). If a debtor chooses to redeem or reaffirm an obligation, then it is taken out of the trustee's hands. The clear relationship between these terms and the estate underscores that the *Failla* court's analysis lacks textual support in the Code.

Moreover, the *Failla* court's interpretation creates a conflict between section 521(a)(2) and the automatic stay provisions of the Bankruptcy Code. 11 U.S.C. § 362(a). "Surrender" to a secured creditor is not among the exceptions to the automatic stay listed in section 362(b). Congress knew how to create exceptions to the stay, yet it did not create one based on the "surrender" election. 4-521 Collier on Bankruptcy ¶ 521.14[5]; *In re Kasper*, 309 B.R. at 93-94.

The leading treatise on Bankruptcy roundly criticizes *Failla* and the Appellant's argument, saying:

> stating an intention to surrender should not affect a debtor's substantive rights with respect to the collateral. *In re Ryan*, 560 B.R. 339 (Bankr. D. Haw. 2016). The duty to make the property available to the creditor arises only if the creditor has a right to take the property. A creditor that has no right to repossess the property or to foreclose on it does not gain such a right because a debtor states an intention to surrender. But see *Failla v. Citibank, N.A.* (In re Failla), 838 F.3d 1170 (11th Cir. 2016) (erroneously holding that debtor who stated intent to surrender was not permitted to defend a foreclosure action). As discussed below, the saving clause at the end of section 521(a)(2)(B) provides that, except for relief from the automatic stay in some circumstances, section 521(a)(2) is not intended to affect the debtor's rights under the Code. And, in view of the fact that the Code specifically provides a more limited remedy for failure to follow through on the stated intention in some cases—relief from the automatic stay and permission for the creditor to take such action as is permitted by applicable nonbankruptcy law (11 U.S.C. § 521(a)(6)) it is unlikely that Congress intended to give secured creditors rights that they would not have had absent the filing of the bankruptcy case. *In re Foster*, 2016 Bankr. LEXIS 888 (Bankr. W.D. Okla. Mar. 21, 2016).

4 Collier on Bankruptcy ¶ 521.14[3] (2022) (emphasis added). *In re Metzler*, cited by the Appellant is part of the 11th circuit law that led to the *Failla* decision, *In re Metzler* 530 B.R. 894, 896 (Bankr. M.D. Fla. 2015) and equally deserves rejection.

Failla has not been widely followed outside the Eleventh Circuit. And the question remains unsettled. The most thorough rejection of *Failla* is from *In re Ryan*, a district court decision addressing the question of whether a chapter 7 surrender prevented the debtor from asserting claims against a mortgagee for wrongful foreclosure. *In re Ryan*, 560 B.R. 339, 349 (Bankr. D. Haw. 2016) (vacated on other grounds in *Cit Bank, N.A. v. Ryan* (In re Ryan), BAP No. HI-16-1391-TaLB (B.A.P. 9th Cir. Jan. 4, 2018)). In *In re Ryan*, the court directly rejected the Eleventh Circuit's interpretation of "surrender" as articulated in Failla. Also delving into the potentially conflicting interpretations of "surrender," in *In re Ryan* the court held that "surrender" under section 521(a)(2) of the Bankruptcy Code does not require debtors to relinquish all rights to defend against a post-discharge foreclosure. *Id.* at 349. Instead, the court reasoned that a debtor's statement of intent to "surrender" property is a notice provision that merely indicates that the debtor does not intend to redeem, reaffirm, or claim the property as exempt. *Id.* This interpretation preserves the debtor's ability to challenge a foreclosure action based on defenses available under state law, which the court found to be consistent with the debtor's rights as envisioned by the Bankruptcy

Code, such as the debtor's right, as a party in interest, to object to claims on the estate under 11 U.S.C. § 502. *Id.*

