AMERICAN BANKRUPTCY INSTITUTE

2021 Consumer Practice Extravaganza

Post-Filing Issue-Spotting

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CONCURRENT SESSION

2021

POST-FILING ISSUE SPOTTING:

Motions for Relief from Stay, Turnover Issues, 523 Actions and Violations of the Discharge Injunction

For

CONSUMER PRACTICE EXTRAVAGANZA
(CPEX 2021)

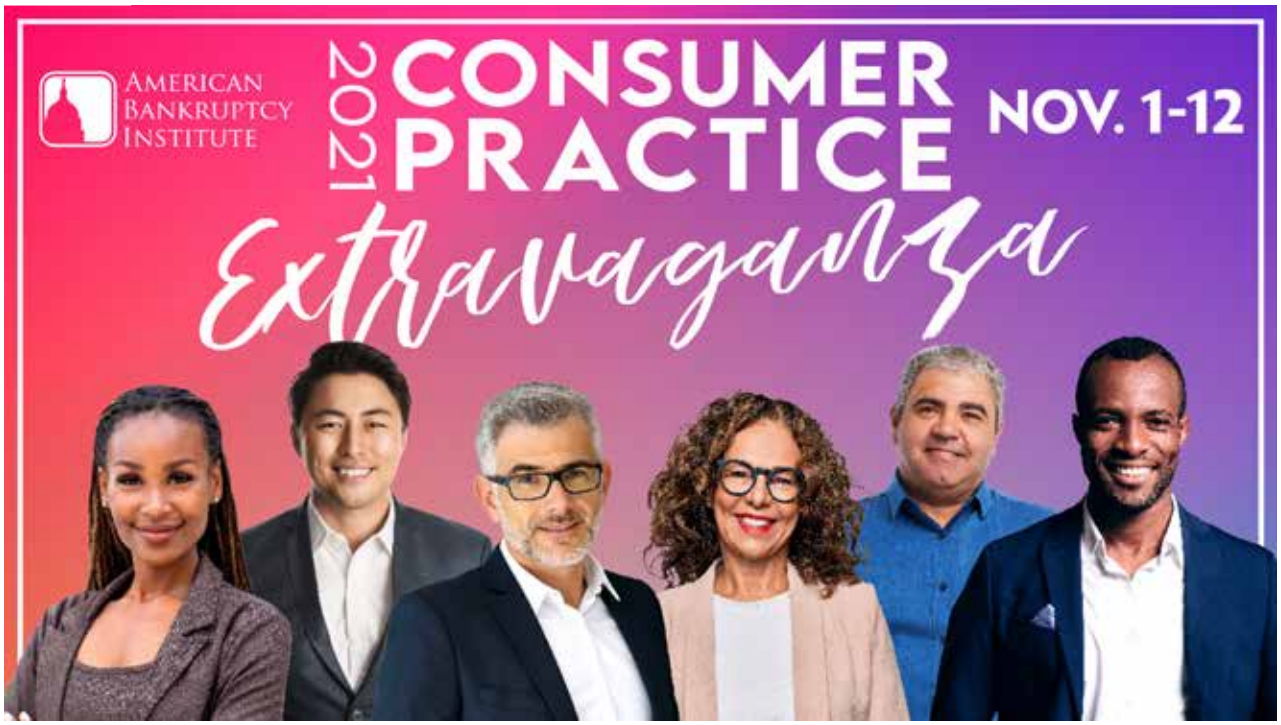
AMERICAN BANKRUPTCY INSTITUTE

Supplemental Materials

By Summer Shaw

Shaw & Hanover, PC, *Palm Desert, CA*

November 12, 2021



2021 CONSUMER PRACTICE Extravaganza
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Motions for Relief from Stay, Turnover Issues, Dischargeability of Debts under 523, and Violations of the Discharge Injunction

Motions for Relief from Stay

Selected Rules And Statutes

11 U.S. Code § 362(d)- Automatic stay
FRBP 4001, 9014 or 9075

§ 362(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1)for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2)with respect to a stay of an act against property under subsection (a) of this section, if—

(A)the debtor does not have an equity in such property; and

(B)such property is not necessary to an effective reorganization;…

§ 362 (d)(4)with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A)transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B)multiple bankruptcy filings affecting such real property….
"RECORDING WARNING"

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Issues to Consider In Responding:

a. Proper Service?

