STEERING CLEAR OF THE BIG STOP SIGN: A REVIEW OF THE AUTOMATIC STAY

Everyone needs to review areas of bankruptcy law that seem cut and dried from time to time. Lawyers and judges find new issues and ways to interpret code sections that bankruptcy practitioners think they know thoroughly. The automatic stay is one such section. This paper focuses on new case law on issues relating to 11 U.S.C. § 362.

The automatic stay is triggered by the filing of a bankruptcy petition. 11 U.S.C. § 362(a). "The scope of the stay is broad." *Gordon v. Taylor, et al. (In re Taylor)*, 430 B.R. 305, 311 (Bankr. N.D. Ga. 2010). Federal law determines the scope of a debtor's estate, but in the absence of controlling federal law, state substantive law determines the nature of a debtor's property rights. *In re Stone Creek Village Property Owners Association, Inc.*, No. 10-54343, 2011 WL 3236038, at *3 (Bankr. W.D. Tex. June 27, 2011). The stay prevents the following actions:

> **(1)** the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> **(2)** the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
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> **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
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> **(4)** any act to create, perfect, or enforce any lien against property of the estate;
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> **(5)** any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
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> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

> **(7)** the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
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> **(8)** the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

There are, however, 28 exceptions to the stay that are set forth in 11 U.S.C. § 362(b). Some of them will be discussed below.

A. **Scope and duration of the stay**

In *In re Ebadi*, 448 B.R. 308 (Bankr. E.D.N.Y. 2011), a New York judge held that the automatic stay stayed a foreclosure suit against a nondebtor when the guarantor was in bankruptcy. In New York, the guarantor may be liable for any deficiency after a foreclosure sale is conducted. Even though a foreclosure sale "was not the final step required in order to obtain a deficiency judgment, it was a significant step in a process that could lead to recovery of a deficiency judgment against [the guarantor]." *Id*. at 314. Therefore the foreclosure action is an "act to collect, assess, or recover a claim against the debtor" which is a prohibited act under 11 U.S.C. § 362(a)(6).

In *Chicago Title Ins. Co. v. Lerner*, 435 B.R. 732 (S.D. Fla. 2010), a suit against the third party guarantors was not stayed by the bankruptcy of the limited liability company of which the guarantors were members. The guarantors argued that they had rights to indemnity against the LLC and the guaranty suit was a veiled attempt to collect from the debtor LLC. The Court held that

> Where suit is an attempt to enforce a personal guaranty which was obtained for consideration, particularly one which induced a creditor to extend liquidity, more favorable loan terms, or, as in this case, the commitment to ensure clear title, and it does not

> appear that suit is merely a veiled attempt to collect against the debtor or against the debtor's officers or directors for actions taken solely in their official capacities, the automatic stay should not be extended to preclude or delay the action.

Id. at 736.

Finally, in a case of first impression, a New York bankruptcy court ruled that the automatic stay in a chapter 15 case arises on recognition of the foreign main proceeding and may extend to the debtor as to proceedings in other jurisdictions for purposes of protecting property of the debtor that is in the United States. *In re JSC BTA Bank*, 434 B.R. 334 (Bankr. S.D.N.Y. 2010). However, the stay does not apply globally to all proceedings involving the debtor. *Id*. The stay should not apply to stay "miscellaneous foreign litigation or arbitration proceedings having no meaningful nexus to property of the foreign debtor located in the United States." *Id*. at 337.

Who has the authority to enforce the stay against property of the estate in a chapter 7 case? Not the debtor, according to *Zavala v. Wells Fargo Bank, N.A. (In re Zavala)*, 444 B.R. 181 (Bankr. E.D. Cal. 2011). Only the trustee has standing to assert that a creditor has violated the stay against estate property. The Zavalas claimed that two deposit accounts they had at filing were exempt assets. The debtors demanded turnover of the monies and Wells Fargo did not do so. The Zavalas filed a violation of the stay adversary proceeding 16 days after they filed their chapter 7 petition claiming that Wells Fargo was creating, perfecting or enforcing a lien against property of the debtor pursuant to 11 U.S.C. § 362(a)(3). The court dismissed the suit on Wells Fargo's motion. At the time of the suit's commencement, the property at issue was not yet exempted. A debtor is not granted "co-trustee" like powers to control property of the estate. *Id*. at 191.

Does the stay apply to corporate assets in the bankruptcy of the shareholder's bankruptcy case? In *Donarumo, et al. v. Furlong (In re Furlong)*, Nos. 11-1364, 11-1386, 2011 WL 5139451 (1st Cir. November 1, 2011), the Court ruled "No." The Furlongs filed a chapter 7 bankruptcy case themselves and filed a corporate chapter 7 case for their business, Drew's Plumbing & Heating ("Drews"). The corporate case listed as an asset "claims for breach of contract" against the party from whom the Furlongs purchased the business. The debtor orally indicated there were other related claims at the meeting of creditors. The trustee abandoned the claims in the corporate bankruptcy and filed a Notice of Abandonment in the personal bankruptcy as well. The corporate debtor and the Furlongs filed suit against the seller of the business. The lender for Drew's had received all of the corporate assets from Drew's prebankruptcy in a voluntary surrender (including possibly the claims against the seller) and the lender had assigned the claims to the Furlongs and Drew's postpetition. The trustee had no knowledge of this transfer. The trustee sought to withdraw the final account and distribution in the Furlongs' bankruptcy case because the seller of the business offered to buy the Furlongs' stock in Drew's. The seller and trustee argued that the claims were subject to the automatic stay in the Furlongs' case. The 1st Circuit held that the corporate and personal bankruptcy case abandonments were final and unequivocal. The stay in the personal case did not extend to the corporate claims, even if the Furlongs owned all of the stock. *Id*. at *6.

The duration of the stay is governed by 11 U.S.C. § 362(c). It states that the stay does not apply once property is no longer property of the estate (362(c)(1)), the bankruptcy case is closed, dismissed or a discharge is granted (362(c)(2)), or, if the debtor has filed before, within certain time frames, unless the debtor meets certain conditions (362(c)(3) and (4)). The recent

cases have focused on when property is no longer property of the estate and what happens when a case is dismissed and a debtor seeks reinstatement.

Reaffirmations. In *In re Heflin*, No. 09-31574, 2011 WL 1656094 (Bankr. D. Conn. May 2, 2011), the debtor stated in his Statement of Intentions that he intended to reaffirm his truck loan pursuant to 11 U.S.C. § 521(a)(2). The Statement did not state the terms of the proposed reaffirmation. Santander, the lender, sent the debtor a default notice. No reaffirmation agreement was signed or filed within 30 days after the meeting of creditors. Section 521(a)(1) states that the automatic stay is terminated as to any property when the debtor fails to file his/her Statement of Intention within 30 days and fails to act on his/her intention. Section 521(a)(2)(B) and (7) state that if the debtor offers to reaffirm a debt on the original contract terms and the lender refuses, the automatic stay is not terminated if the trustee seeks to keep the stay in place because the property has consequential value and the trustee offers adequate protection. In the *Heflin* case, the court concluded that the debtor's actions did not constitute a specific reaffirmation offer and the stay terminated.

