

NATIONAL BUSINESS INSTITUTE, INC.

PRESENTS

THE BANKRUPTCY CODE'S AUTOMATIC STAY, 11 U.S.C. §362

April 4, 2016, 11:00 A.M. EST to 12:30 P.M. EST

Via Teleconference Seminar (NBI Program # 72073)

Presented by

William J. Amann, Esq.

CRAIG, DEACHMAN & AMANN, PLLC

65A Flagship Drive

North Andover, MA 01845

978-702-3077

wamann@cda-law.com

&

Craig, Deachman & Amann, PLLC

1662 Elm Street

Manchester, NH 03101

603-665-9111

www.cda-law.com

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A. THE PURPOSE OF THE AUTOMATIC STAY

11 U.S.C. § 362, known as the automatic stay, is one of the most powerful, if not the most powerful, provisions of the Bankruptcy Code. The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own

remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

In addition to protecting relative positions of creditors, automatic stay is designed to shield Chapter 7 debtor from financial pressure during pendency of bankruptcy proceeding. In re Stringer (1988, CA9 Cal) 847 F2d 549, 17 BCD 1169, 19 CBC2d 233, CCH Bankr L Rptr P 72297.

Automatic stay is crucial provision of bankruptcy law and prevents disparate actions against debtors and protects creditors in manner consistent with bankruptcy goal of equal treatment of creditors by ensuring that no creditor receives more than equitable share of debtor's estate. Lincoln Sav. Bank, FSB v Suffolk County Treasurer (In re Parr Meadows Racing Ass'n) (1989, CA2 NY) 880 F2d 1540, 19 BCD 1125, CCH Bankr L Rptr P 73010, cert den (1990) 493 US 1058, 110 S Ct 869, 107 L Ed 2d 953 and (superseded by statute on other grounds as stated in In re Fischer (1995, BC MD Tenn) 184 BR 41, 27 BCD 569, 34 CBC2d 99) and (superseded by statute on other grounds as stated in Marc Stuart Goldberg, P.C. v City of New York (In re Navis Realty) (1996, BC ED NY) 193 BR 998) and (criticized in Marine

Midland Bank v Bennett Funding Group, Inc. (In re Bennett Funding Group, Inc.) (1997, BC ND NY) 1997 Bankr LEXIS 2197) and (criticized in In re Bennett Funding Group, Inc. (1997, BC ND NY) 1997 Bankr LEXIS 2359) and (criticized in In re Marfin Ready Mix Corp. (1998, BC ED NY) 220 BR 148, 40 CBC2d 199) and (criticized in In re P.G. Realty Co. (1998, BC ED NY) 220 BR 773, 32 BCD 718) and (criticized in City of White Plains v A&S Galleria Real Estate, Inc. (In re Federated Dep't Stores, Inc.) (2000, BC SD Ohio) 243 BR 341, 43 CBC2d 906) and (superseded by statute on other grounds as stated in 229 Main St. Ltd. Pshp. V Department of Environmental Protection (In re 229 Main St. Ltd. Pshp.) (2000, DC Mass) 251 BR 186, 51 Env't Rep Cas 1188).

Primary purpose of stay is to afford debtors in Chapter 11 reorganizations opportunity to continue their businesses with their available assets. Small Business Admin. v Rinehart (1989, CA8 SD) 887 F2d 165, 19 BCD 1508, 21 CBC2d 917, CCH Bankr L Rptr P 73125 (criticized in In re Tillery (1995, BC WD Ark) 179 BR 576, 33 CBC2d 521).

Purpose of stay provisions of 11 USCS § 362, as regards Chapter 13 proceedings, is to allow trustee to have opportunity to inventory debtor's position before proceeding with administration of case and drafters intended § 362(a)(7) as mere stay of creditor's enforcement of setoff rights and not as evisceration of substantive rights to sell. In re Hammett (1983,

ED Pa) 28 BR 1012, 9 CBC2d 98, CCH Bankr L Rptr P 69211, 83-1
USTC P 9336, 52 AFTR 2d 5394.

11 USCS § 362 requires that set of facts occurring
prepetition and creating legal relationship be claim that must
be stayed unless it is excepted in 11 USCS § 362(b); purpose of
statute is to cover both those claims based upon fully accrued
prepetition causes of action and those claims based on
prepetition facts or relationships which may still be contingent
or un-matured. Baldwin-United Corp. v Paine Webber (1985, SD
Ohio) 57 BR 759, 14 BCD 374, 15 CBC2d 921.