- *Parties*
- *Timing*
- *FRBP 7004- Corp's (ODMA & AFSOP), USA, & Insured Depository (Certified Mail & to the officer of the Institution- https://banks.data.fdic.gov/bankfind-suite/bankfind*
- *FRBP 9006(d)- Computing and Extending Time*

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Issues to Consider In Responding: (cont'd)

b. Evidence provided? *Note, security, properly signed dec, value*
c. Value/Equity Cushion? *20% for real property, local standards*
d. FRBP 3002.1 if dealing with real property- *What makes up what the debtors are allegedly behind? (See recording of CPEX panel on 3002.1 re Gravel* and *Blanco)*
e. Adequate protection Order
f. Last resort…Carve-Out?

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Turnover To the Trustee and the Debtor
Selected Rules And Statutes

11 U.S. Code § 363. Use, sale, or lease of property
11 U.S. Code § 521. Debtor's duties- (a)(3) and (4)
11 U.S. Code § 541 - Property of the estate- (a)(1)
11 U.S. Code § 542 - Turnover of property to the estate
11 U.S. Code § 704 - Duties of trustee

§ 521(a) The debtor shall

(1)file—…..(all the usual stuff)

(2)if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—**(A)**….file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and **(B)**within 30 days after the first date set for the meeting of creditors under section 341(a)…perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

§ 521(a)…

(3) ….cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4)….surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

(5)appear at the hearing required under section 524(d) of this title;

(6)in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341 (a), either—

(A)enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B)redeems such property from the security interest pursuant to section 722; and

(7)unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

What happens when your client doesn't comply?:

Trustee cannot comply with their duties (11 U.S. Code § 704): Know those duties as Debtor's counsel-

§ 704(a)The trustee shall—

(1)collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2)be accountable for all property received;

(3)ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title;

(4)investigate the financial affairs of the debtor;

(5)if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6)if advisable, oppose the discharge of the debtor;

(7)unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8)if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business…;

(9)make a final report and file a final account of the administration of the estate with the court and with the UST….

Trustee must remedy and Turnover powers are enlisted to deal with these issues (11 U.S. Code § 542):

§ 542…

a. property that the trustee can use, sell, or lease…that is not of "inconsequential value or benefit to the estate;" (*See In re KNV*)

b. debt that is owed to the debtor/estate;

c. Protection for those that do not know about the bankruptcy;

d. Life Insurance protection;

e. Records...

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Discharge Issues Under 523

Selected Rules And Statutes

11 U.S. Code § 523 - Exceptions to discharge

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Some Consumer Discharge Issues Under 523

a. Under 727 and 1328(b)., the following are excepted . . .:
1. certain taxes- *Get the transcripts*;
2. false representations & used in a writing- *look at the loan app's*;
3. Not listed- *Be THOROUGH!;*
4. Fraud or "defalcation"- *No payments ever made?;*
5. Domestic Support Obligations- *Not just monthly payment*;
6. "willful and malicious injury;"
7. Certain fines and penalties;
8. Student loans unless "undue hardship"- *Brunner Test;*
9. Death or injury "because the debtor was intoxicated. . ."- DUI?
10. Debt in a prior case where debtor waived /denied a discharge;
15. Family law Court Order

****Chapter 13 Discharge under 1328(a) does discharge:**

6, 7, 10, and 15**

Violations of the Discharge Injunction post-*Taggart*

Selected Rules And Statutes

11 U.S. Code §105. Power of court
11 U.S. Code §524. Effect of discharge
FRBP 9014 & 9020

Taggart Holding:

"A court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct."

