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**The Timing of a Debtor's Petition for Bankruptcy can Determine if a Pending Title Pawn Contract becomes Property of a Debtor's Estate**

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**INTRODUCTION**

Section 541 of title 11 of the United States Code (the "Bankruptcy Code") determines whether property comes into a debtor's bankruptcy estate falling under the protection of the automatic stay afforded by section 362 of the Bankruptcy Code. Bankruptcy Code section 541 defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case[.]"<sup>1</sup> What constitutes a debtor's "legal or equitable interest" in property is determined by state property law, making state law the determining factor in whether a debtor's interest in a specific property constitutes property of the estate.

The state law inquiry of whether property is property of the estate has led to divergent outcomes in factually similar or identical bankruptcy cases in different jurisdictions. In cases involving the debtor pawning an item of value and subsequently filing a bankruptcy petition, these differing outcomes are not always due to the differences in state pawn statutes. This memorandum examines how bankruptcy courts determine whether pledged property in a title pawn transaction enters a debtor's bankruptcy estate. Section I gives a brief overview of the

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<sup>1</sup> 11 U.S.C. § 541(a)(1).

transaction which is the title pawning of an item. Section II details three Bankruptcy Code sections that are relevant to the determination as to whether a title pawned item constitutes property of the estate. Section III analyses the timeline of a title pawn contract to demonstrate how the time of filing for bankruptcy impacts whether the pledged collateral is placed in the debtor's bankruptcy estate or is forfeited to the pawnbroker.

## ANALYSIS

### I. Introduction to Pawning an Item

Pawning an item involves an individual turning over an item of value that they own as collateral in exchange for a typically small loan by the pawnbroker.<sup>2</sup> The parties enter into a pawn agreement which documents that in exchange for a small loan, the individual pledges as collateral the item that is being pawned. The pawn agreement will provide that the original loan amount plus accrued interest is due within a specified time. If paid back within the contracted time period, the individual will maintain title to the pledged collateral. Conversely, if the loan and interest are not paid back within the prescribed time, the property interest in the collateral is forfeited to the pawnbroker.<sup>3</sup> Title pawn contracts operate in the same way, but instead of the pawnbroker keeping the collateral throughout the loan period, they retain the title to the collateral while the individual who title pawned the item retains the physical property.

State legislatures, recognizing the dangers in allowing pawn shops to make no risk loans that could cause substantial loss to individuals desperate for money, have implemented redemption periods that requires the pawnbroker to allow the individual to redeem their collateral past the contracted for due date.<sup>4</sup> While the length of the redemption period varies from

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<sup>2</sup> See Michael Knisley, *What a Pawn Shop Is & How They Work*, IN CHARGE (Nov. 11, 2022), <https://www.incharge.org/financial-literacy/how-pawnshops-work/>.

<sup>3</sup> See *id.*

<sup>4</sup> See *In re Snyder*, 635 B.R. 901, 924 (Bankr. S.D. Ga. 2022).

state to state, thirty days after the contracted for period is typical.<sup>5</sup> This redemption period is noteworthy because it can be the deciding factor in whether a debtor retains the collateral in their bankruptcy estate.

## II. Relevant Bankruptcy Statutes Concerning a Title Pawned Item

Three sections of the Bankruptcy Code are relevant to the issues surrounding title pawning of an item. First, section 108(b) of the Bankruptcy Code addresses "extension of time." Specifically, section 108(b) provides:

- (b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
  - (2) 60 days after the order for relief.<sup>6</sup>

This section details issues arising when nonbankruptcy law fixes a specific amount of time, e.g., the thirty-day redemption period offered by state legislatures after contracted for time to repay the pawn loan has finished, within which the debtor can remain as the title holder to the collateral.<sup>7</sup> When this amount of state prescribed time has not expired before the debtor files a bankruptcy petition, this state prescribed period is extended to the later of (1) the end of the period provided by the non-bankruptcy law, or (2) sixty days after the filing of the bankruptcy petition.<sup>8</sup> Thus, as the typical state pawn statute's redemption period is thirty days, if the bankruptcy filing occurs within those thirty days, the redemption period to repay the loan and

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<sup>5</sup> *See id.*

<sup>6</sup> 11 U.S.C. § 108(b).

<sup>7</sup> *See In re Rodriguez*, No. 23-000134 (ESL), 2023 Bankr. LEXIS 2868, at \*5–6 (Bankr. D.P.R. 2023).

<sup>8</sup> *See id.* at \*6.

interest to remain as title holder of the collateral will be extended sixty days from the time of filing the bankruptcy petition for the individual who has title pawned the item.