Policy underlying 11 USCS § 362 as whole is to afford
immediate relief to debtor from understandably importunate
creditors, and also to prevent dissipation of debtor's remaining
assets before orderly, equitable distribution to creditors may
be effected. In re Compton Corp. (1988, ND Tex) 90 BR 798, app
dismd (1989, Em Ct App) 889 F2d 1104 and (criticized in Minn.
Corp. v First Alliance Mortg. Corp. (In re First Alliance Mortg.
Corp.) (2001, CD Cal) 264 BR 634).

Automatic stay of 11 USCS § 362 is merely recognition of
necessity for protection of estate from pending and additional
actions by creditors to recover collateral or collect debts;
orderly liquidation or rehabilitation is objective of such
section, not dismemberment of assets of debtor. In re Feimster
(1979, BC ND Ga) 3 BR 11, 6 BCD 131, 1 CBC2d 956.

In Chapter 11 context, purpose of automatic stay is not as end in itself but rather to facilitate reorganization; its function so far as secured creditors are concerned is to preserve their position, within equitable limits, during period between filing of case and confirmation of plan of reorganization. In re Mr. D Realty Co. (1983, BC SD Ohio) 27 BR 359.

One primary goal of automatic stay is to sort out creditors into order of priority untainted by post-petition jockeying for position; intended effect of stay, is to fix rights and priorities as of time of petition filing and to prohibit any further acts to advance those rights and priorities. In re Paul (1986, BC DC Mass) 67 BR 342.

Purpose of automatic stay is to preserve what remains of debtor's insolvent estate and to provide systematic equitable liquidation procedure for all creditors, thereby preventing chaotic and uncontrolled scramble for debtor's assets in variety of uncoordinated proceedings in different courts. In re Sparks (1995, BC ND Ill) 181 BR 341.

Manifest purpose of automatic stay provision is to act of debtor's shield from proceedings which may adversely affect its interest; this purpose will hardly be served by requiring indefinite suspension of debtor's attempt to be relieved of judgments with obvious effect of acting as debtor's sword

against creditor's claims upon it. Shop in the Grove, Ltd. v Union Federal Sav. & Loan Asso. (1982, Fla App D3) 425 So 2d 1138.

Purpose of automatic stay provision is to prevent interference with debtor's property during involuntary bankruptcy proceeding. Bishop v Geno Designs, Inc. (1982, Tex App Tyler) 631 SW2d 581.

Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case. The commencement or continuation, including the issuance of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case is stayed under paragraph (1). The scope of this paragraph is broad. All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings. Proceedings in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals.

The provision in this first paragraph prohibiting the issuance of process is designed to prevent the issuance of a writ of execution by a judgment creditor of the debtor to obtain property that was property of the debtor before the case, but that was transferred, subject to the judgment lien, before the

case. Because the other paragraphs of this subsection refer only to property of the estate or property of the debtor, neither of which apply to this kind of transferred property, they would not prohibit pursuit of the transferred property by issuance of process. Thus, the prohibition in this paragraph is included and the judgment creditor is allowed to proceed by way of foreclosure against the property, but not by a general writ of execution (in the State court, or wherever the creditor obtained the judgment) against the debtor and all of the debtor's property.

The stay is not permanent. There is adequate provision for relief from the stay elsewhere in the section. However, it is important that the trustee have an opportunity to inventory the debtor's position before proceeding with the administration of the case. Undoubtedly the court will lift the stay for proceedings before specialized or nongovernmental tribunals to allow those proceedings to come to a conclusion. Any party desiring to enforce an order in such a proceeding would thereafter have to come before the bankruptcy court to collect assets. Nevertheless, it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.

Paragraph (2) stays the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the bankruptcy case. Thus, execution and levy against the debtors' prepetition property are stayed, and attempts to collect a judgment from the debtor personally are stayed.

Paragraph (3) stays any act to obtain possession of property of the estate (that is, property of the debtor as of the date of the filing of the petition) or property from the estate (property over which the estate has control or possession). The purpose of this provision is to prevent dismemberment of the estate. Liquidation must proceed in an orderly fashion. Any distribution of property must be by the trustee after he has had an opportunity to familiarize himself with the various rights and interests involved and with the property available for distribution.