(a) This conclusion rests on a longstanding interpretive principle: When a statutory term is " 'obviously transplanted from another legal source,' " it " 'brings the old soil with it.' "…. Civil contempt sanctions may be warranted when a party acts in bad faith, and a party's good faith may help to determine an appropriate sanction."
(b) "Proper standard is an objective one (maybe even higher)"

Violations of the Discharge Injunction post-*Taggart:*

Issues to consider-

1. Is a motion to reopen needed in your Circuit?
2. Motion for OSC (FRBP 9020)
3. *In re Taggart*
4. Evidence of VOD- Preferably in writing, warnings, damages

SAMPLE FORMS FOR:

Relief from Stay, Turnover, and 523 Action

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address ☐ *Attorney for Debtor* ☐ *Debtor appearing without an attorney*:	FOR COURT USE ONLY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - **SELECT DIVISION**

In re: Debtor(s).	CASE NO.: CHAPTER: [1] **Select Chapter** **NOTICE OF MOTION AND MOTION FOR ORDER ESTABLISHING ADEQUATE PROTECTION, INCLUDING PROCEDURES TO RETURN SEIZED PERSONAL PROPERTY** **[11 U.S.C. §§ 362, 363, 542]** This motion is being made under **ONLY ONE** of the following notice procedures: ☐ **No hearing requested: LBR 9013-1(p):** ☐ **Hearing requested on emergency basis: LBR 9075-1(b); or** ☐ **Hearing requested on shortened notice: LBR 9075-1(b); or** ☐ **Hearing set on regular notice: LBR 9013-1(d):** DATE: TIME: COURTROOM: ADDRESS:
Creditor:	

TO THE CREDITOR, INCLUDING ALL PART(IES) WITH POSSESSION, CUSTODY, OR CONTROL OF THE PROPERTY DESCRIBED BELOW (COLLECTIVELY, CREDITOR), AND OTHER PARTIES IN INTEREST:

1. **PLEASE TAKE NOTICE THAT** the undersigned debtor(s) (collectively, Debtor) moves this court for an adequate protection order for the following property (Property) seized prepetition by Creditor *(describe vehicle or other property)*:_____.

2. **NOTICE PROVISIONS AND DEADLINES FOR FILING AND SERVING A WRITTEN RESPONSE:** Your rights might be affected by this Motion. You may want to consult an attorney. Refer to the box checked below for the deadline to file and serve a written response. If you fail to timely file and serve a written response, the court may treat such failure

as consent to the relief sought in the Motion and may grant the requested relief. You must serve a copy of your opposition upon Debtor, Debtor's attorney, the United States trustee, and also serve a copy on the judge assigned to this bankruptcy case pursuant to LBR 5005-2(d) and the Court Manual. [1]

a. ☐ **Hearing Requested on Emergency Basis under LBR 9075-1(a):** Debtor has contacted the court and requested an emergency hearing on less than 48 hours notice. If the court grants the request, you will receive a separate Notice of Hearing that identifies the deadline for you to file and serve a written response. If the court denies the request to set an emergency hearing, Debtor will provide written notice of a hearing date on regular notice or other disposition of this Motion and the deadline for filing an opposition.

b. ☐ **Hearing Requested on Shortened Notice under LBR 9075-1(b):** Debtor has filed a separate application asking the court to set a hearing on shortened notice, entitled Application for Order Setting Hearing on Shortened Notice (Application). If the court grants the Application, Debtor will serve you with another document providing notice. The deadline to file and serve a written response will be contained in this document. If the court denies the Application, Debtor will provide written notice of a regular hearing date or other proposed disposition of this Motion.

c. ☐ **Hearing Set on Regular Notice: Notice Provided Under LBR 9013-1(d):** This Motion is set for hearing on regular notice pursuant to LBR 9013-1(d). The full Motion and supporting documentation are attached, including the legal and factual grounds upon which the Motion is made. If you wish to oppose this Motion, you must file a written response with the court and serve it as stated above **no later than 14 days prior to the hearing**. Your response must comply with LBR 9013-1(f). The undersigned hereby verifies that the hearing date and time selected were available for this type of Motion according to the judge's self-calendaring procedures [LBR 9013-1(b)].

d. ☐ **Hearing Not Requested: Notice Provided Under LBR 9013-1(p):** The Debtor and Creditor reached an agreement (which is set forth in the Adequate Protection Attachment) and there are no other parties affected by the agreement.

e. ☐ **Other** (*specify*)**:**

Date:_____ By: _____
Signature of Debtor or attorney for Debtor

Name: _____
Printed name of Debtor or attorney for Debtor

[1] "LBR" refers to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California. "Court Manual" refers to the Court Manual of the United States Bankruptcy Court for the Central District of California The LBR and the Court Manual are posted on the court's website and may be viewed online. "FRBP" refers to the Federal Rules of Bankruptcy Procedure. "11 U.S.C." refers to Title 11 of the United States Code, or the Bankruptcy Code.