Ride-Through. The case of *Dumont v. Ford Motor Credit Company (In re Dumont)*, 581 F.3d 1104 (9th Cir. 2009) deals with whether a debtor can have a debt ride-through his/her bankruptcy case after BAPCPA. The facts of the case are simple and common. The debtor had listed the car on his schedules but did not indicate that she would surrender, reaffirm or redeem the vehicle. In line with pre-BAPCPA cases, she continued to make payments and intended to have the loan ride-through the bankruptcy. The lender offered the debtor a reaffirmation agreement. The debtor did not reaffirm the debt. The lender sent the debtor a notice of default shortly after discharge and repossessed the car. The debtor claimed that the lender had violated her discharge injunction. The 9th Circuit Court held that ride-through did not exist as a viable

option after BAPCPA. A debtor must redeem property or reaffirm the debt to escape loss of the property post-BAPCPA.

Unscheduled Assets. If a debtor fails to schedule assets, section 521 also governs whether the stay is terminated automatically 30 days after the meeting of creditors. In *Samson v.Western Capital Partners, LLC (In re Blixseth)*, 454 B.R. 92 (B.A.P. 9th Cir. 2011), the debtor had failed to list certain property on his schedules. The trustee argued that the stay did not automatically terminate as to the unscheduled property pursuant to § 362(h). The court ruled that the language of §§ 521(a)(2) and 362(h) was unambiguous and dictated that the stay lifted.

Redemption. The case of *In re Herrera*, 454 B.R. 559 (Bankr. E.D.N.Y. 2011), held that even though the stay terminates automatically when a debtor fails to timely perform his statement of intention to redeem a vehicle, the debtor can still redeem the vehicle. This case disagrees with the case of *In re Buck*, 331 B.R. 322 (Bankr. N.D. Ohio 2005), which held that the debtor's right to redeem is extinguished upon the termination of the stay.

Post-Discharge Relief From the Stay. All of the recent cases are in accord that the court has no authority to grant relief from the stay post-discharge and the motion is moot. *In re Ulrich*, 456 B.R. 345 (Bankr. N.D. Ohio 2011); *In re Schultz*, No. 11-00045, 2011 WL 3348180 (Bankr. W.D. Mich. July 22, 2011). These cases are in accord with 11 U.S.C. § 362(c)(2) which states that the stay terminates at discharge.

Effect of Dismissal and Subsequent Reinstatement. All of the recent cases hold that the automatic stay is not in effect while a case is dismissed, even when a motion to reinstate has been filed. *In re Jackson*, 452 B.R. 818 (Bankr. D. Kan. 2011); *In re Gargani*, 398 B.R. 839 (Bankr. W.D. Pa. 2009); *Jeffries v. Commissioner of Internal Revenue,* T.C. Memo. 2010-172, 100 T.C.M. (CCH) 97, 2010 WL 3035998, *5 (T.C. 2010) (holding that reopening "does not

automatically continue or reactivate the automatic stay" and implying that the stay must be specifically reinstated under the court's section 105 powers).

Post-Confirmation Relief From the Stay. What is property of the estate subject to the automatic stay after confirmation of a chapter 13 plan? Section 1327(b) states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Section 541(a) states that "all legal or equitable interests of the debtor in property as of the commencement of the case" are property of the estate. Section 1306(a)(1) states that "all property of the kind specified in [section 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted. . ." is property of a chapter 13 estate. In *In re Jackson*, 403 B.R. 95 (Bankr. D. Idaho 2009), chapter 13 debtors inherited 2 parcels of real estate after confirmation of their chapter 13 plan. Their plan stated that all property of the estate vested in the debtors post-confirmation. After confirmation the debtors also incurred a debt in their business which they failed to pay. The creditor commenced a suit and obtained a judgment. The creditor asserted a statutory judgment lien against the 2 parcels of inherited property and the debtors' homestead. The debtors moved to avoid the judgment liens and alleged that their creation violated the automatic stay. The court concluded that the stay did apply to the assets and no liens could attach.

The *Jackson* court indicated that courts are split on the issue of whether section 1306(a) or 1327(b) controls as to postpetition gifts, inheritances and causes of action. Some courts hold that these assets become property of the estate. *In re Wetzel*, 381 B.R. 247 (Bankr. E.D. Wis. 2008), cites all of the cases. The first approach holds that "the bankruptcy estate is extinguished when, by operation of a provision of a confirmed plan, property vests in the debtor upon confirmation." *Jackson,* 403 B.R. at 99; *Oliver v. Toth (In re Toth)*, 193 B.R. 992 (Bankr. N.D.

Ga. 1996); *In re Mason*, 45 B.R. 498 (Bankr. D. Or. 1984), *aff'd*, 51 B.R. 548 (D. Or. 1985). "Under this approach, any property acquired by the debtor post-confirmation would no longer be protected by the automatic stay." *Jackson,* 403 B.R. at 99. The second approach holds that the automatic stay continues in effect until the case is closed, dismissed or converted. If the plan states that property revests in the debtor at confirmation, the pre-confirmation property is revested in the debtor and there is no stay. However, property acquired post-confirmation is subject to the stay. *In re Holden*, 236 B.R. 156 (Bankr. D. Vt. 1999); *Waldron v. Brown (In re Waldron),* 536 F.3d 1239 (11th Cir. 2008); *Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000). The third approach follows a "middle ground" between the other 2 approaches. It states that "only the post-confirmation property that is necessary to fund the payments under the confirmed plan is property of the estate." *Jackson,* 403 B.R. at 99 (citing *In re Ziegler*, 136 B.R. 497 (Bankr. N.D. Ill. 1992); *In re Root*, 61 B.R. 984 (Bankr. D. Colo. 1986)). The *Jackson* court aligned itself with the second approach and calls it the "growing majority." *Jackson,* 403 B.R. at 99.

B. Freezing and Offsetting checking accounts

There have been numerous cases, resulting in a split of opinion, about the issue of bank administrative holds on debtors' deposit accounts in chapter 7 cases in recent years. The United States Supreme Court held in *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 116 S. Ct. 286, 133 L.Ed.2d 258 (1995), that an administrative hold on a chapter 13 debtor's account until the bank's setoff rights could be exercised did not constitute a violation of the stay. The bank would need relief from the stay to do the setoff, but a temporary stay until relief from the stay could be granted was not improper. The issue that has arisen in recent years, post-*Strumpf*, is whether a hold on a debtor's account is proper when the bank is not a creditor of the debtor and has no

setoff right, particularly when the debtor has claimed the account as an exempt asset. The cases, in the main, are chapter 7 cases and involve Wells Fargo Bank.

The facts are virtually the same in all of the cases. A chapter 7 debtor has a prepetition account at Wells Fargo. The debtor owes no debt to the bank at filing. The debtor claims the account (or a part of it) as exempt pursuant to federal or state exemption law. Wells Fargo has a policy of doing a nightly check of new bankruptcy filings and compares them to its records of account holders. If a debtor has an account, the bank sends a letter to the chapter 7 trustee asking the trustee to instruct the bank as to what the bank should do with the account funds. The bank sends a letter to debtor's counsel indicating that a hold has been placed on the funds and the debtor will have no access to them. These letters and the hold are instituted before the 341 meeting, so the time for objecting to debtor's exemptions has not expired.