Paragraph (4) stays lien creation against property of the estate. Thus, taking possession to perfect a lien or obtaining court process is prohibited. To permit lien creation after bankruptcy would give certain creditors preferential treatment by making them secured instead of unsecured.

Paragraph (5) stays any act to create or enforce a lien against property of the debtor, that is, most property that is acquired after the date of the filing of the petition, property

that is exempted, or property that does not pass to the estate, to the extent that the lien secures a prepetition claim. Again, to permit post-bankruptcy lien creation or enforcement would permit certain creditors to receive preferential treatment. It may also circumvent the debtors' discharge.

Paragraph (6) prevents creditors from attempting in any way to collect a prepetition debt. Creditors in consumer cases occasionally telephone debtors to encourage repayment in spite of bankruptcy. Inexperienced, frightened, or ill-counseled debtors may succumb to suggestions to repay notwithstanding their bankruptcy. This provision prevents evasion of the purpose of the bankruptcy laws by sophisticated creditors.

Paragraph (7) stays setoffs of mutual debts and credits between the debtor and creditors. As with all other paragraphs of subsection (a), this paragraph does not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditors' rights.

Subsection (b) lists five exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction. The court has ample other powers to stay actions not covered by the automatic stay. Section 105, of proposed title 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The bankruptcy courts are brought within

the scope of the All Writs Statute, 28 U.S.C. 1651 (1970), and are given the powers of a court of law, equity, and admiralty (H.R. 8200, § 243(a), proposed 28 U.S.C. 1481). Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

With respect to stays issued under other powers, or the application of the automatic stay, to governmental actions, this section and the other sections mentioned are intended to be an express waiver of sovereign immunity of the Federal government, and an assertion of the bankruptcy power over State governments under the Supremacy Clause notwithstanding a State's sovereign immunity.

The first exception is of criminal proceedings against the debtor. The bankruptcy laws are not a haven for criminal

offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.

Paragraph (2) excepts from the stay the collection of alimony, maintenance or support from property that is not property of the estate. This will include property acquired after the commencement of the case, exempted property, and property that does not pass to the estate. The automatic stay is one means of protecting the debtor's discharge. Alimony, maintenance and support obligations are excepted from discharge. Staying collection of them, when not to the detriment of other creditors (because the collection effort is against property that is not property of the estate), does not further that goal. Moreover, it could lead to hardship on the part of the protected spouse or children.

Paragraph (3) excepts any act to perfect an interest in property to the extent that the trustee's rights and powers are limited under section 546(a) of the bankruptcy code. That section permits post-petition perfection of certain liens to be effective against the trustee. If the act of perfection, such as filing, were stayed, the section would be nullified.

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a

debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

Subsection (c) of section 362 specifies the duration of the automatic stay. Paragraph (1) terminates a stay of an act against property of the estate when the property ceases to be property of the estate, such as by sale, abandonment, or exemption. It does not terminate the stay against property of the debtor if the property leaves the estate and goes to the debtor. Paragraph (2) terminates the stay of any other act on the earliest of the time the case is closed, the time the case is dismissed, or the time a discharge is granted or denied (unless the debtor is a corporation or partnership in a chapter 7 case).

Subsection (c) governs automatic termination of the stay. Subsections (d) through (g) govern termination of the stay by the court on the request of a party in interest. Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. Generally, proceedings in which the debtor is a fiduciary, or involving post-petition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances.

Subsection (e) provides a protection for secured creditors that is not available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided of the secured creditor's interest. If the court does not rule within thirty (30) days from a request for relief from the stay, the stay is automatically terminated with respect to the property in question. In order to accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order is similar to a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g)

leaves that burden on the party opposing relief from the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection.

At the expedited hearing under subsection (e), and at all hearings on relief from the stay, the only issue will be the claim of the creditor and the lack of adequate protection or existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor on largely unrelated matters. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustees to recover property of the estate or to object to the allowance of a claim.

Subsection (f) permits ex parte relief from the stay in situations in which irreparable damage might occur to the stayed party before there is opportunity for notice and a hearing under the usual procedure. The Rules of Bankruptcy Procedure will provide for a hearing soon after the issuance of any ex parte order under this subsection.

Reach of stay is intended to be quite broad, and therefore exceptions to stay should be read narrowly to secure broad grant of relief to debtor. In re Stringer (1988, CA9 Cal) 847 F2d 549, 17 BCD 1169, 19 CBC2d 233, CCH Bankr L Rptr P 72297.