MOTION FOR ORDER ESTABLISHING ADEQUATE PROTECTION, INCLUDING PROCEDURES TO RETURN SEIZED PERSONAL PROPERTY

1. Urgency of Need. Debtor urgently needs the Property, which was seized prepetition, for the following reasons *(check all that apply for vehicle or other Property)*:
   ☐ to commute to work;
   ☐ for Debtor's business *(e.g., deliveries)*;
   ☐ to travel to medical appointments;
   ☐ for grocery shopping;
   ☐ to take children to school;
   ☐ to transport elderly relatives to appointments;
   ☐ other (describe):_____.

2. Nature of relief. Debtor requests that the court issue an order:
   a. fixing the proposed types of adequate protection set forth below, including directing Creditor to provide a point of contact and cooperate in arranging for return of the Property; and
   b. authorizing (to the extent required) use of property of the estate to provide such adequate protection.

3. Authority. Debtor seeks the foregoing relief pursuant to 11 U.S.C. §§ 105(a), 361, 362(a), (d) and (g), 363(b) and (e), 542, 543, and 549(a)(2)(B), and FRBP 4001(a) and (d). Specifically, in this contested matter Debtor seeks a court order (x) determining what will adequately protect Creditor's interest in the Property, (y) granting relief from the automatic stay, to the extent required, so that Debtor may offer and Creditor may accept whatever adequate protection is to be provided to Creditor, and (z) authorizing Debtor to use property of the estate to provide such adequate protection to Creditor. Debtor maintains that such relief is appropriate to facilitate turnover of the Property under 11 U.S.C. §§ 542 and 543, and pursuant to the authorization required for postpetition transfers under 11 U.S.C. § 549(a)(2)(B). In the event that Creditor fails or refuses to turn over the Property notwithstanding any proffered and/or ordered adequate protection, Debtor reserves all rights (a) to seek an order or judgment enforcing any turnover obligation and (b) to seek compensatory, coercive, or other sanctions, including (i) filing any motion for contempt sanctions for violation of 11 U.S.C. § 542 and (ii) filing a complaint to recover the Property and for any additional injunctive, declaratory, or other relief. *See* FRBP 7001(1), (7), (9).

4. Service. Debtor asserts that service on the following persons is sufficient notice of the relief requested in this Motion *(check one)*:
   a. ☐ Service on usual persons: Debtor has served:
      (i) Creditor, and/or an attorney representing Creditor in this bankruptcy case, known as *(name(s) of Creditor or bankruptcy attorney):*
      _____
      _____,
      (ii) any trustee in this case, and, if applicable,
      (iii) any official creditors committee, or the persons included on Debtor's filed list of 20 largest unsecured creditors,
      all pursuant to FRBP 4001(a)(1) or 4001(d)(1)(C) and as shown on the attached proof of service.
      Note to Debtor: ***Telephoning, emailing or faxing Creditor*** *might be advisable to provide as much notice as possible; but, unless Creditor has consented to service by email or facsimile, those methods do constitute legal service.*[1]
   b. ☐ Consensual, immediate relief: Debtor asserts that no notice is required beyond what is shown on the attached proof of service, and no hearing is required, based on
      (i) Creditor's consent, shown by its signature below, and
      (ii) Debtor's urgent need for the Property,
      all pursuant to 11 U.S.C. §§ 102(2) and 363(e) (adequate protection "shall" be provided, on request of any party with an interest in property proposed to be used, "at any time … with or without a hearing"), and FRBP 4001(a)(2) (entitled "Relief Without Hearing").

[1] *See* Federal Rule of Civil Procedure ("FRCP") 4(d)(1)(G) (incorporated by FRBP 7004 and 9014(b)) (procedures for waiving regular service of initial motion papers) *and compare, e.g.,* FRCP 5(b)(2)(E) (incorporated by FRBP 7005) (procedures for consent to electronic service after initial motion papers) *and* FRBP 9036 (same).

c. ☐ Other *(describe)*:_____.
If the court is unwilling to grant relief on the notice described above and in the attached proof of service, Debtor requests that the court issue an order directing what notice Debtor must provide.