4. The Statement of Intention is Merely a Notice and the Legislative History of Section 521(a)(2) Supports This.

A Statement of Intention to surrender an asset under Section 521(a)(2), as its title implies, merely gives notice of an intent. It serves as a notice, not any substantive position. It would, at most, be a "position" that, during the bankruptcy, the debtor did not intend to redeem or reaffirm. This is consistent with reading "surrender" under section 521(a)(4) as "turning over to the bankruptcy trustee for administration," with the subsequent Statement of Intention, under section 521(a)(2) (and its savings clause) making it clear that there will be no efforts from the debtor to redeem, reaffirm, or exempt the property. The statutory history supports this. A debtor's obligation to state an intention regarding secured debts was added to the Code in 1984 after secured creditors complained that they could not easily find out what debtors intended to do with collateral. See*, e.g., In re Belanger,* 118 B.R. 368, 370-71 (Bankr. E.D. N.C. 1990). Having debtors state their intentions with secured debts saved effort in avoiding unnecessary motions to modify the automatic stay. Many courts have recognized that the statement of intention requirement of Section 521 serves a notice function. *In re Boodrow*, 126 F.3d 43, 50-51 (2nd Cir. 1997). Accord *In re Price*, 370 F.3d 362, 376 (3rd Cir. 2004) (reviewing legislative history and noting that creditors recommended a notice provision to remedy communication failures); *Mayton*

v. Sears Roebuck & Co., 208 B.R. 61, 66 (B.A.P. 9th Cir. 1997) (section 521(2) is essentially a notice statute); *In re Irvine*, 192 B.R. 920, 921 (Bankr. N.D. Ill. 1996) ("the purpose behind the section is one of notice"); *In re Parker*, 142 B.R. 327, 329 (Bankr. W.D. Ark. 1992) ("[s]ection 521 is 'essentially a notice requirement adopted to permit secured creditors to ascertain the debtor's intentions early in the case.'").

The notice purpose of section 521(a)(2) and that section's use of "surrender" is readily harmonized with the "turn over to the trustee for administration" use of the word in section 521(a)(4). Under section 521(a)(2) the debtor lets the trustee and creditors know that they do not intend to redeem or reaffirm, and that the default option of surrender to the trustee will be maintained. To avoid confusion, the drafters included a savings clause which makes it explicit that nothing in section 521(a)(2) should be read as giving up any rights saying "nothing in . . . this paragraph shall alter the debtor's or the trustee's rights with regard to such property." 11 U.S.C. § 521(a)(2).

C. If a Scheduled Asset is not Administered by the Trustee, it is Abandoned back to the Debtor and "Treated as if no Bankruptcy Petition was Filed."

A trustee does not have to administer all assets of an estate. See *Staiano v. Cain*, 192 F.3d 109, 119 (3d Cir. 1999) ("if no estate benefit is anticipated, then the proper course of action is to abandon the property.") (citing 11 U.S.C. § 554(a)). If any property, such as the Property, is not administered (sold) by the trustee, then:

> any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

11 U.S.C. § 554(c).

Collier, puts it thus:

> [u]pon abandonment under section 554, the trustee is divested of control of property because it is no longer part of the estate. Thus, abandonment constitutes divestiture of all of the estate's interest in the property. Property abandoned under section 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed.

5-554 Collier on Bankruptcy ¶ 554.02[3] (citing *In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990), aff'd 502 U.S. 410 (1992)); see also *Catalano v. C.I.R*, 279 F.3d 682, 685 (9th Cir. 2002) ("Upon abandonment, the debtor's interest in the property is restored *nunc pro tunc* as of the filing of the bankruptcy petition"). The Property in the Benoits' bankruptcy was not "otherwise administered, and therefore it was abandoned back to the Benoits, with their "rights to the property . . . treated as if no bankruptcy petition was filed." *Id.*

D. Judicial Estoppel Does Not Apply to the Benoits' Bankruptcy Case.

The Benoits' Statement of Intention to surrender their property in bankruptcy does not constitutes a "position" that judicial estoppel attaches to. To the extent they took a position, it is easily reconciled with putting a the mortgagee to its proof 17 years later in a foreclosure action. Likewise, it is fair for the Benoits to make the

current mortgagee prove its case its case in court, as with any other foreclosure, or any other effort to dispose of collateral, and as it would have had to do if it had foreclosed during the bankruptcy.

1. The Benoits did not take a Position in the Bankruptcy, as that Term is Used in Judicial Estoppel Caselaw in Maine or the Supreme Court of the United States.