Under section 541(a) of the Bankruptcy Code, the deposit account is property of the debtor's estate. The debtor, pursuant to section 521(a)(4), must "surrender to the trustee all property of the estate." If the debtor claims the deposit account as exempt in Schedule C, the property remains property of the estate until the exemption is allowed or the time for objection has expired. Fed.R.Bankr.P. 4003. Section 542(b) of the Code requires an entity that owes a debt to the debtor to pay such debt to, or on the order of, the trustee." Section 542(a) also requires an entity to "deliver to the trustee . . . property" that "the trustee may use . . . or that the debtor may exempt under section 522."

The majority of the cases interpreting these sections have held that a debtor does not have standing to bring an action for violation of the stay for an administrative hold by Wells Fargo before the expiration of the period for objection to exemptions. The same cases have held that, even if the debtor has standing, there is no violation of the automatic stay. *In re Phillips*, 443

B.R. 63 (Bankr. M.D.N.C. 2010); *In re Young*, 439 B.R. 211 (Bankr. M.D. Fla. 2010); *Bucchino v. Wells Fargo Bank, N.A.*, 439 B.R. 761 (Bankr. D.N.M. 2010); *Wells Fargo Bank, N.A. v. Jimenez*, 406 B.R. 935 (D.N.M. 2008); *Calvin v. Wells Fargo Bank, N.A.,* 329 B.R. 589 (Bankr. S.D. Tex. 2005).

The minority view is that a debtor does have standing to assert a stay violation for a bank administrative hold and it may be a violation of the stay. *Mwangi v. Wells Fargo Bank, N.A.*, 432 B.R. 812 (B.A.P. 9th Cir. 2010); *Jimenez v. Wells Fargo Bank, N.A.*, 335 B.R. 450 (Bankr. D.N.M. 2005) (reversed by decision listed above).

What if the case is a chapter 11 or chapter 13 case? In the District of Columbia, the judge ruled that the situation is the same in a chapter 11 context. *In re Randolph Towers Cooperative*, 458 B.R. 1 (Bankr. D. Col. 2011). The court concluded that all the debtor/account holder had was a right under its contract with Wachovia Bank to seek payment of the funds the bank holds. "If a party to a contract with a debtor refuses to perform the contract because the debtor is in bankruptcy, that may be a breach of contract but it is not an exercise of control over property of the estate." *Id*. at *3. In fact, failure to pay on a deposit agreement does not implicate *Strumpf* either. "A restraint [does not] become[] something more than a refusal to pay . . . based on how long the restraint lasts. Whether it is temporary or indefinite, the debit restraint logically is 'neither a taking of possession of [the debtor's] property nor an exercising of control over it, but merely a refusal to perform its promise.'" *Id*. at *4. In the *Young* decision cited above, the Court stated

> For the guidance of parties, the holding in this case is limited to chapter 7 cases. In fact, it is the Court's preliminary view that a bank's freezing of a chapter 11 or chapter 13 debtor's bank account, solely based on the filing of a petition under chapter 11 or 13, may well be a violation of the automatic stay for which a bank may be subject to sanctions and be liable for any resulting

> damages. And a chapter 11 or chapter 13 debtor would have standing to seek such relief. The reason for this distinction is apparent when one considers the substantial differences between a chapter 7, which has as its purpose liquidation of property of the estate, and chapter 11 and 13 cases, which have as their purpose the debtor's continued possession and use of property of the estate pending confirmation of a plan.

Young, 439 B.R. at 218-19.

In *In re Lehman Brothers Holdings Inc*., 433 B.R. 101 (Bankr. S.D.N.Y. 2010), a court held that a bank violated the stay when it administratively froze postpetition funds in a Lehman debtor's account against which it wished to set off a prepetition debt. The agreements that the bank had with the debtor were not swap agreements that give a bank a "safe harbor" exception to the stay.

In *In re Schafer*, 315 B.R. 765 (Bankr. D. Colo. 2004), the court held that a bank could not set off a prepetition debt owed by the debtor to the bank because part of the funds in the account of the debtor were deposited postpetition and only the amount available on a "lowest post-petition balance" could be set off. The setting off of a prepetition line of credit loan against a deposit account was not a recoupment. The court narrowly construed the doctrine of recoupment and stated that the narrow construction was consistent with the general court consensus to do so in the area of banking relationships. *Id*. at 772-73. The Court held that the bank violated the stay of the debtor.

> How then can a creditor order its practices to avoid this liability? The answer is to bring a motion for stay relief before the Court at the earliest opportunity whenever it seeks to effect a setoff. This does not prevent the parties from engaging in negotiations after the fact. . . An ounce of prevention is worth a pound of cure.

Id. at 775.

C. Prebankruptcy waivers of the automatic stay

Creditors have been placing waivers of the automatic stay in prepetition workout and forbearance agreements for some time now. These clauses require the debtor to agree that, in the event of a bankruptcy filing, the stay will be waived by the debtor as to the creditor. Some of the clauses also contain (or alternatively contain) stipulations by the debtor as to facts or legal conclusions necessary for a creditor to obtain relief from the stay. The debtor stipulates to property values or "bad faith filing" facts.

Courts have given the provisions mixed reviews. Some courts have honored them. *In re Bryan Road, LLC,* 382 B.R. 844 (Bankr. S.D. Fla. 2008); *In re Sky Group Int'l, Inc.* 108 B.R. 86 (Bankr. W.D. Pa. 1989); *In re Hudson Manor Partners, Ltd.*, No. 91-81065, 1991 WL 472592 (Bankr. N.D. Ga. December 31, 1991); *In re McBride Estates,* 154 B.R. 339 (Bankr. N.D. Fla. 1993)*; In re Jenkins Court Assoc. Ltd. Partnership*, 181 B.R. 33 (Bankr. E.D. Pa. 1995); *In re Frye*, 323 B.R. 396 (D. Vt. 2005). Several courts have found the waivers to be unenforceable per se. *In re Shady Grove Tech Ctr. Assocs. Ltd. Partnership*, 216 B.R. 386 (Bankr. D. Md. 1998); *In re Pease*, 195 B.R. 431 (Bankr. D. Neb. 1996); *In re Madison*, 184 B.R. 686 (Bankr. E.D. Pa. 1995).

Most courts have taken a "middle of the road" approach which considers a waiver to be a factor to be considered when the creditor files a relief from stay motion. *In re Bryan Road, LLC*, 382 B.R. 844 (Bankr. S.D. Fla. 2008), *In re Deb-Lyn, Inc.*, No. 03-00655, 2004 WL 452560 (Bankr. N.D. Fla. March 11, 2004)*; In re Desai*, 282 B.R. 527 (Bankr. M.D. Ga. 2002)*; In re Shady Grove Tech Center Assoc. Ltd. Partnership*, 216 B.R. 386, *reconsidered on remand*, 227 B.R. 422 (Bankr. D. Md. 1998); *In re Wald,* 211 B.R. 359 (Bankr. D.N.D. 1997*);In re Darrell Creek Assoc. L.P.*, 187 B.R. 908 (Bankr. D.S.C. 1995); *In re Powers*, 170 B.R. 480 (Bankr. D.