5. Proposed Adequate Protection. Debtor asserts that the Property can be returned to Debtor while adequately protecting any interest that Creditor may have in the Property based on the following (Proposed Adequate Protection) *(select all that apply):*

a. ☐ Insurance and taxes. Debtor will:
(i) maintain adequate insurance on the Property *(attach a copy of insurance declarations page or similar proof of insurance, which may need to name Creditor as a loss payee if required by the parties' contract)* and
(ii) remain current on any taxes or other governmental charges that become due postpetition and would, if unpaid, constitute a lien on the Property.

b. ☐ Monthly adequate protection payments *(attach evidence of ability to pay, such as a copy of latest redacted pay stub; Bankruptcy Schedules "I" and "J"; and/or a similar evidence).*
Debtor will make payments as follows *(choose one)*:
☐ direct payments: Debtor will pay Creditor all regular monthly payments coming due postpetition, in the approximate amount of $_____, which may be subject to change under the terms of the underlying contract, subject to any additional or different provisions in any attached form of proposed Adequate Protection Order (APO)*;* or
☐ payments by the chapter 13 trustee: Creditor will be paid by the chapter 13 trustee in the dollar amount proposed in the chapter 13 plan attached hereto *(attach copy of plan)*

c. ☐ Cure of arrears. Debtor will cure arrears as set forth in *(choose one)*:
☐ plan: a chapter 11 or 13 plan, a draft of which is attached *(attach proposed plan)*;
☐ APO: the attached proposed APO *(attach proposed APO)*.

d. ☐ Allowed administrative expense. Debtor proposes that Creditor be granted an allowed administrative expense in the following estimated amounts (*e.g.,* $xx for postpetition expenses such as delivering the Property to Debtor as provided below):
_____.

e. ☐ Equity cushion. Based on the attached declaration, Debtor submits that there is sufficient equity in the property to provide adequate protection. Debtor asserts that the value of the Property is not less than $_____and that the dollar amount of the debt owed to Creditor is approximately $_____, leaving an equity cushion of $_____or_____%.

f. ☐ Other *(describe):*_____.

Debtor requests that the court issue an order approving the foregoing Proposed Adequate Protection.

6. Return of Property. In furtherance of the foregoing, and as further adequate protection of any interest that Creditor may have in the Property, Debtor seeks to establish the following procedures for the safe and speedy return of the Property to Debtor as follows. Creditor is requested *immediately* to contact Debtor (if not already done) using the contact information specified below, (x) to specify the name, email address, and telephone number of a point of contact for Creditor and (y) to arrange a reasonable time and place for return of the Property to Debtor. Debtor requests that this Court direct Creditor to *immediately* provide such a point of contact and to meet and confer regarding return of the Property.

a. For future communications regarding return of the Property, Creditor should contact *(select all that apply)*:
i. ☐ Attorney for Debtor, at the telephone number and email address listed in the top left corner of the first page of this Motion
ii. ☐ Debtor directly, at the following telephone number and email address (if different from any contact information in the top left corner of the first page of this Motion):
_____.

b. Debtor proposes return of the Property in the following ways *(select all that apply):*
i. ☐ Debtor pickup: Debtor will retrieve the Property from *(specify full address of location)*:
_____, during regular business hours between_____a.m. and_____p.m. on Mondays through Fridays,_____.m. to _____ p.m. on Saturdays, and_____.m. to_____p.m. on Sundays.
ii. ☐ Creditor delivery: Creditor is requested to deliver the Property to Debtor's address, *(specify Debtor's home or business address)*:
_____, at a day and time to be arranged by communicating immediately with Debtor, between the hours of_____.m. and _____

_.m., using the telephone number or email address referenced in paragraph "6.a.ii" above, or as follows *(specify any different telephone number and/or email address)*: _____.

c. ☐ Other *(describe):* _____
_____.

Debtor requests that the court issue an order establishing the foregoing proposed procedures for return of the Property to Debtor as a reasonable and appropriate form of adequate protection of any interest that Creditor may assert in the Property.