To take a "position" for judicial estoppel purposes means to make a specific factual or legal assertion that impacts a court proceeding. *State Tax Assessor v. TracFone Wireless, Inc.*, 2022 ME 36, 276 A.3d 521, 527, n.6. In *New Hampshire*, for example, New Hampshire asserted a factual position, when, in the 1970s it agreed to a consent decree, after contested litigation, that the New Hampshire-Maine border for a certain portion was the "middle of the Piscataqua River's main navigable channel" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). New Hampshire later took the contrary position that the boundary lay at a different point, quite a lot closer to the Maine shore, granting New Hampshire dominion over Seavey Island and the Portsmouth Naval Shipyard. *Id.* at 747-48. See also *In re Child of Nicholas P.*, 2019 ME 152, ¶16, 218 A.3d 247 (appellant had asserted certain positions as a child's parent in early stages of DHHS proceedings, and then, later argued that DHHS had not proven he was the child's parent).

Judicial estoppel can also apply to legal or procedural positions. In *Maine Education Ass'n v. Maine Community College System Board of Trustee*s, 2007 ME 70, 218 A.2d 247 (Maine Education), the Maine Education Association (MEA) had argued in early court proceeding in the same litigation, that the matter should not be remanded to an arbitrator to decide certain issues, but some months later changed its view and moved to remand the matter to the arbitrator.. The Court upheld a lower court's determination that judicial estoppel barred the later request for a remand because "the MEA now seeks the remand it previously opposed." *Id.* at ¶ 20.

A debtor's providing a Statement of Intention to surrender under 521(a)(2) is not a factual or legal position, and it affects no one's rights; the section specifically says that nothing in that subsection impacts a debtor's rights. See also *Green Tree Fin. Servicing Corp. v. Theobald*, 218 B.R. 133, 136 (10th Cir. BAP 1998) ("Section 521 was not designed to provide a mechanism by which creditors may avoid obligations imposed by state law."); *In re Kasper*, 309 B.R. 82, 86 (Bankr. D.D.C. 2004); *In re Lair*, 235 B.R. 1, 12 (Bankr. M.D. La. 1999) (stating that "surrender" means nothing other than choosing not to use the bankruptcy alternatives of reaffirmation, redemption or exemption and avoidance).

Because the Benoits took no position to which judicial estoppel might attach, the lower court's decision should be upheld and the matter remanded.

2. The Benoits' "Position" in Stating an Intent to Surrender is Easily Reconciled with Putting the Mortgagee to its Proof some 17 Years Later.

"The doctrine of judicial estoppel does not apply when there is "an innocent inconsistency or apparent inconsistency that is actually reconcilable." 28 Am. Jur. 2d *Estoppel and Waiver* § 68 (footnote omitted). "The estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive" for judicial estoppel to apply. *Alternative System Concepts, Inc. v. Synopsys*, 374 F.3d 23, 33 (1st Cir. 2004).

In the judicial estoppel cases discussed so far, all finding that the doctrine applies, there is little nuance—the positions estopping and to be estopped are, "clearly inconsistent." In *New Hampshire,* New Hampshire said a boundary line was one place, and then another. *New Hampshire v. Maine,* 532 U.S. 742, 745-48 (2001). In *Child of Nicholas* the father first asserted rights as a parent in a proceeding, and then, later, argued that the State did not prove he was a parent. *In re Child of Nicholas P.*, 2019 ME 152, ¶4, 218 A.3d 247. In *Maine Education* the case could not be remanded, and then it could. *Maine Education Ass'n v. Maine Community College System Board of Trustee*s, 2007 ME 70, ¶¶ 10-12, 218 A.2d 247. In each instance a narrow, irreducible, contention is made, and then an irreconcilable change of tune. There is nothing of the sort here. A stated intention to choose "surrender" of an asset, only says that the debtor does not want, or is not able, to reaffirm or redeem.

The Appellant asks this Court to create a categorical rule first by accepting an expansive, and unnecessary in the Code, understanding of what it may mean to "surrender" an asset and then to apply it, again broadly, to a different legal context. A similar issue has come to the U.S. Supreme Court, and several circuits, on the meaning(s) of "disability" under the Americans with Disabilities Act (ADA) and the Social Security Act (SSA).