Mass. 1994); *In re Cheeks*, 167 B.R. 817 (Bankr. D.S.C. 1994); *Farm Credit of Cent. Florida, ACA v. Polk*, 160 B.R. 870 (M.D. Fla. 1993); *In Re B.O.S.S. Partners I,* 37 B.R. 348 (Bankr. M.D. Fla. 1984).

Other courts have held them to be binding but not as they relate to parties who were not party to the waiver, e.g., the unsecured creditors' committee. *In re South East Financial Associates, Inc*., 212 B.R. 1003 (Bankr. M.D. Fla. 1997); *In re Atrium High Point, Ltd. Partnership*, 189 B.R. 599 (Bankr. M.D.N.C. 1995).

An excellent article on this issue is *Prepetition Waivers of the Automatic Stay: Are They Enforceable?*, Sally S. Neely, ALI-ABA, Chapter 11 Business Reorganizations, July 26-28, 2001. *See also* William J. Burnett, *Prepetition Waiver of the Automatic Stay: Automatic Enforcement Equals Automatic Trouble*, 5 J. BANKR. LAW & PRAC. 257 (1996); Jeffrey W. Warren & Wendy V.E. England, *Prepetition Waiver of the Automatic Stay is Not Per Se Enforceable*, 13-MAR AM. BANKR. INST. J. 22 (March 1994).

D. Effect of automatic stay on divorce proceedings

There are several exceptions to the automatic stay that pertain to divorce and family law matters. Section 362(b)(1) excepts criminal proceedings from the stay; section 362(b)(2) excepts paternity actions, "establishment or modification" and collection of DSOs (from non-bankruptcy estate property), including withholding of income pursuant to judicial or administrative order, child custody and visitation, domestic violence issues, "withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license," reporting of overdue support to a consumer reporting agency, interception of a tax refund, enforcement of a medical obligation, and the actual dissolution of the marriage itself from the stay. Section (b)(2) however does NOT automatically except property division of bankruptcy estate property from

the stay. How these sections have been interpreted in relation to issues in recent cases is discussed below.

There is disagreement at the circuit court level about what attorneys fees should be awarded to a debtor upon a finding of violation of the stay under section 362(k). Both cases arose in the divorce dispute context. The Fifth Circuit held in *Young v. Repine (In re Repine)*, 536 F.3d 513 (5th Cir. 2008), that an award to the debtor of fees for prosecution of the violation of the stay case was appropriate. In *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010) (on denial of rehearing), *cert. denied*, 131 S.Ct. 180, 178 L.Ed.2d 42 (2010), the Ninth Circuit held that only attorney's fees incurred until the stay violation ends are compensable. "[A]ny fees the debtor incurs . . . in pursuit of a damage award would not be to compensate for 'actual damages' under § 362(k)(1). Under the American Rule, a plaintiff cannot ordinarily recover attorney fees spent to correct a legal injury as part of his damages, even though it could be said he is not made whole as a result." *Id*. at 947.

Many courts lift the stay and allow the state court to proceed with entry of a judgment as to the entire divorce proceeding, including division of property. *Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992). In cases with minimal assets this is particularly true. What are the type of cases in which bankruptcy courts have not allowed the state court to decide all of the issues related to a property division? In *In re Chandler*, 441 B.R. 452 (Bankr. E.D. Pa. 2010), a husband and wife were involved in a divorce proceeding. The husband filed bankruptcy during the divorce case to stay the sale of real property from which he derived all of his income for what he believed to be an inadequate price. The state court had appointed a conservator to handle the sale pursuant to the state court's order. The state court had not yet determined what the equitable division of the couple's assets would be. The wife moved to dismiss the bankruptcy case as a

"bad faith" filing. The court lifted the stay to allow the state court to equitably divide the assets, but refused to permit the stay to be lifted to allow sale of the real estate because it might be needed to fund the husband's plan of reorganization.

The husband filed a chapter 7 case four days before the trial of all issues in his divorce case in *In re Secrest*, 453 B.R. 623 (Bankr. E.D. Va. 2011). The trustee abandoned all of the property of the estate except the marital home which had approximately $600,000 in equity. The court granted relief from the stay to allow all aspects of the divorce case to proceed, except that the chapter 7 trustee was allowed to sell the home and the proceeds would be used to provide the equitable distribution to the parties. "The state court may proceed with an equitable distribution hearing as long as it does not involve distribution of property of the estate. A monetary award . . . instead of a division of assets may be appropriate if the bankruptcy court is likely to administer an otherwise marital asset." *Id.* at 632.

The Herters filed a consensual divorce prior to their bankruptcy cases in Idaho which is a community property state. In their property division, they agreed to sell their homestead and divide the proceeds equally. They each filed bankruptcy separately after executing the property settlement, but the divorce decree was not entered until after both bankruptcy filings. The husband's attorney filed the husband's case as if he were already divorced. The wife's attorney filed her case as if they were still married. After the husband received his discharge, but while the wife's case was still open, the wife deeded her half of the home to her ex-husband and he refinanced the home and paid her for her interest. The court held that the parties' divorce settlement agreement did not transmute the homestead interests of the parties into separate property and the deed to the husband and refinance of the home could be avoided by the wife's trustee. Both the deed and refinance were done postpetition without relief from the stay in her

case and the actions were void. *Hopkins v. Idaho State University Credit Union, et al. (In re Herter)*, 456 B.R. 455 (Bankr. D. Idaho 2011).

What is a civil contempt action versus what is a criminal contempt action is a controversy that is never finally resolved. There continue to be cases brought by debtors alleging that a family court action to jail the debtor is civil contempt and subject to the automatic stay while ex-spouses and states are asserting the action is one for criminal contempt and not subject to the stay. A recent case gives an excellent review of the distinctions between civil and criminal contempt. *In re Storozhenko*, 459 B.R. 697 (Bankr. E.D. Mich. 2011). It lists 6 factors to be considered. (1) How does the state court characterize the action? This is not determinative, but is one sign of the true nature of the action. *Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992). (2) What is the purpose of the action? Is it punishment or collection of the unpaid support? (3) Does the action include both criminal and civil aspects? (4) Is the contempt action meant to coerce compliance with a support order or to punish? (5) Will the action result in incarceration and under what type of release order? If the contempt can be "purged" and the contemnor can get out of jail upon a payment, the contempt is likely civil contempt. (6) Is the punishment a fine or is it payment of the debt? A fine, payable to the court, would be more of a criminal contempt remedy.

In *Rucker v. Johnson, et al. (In re Rucker)*, 458 B.R. 287 (Bankr. D.S.C. 2011), the bankruptcy court held that the court would not order the release of a debtor jailed prebankruptcy on a contempt order. The court ruled that the proper course of action was to seek relief in the family court first. The court cited cases that have held that the automatic stay does not apply to contempt proceedings in which a debtor was incarcerated prebankruptcy. *In re Montana*, 185 B.R. 650 (Bankr. S.D. Fla. 1995); *O'Brien v. Nachtigal (In re O'Brien*), 153 B.R. 305 (D. Or.

1993). The court reasoned that it cannot compel a family court to release a debtor, at least without a writ of habeas corpus, and it is unclear if bankruptcy courts can issue such writs.