7. Reservation of rights. This form provides standard procedures for establishing adequate protection, including the safe and speedy return of the Property, but both Debtor and Creditor may be obligated or permitted to act sooner, or take other steps, than what is contemplated in this form. *See, e.g.,* 11 U.S.C. §§ 362(f), 363(e), 542.

8. Additional Provisions: _____
_____
_____
_____
_____

☐ Attached to this motion is an (optional) Memorandum of Points and Authorities.

For the foregoing reasons, Debtor requests that the court issue an order (a) establishing that the Proposed Adequate Protection set forth above is adequate to protect any interest that Creditor may assert in the Property and, to the extent required, that this Court authorize payment of the proposed adequate protection payments or other proposed use of property of the estate to provide such Proposed Adequate Protection, and (b) as additional adequate protection, establishing the procedures set forth above for the safe and speedy return of the Property, and authorize and direct Debtor and Creditor to do all things reasonably necessary or appropriate to implement such procedures.

Date: _____

By: _____
Signature of Debtor or attorney for Debtor

Name: _____
Printed name of Debtor or attorney for Debtor

CONSENT BY CREDITOR *(if applicable)*

a. ☐ Proposed Adequate Protection. The undersigned Creditor hereby consents to the Proposed Adequate Protection set forth in paragraph "5" of the Motion, with the following exceptions or additions *(specify, if any)*: _____

_____

b. ☐ Return of the Property. The undersigned Creditor hereby consents to the proposed procedures for return of the Property set forth in paragraph "6" of the Motion, with the following exceptions or additions *(specify, if any)*: _____

_____

c. ☐ Point of contact.

Name of Creditor's point of contact: _____

Email address of Creditor's point of contact: _____

Telephone number of Creditor's point of contact: _____

d. ☐ Additional provisions. (Add any additional provisions regarding the foregoing consent, or the requests for relief in the Motion.)

_____

_____

Date: _____

By: _____

Signature of Creditor or attorney for Creditor

Name: _____

Printed name of Creditor or attorney for Creditor

DECLARATION OF DEBTOR IN SUPPORT OF MOTION FOR ORDER ESTABLISHING ADEQUATE PROTECTION, INCLUDING PROCEDURES TO RETURN SEIZED PERSONAL PROPERTY

I,_____, declare:

1. I am the debtor in this case.

2. The facts asserted in this declaration are of my own personal knowledge.

3. I am the owner of the Property described in the Motion, or I have the following interest in the Property (*e.g.,* if Debtor is a co-owner of the Property) (*describe, if applicable*):_____
_____
_____

4. I urgently need the Property for the reasons set forth in the Motion.

5. To the extent that adequate protection is offered and/or required, I offer the forms of adequate protection indicated in the Motion.

6. Attached to this Declaration are true and correct copies of documents evidencing my ability to provide the forms of adequate protection indicated in the Motion, including (if stated in the Motion):
   - ☐ evidence of insurance;
   - ☐ evidence of my ability to pay (*e.g.,* a copy of latest redacted pay stub, Bankruptcy Schedules "I" and "J," or other evidence);
   - ☐ a copy of my proposed chapter 11 or 13 plan;
   - ☐ a copy of my proposed Adequate Protection Attachment: (see Exh. A, in proposed order);
   - ☐ if an equity cushion is asserted as a form of adequate protection then (i) based on the attached evidence (*e.g.,* BlueBook valuation) and/or based on my familiarity with the condition of the Property and the common value of comparable property, I believe that the value of the Property is not less than $_____.; (ii) based on the attached evidence (*e.g.,* a recent billing statement), I believe that the dollar amount of the debt owed to Creditor is approximately $_____, and (iii) I calculate that this results in an equity cushion of $_____or_____%.
   - ☐ other (*describe*): _____
_____
_____

7. I propose to provide adequate protection, and I propose to recover the Property, pursuant to the terms of the Motion and any Memorandum of Points and Authorities attached to the Motion.

I declare under penalty of perjury that the foregoing is true and correct.