The Automatic stay is fundamental to reorganization process and its scope is intended to be broad. Small Business Admin. v Rinehart (1989, CA8 SD) 887 F2d 165, 19 BCD 1508, 21 CBC2d 917, CCH Bankr L Rptr P 73125 (criticized in In re Tillery (1995, BC WD Ark) 179 BR 576, 33 CBC2d 521).

11 USCS § 362 is extremely broad in scope and should apply to almost any type of formal or informal action against debtor or property of estate. Delpit v Commissioner (1994, CA9) 18 F3d 768, 94 CDOS 1745, 94 Daily Journal DAR 3125, 25 BCD 590, 30 CBC2d 1745, 94-1 USTC P 50127, 73 AFTR 2d 1409, 94 TNT 51-32 (criticized in Roberts v Commissioner (1999, CA11) 175 F3d 889, 99-1 USTC P 50511, 83 AFTR 2d 2282, 12 FLW Fed C 782) and (criticized in Spence v Brooks (2001, CA4 Va) 11 Fed Appx 175) and (criticized in Haag v United States (2007, CA1 Mass) 485 F3d 1, 2007-1 USTC P 50473, 99 AFTR 2d 1986).

The scope of automatic stay provisions is broad and applies to formal and informal proceedings against debtor; any action taken in violation of automatic stay is void. In re Smith (1988, WD Mich) 86 BR 92, affd in part and revd in part on other grounds (1989, CA6 Mich) 876 F2d 524, 19 BCD 1097, CCH Bankr L Rptr P 72936.

Legislative history reveals clear congressional intent that automatic stay be broadly enforced so as to preserve status quo as of petition date, insure orderly administration of bankruptcy estate, and prevent race among creditors. Pension Benefit Guar. Co. v LTV Corp. (In re Chateaugay Corp.) (1988, SD NY) 87 BR 779, 17 BCD 1089, 9 EBC 2209, affd (1989, CA2 NY) 875 F2d 1008, 19 BCD 913, 10 EBC 2425, 111 CCH LC P 11200, 16 FR Serv 3d 400, revd on other grounds, remanded (1990) 496 US 633, 110 S Ct 2668, 110 L Ed 2d 579, 20 BCD 1075, 22 CBC2d 1237, 12 EBC 1593, CCH Bankr L Rptr P 73423 and (Abrogated as stated in Cohen v JP Morgan Chase & Co. (2007, CA2 NY) 498 F3d 111).

Although scope of automatic stay is undeniably broad, it does not serve to stay all actions involving bankrupt party; rather, reach of automatic stay is limited by its purpose. Rett White Motor Sales Co. v Wells Fargo Bank (1989, ND Cal) 99 BR 12, CCH Bankr L Rptr P 72814.

Congress intended automatic protection afforded by automatic stay provisions of 11 USCS § 362 to be far reaching and to eliminate previously existing limited perimeters of Bankruptcy Code automatic stay; scope of protection under 11 USCS § 362 is broad and was designed to reach all proceedings, including license revocations, arbitrations, administrative and judicial proceedings, and its operation is no longer limited to civil action, but includes proceedings even if they are not

before governmental tribunals. In re R. S. Pinellas Motel Partnership (1979, BC MD Fla) 2 BR 113, 5 BCD 1292, 1 CBC2d 349, CCH Bankr L Rptr P 67384, 53 ALR Fed 611.

The scope of automatic stay is broad and encompasses all proceedings, even those not before governmental tribunals. In re Elsinore Shore Associates (1986, BC DC NJ) 66 BR 723, 15 BCD 420, 15 CBC2d 1128, CCH Bankr L Rptr P 71553.

The Automatic stay provision is very broad, and any exceptions to it must be strictly construed to further purposes of automatic stay. Gunther v Glabb (In re Glabb) (2001, BC WD Pa) 261 BR 170.

Chapter 7 debtors were entitled to recovery of their attorney's fees incurred in bringing motion for stay violation under 11 USCS § 362 by creditor's law firm, which was obligated to turn over funds garnished under Colo. R. Civ. P. 103 § 6(a)(1) to chapter 7 trustee under 11 USCS § 542(a), although debtors were not entitled to funds as cash collateral under 11 USCS § 363(a). In re Trujillo (2012, BC DC Colo) 485 BR 238.

