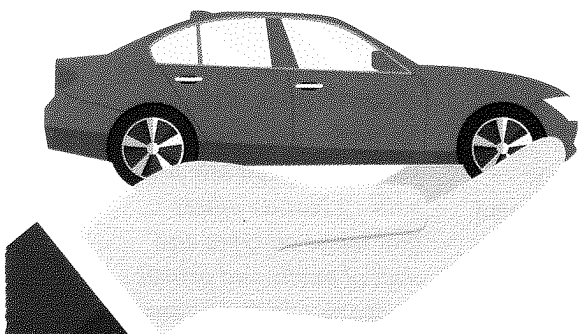
YOU DON'T HAVE TO GIVE THE CAR BACK

Florida lenders do not have to give a car back when repossession occurs before a customer files bankruptcy.

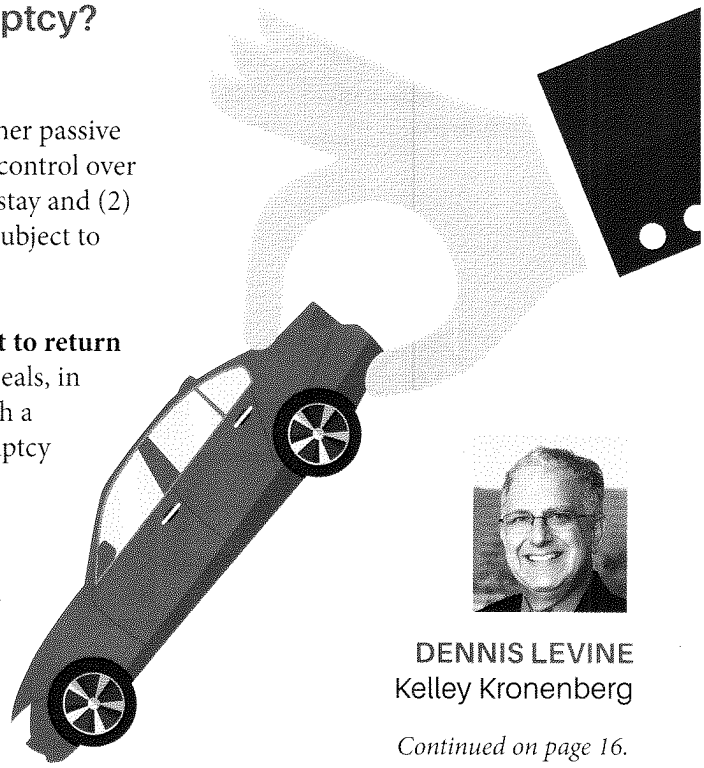
BY DENNIS LEVINE



We hear this question all the time - a dealer has been looking for a car for a long time, picks it up, and a day later is notified that the customer filed bankruptcy and wants the car back. Does the dealer have to return the car to the customer after they file bankruptcy?

The legal issues under the Bankruptcy Code are (1) whether passive possession of a vehicle by a creditor is an "act to exercise control over property of the estate" such that it violates the automatic stay and (2) whether the vehicle is property of the bankruptcy estate subject to turnover.

In Florida, the answer is clear—there is no requirement to return the vehicle to the debtor. The 11th Circuit Court of Appeals, in the case of "*In re Kalter*", ruled that a secured creditor with a lien on a Florida title which repossessed a car pre-bankruptcy did not have to return it when the customer later filed bankruptcy[1]. The Court's decision was based on the language in Fla. Stat. § 319, the statute covering car titles.



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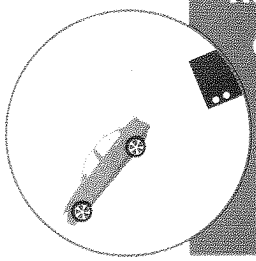
[1] *In Bell-Tel Federal Credit Union (In re Kalter)*, 292 F.3d 1350 (11th Cir. 2002). The 11th Circuit used the same analysis interpreting Alabama law. *In re Lewis*, 137 F.3d 1280 (11th Cir. 1998)(holding under Alabama law that an automobile repossessed pre-petition did not constitute property of the estate subject of turnover).