Section 362(a) of the Bankruptcy Code is also relevant in the title pawn context. Section 362(a), known as the automatic stay, prohibits a creditor from taking any action against a "debtor to recover a claim, enforcement of any judgment against property of the debtor, any act to obtain possession of property of the estate, enforce any lien against property of the estate, and others[.]"<sup>9</sup>

Section 541(b)(8) is the only Bankruptcy Code provision that specifically pertains to pawned collateral:

- (b) Property of the estate does not include—
- (8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidence of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—
- (A) the tangible personal property is in the possession of the pledgee or transferee;
- (B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and
- (C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b);<sup>10</sup>

Before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") came into effect, the Bankruptcy Code did not contain a section so pointedly referencing pawn transactions.<sup>11</sup> This provision clearly indicates the legislatures intent for typical pawn transactions to be excluded from the bankruptcy estate.

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<sup>9</sup> *Id.* (citing 11 U.S.C. § 362(a)).

<sup>10</sup> 11 U.S.C. § 541(b)(8).

<sup>11</sup> See *In re Snyder*, 635 B.R. 901, 919 n.33 (Bankr. S.D. Ga. 2022) (citing Williams, *Bankruptcy Practice Handbook* § 9:8 (2d ed.) ("One commentator observed that 'Congress spent little ink on the question of pawn transactions' in § 541(b)(8) but that 'compared to the absence of statutory treatment which had been the condition for some years, even the small amount of ink has been helpful.'")).

Subsections (B) and (C) of section 541(b)(8) address whether the contract is a pawn transaction and if the individual pawning the item has "exercised any right to redeem[.]"<sup>12</sup> If a debtor has entered a title pawn contract and has yet to redeem the item, both elements are met.

The critical element of section 541(b)(8) that makes title pawn contracts different from typical pawn contracts is the requirement that the collateral be in possession of "the pledgee or transferee[.]" Some courts have interpreted this to mean that merely providing the pawnbroker with the title of the car would relieve the debtor from the 541(b)(8) exception and allow the debtor to place their collateral into the property of the estate.<sup>13</sup> However, more recent cases have found this analysis to be flawed and that the title in which the pawnbroker is taking a security interest in is the vehicle.<sup>14</sup>

Relevant case law that details the title pawning of an item under Section 541(b)(8) is slim.<sup>15</sup> However, an influx of cases, most involving title pawning of a car and examining Georgia pawn law, have brought bankruptcy courts back into deciding whether title pawn contracts should be placed in a debtor's bankruptcy estate.

### III. Timeline of the Title Pawn Agreement and why it Impacts the Bankruptcy Estate

At the outset of this timeline analysis, it is important to understand why there are divergent outcomes in factually similar or identical bankruptcy cases in different jurisdictions. For example, in cases where a California debtor has entered a title pawn contract, the debtor

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<sup>12</sup> 11 U.S.C. § 541(b)(8).

<sup>13</sup> See *In re Stanfield*, 2016 Bankr. LEXIS 499, at \*5–7 n.3 (Bankr. S.D. Ga. Feb. 18, 2016) ("[W]ritten or printed evidences of indebtedness or title are excepted from the pledged property to which the [541(b)(8)] exclusion applies.").

<sup>14</sup> See *In re Snyder* 635 B.R. at 920 ("The tangible personal property in which TitleMax took a security interest was the vehicle, not the certificate of title. The title is simply the device by which a pawnbroker perfects its lien in the vehicle.").

<sup>15</sup> See *id.* at 920 n.35 (citing *In re Paul*, 534 B.R. 430, 434 (Bankr. M.D. Ga. 2015) (holding that each element of § 541(b)(8) was satisfied where pawnbroker repossessed vehicle prior to petition date)); *In re Bolton*, 466 B.R. 831, 838–39 (Bankr. S.D. Miss. 2012) (holding that § 541(b)(8) did not exclude vehicle from estate because right to redeem had not expired).

should file for bankruptcy as soon as possible because California law requires pawnshops to notify the debtor before obtaining legal title to their pawned item.<sup>16</sup> This notice would violate Section 362(a), leaving the property in the debtor's bankruptcy estate.<sup>17</sup> However, in Georgia, a debtor in the same situation who fails to redeem the item during the redemption period automatically passes the title of the pawned item to the pawnbroker.<sup>18</sup> Thus, filing a bankruptcy case would not protect the property from passing to the pawnbroker post-petition in Georgia.<sup>19</sup>

The timing of when a debtor files for bankruptcy during the life of a title pawn contract also impacts whether the collateral will be retained in their bankruptcy estate. There are four significant periods in a title pawn contract timeline. The first is the starting point where the two parties agree to a title pawn contract. The second is the contracted for period, where the pawnbroker is required to give the title of the collateral back if the individual who title pawned the item pays back the loan and interest. The third is the statutorily prescribed redemption period, the legislature's safety net provision allowing for an individual who title pawned their property to have additional time to retain their collateral outside of the contracted time frame. The fourth is the conclusion of the transaction, when the statutorily prescribed redemption period ends, and the pawnbroker retains the physical item and retains title.