Automatic stay provision is purposely broad in its reach so as to prevent dismemberment of debtor's estate in chaotic and uncontrolled scramble for debtor's assets in variety of uncoordinated proceedings in different courts. Stone v George F. Richardson, Inc. (1983) 169 Ga App 232, 312 SE2d 339 (ovrld in

part on other grounds by State v Glover (2007) 281 Ga 633, 641 SE2d 543, 2007 Fulton County D R 488).

The Automatic stay is broad in scope and applies in almost any type of action against debtor or property of estate; it stays collection efforts, harassment, and interference with debtor's assets. General Motors Acceptance Corp. v Yates Motor Co. (1981) 159 Ga App 215, 283 SE2d 74.

The Automatic stay is critical protection of bankruptcy law and quite broad in its scope. Ramirez v Fuselier (In re Ramirez) (1995, BAP9 Cal) 183 BR 583, 95 CDOS 5397, 95 Daily Journal DAR 8390, CCH Bankr L Rptr P 76595, app dismd (1999, CA9 Cal) 201 F3d 444, reported in full (1999, CA9) 1999 US App LEXIS 26239.

B. CREDITOR STRATEGIES

Whether you represent creditors or debtors, it is valuable to know some basic strategies. With that said, I'll share with you what a more experienced debtor's counsel told me at a deposition in a complex chapter 11 case more than a decade ago.

I was representing a secured creditor who had filed a motion for relief in order to foreclose on various parcels of real estate. Debtor's counsel told me (in his typical, threatening fashion) that I had "gone too far" in pressing my motion for relief. Well, I soon found out what he meant when the debtor filed a host of adversary proceedings against my

client seeking to re-characterize the debt to equity and to otherwise subordinate our debt to other claimants. In the end, after years of protracted litigation, we obtained the property. But not without a fairly high cost in time and money. This isn't meant to discourage filing motions for relief; just be aware of the full picture in the case, if you can, before filing. Discussing and addressing concerns before filing, at least in a chapter 11 case, is often advisable.

So, the first thing to understand is what a moving creditor wants and whether there are other things which can be offered, in way of adequate protection or plan concessions (in a Chapter 11). Quite simply, if your case involves a personal debtor and you are dealing with consumer goods (be it a house, car, boat or other secured asset), the approach is simple-you often just file first and ask questions or negotiate afterwards. Is there something the debtor can offer to temporarily satisfy or placate the creditor? Is there equity in the asset? Can you offer a better alternative to foreclosure or repossession? Are there offensive maneuvers you can make if the creditor refuses to deal?

I am reminded of a small business case where I represented a small business owner (debtor) against a very aggressive creditor. The creditor took the position that the equipment contract (for the company's large manufacturing equipment) was a

lease and under the Code, the debtor had to assume or reject and more importantly, had to get current if it wanted to retain the equipment. We took the position that the equipment contract was not a *true* lease (under the U.C.C.) but rather was a loan; a loan which could be crammed-down since the value of the equipment was far less than the outstanding balance due. We offered adequate protection, we offered additional cash collateral and we asked to re-write or modify the equipment contract. None of these offers were appealing to the zealous creditor. So, we filed an adversary proceeding to determine whether the equipment contract was a lease or a loan. We survived the creditor's motion to dismiss. Soon after that hearing, the creditor became remarkably receptive to a principal write down and adequate protection. Because of this, the company survived for several more years. The owner (who was an interesting character, had a Ph.D. And had a bush pilot's license) ultimately decided to close up shop and move to South America. Yet, knowing the right strategy to counter the motion for relief enabled him and his family to keep the business going, earn much needed money and divest themselves (legally) of debt-laden assets. The case converted to a 7, he received a discharge and I'd like to think he's happily flying a cargo plane over Brazilian skies.

Creditors typically take definite and predictable paths with motions for relief depending on the case chapter and how intricate the relationship between the debtor and creditor is.

In a consumer chapter 7 case with a bank mortgagee, there's usually little negotiation or creativity. The bank will seek relief almost immediately and just seek the return of its collateral.

In a chapter 13, if the creditor is a mortgagee, it will typically seek relief for any post-petition default such as delinquent post payments, unpaid real estate taxes or lack of insurance.

