Your Auto Loan*

This memorandum describes the four choices you have about how to deal with your auto loan in your Chapter 7 case. You must be the judge of which of these choices is best for you.

There are a few basic facts you should know to decide which choice is right for you. When you bought the car, you signed a promissory note. In the note, you promised to pay a certain amount of money in monthly installments. Your obligation to make those payments will be discharged in your bankruptcy unless you pick the "reaffirm" choice described later.

You also signed a security agreement giving the lender a "security interest" in the car until you payoff the loan. The lender's interest is noted on the title certificate, which is how the lender makes sure you don't sell the car to someone else without first paying off the loan—any buyer would want to get a clean title, but won't be able to because of the security interest noted on your title. Your insurance policy also names the lender as the primary insured party for damage or theft because the lender has the right to decide whether and how any insurance proceeds should be applied. The lender' security interest will normally ***not*** be affected by a bankruptcy. That means that the lender will usually keep the right to repossess the car for nonpayment. Were it not for bankruptcy, if the total amount you borrowed was more than $2,000, the lender also has the right to sue you for the amount (called a "deficiency") they lose after repossessing and selling the car.

When you file a bankruptcy case, however, an "automatic stay" goes into effect that requires your auto lender to get permission from the Bankruptcy Court before attempting to repossess the car. So long as you keep up the payments, the court will not grant permission. But, if you are behind in your payments when you file bankruptcy, or if you fall behind after filing, the court will nearly always give permission to the lender.

Choice 1: Surrender

You may choose to "surrender" your car to the lender in full satisfaction of the loan. Your bankruptcy discharges your obligation to make payments ***and*** your obligation to make good any deficiency between the value of the car and the amount you still owe.

Surrender is often the best choice when you owe a lot more on the loan than the car is currently worth, such as when the car has been damaged in a wreck or when you rolled over the unpaid balance on your trade-in into the loan on your present car.

To accomplish a surrender, we will tell the lender on the "Statement of Intention" we file in your case that you intend to surrender the car. You must actually deliver possession of the car before 30 days after first date set for the meeting of creditors under section 341(a). The lender cannot force you to deliver the car any sooner than that. We usually ask the lender to arrange to pickup the car from you at a time when it's

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convenient to you. Until then, you must keep the car insured. If you park it on a public way, you must keep the plates on it, too.

Choice 2: Redeem

You may instead choose to "redeem" the car by paying the lender its fair market value. When you redeem the car, you (or whoever loans you the money to redeem it) end up owning the car. The lender cannot ask you to pay any deficiency.

Redemption is often the best choice when you owe a lot more on the loan that the car is currently worth ***and*** you have enough cash or can borrow enough cash.

To accomplish a redemption, we will tell the lender on the "Statement of Intention" we file in your case that you intend to redeem the car. You must actually tender the fair value of the car within 30 days after the first date set for the meeting of creditors under section 341(a). I can help you find a "redemption loan" to facilitate the redemption process.

I will charge you additional fees for assisting with a redemption because a court proceeding will likely be necessary.

Choice 3: Reaffirm

Your third choice is to "reaffirm" the car loan. Reaffirming the loan means agreeing with the lender that you will personally payoff the loan, usually according to the original payment schedule. If you default on the reaffirmed loan, the lender can repossess ***and*** sue you for the deficiency, just as if you had never filed for bankruptcy.

To accomplish a reaffirmation, we will tell the lender on the "Statement of Intention" we file in your case that you intend to reaffirm. The lender will send a reaffirmation agreement to me, and I will send it to you for signature. It goes back to the lender, who then files it with the court along with a motion to approve it.

To be effective, a reaffirmation agreement must be made before the discharge enters in your case (generally about three months after filing) and must be filed with the court. Even when you sign a reaffirmation agreement, you have until the ***later*** of the date you are discharged and 60 days after the agreement is filed with the court to cancel the agreement.

The standard form of reaffirmation agreement has a signature block for me to certify, among other things, that the agreement doesn't impose an undue hardship on you. I can almost never sign that. Consequently, the court will likely schedule a hearing at which you and I must both appear. I will charge you additional fees for attending that hearing.

I believe that reaffirmation is almost never the best choice. If you really want to keep your current car and to continue making the payments, you can probably choose the fourth choice—"retain and pay"—instead.

Choice 4: Retain and Pay

Your fourth and final choice is to keep making the payments without reaffirming the loan. This choice isn't available in all states, but Massachusetts has some favorable laws that make this choice better than reaffirmation. As long as you make all the payments on

time, and as long as you keep the car insured and avoid major accidents, you are not in default. The lender cannot repossess the car. When you eventually payoff the loan, the lender must send you a clean title certificate. And, best of all, if you eventually default on the loan and the lender repossesses, you will not owe the lender a deficiency because your obligation to pay the loan will have been discharged.

The lender will probably stop sending you statements. All this means is that you must make the payments on time without getting reminded.

There is one risk that you should know about. Technically, under the 2005 amendments to the Bankruptcy Code, you're not allowed to retain possession of a car unless you redeem it or reaffirm the loan. A particularly silly car lender ***could*** argue that this provision preempts the Massachusetts statutes that say a lender can't repossess or accelerate a loan for anything except nonpayment or because of an event that substantially impairs the value of the car as collateral for the loan. Ford Motor Credit has taken that position in other parts of the country. The issue has not been litigated in Massachusetts, so there is a risk that Ford Motor Credit or some other lender might seek to repossess your car if you elect the "retain and pay" option. Most lenders, however, would much rather have a stream of payments than a used car. Some lenders will, in fact, explicitly tell us that you can retain and pay.