Under the ADA, a person who could perform a job if their employer made "reasonable accommodations" has the right to those accommodations. *Tobin v. Liberty Mut. Ins. Co.,* 553 F.3d 121, 125 (1st Cir. 2009) (citing 42 U.S.C. § 12112(b)(5)(A). To prevail in these claims the person must be capable of working and doing the job, so long as they are accommodated. People suing under the ADA have applied for disability benefits premised on the notion that they cannot work. As explained by the Second Circuit, the Supreme Court, resolving a circuit split, has ruled these positions are not necessarily at odds leading to judicial estoppel. As explained by the Second Circuit:

> the interaction of statements made in applications for social security disability benefits and ADA claims is not a new issue for the courts. The Supreme Court addressed a variation of this issue in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999). In *Cleveland*, the Court held that the mere fact that a plaintiff files for social security benefits (and thus, represents herself to be disabled) does not create a presumption that she is unable to perform the essential functions of her job, and thus, unable to prove an ADA claim. *Id.* at 802-03, 119 S.Ct. 1597. The Court emphasized that the statutory schemes have different definitions of disability; the ADA includes the notion of reasonable accommodation, whereas the SSDI system does

> not. *Id.* at 803, 119 S.Ct. 1597. The Court noted, however, that a sworn assertion in an SSDI application that someone is "unable to work" could negate an element of an ADA claim unless the plaintiff offers a sufficient explanation for the apparent contradiction.

Derosa v. Nat'l Envelope Corp., 595 F.3d 99, 102-03 (2d Cir. 2010).

In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999)(*Cleveland*) the Court addressed a Fifth Circuit decision where the lower court had, applying judicial estoppel, made a rule that where an ADA claimant had filed for disability, there would be a presumption that the claimant was estopped from bringing the ADA claim, since the disability claim required the claimant to assert that they were disabled. *Id. at* 526 U.S. 795, 800 *citing Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513 (5th Cir. 1997). The Supreme Court overruled the Fifth Circuit, and reasoned that the two statements of being "disabled" did not:

> involve directly conflicting statements about purely factual matters, such as "The light was red/green," or "I can/cannot raise my arm above my head." An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely "I am disabled for purposes of the Social Security Act."

Cleveland., 526 U.S. 795, 802 . And, because the two positions could be reconciled, the doctrine, and the categorical rule the doctrine had inspired in the lower court, did not apply to prohibit the latter ADA claim. *Id.* The Court said that, however, when "a plaintiff 's sworn assertion in an application for disability benefits that she is, for example, "unable to work" will appear to negate an essential element of her ADA case

-- at least if she does not offer a sufficient explanation," then the statement, but not the mere fact of one is disabled, may allow a party to prevail against her ADA claim. *Id.* at 806.

Here, the Benoits made no statement or definitive declaration they would not challenge a would-be mortgagee's compliance with applicable foreclosure law. Surrender in the bankruptcy context does not go that far. It is possible to reconcile "surrender" in the bankruptcy context with defending a future foreclosure. Just as a person might be "disabled for the purposes of the Social Security Act" but still able to work with reasonable accommodations, the Benoits can easily have surrendered the Property "for purposes of the Bankruptcy Code" (that is surrender for the trustee to administer, with no intent to redeem or reaffirm) without having given up statutory rights under the Maine residential foreclosure statute(s) on which this case was decided; there is nothing in the Code that surrender means the Benoits or the trustee ceded any rights when they noticed an intention to surrender regarding the Property, as required by Section 521(a)(2). That reading is overbroad and counter to *Cleavland*

This Court, too, has addressed a related issue of applying judicial estoppel between separate actions under separate legal frameworks, in *Linnehan Leasing v. State Tax Assessor*, 2006 ME 33, 898 A.2d 408 (*Linnehan*). Linnehan, a car dealer, was contesting the state's refusal to grant it a tax credit it may have been entitled to if Linnehan and Atlantic Acceptance Company (Atlantic) were treated, for the purposes

of determining eligibility for the credit, as the same entity. *Id.* at ¶ 24. The two entities shared an office, staff, and overlapped significantly in management. *Id.* at ¶ 6. The problem for Linnehan was that some acts that would have qualified them for the tax credit were undertaken by Atlantic. *Id.* at ¶¶ 5-12.