A court held that relief from the stay would be granted to allow an equitable division of a couple's property in a state court divorce proceeding even though there may be fraudulent transfer actions brought as to the property in bankruptcy court as well. Allowing a division of property outside the bankruptcy court, even though it results in "piecemeal litigation" is not inappropriate. *In Re Dryja*, 425 B.R. 608 (Bankr. D. Colo. 2010).

A new 11th Circuit Court of Appeals case, *State of Florida Dept. of Revenue v. Diaz (In re Diaz)*, 647 F.3d. 1073 (11th Cir. 2011), held that an action to collect child support, unpaid after the debtor's discharge in a chapter 13 case, did not violate the debtor's stay or his discharge injunction. The debtor had listed the child support debt in his schedules (without accrued and accruing interest) and had fully paid the disclosed debt in his case. Florida had filed a claim to which the debtor objected and Florida did not respond to the objection. Florida had notice of all of the proceedings. The Court held that pursuant to 11 U.S.C. § 523(a)(5) a debt for a domestic support obligation is not discharged so, even though the debtor paid the principal amount of the debt during the case, the accrued interest was not discharged and an action to collect post-discharge did not violate the stay or the discharge injunction.

Finally two recent family law cases again remind attorneys that they and their clients have an affirmative duty to stop violations of the stay once the attorney or client become aware of a bankruptcy. In *Bailey v. Davant, et al. (In re Bailey)*, 428 B.R. 694 (Bankr. N.D. W.Va. 2010), a debtor's ex-wife and her attorney had lawfully obtained a garnishment order on the debtor's wages prebankruptcy. Once the bankruptcy was commenced, the ex-wife and attorney did not take sufficient steps to stop the garnishment and were held to violate the debtor's stay.

"In a garnishment proceeding, the creditor 'is in the driver's seat and very much controls what is done thereafter if it chooses.'" *Id*. at 699. (citing *In re Elder*, 12 B.R. 491, 494 (Bankr. M.D. Ga. 1981)). *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008) held that a postpetition incarceration of a debtor by a creditor who knew of the bankruptcy was a willful stay violation. "Many courts put a higher burden on a creditor than merely refraining from violating the stay, they 'have emphasized the obligation of creditors to take affirmative action to terminate or undo any action that violates the automatic stay.'" *Id*. at 307 (quoting *Johnston v. Parker (In re Johnston)*, 321 B.R. 262, 283 (D. Ariz. 2005)).

E. Criminal prosecutions for bad checks

The law in the Eleventh Circuit on bad checks is based on a 1982 case, *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982). In that case, the Court held that a bankruptcy court should not enjoin a state court bad check prosecution. "The basic error of the bankruptcy judge was to misjudge the width of his turf. The purpose of bankruptcy is to protect those in financial, not moral, difficulty. The bankruptcy courts were not created as a haven for criminals." *Id*. at 1251. The Court explained that the *Younger v. Harris* doctrine precludes a federal court from enjoining a pending state court action "except under extraordinary circumstances where there is a great and immediate danger of irreparable harm to plaintiff's federally protected rights that cannot be eliminated by his defense against a single prosecution." *Id*. at 1252 (citing *Younger v. Harris*, 401 U.S. 37, 46 (1971)). The debtor could have raised any issues he had with the prosecution as a defense in state court. The Court's ruling was done on the premise that 11 U.S.C. § 362(b)(1) was an absolute exception to the stay. It provides that the stay does not apply to "the commencement or continuation of a criminal action or proceeding against the debtor."

There is however a split of authority on the extent of this "absolute" exception. *In re Michalski*, No. 10-3654, 2011 WL 6415052, at *2 (6th Cir. December 21, 2011). The majority of the cases hold that the exception is absolute, regardless of prosecutorial purpose or bad faith. *Gruntz v. Los Angeles*, 202 F.3d 1074 (9th Cir. 2000); *Simonini v. Bell (In re Simmons)*, 69 Fed.Appx. 169 (4th Cir. 2003); *Dovell v. The Guernsey Bank*, 373 B.R. 533 (S.D. Ohio 2007); *Rollins v. Campbell (In re Rollins)*, 243 B.R. 540 (N.D. Ga. 1997); *In re Storozhenko*, 459 B.R. 697 (Bankr. E.D. Mich. 2011); *In re Caravona*, 347 B.R. 259 (Bankr. N.D. Ohio.2006); *Dennison v. Davis (In re Dennison)*, 321 B.R. 378 (Bankr. D. Conn. 2005); *Pickett v. Quinn (In re Pickett)*, 321 B.R. 663 (Bankr. D. Vt. 2005); *In re Bartel*, 404 B.R. 584 (B.A.P. 1st Cir. 2009).

The minority view is that the intent of the prosecution does matter and the prosecution can be stayed if the primary intent is the collection of a debt. *Dorsey v. Prokos Check Cashing (In re Dorsey)*, 373 B.R. 528 (Bankr. N.D. Ohio. 2007); *Batt v. Am. Rent-All (In re Batt)*, 322 B.R. 776 (Bankr. N.D. Ohio 2005); *Williamson-Blackmon v. Kimbrells's of Sanford (In re Williamson-Blackmon)*, 145 B.R. 18 (Bankr. N.D. Ohio. 1992); *In re Dovell*, 311 B.R. 492 (Bankr. S.D. Ohio 2004).

A recent case from Nevada, *In re Fidler*, 442 B.R. 763 (Bankr. D. Nev. 2010), held that even though the prosecuting authority was not liable for a violation of the stay, the prosecuting creditors might be subject to sanction post-discharge if the NSF check debt is dischargeable. In the *Fidler* case, the creditors who were behind the bad check prosecution had the complaint sworn out against the debtor after the debtor filed bankruptcy. The creditors then withdrew their claims in the bankruptcy case. The court stated that "[i]t does seem clear from the record that [the creditors who received the NSF checks] are attempting to use the criminal proceeding as an end-run around the discharge order." *Id*. at 768.

Another recent case examined this issue. In *In re Michalski*, No. 10-3654, 2011 WL 6415052, at *2 (6th Cir. December 21, 2011), the debtor filed chapter 7 bankruptcy after writing several bad checks to two different creditors. Prior to the bankruptcy filing, both creditors gave the debtor a ten-day notice to make good on the checks. The debtor did not comply. Instead, the debtor listed the creditors in his bankruptcy petition. One month after filing bankruptcy, criminal charges were filed against the debtor for the bad checks. However, the prosecution dismissed those charges prior to the completion of the debtor's bankruptcy case.

After receiving a chapter 7 discharge, the debtor was indicted for writing the bad checks. The debtor responded by moving to reopen his bankruptcy case and requested that the bankruptcy court enter an injunction against the criminal prosecution and an order stating that the prosecution violated the automatic stay and discharge injunction. The debtor sought civil contempt damages for the violations. The 6th Circuit held that the prosecutions did not violate the automatic stay because they were instituted over a year after he had received his discharge. *Id*. at *2. The court also acknowledged the split among courts regarding whether to use the "absolute" exception approach or to look to the underlying motive of the prosecution, but declined to adopt an approach for the 6th Circuit because it was clear to the court that the stay had not been violated.