Fla. Stat. § 319.28 provides an exception to the general rule that a certificate of title is required in order to obtain marketable title to sell a car. The 11th Circuit concluded that the provisions of Fla. Stat. § 319.28 recognize that "ownership transfers upon repossession". As a result, when a car has been repossessed or otherwise transferred by operation of law, the repossessing party becomes the "owner" and does not have to meet the certificate of title requirement.

In rejecting the debtor's argument that a certificate of title in the name of the repossessing creditor was required for the creditor to be deemed the owner (and this obviously had not been obtained prior to repossession), the 11th Circuit stated that under Florida law, a certificate of title is merely evidence of, but not a requirement of, establishing ownership. Thus, the fact that the creditor had not yet obtained a "repo title" in its name by the time the customer filed bankruptcy did not render the repossessed automobile property of the bankruptcy estate subject to turnover.



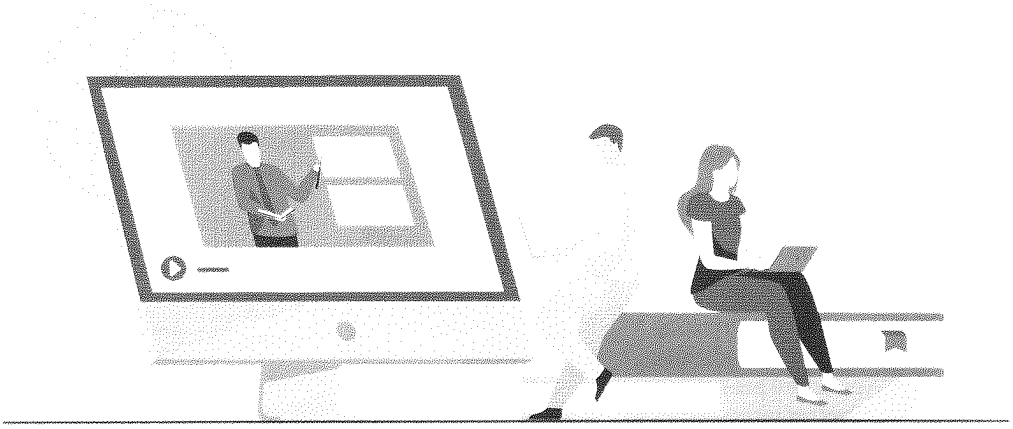
Based on the Kalter case, we advise dealers and lenders in Florida they have no obligation to return the car to the customer.

Based on the *Kalter* case, we advise dealers and lenders in Florida they have no legal obligation to return the car to the customer. We also advise clients that in this situation they can sell the vehicle and do not have to move for relief from the automatic stay in the Bankruptcy Court.

What about the law outside of Florida? The case law across the country on this issue is split. The majority rule is the creditor must give the car back to the debtor. Currently, only two Circuits allow creditors to hold the car. THE SUPREME COURT IS READY TO TELL US THE ANSWER.

On October 13, 2020 the United States Supreme Court heard oral argument on the issue of whether passive possession of a vehicle violates the automatic stay in the case of "*Fulton vs. City of Chicago.*" An opinion in this case is expected next spring. Nevertheless, since the issue in *In re Kalter* was resolved based on Florida law, and not an interpretation of the automatic stay in the Bankruptcy Code, the ruling in *In re Kalter* should continue to be effective in Florida no matter how the Supreme Court rules in the Fulton case.

Dennis LeVine focuses on bankruptcy litigation and creditors' rights. He is one of only seven attorneys in Florida to be Board Certified in both consumer bankruptcy law and business bankruptcy law by the American Board of Certification. Kelley Kronenberg is a multi-practice business law firm with 10 Florida offices that serves all types and sizes of public and private companies, including small businesses and individuals.



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