In a business case, usually a chapter 11 if a motion for relief is involved, there are a myriad of creditor approaches. Chapter 11 is beyond the scope of this discussion. However, it is wise to determine how aggressive, if you are representing a creditor, you can and want to be. While being aggressive is usually a smart move, you want to be careful not to "go too far". For example, in a chapter 11 case I am involved with now, I represent a creditor which holds a first mortgage on several rental properties. We are incredibly over-secured. Under § 506(b), the over-secured creditor is entitled to post-petition interest on their claim until payment of their claim or until the effective date of the plan. Rake v. Wade [508 U.S. 464], 113 S.Ct. 2187, 2190 [124 L.Ed.2d 424] (1993); In re Laguna, 944

F.2d 542, 544 (9th Cir.1991), cert. denied [503 U.S. 966], 112 S.Ct. 1577 [118 L.Ed.2d 219] (1992). The U.S. Supreme Court has held that the language of § 506(b) entitles holders of both consensual and nonconsensual over-secured claims to post-petition interest on their claim. U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 [109 S.Ct. 1026, 103 L.Ed.2d 290] (1989). So, being over-secured means, in essence, that the creditor will eventually be paid in full. While my aggressive creditor client wants to foreclose and have its outstanding loan paid in full as soon as possible, there aren't any good grounds right now to file a motion for relief. Instead, we struck a very favorable post-petition interest rate for cash collateral payments and the debtor is either going to sell some or all of the properties or refinance. If that does not occur within the next six (6) months, we will likely move for relief then but until now we are being paid at 12% and will, in the context of either a Proof of Claim, §363 sale motion or an *In re Till* motion, seek repayment based upon the post-petition, default rate of 25%. And since we are over-secured, we are likely to win. And given that the debtor is currently paying us at 12% (with the other 13% accruing), it has a real incentive to sell or refinance quickly.

So, from a strategy standpoint, knowing one's relative position is critical. In this same case, the debtor is filing an adversary against the second position mortgagee claiming

usury and taking aim at the perfection of the mortgage. By working with the debtor when advantageous and prudent, we avoid pushing the debtor into a corner, where they will most likely come out swinging.

C. DETERMINING VIOLATIONS

Let's discuss In re A & J Auto Sales, Inc., d/b/a Wise Auto Sales, Debtor; A & J Auto Sales, Inc., d/b/a Wise Auto Sales v. United States of America, Civil No. 97-294-SD, 223 B.R. 839. In a bankruptcy appeal, appellant A & J Auto Sales, Inc., d/b/a Wise Auto Sales (A & J), sought review of the bankruptcy court's order finding that the Internal Revenue Service (IRS) willfully violated the automatic stay, but declined to award damages for civil contempt under *11 U.S.C. § 105*. The IRS cross-appealed, arguing that the bankruptcy court erred by finding the IRS willfully violated the automatic stay. The appeal raised three issues of unsettled law; i.e., the proper standard for determining whether a violation of the automatic stay is willful, whether corporations can recover damages pursuant to *11 U.S.C. § 362(h)*, and whether the court could award damages for a violation of the automatic stay pursuant to *11 U.S.C. § 105*.

The court must first determine whether the IRS violated the automatic stay at all. The Bankruptcy Code provides that filing a bankruptcy pre-petition "operates as a stay, applicable to all entities, of . . . any action to obtain possession of property

of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The bankruptcy court found that "the IRS's actions in removing the cars from the Debtor's premises and retaining them post-petition were actions to obtain possession of property of the estate or to exercise control over property of the estate.'" A & J Auto Sales, Inc., v. United States (In re A & J Auto Sales), 210 B.R. 667, 670 (Bankr. D.N.H. 1997). The IRS, however, argued that the seizure was completed prepetition when it served the debtor with notice of seizure and tagged the vehicles. And "the removal of vehicles from the lot after a valid prepetition seizure did not constitute a violation of the automatic stay."