F. Governmental actions to obtain and enforce money judgments

Section 362(b)(4) excepts from the automatic stay

> the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

Courts have employed 3 different tests to determine what matters are stayed under this section---(1) the pecuniary purpose or pecuniary interest test; (2) the public policy test; and (3) the pecuniary advantage test. *Solis v. SCA Restaurant Corp*., No. 9-CV-02212, 2011 WL 6000770 (E.D.N.Y December 1, 2011). The first test, the pecuniary purpose test, "looks to whether a governmental proceeding relates to public safety and welfare, which favors application of the stay exception, or to the government's interest in the debtor's property, which does not." *Id*. at *2 (citing *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig*., 488 F.3d 112, 133 (2nd Cir. 2007)); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108-09 (9th Cir. 2005*); In re Commonwealth Oil Refining Co., Inc.*, 805 F.2d 1175 (5th Cir. 1986). The "pecuniary advantage" test is a broader test that will more likely favor the government position. It looks to "whether the specific acts that the government wishes to carry out would create a pecuniary advantage for the government." *Solis,* 2011 WL 6000770, at * 2 (citing *U.S. v. Commonwealth Cos. (In re Commonwealth Cos.*), 913 F.2d 518, 523-25 (8th Cir. 1990). The public policy test "distinguishe[s] between proceedings that adjudicate private rights and those that effectuate public policy." *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385-86 (6th Cir. 2001). If there are both public and private rights that will be furthered, courts should exempt the action from the automatic stay if "the private interests do not significantly outweigh the public benefit from enforcement." *Chao,* 270 F.3d at 390.

The tests overlap. Therefore, many courts have considered both in making a decision and found that an action was exempt from the stay if it satisfied either test. See *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005); *Solis v. SCA Restaurant Corp., supra*.

What types of actions are covered? Enforcement of the Fair Labor Standards Act, *Solis V. SCA Restaurant Corp., supra.*; civil enforcement actions for punishing an alleged fraudulent

scheme to obtain placement agent commissions by corrupting the investment decision-making of CALPERS, *Brown v. Villalobos and Arvco Capital Research, LLC*, 453 B.R. 404 (D. Nev. 2011); collection of fines for parking violations, *Valle v. Montgomery County, MD (In re Valle)*, 456 B.R. 228 (Bankr. D. Md. 2011); enforcement of New York Department of Labor overtime wage laws, *In re Pollock*, 402 B.R. 534 (Bankr. N.D.N.Y. 2009); civil forfeiture actions, *In re Winpar Hosp. Chattanooga*, 401 B.R. 289 (Bankr. E.D. Tenn. 2009); condemnation proceedings, *Bevelle v. Jefferson County, Alabama (In re Bevelle)*, 348 B.R. 812 (Bankr. N. D. Ala. 2006). A Virginia court held that section 364(b)(4) even applies in a chapter 15 case involving a U.S. International Trade Commission action involving importation of devices that allegedly violated an American patent. *U.S. International Trade Comm'n v. Jaffe*, 433 B.R. 538 (E.D. Va. 2010).

Even if the police or regulatory action requires the debtor to pay for actions or to pay fines or other penalties, the action is usually not stayed. "Punishment in the form of civil penalties, disgorgement, and restitution serves a public, rather than a pecuniary, purpose." *Brown v. Villalobos*, 453 B.R. at 412 (citing *City & County of San Francisco v. PG &E Corp.*, 433 F.3d 1115, 1125 (9th Cir. 2006)). These types of payments do not violate the pecuniary purpose test. This is true even if the action results in a fine or penalty or claim that serves a debt collection purpose. These actions are also not stayed under the criminal proceedings exception to the stay in many cases. 11 U.S.C. § 362(b)(1).

How recoveries under section 362(b)(4) of fines, restitution and other funds are dealt with in a bankruptcy case is not clear. In *In re Winpar Hosp. Chattanooga, LLC*, 401 B.R. 289 (Bankr. E.D. Tenn. 2009), the U.S. commenced a civil forfeiture action against the proceeds of $7,200,000 from a sale of the real estate of *Winpar*. The bankruptcy court had already ruled that the liens of certain creditors had attached to the proceeds. The U.S. asserted that the property

was subject to forfeiture because it was purchased with proceeds from a criminal scheme. A U.S. magistrate judge issued a warrant of arrest for the proceeds and filed a turnover motion in the bankruptcy court. The court ruled that the section 362(b)(4) exception to the automatic stay applied to the forfeiture and ordered the funds turned over to the government. The court held that this was the proper result under the pecuniary purpose test. The court said that the exception trumps section 726(a)(4) of the claims priority scheme of the Bankruptcy Code. "The position of the United States is not that it is a claim holder in this case: it has never filed a claim. Rather, it contends it *owns* the property in question by virtue of forfeiture." *Id.* at 294 (italics in original). The court quoted from a Ninth Circuit B.A.P. case as follows:

> Now, trustee's problem is that once the government obtains a forfeiture judgment, it can assert that the proceeds are not property of the estate based on the relation –back doctrine: this is what troubled the bankruptcy court. The bankruptcy court saw the Action as circumventing the distribution priorities in §726 and preferring the government over unsecured creditors . . . As previously discussed, there is no conflict between § 726(a)(4) and § 362 (b)(4). Indeed the conflict here arises because of the relation –back doctrine and the possibility that the Property, when all is said and done, may not be property of the estate. However, if that happens, it is because that is the appropriate result under the law. Under § 362(b)(4), the government is not stayed from pursuing the Action to judgment even if the end result is that the Proceeds are not property of the estate.

Id. at 293 (quoting *U.S. v. Klein (In re Chapman)*, 264 B.R. 565, 572 (B.A.P. 9th Cir. 2001)).

G. Landlord actions to evict

BAPCPA added several new provisions to the Bankruptcy Code in regard to leases. 11 U.S.C. § 362(b)(22) excepts from the automatic stay

> any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the

> filing of the bankruptcy petition, a judgment for possession of such property against the debtor.

The exception is subject to 11 U.S.C. § 362(l). Section (1) stays any action of repossession or eviction for 30 days after the bankruptcy case is filed if the debtor files and serves on the creditor a certification that "there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession" under state law AND the debtor deposits with the clerk of court, one month's rent. If the debtor files the certification, the creditor must seek relief from the stay because section 362(b)(22) does not apply.

Under 11 U.S.C. § 362(b)(23) an eviction that seeks possession of residential lease property that is based upon endangerment of the property or use of controlled substances in the property is not stayed under section 362, but only if the lessor files and serves "a certification . . . that the eviction action was filed . . . due to endangered property or [the debtor has] illegally used . . . a controlled substance on the property." Under section 362(m), the stay lifts 15 days after the certification is filed unless the debtor files an objection to the certification. The court then must hold a hearing within 10 days "to determine if the situation giving rise to the lessor's certification . . . existed or has been remedied."

In *In re Griggsby*, 404 B.R. 83 (Bankr. S.D.N.Y. 2009), the court held that section 362(b)(22) applies to cases in which the debtor's default that gave rise to the judgment of possession was non-monetary. The debtor has no right to utilize the safe harbor provision of section 362(l). The reason for the eviction was accumulated debris that posed a health and fire risk to the building. An article in the American Bankruptcy Law Journal had reached the same conclusion. Alan M. Ahart, *The Inefficacy of the New Eviction Exceptions to the Automatic Stay*, 80 Am.Bankr. L.J. 125, 132 (Winter 2006). The *Griggsby* court quoted the legislative history to the new section which stated:

> Where nonbankruptcy law applicable in the jurisdiction does not permit a tenant to cure a monetary default after the judgment for possession has been obtained, the automatic stay of section 362(a)(3) does not operate to limit the action by a rental housing provider to proceed with, or a marshal, sheriff, or similar local officer to execute, the judgment for possession.