As to judicial estoppel, Linnehan argued that the State of Maine had, in a 2002 litigation, successfully argued that Atlantic and Linnehan were collectively a single dealership which functioned as a "buy here pay here operation" notwithstanding a gossamer corporate veil. See *Id.* at ¶¶ 4-8. Linnehan argued that if the State's past position was that Linnehan and Atlantic were the same entity, judicial estoppel should bar them from arguing that they were two entities in the latter case. This Court disagreed. It said that judicial estoppel:

> cannot apply to the facts of this case. The statute under which the State was proceeding in the previous action, the Unfair Trade Practices Act, 5 M.R.S. §§ 205-A to 214 (2005), is entirely different than the tax code. The prior action did relate to the repossession and resale of vehicles returned as a result of defaulted loans, but the action had nothing to do with the tax laws and did not require application or interpretation of sections 111(3), 1752(9), 1752(10), or 1811(A). In these circumstances, Linnehan's argument that the State Tax Assessor is judicially estopped from asserting that Linnehan and Atlantic are separate corporations fails.

Id. at ¶ 26.

Here too, the statute under which intention to surrender was noticed, the United States Bankruptcy Code, is different than Maine's foreclosure statutes. The Code relates to a system of allowing debtors a clean start if their obligations are

outpacing their assets and income. The Statement of Intention, as required by 11 U.S.C § 521(a)(2), is just that, a notice of an intention about how to treat an asset within a bankruptcy proceeding. The Maine foreclosure statutes ensure that consumers get proper notice of amounts allegedly due on residential real estate that serves as their primary residence, that the property is properly disposed of, and that all lienholders are properly compensated.

In any foreclosure, the mortgagee to the Benoits' mortgage, in 2005, would still have had to properly exercise its state law remedies. See, e.g. 14 M.R.S. § 6321. It would still have to bring a proper foreclosure and show what amounts it was owed, to take title. *Id.* It would have to conduct a proper sale, and give excess proceeds to the debtor or the trustee. See 14 M.R.S. §§ 6323-24.

Under either the "notice" construction, or the "make available during the bankruptcy" construction of what a Statement of Intention may signify, it is easy to reconcile it with defending a foreclosure, putting a propertied mortgagee to its proof, or raising legal defenses.

3. Surrender in Bankruptcy is never "accepted" or acted on by a court, so Judicial Estoppel does not apply to the Benoits', or any other Debtor's Surrender.

The second of the elements of judicial estoppel as discussed in *New Hampshire* is that a party has persuaded a court to take the prior position. In *New Hampshire*, an initial decision was reached in the 1970s about the states' boundaries and reduced to a consent judgment in the Supreme Court, after contested litigation. *New Hampshire v.*

Maine, 532 U.S. 742. In *Child of Nicholas*, the father had fought and won legal battles in DHHS hearings, premised on him being the child's father that led to the jeopardy petition on appeal. *In re Child of Nicholas P.*, 2019 ME 152, ¶16, 218 A.3d 247. Similarly in *Maine Education*, the MEA had received a final judgment confirming the decision from arbitration, and no party had appealed. *Maine Education Ass'n v. Maine Community College System Board of Trustee*s, 2007 ME 70, 218 A.2d 247. In these cases, there was an agreed-to final judgment with an articulated factual or legal contention—the boundary is *here;* the case *should not be remanded*; *I am the child's father*—that a court used to make its decision.

Here, the Benoits' Statement of Intention does not lay out a position of the same sort. It is a mere filing with the clerk. 11 U.S.C. § 521(a)(2) (debtor shall "file with the clerk a statement of his intention…"). But more to the point there is nothing in the record to suggest that the Bankruptcy Court ever acted on the Benoits' stated intention in the Statement of Intention. See A. 90-94. There is no order, the Bankruptcy Court Judge is never persuaded to do anything or make any decision based on the stated intention. *Id.* Based on the Statement of Intention, the trustee might (though not in this case) have decided to sell the property and a creditor (as may have been the case here) might move, unopposed, for relief from the automatic stay to pursue state law remedies during the bankruptcy. See A. 91 (docket entry dated December 29, 2005).

The Statement of Intention is processed administratively by the bankruptcy court. The Record does not show that the Bankruptcy Court took an action it would not have otherwise, other than docketing and maybe determining that the petition is complete, based on or because of the Statement of Intention. A. 90-94. The Statement of Intention is neither a request to the court nor an assertion of anything other than the debtors' intent not to redeem or reaffirm.