As an initial matter, the court noted that the vehicles remained property of the bankruptcy estate even after the IRS seized them. Property of the estate is defined broadly to include any property to which the estate has some right. See 11 U.S.C. § 541; United States v. Whiting Pools, Inc., 462 U.S. 198, 204, 76 L. Ed. 2d 515, 103 S. Ct. 2309 (1983) ("Congress intended a broad range of property to be included in the estate"). Thus the United States Supreme Court has held that a "reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization . . ." Whiting Pools, supra, 462 U.S. at 209. "The creditor with a secured interest in property included in

the estate must look to [the Bankruptcy Code] for protection, rather than to the non-bankruptcy remedy of possession." *Id.* at 204. "The Bankruptcy Code provides secured creditors various rights, including the rights to adequate protection, and these rights replace the protection afforded by possession." *Id.* at 207. Furthermore, "the [IRS]'s interest in seized property is its lien on that property." *Id.* at 210. Thus the debtor retains an interest in property that has been seized by the IRS, making it property of the estate. The District Court found, on appeal, that the IRS willfully violated the automatic stay.

Section 362(k)(1) of the Bankruptcy Code provides, with certain exceptions, that "an individual injured by a willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." "A willful violation does not require a specific intent to violate the automatic stay. The standard for a willful violation of the automatic stay under [§ 362(k)(1)] is met if there is knowledge of the stay and the defendant intended the actions which constituted the violation." Fleet Mortgage Group, Inc. v. Kaneb (In re Kaneb), 196 F.3d 265, 269 (1st Cir. 1999).

In a case I successfully defended nine (9) years ago, see Cunha v. Ablitt & Caruolo, P.C. (In re Cunha), 2007 BNH 003 (finding in favor of the defendant that postponement of a

foreclosure sale (1) prior to confirmation of the debtor's chapter 13 plan, (2) while a motion to dismiss or a motion for relief is pending, is an action to maintain the status quo and is not a violation of the automatic stay under § 362(a)(1) because defendant has a reasonable expectation that it may obtain relief from the stay.)

Many courts have held that postponing the date of a foreclosure sale does not violate the automatic stay. See In re Roach, 660 F.2d 1316, 1319 (9th Cir. 1981); Zeoli v.

RIHT Mortgage Corp., 148 B.R. 698, 702 (D.N.H. 1993); Atlas Machine & Iron Works, Inc. v. Bethlehem Steel Corp. (In re Atlas Machine & Iron Works, Inc.), 239 B.R. 322, 332 (Bankr. E.D. Va. 1998). The rationale for such a holding is that postponing the foreclosure sale maintains the status quo between creditor and debtor as of the petition date. See Zeoli, 148 B.R. at 700. According to Zeoli, while postponement of a foreclosure sale is an "act," it is not an act in "continuation" of a proceeding "against the debtor" prohibited by § 362(a)(1). See id. at 701. "Rather, it is more appropriately characterized as an act in preservation of a stayed proceeding." Id. However, this Court has previously held that repeated postponements of a foreclosure sale over a protracted period of time - when a debtor was current in post-petition payments, no motion for relief was pending and a chapter 13 plan to cure a prepetition arrearage

was pending constituted harassment of a debtor and did not constitute the maintenance of the status quo of a stayed foreclosure sale. Sherkanowski v. GMAC Mortgage Corp. (In re Sherkanowski), 2000 BNH 029, 10. In a companion case, where I was not so fortunate, see Michaud v. Ablitt & Caruolo, P.C. (In re Michaud), 2007 BNH 002 (finding in favor of the plaintiff that postponement of a foreclosure sale (1) after confirmation of the debtor's chapter 13 plan, (2) when the debtor is current on post-petition payments, and (3) in the absence of a pending motion for relief, cannot be considered maintaining the status quo and is a violation of the automatic stay under § 362(a)(1)). Luckily, the Court found minimal damages. Remedies for stay violations are a separate subject beyond the scope of these materials but are governed by the Code and there is a plethora of case law in that area as well. Section 362(k)(1) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees" "The burden is on the debtor to prove by a preponderance of the evidence that she suffered damages as a result of the stay violation." Heghmann v. Hafiani (In re Heghmann), 316 B.R. 395, 404-05 (B.A.P. 1st Cir. 2004).