404 B.R. at 90 (quoting H.R. Rep. No. 109-31, pt. 1, at 74-75 (2005)).

A second case, *In re Harris*, 424 B.R. 44 (Bankr. E.D.N.Y. 2010), dealt with a debtor who certified in her bankruptcy petition that the lessor had a judgment of possession against her. She did not file a certification under section 362(l) and did not pay any rent into court. The debtor was evicted the day after she filed bankruptcy. More than two weeks after her bankruptcy filing, the debtor amended her petition to include section 362(l) certifications and submitted rent money to the court. The court held that section 362(b)(22) applies immediately upon a debtor's failure to file the section 362(l) certifications. *See also In re Parker*, No. 08-00278, 2008 WL 2081536, at *1 (Bankr. D.D.C. 2008). The court stated that the procedure was designed so that landlords "can know with certainty whether or not the stay applies to their continued enforcement of pre-petition judgments for possession." *Harris,* 424 B.R. at 53.

A lessor must be sure that a lease terminated prepetition or relief from the stay will be necessary. The proof needed to obtain relief from the stay will be more stringent if the lease is still in effect. In *In re Citrus Tower Boulevard Imaging Center, LLC*, 460 B.R. 334 (Bankr. N.D. Ga. 2011) the lessor argued that it had terminated the lease under Florida law. The debtor asserted that the lease was not terminated because Florida law did not permit termination clauses to be self executing or automatic. The court refused to lift the stay provided the debtor made postpetition rent payments. The court did allow the stay to lift to determine the amount of the prepetition rent claim in state court.

As a cautionary note, two courts have sanctioned debtors' counsel for failing to check the box on the bankruptcy petition that indicated there was a judgment of possession against the debtor. *In re Plumeri*, 434 B.R. 315 (S.D.N.Y. 2010) and *In re Green*, 422 B.R. 469 (Bankr. S.D.N.Y. 2010) held that, when there is "no colorable reason for [debtor's counsel] to omit disclosure of the judgment of possession," sanctions are appropriate. *Green*, 422 B.R. at 474.

H. Special provisions with respect to single asset real estate cases and small business cases

There are several provisions of § 362 that deal with single asset real estate cases and small business cases. The thrust of the provision as to small business cases limits the situations in which a small business can have a stay in a second bankruptcy case. The SARE provisions limit the time in which the stay is in effect in a SARE case without action by the debtor to keep the stay in effect.

Section 362(n) states that there is no stay in a small business case if the debtor

> (A) is a debtor in a small business case pending at the time the petition is filed;
>
> (B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;
>
> (C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or
>
> (D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A),(B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

Paragraph (n)(2) states that there are 2 exceptions to the provisions listed in (n)(1). If a noncollusive involuntary case is filed against the debtor or "if the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed" and it is more likely than not that the court will confirm a nonliquidating plan within a reasonable time.

In a recent case, *In re Pink Moon Enterprises, LLC*, 444 B.R. 490 (Bankr. S.D. Fla. 2011), the sole petitioning creditor in an involuntary bankruptcy against the debtor was also the sole registered agent and managing member of the alleged debtor. In ruling upon whether the stay took effect immediately in an involuntary case, the court held that it did in this case. However, the court immediately lifted the stay alluding to "small business debtor gamesmanship." *Id*. at 491. In *Palmer v. Bank of the West*, 438 B.R. 167 (E.D. Wis. 2010), the court held that a case filed by a boat marina within 2 years of the filing of the first case meant that there was no automatic stay applicable to the debtor's assets in the second case. The debtor argued that her case met the requirements of section 362(n)(2) because she could confirm a plan and the filing of the petition in her second case resulted from circumstances beyond her control. The District Court concluded that "the case then pending" meant a case that is pending at the time the second petition is filed. *Id*. at 169. If this is the case, then the exception will never be able to be met, because the situation that would give rise to it is nonsensical and nearly impossible. The more logical interpretation is that "the case then pending" means the second case.

Section 362(d)(3) states that a debtor that is a single asset real estate entity must meet stricter requirements than other debtors to avoid the grant of relief from the automatic stay. Section 362(d)(3) provides

> [W]ith respect to a stay of an act against single asset real estate . . . by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is . . . [a SARE], whichever is later—
>
> > (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
> >
> > (B) the debtor has commenced monthly payments that—
> >
> > > (i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
> > >
> > > (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate

Section 362(d)(3) applies in chapter 7, 11, 12 and 13 cases according to 11 U.S.C. § 103(a). *Suntrust Bank v. Global One, LLC (In the Matter of Global One, LLC)*, 411 B.R. 524, 529 (Bankr. S.D. Ga. 2009). The *Global One* court concluded that this does not lead to an absurd result as the debtor asserted. The court can grant relief from the stay if the trustee is not making interest payments or proposing a plan. However, "it is not mandatory to grant unconditional relief from stay. . . If the Court faces a situation like Debtor describes [property with very high value and little debt], a court may condition the stay to allow a Chapter 7 Trustee time to try to sell property." *Id*. at 529.

In *In re Amagansett Family Farm, Inc.*, Nos. 11–73929, 11–73928, 11–73930, 2011 WL 5079493 (Bankr. E.D.N.Y. October 25, 2011), the court held that a debtor who did not file a

motion to extend the exclusive period to file a plan during the first 90 days of its case, could not file the motion after that time, even though a determination that the debtor was a SARE did not occur until 5 months into the case. A debtor whose case passes that deadline must file a plan or begin paying interest within 30 days of the SARE determination.

What must a debtor prove to fulfill the requirement of section 362(d)(3)(A)? One court has held that "while a hearing on a (d)(3) motion should not be a mini confirmation hearing," the debtor must show a "realistic chance" that the plan will be confirmed and the plan must not be patently unconfirmable. *In re Rim Development, LLC*, 448 B.R. 280, 288-89 (Bankr. D. Kan. 2010).

I. Damages for violation of the stay

One of the biggest areas of litigation at this time is over what notices lenders may send debtors without being in violation of the stay. The new Federal Rules of Bankruptcy Procedure 3002 will solve some of the issues. However, most of the case law is holding that RESPA or HAMP required notices and other like statements are not violative of the stay or the discharge injunction. *Singh v. U.S. Bank, et al. (In re Singh)*, 457 B.R. 790 (Bankr. E.D. Cal. 2011) is one of the latest pronouncements. On a motion to dismiss, the court dismissed stay violation allegations in regard to the issuance of RESPA notices. The court cited numerous other cases that agreed with it. "Not every communication is prohibited. Rather, prohibited communications are those which, based on direct or circumstantial evidence, are geared toward collection of pre-petition debt, and which are accompanied by coercion or harassment." *Id*. at 800. A similar recent case is *Knowles v. Bayview Loan Servicing, LLC (In re Knowles)*, 442 B.R. 150 (B.A.P. 1st Cir. 2011) (regarding RESPA notices).