Because the Benoits did not convince a court to do anything like making a ruling or judgment based on their Statement of Intention, the doctrine of judicial estoppel does not apply.

4. There is Nothing Unfair about the Appellant Having to Prove its Case some 17 year after the Bankruptcy Discharge.

Finally, the party must "gain an unfair advantage as a result of their change of position in the subsequent action" for judicial estoppel to apply. *Linnehan Leasing v. State Tax Assessor*, 2006 Me. 33, ¶ 25, 898 A.2d 408. Asserting defenses in this foreclosure action does not give the Benoits an unfair advantage. The current mortgagee must prove its case just as if the prior mortgagee filed a foreclosure during the bankruptcy, and either the trustee or the Benoits had chosen to oppose a foreclosure in 2005. The mortgagee has no right to a shortcut around these legal requirements simply because the Benoits indicated an intent to surrender the property to the trustee nearly two decades ago. As established in *New Hampshire v. Maine*, 532 U.S. 742, 751, the doctrine of judicial estoppel is primarily concerned with protecting

the integrity of the judicial process, not with relieving a party of its obligation to prove its case.

E. Even if Estoppel Should have Worked to Stop the Benoits from Challenging the Appellants' Witnesses, it Would not Change the Outcome. Anyone Revieing the Appellant's Trial Exhibits can see From the Face of the 6111 Notice that it is Defective.

Even if the trial court erred in letting the Benoits challenge Wells Fargo's evidence and cross-examine its witnesses, any error like this is ultimately harmless. The defects in Wells Fargo's Section 6111 notice are apparent from the document itself, which means the trial court's decision would have been the same regardless of the Benoits' involvement.

During the trial, it was evident that Wells Fargo's Section 6111 notice did not meet the statutory requirements, particularly in its failure to itemize the amounts due, including the breakdown of principal and interest. This deficiency was highlighted during cross-examination when Wells Fargo's witness acknowledged that the itemization was not included in the notice. A. 23-26.

As the Appellant correctly notes, under Maine Rule of Civil Procedure 55(b)(3), the trial court has a duty to carefully review the plaintiff's evidence in foreclosure actions, even when the defendant does not participate. The rule makes sure a foreclosure plaintiff has complied strictly with the service and notice requirements of 14 M.R.S. § 6111 and has provided adequate evidence of its ownership of the mortgage note. Here, the trial court's review of the Section 6111 notice would have

led to the same conclusion—that the notice was defective—whether or not the Benoits had raised objections.

So, even if the Benoits had been barred from participating in the trial based on judicial estoppel, the outcome would have remained unchanged. The deficiencies in Wells Fargo's notice were clear and would have been identified by the court in its independent review. Any error in letting the Benoits challenge the evidence is harmless and does not require a reversal of the trial court's decision.

V. CONCLUSION

The Superior Court erred in applying judicial estoppel to this case. Surrender in bankruptcy is merely giving notice of how a debtor intends to treat a secured asset. An asset surrendered is turned over to the trustee for administration, come what may. If it is not sold by the trustee, it is abandoned back to the debtor. Here, the trustee chose not to administer or sell the Property, and the Property was abandoned back to the Benoits, with all rights intact. At no point did the Benoits, or the trustee take a position on "surrender" as that term is used in judicial estoppel jurisprudence. To the extent that they did, that position is easily reconciled with, 17 years later, asserting legal defenses to a foreclosure brought to determine and enforce a creditor's rights in the collateral.

The Court should hold that the trial court erred in determining that judicial estoppel applied and remand the matter to the trial court for a decision consistent with this decision. The Benoits further ask that this court clarify that in a case such as

this, where a court "dismisses the lender's foreclosure claim due to a deficient notice of the right to cure under section 6111, the effect of the . . . dismissal of the claim is to preclude any future claim for the outstanding balance due on the note as of the date of the judgment." *J.P. Morgan Mortg. Acquisition Corp. v. Moulton*, 2024 Me. 13, ¶ 12 (Me. 2024). The Superior Court's decision is ambiguous, with the dismissal being "without prejudice" but clearly "due to a deficient notice of the right to cure under section 6111." A. 26-27.

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Respectfully Submitted,

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