McAdam v. Lorden (In re McAdam), 2004 BNH 022 (granting the Defendant's motion to dismiss the Plaintiff's complaint for damages for violation of the automatic stay finding that under

New Hampshire law, the Debtor did not retain any interest in her residence by reason of her continued occupancy of the premises protected by the automatic stay after the foreclosure sale was completed and that the foreclosed property's purchaser's attempt to remove the Debtor from the foreclosed property did not violate the automatic stay). The automatic stay imposed by § 362 does not apply to property unless the debtor or the bankruptcy estate has an interest therein. See § 541(a)(1). Under New Hampshire law, the mortgagor does not have a right of redemption after foreclosure. See N.H. Rev. Stat. Ann. § 479:18 (2001). Furthermore, title to the foreclosed premises shall pass to the purchaser free and clear of all interests and encumbrances which do not have priority over such mortgage upon the recording of the deed and affidavit. See N.H. Rev. Stat. Ann. § 479:26 (2001); See also Barrow v. Boles, 141 N.H. 382, 393 (1997) ("Even though legal title does not pass until the deed has been recorded . . . 'this rule does not change the fact that [the debtor] possessed neither a legal nor an equitable interest in the property once the auctioneer's hammer fell and the memorandum of sale was signed.'" (citation omitted)). The Court notes that the Plaintiff does not dispute that the foreclosure deed was properly recorded. Because the Plaintiff lost her legal and equitable interests in the property by virtue of the foreclosure sale and subsequent recording of the foreclosure

deed, the Subject Property ceased to be the property of the estate for purposes of § 541. See In re Rodgers, 333 F.3d 64 (2nd Cir. 2003) (holding that because the debtor's legal or equitable interest did not survive the foreclosure auction, the foreclosed property is no longer property of the estate). As a result, the automatic stay is not applicable to the Defendant's actions to have the Plaintiff removed from the Subject Property.

As an example of a non-violation in the context of a town enforcing a zoning ordinance see Patton v. Town of Orford (In re Patton), 323 B.R. 311 (Bankr. D.N.H. 2005) (granting the Defendant's motion for summary judgment based on § 362(b)(4) and denying the Plaintiffs/Debtors' cross-motion for summary judgment finding that (1) under the holding of Cournoyer v. Town of Lincoln, 790 F.2d 971 (1st Cir. 1986), the town's enforcement of a zoning ordinance, when the debtors violated the junkyard statute but refused to abate the violation, is excepted from the automatic stay pursuant to § 362(b)(4); (2) the legal fees associated with the actions by the town to enforce the junkyard statute are, as costs of removal, also protected by § 362(b)(4); and (3) the doctrine of collateral estoppel bars the Debtors from relitigating the issue of a commercial reasonableness of the sale of the vehicles because this issue was fully and fairly litigated in state court).

D. STAY'S AFFECT ON THE STATUTE OF LIMITATIONS

Bankruptcy Code § 108(c), among other things, extends state statutes of limitation on claims by creditors who are prevented by the automatic stay from taking timely action to assert those claims. The statute reads, in pertinent part as follows:

[I]f applicable non-bankruptcy law ... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, ... and such period has not expired before the date of the filing of the petition, then such period does not expire until 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) 30 days after notice of the termination or expiration of the stay under section 362 ... of this title ... with respect to such claim.

Recognizing that a petition in bankruptcy could sometimes give a debtor unfair advantage over a claimant by allowing the debtor to remain under the protection of the automatic stay until the limitation period governing the claimant's action had expired, see Meyer v. Cunningham, 196 Ark. 1097, 121 S.W.2d 90 (1938) (party's claim barred by the statute of limitations even though limitation period ran during time that automatic stay prohibited party from bringing the action); American Woolen Co. v. Samuelson, 226 N.Y. 61, 123 N.E. 154 (1919) (same) congress acted to solidly preserve the rights of a party "stayed from commencing or continuing an action against the debtor because of

the bankruptcy case". S.R.Rep. No. 95-989, 95th Cong., 2d Sess. 30 (1978); H.R. No. 95-595, 95th Cong., 2d Sess. 318 (1978), U.S.Code Cong. & Admin. News 1978, p. 5787. It did so by extending the period for "commencing or continuing a civil action" against the debtor to, at a minimum, 30 days after termination or expiration of the automatic stay. 11 U.S.C. § 108(c). Morton v. Bank of New York City (In re Morton), 866 F.2d 561, 566 -67 (2d Cir. 1989) (emphasis added). See also Shamus Holdings, 642 F.3d at 266-67.

NOTE: IF YOU WOULD LIKE TO RECEIVE A FORM MOTION FOR RELIEF, PLEASE CONTACT THE AUTHOR, WILLIAM J. AMANN, ESQ. AT WAMANN@CDA-LAW.COM SO THAT I MAY OFFER YOU THE BEST, POSSIBLE FORM TAILORED TO YOUR CHAPTER AND CASE. THANK YOU.

END OF MATERIALS