Filing for bankruptcy in the "contracted for period" will allow the debtor to retain the pledged collateral in their bankruptcy estate. In *In re Womack*, the debtor filed for bankruptcy during this contracted for period.<sup>20</sup> The debtor named her title pawned car as an asset of her estate and the pawnbroker as a secured creditor and proposed in her plan of reorganization to

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<sup>16</sup> See *In re Sorensen*, 586 B.R. 327, 329 (B.A.P. 9th Cir. 2018).

<sup>17</sup> See *id.*

<sup>18</sup> See *Max v. Northington (In re Northington)*, 876 F.3d 1302, 1305 (11th Cir. 2017) (citing Ga. Code Ann. § 44-14-403(b)(3)).

<sup>19</sup> See *id.*

<sup>20</sup> No. 21-11476, 2021 U.S. App. LEXIS 26127, at \*3 (11th Cir. 2021).

repay the pawnbroker over the life of the plan.<sup>21</sup> The pawnbroker objected, noting *In re Northington*, 876 F.3d 1302 (11th Cir. 2017) for support that the debtor's bankruptcy petition "did not freeze the statutory right of redemption . . . and after the expiration of the 60-day period [the debtor] automatically forfeited the [pawned] vehicle and absolute right, title and interest [to the vehicle] vested in TitleMax."<sup>22</sup> In *In re Northington*, the facts are substantially similar to those in *In re Womack*, except the debtor's petition for bankruptcy was filed during the statutorily prescribed redemption period.<sup>23</sup>

These two cases have different outcomes due to the interaction of section 108(b) and section 362(a). In *In re Womack*, the debtor benefitted from the automatic stay; however, because the debtor in *In re Northington* transferred his vehicle to the bankruptcy estate after the period to redeem started, his redemption period was extended by section 108(b) "for a finite term of 60 days."<sup>24</sup> Accordingly, the debtor could not avail himself of the automatic stay because "anything temporarily stayed under the specific language of section 108(b) [can]not [be] indefinitely stayed by the more general language of section 362(a)."<sup>25</sup> Thus, the debtor who files for bankruptcy in the contracted for period gets to retain their pledged collateral in their bankruptcy estate, while the debtor who files in the redemption period is required to pay back the loan and interest in sixty days per section 108(b).

Bankruptcy courts have questioned why the 11th Circuit largely ignored Section 541(b)(8) when deciding *Womack* and *Northington*.<sup>26</sup> The *In re Northington* court noted section

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *In re Northington*, 876 F.3d at 1305.

<sup>24</sup> 876 F.3d at 1313.

<sup>25</sup> *Id.*

<sup>26</sup> See *In re Snyder*, 635 B.R. 901, 919 (Bankr. S.D. Ga. 2022) ("Curiously, neither *Northington* nor *Womack* discussed in any detail the only Bankruptcy Code provision that actually addresses pawn transactions, namely § 541(b)(8)."); see also *In re Rodriguez*, No. 23-000134 (ESL), 2023 Bankr. LEXIS 2868, at \*11 (Bankr. D.P.R. 2023).



541(b)(8) in a footnote, holding that state-law property rules regarding title pawn contracts take priority over section 541(b)(8).<sup>27</sup>

## CONCLUSION

While title pawn agreements lead to differing outcomes across state lines as to when they fall into a debtor's bankruptcy estate, "[s]ection 541(b)(8) reflects congressional intent for unredeemed pawned property to be excluded from the bankruptcy estate."<sup>28</sup> State property law determines what constitutes the debtor's property. However, the Bankruptcy Code allows debtors to retain in their bankruptcy estate the collateral of their title pawn contract if they commence their bankruptcy cases during the contractually agreed-upon period before the statutorily prescribed redemption period and Bankruptcy Code section 108(b) comes into effect.

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<sup>27</sup> See *In re Snyder*, 635 B.R. at 922 (citing *In re Northington*, 876 F.3d at 1314 n.9).

<sup>28</sup> *Id.* at 920.