_____	_____	_____
Date	*Printed Name of Debtor*	*Signature of Debtor*

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **NOTICE OF MOTION AND MOTION FOR ORDER ESTABLISHING ADEQUATE PROTECTION, INCLUDING PROCEDURES TO RETURN SEIZED PERSONAL PROPERTY [11 U.S.C. §§ 362, 363, 542]** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*)_____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*)_____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date	*Printed Name*	*Signature*

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address ☐ *Individual appearing without attorney* ☐ *Attorney for:*	FOR COURT USE ONLY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - **SELECT DIVISION**

In re: Debtor(s).	CASE NO.: CHAPTER: **Select Chapter** **NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (with supporting declarations) (ACTION IN NONBANKRUPTCY FORUM)** DATE: TIME: COURTROOM:

Movant:

1. **Hearing Location**:
   - ☐ 255 East Temple Street, Los Angeles, CA 90012
   - ☐ 21041 Burbank Boulevard, Woodland Hills, CA 91367
   - ☐ 3420 Twelfth Street, Riverside, CA 92501
   - ☐ 411 West Fourth Street, Santa Ana, CA 92701
   - ☐ 1415 State Street, Santa Barbara, CA 93101

2. Notice is given to the Debtor and trustee (*if any*)(Responding Parties), their attorneys (*if any*), and other interested parties that on the date and time and in the courtroom stated above, Movant will request that this court enter an order granting relief from the automatic stay as to Debtor and Debtor's bankruptcy estate on the grounds set forth in the attached Motion.

3. To file a response to the motion, you may obtain an approved court form at www.cacb.uscourts.gov/forms for use in preparing your response (optional LBR form F 4001-1.RFS.RESPONSE), or you may prepare your response using the format required by LBR 9004-1 and the Court Manual.

4. When serving a response to the motion, serve a copy of it upon the Movant's attorney (or upon Movant, if the motion was filed by an unrepresented individual) at the address set forth above.

5. If you fail to timely file and serve a written response to the motion, or fail to appear at the hearing, the court may deem such failure as consent to granting of the motion.

6. ☐ This motion is being heard on REGULAR NOTICE pursuant to LBR 9013-1(d). If you wish to oppose this motion, you must file and serve a written response to this motion no later than 14 days before the hearing and appear at the hearing.

7. ☐ This motion is being heard on SHORTENED NOTICE pursuant to LBR 9075-1(b). If you wish to oppose this motion, you must file and serve a response no later than (*date*) _____ and (*time*) _____; and, you may appear at the hearing.

   a. ☐ An application for order setting hearing on shortened notice was not required (according to the calendaring procedures of the assigned judge).

   b. ☐ An application for order setting hearing on shortened notice was filed and was granted by the court and such motion and order have been or are being served upon the Debtor and upon the trustee (if any).

   c. ☐ An application for order setting hearing on shortened notice was filed and remains pending. After the court rules on that application, you will be served with another notice or an order that specifies the date, time and place of the hearing on the attached motion and the deadline for filing and serving a written opposition to the motion.

Date: _____

_____
Printed name of law firm (if applicable)

_____
Printed name of individual Movant or attorney for Movant

_____
Signature of individual Movant or attorney for Movant

MOTION FOR RELIEF FROM THE AUTOMATIC STAY AS TO NONBANKRUPTCY ACTION

1. **In the Nonbankruptcy Action, Movant is:**
   a. ☐ Plaintiff
   b. ☐ Defendant
   c. ☐ Other (*specify):*

2. **The Nonbankruptcy Action:** There is a pending lawsuit or administrative proceeding (Nonbankruptcy Action) involving the Debtor or the Debtor's bankruptcy estate:
   a. *Name of Nonbankruptcy Action*:
   b. *Docket number*:
   c. *Nonbankruptcy forum where Nonbankruptcy Action is pending*:
   d. Causes of action or claims for relief (Claims):

3. **Bankruptcy Case History:**
   a. ☐ A voluntary ☐ An involuntary petition under chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was filed on (*date*) _____.
   b. ☐ An order to convert this case to chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on (*date*) _____.
   c. ☐ A plan was confirmed on (*date*) _____.