Two similar cases involving notices are *Messick v. Ascend Federal Credit Union*, 424 B.R. 344 (E.D. Tenn. 2010), which held that an informational letter mailed by a credit union to chapter 13 debtor/depositors about their status postfiling did not violate the automatic stay, and *In re Estrada*, 439 B.R. 227 (Bankr. S.D. Fla. 2010), which held that a mortgagee's letter proposing a reaffirmation contained threats which did violate the stay but the court did not grant a contempt motion because the lender's intent was not to threaten the debtor and the form reaffirmation letter of the mortgagee had been changed. Another court held that a letter sent by a municipality informing debtors that their tax liability had been assessed did not violate the stay. *Wcislak v. City of Perrysburg (In re Wcislak)*, 440 B.R. 779 (Bankr. N.D. Ohio 2010).

In *In re Sayeh*, 445 B.R 19 (Bankr. D. Mass. 2011), the court held that a chapter 11 trustee is not an "individual" authorized to seek damages for a stay violation under section 362(k). The case cites numerous cases that discuss this issue. However, the court did hold that the trustee had the power to bring a contempt action against the creditor instead. *See also Havelock v. Taxel (In re Pace)*, 67 F.3d 187 (9th Cir. 1995) (finding that a trustee is not an individual for purposes of section 362(k)); *Martino v. First Nat'l Bank of Harvey (In re Garofalo's Finer Foods, Inc.)*, 186 B.R. 414 (N.D. Ill. 1995) (holding that a trustee is an "individual").

Inaction by an entity can result in a stay violation resulting in damages. *Tyson v. Hunt, et al. (In re Tyson)*, 450 B.R. 754 (Bankr. W.D. Tenn. 2011). In *Tyson*, a purchaser of property postpetition who did not have court authority for the purchase refused to cooperate in setting aside the sale. The court awarded compensatory but not punitive damages.

Two cases from the Northern District of Georgia dealt with alleged violations of the stay by banks. In *Gordon v. Taylor (In re Taylor)*, 430 B.R. 305 (Bankr. N.D. Ga. 2010), a chapter 7

trustee brought an action for violation of the stay against Deutsche Bank, among others. Deutsche was the debtor's mortgage lender. The debtor, without court permission, sold her home and paid off Deutsche Bank and pocketed the profit. Deutsche Bank applied the funds it received to the loan, but did notify the trustee of the sale. The court ruled that the Bank violated the stay by paying off the loan. However, the court held that the trustee was not injured by Deutsche Bank's actions. It only got what it was owed and none of that would have been available to the trustee. The fact that the trustee might have been able to more easily capture the profit that the debtor received if the Bank had notified the trustee earlier was not supported by the evidence. The court also discussed the issue of whether a trustee is an "individual" under section 362(k) as discussed above. However, the court did not need to resolve the issue since the trustee was not damaged.

In *Gordon v. Hill, et al. (In re Wilson)*, 454 B.R. 546 (Bankr. N.D. Ga. 2011), the court held that the loan servicer did not violate the stay when it sold a debtor's homestead to a third party who immediately resold the property for almost $100,000 more than he bought it for from the lender. The trustee alleged that the debtor and third party had perpetrated a fraud on the estate. The court held that the servicer, Ocwen, did not cause the injury to the estate and did not participate in any fraud. The court agreed with and cited *Taylor*. The court also did not decide (but discussed in a footnote) whether a trustee has standing under section 362(k) as an "individual."

J. Retroactive relief from the automatic stay

The Bankruptcy Code states at 11 U.S.C. § 362(d) that the automatic stay may be "terminat[ed], annul[ed], modif[ied], or condition[ed]." In all circuits, this provision has been interpreted to mean that the stay may be retroactively terminated under appropriate conditions.

In re Mitan, 573 F.3d 237 (6th Cir. 2009); *Shaw v. Ehrlich*, 294 B.R. 260 (W.D.Va.2003), *aff'd*, 99 Fed. Appx. 466 (4th Cir. 2004); *E. Refractories Co. Inc. v. Forty Eight Insulations Inc.*, 157 F.3d 169 (2d Cir. 1998); *Albany Partners, Ltd. V. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670 (11th Cir. 1984); *In re Webb*, 294 B.R. 850 (Bankr. E.D. Ark. 2003); *In re Barr*, 318 B.R. 592 (Bankr. M.D. Fla. 2004); *In re Pleasant*, 320 B.R. 889 (Bankr. N.D. Ill. 2004); *In re Bright*, 334 B.R. 19 (Bankr. D. Mass. 2005), *aff'd* 338 B.R. 530 (Bankr. 1st Cir. 2006).

The courts have employed several different factors to be considered when a retroactive stay request is made. In *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997), the court balanced the equities but held that the movant must demonstrate extreme or exceptional circumstances to warrant retroactive annulment. *See also Litton Loan Servicing, LP v. Rockdale County Georgia, et al. (In re Howard)*, 391 B.R. 511, 518 (Bankr. N.D. Ga. 2008). In *In re Myers*, 491 F.3d 120 (3rd Cir. 2007) and *In re Williams,* 323 B.R. 691 (B.A.P. 9th Cir. 2005), *aff'd*, 204 Fed.Appx. 582 (9th Cir. 2006), the courts balanced the equities. The most important factors in a balancing of the equities are "(1) whether the creditor was aware of the filing or encouraged violation of the stay; (2) whether the debtor engaged in inequitable, unreasonable, or dishonest behavior; and (3) whether the creditor would be prejudiced." *Myers* at 491 F.3d 129. Other factors used include "whether the debtor has not acted in good faith, whether the property at issue is necessary for an effective reorganization, whether grounds for stay relief existed at the relevant time and a motion for relief, if filed, would have been granted; and, whether the failure to grant retroactive relief would cause unnecessary expense to the creditor." *In re Taub*, 438 B.R. 39, 50 (Bankr. E.D.N.Y. 2010)(citing *In re Marketxt Holdings, Corp.*, No. 04-12078, 2009 WL 2957809 (Bankr. S.D.N.Y. July 20, 2009)).

The Georgia bankruptcy courts have utilized stay annulment recently. In *Moore v. Complete Cash Holdings, LLC (In re Moore)*, 448 B.R. 93 (Bankr. N.D. Ga. 2011), Judge Bonapfel annulled the stay to allow a pawnbroker to retroactively validate its repossession. He acknowledged that there were two different tests applied by cases to determine if such relief was appropriate. One test is whether there are extreme or exceptional circumstances warranting the relief. The other test balances the equities. He did not determine which test was more correct, because relief was due to be granted under either test.

In *Litton Loan Servicing, LP v. Rockdale County, Georgia, et al. (In re Howard)*, 391 B.R. 511 (Bankr. N.D. Ga. 2008), the court annulled the stay to validate a postpetition tax sale. The court found that the two tests of extreme circumstances and balancing of the equities are very similar. *Id*. at 581. "[B]oth the 'exceptional circumstances' and 'balancing of the equities ' tests focus, to a large degree, on two considerations: whether a creditor had notice of the pending bankruptcy (i.e., was the creditor's conduct innocent or did it knowingly violate the stay) and whether the debtor has engaged in inequitable conduct." *Id*.