4. **Grounds for Relief from Stay:** Pursuant to 11 U.S.C. § 362(d)(1), cause exists to grant Movant relief from stay to proceed with the Nonbankruptcy Action to final judgment in the nonbankruptcy forum for the following reasons:
   a. ☐ Movant seeks recovery only from applicable insurance, if any, and waives any deficiency or other claim against the Debtor or property of the Debtor's bankruptcy estate.
   b. ☐ Movant seeks recovery primarily from third parties and agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or bankruptcy estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.
   c. ☐ Mandatory abstention applies under 28 U.S.C. § 1334(c)(2), and Movant agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or bankruptcy estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.
   d. ☐ The Claims are nondischargeable in nature and can be most expeditiously resolved in the nonbankruptcy forum.
   e. ☐ The Claims arise under nonbankruptcy law and can be most expeditiously resolved in the nonbankruptcy forum.

f. ☐ The bankruptcy case was filed in bad faith.

(1) ☐ Movant is the only creditor, or one of very few creditors, listed or scheduled in the Debtor's case commencement documents.

(2) ☐ The timing of the filing of the bankruptcy petition indicates that it was intended to delay or interfere with the Nonbankruptcy Action.

(3) ☐ Multiple bankruptcy cases affect the Nonbankruptcy Action.

(4) ☐ The Debtor filed only a few case commencement documents. No schedules or statement of financial affairs (or chapter 13 plan, if appropriate) has been filed.

g. ☐ Other (*specify*):

5. **Grounds for Annulment of Stay.** Movant took postpetition actions against the Debtor.

a. ☐ The actions were taken before Movant knew that the bankruptcy case had been filed, and Movant would have been entitled to relief from stay to proceed with these actions.

b. ☐ Although Movant knew the bankruptcy case was filed, Movant previously obtained relief from stay to proceed in the Nonbankruptcy Action in prior bankruptcy cases affecting the Nonbankruptcy Action as set forth in Exhibit. _____.

c. ☐ Other (*specify*):

6. **Evidence in Support of Motion: (*Important Note: declaration(s) in support of the Motion MUST be signed under penalty of perjury and attached to this motion.*)**

a. ☐ The DECLARATION RE ACTION IN NONBANKRUPTCY FORUM on page 6.

b. ☐ Supplemental declaration(s).

c. ☐ The statements made by Debtor under penalty of perjury concerning Movant's claims as set forth in Debtor's case commencement documents. Authenticated copies of the relevant portions of the Debtor's case commencement documents are attached as Exhibit. _____.

d. ☐ Other evidence (*specify*):

7. ☐ **An optional Memorandum of Points and Authorities is attached to this Motion.**

Movant requests the following relief:

1. Relief from the stay pursuant to 11 U.S.C. § 362(d)(1).

2. ☐ Movant may proceed under applicable nonbankruptcy law to enforce its remedies to proceed to final judgment in the nonbankruptcy forum, provided that the stay remains in effect with respect to enforcement of any judgment against the Debtor or property of the Debtor's bankruptcy estate.

3. ☐ The stay is annulled retroactively to the bankruptcy petition date. Any postpetition acts taken by Movant in the Nonbankruptcy Action shall not constitute a violation of the stay.

4. ☐ The co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a) is terminated, modified, or annulled as to the co-debtor, on the same terms and condition as to the Debtor.

5. ☐ The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

6. ☐ The order is binding and effective in any bankruptcy case commenced by or against the Debtor for a period of 180 days, so that no further automatic stay shall arise in that case as to the Nonbankruptcy Action.

7. ☐ The order is binding and effective in any future bankruptcy case, no matter who the debtor may be, without further notice

8. ☐ Other relief requested.

Date: _____

_____
Printed name of law firm (*if applicable)*

_____
Printed name of individual Movant or attorney for Movant

_____
Signature of individual Movant or attorney for Movant

DECLARATION RE ACTION IN NONBANKRUPTCY FORUM

I, (*name of Declarant*) _____, declare as follows:

1. I have personal knowledge of the matters set forth in this declaration and, if called upon to testify, I could and would competently testify thereto. I am over 18 years of age. I have knowledge regarding (Nonbankruptcy Action) because:

   ☐ I am the Movant.
   ☐ I am Movant's attorney of record in the Nonbankruptcy Action.
   ☐ I am employed by Movant as (*title and capacity*):
   ☐ Other (*specify*):

2. I am one of the custodians of the books, records and files of Movant as to those books, records and files that pertain to the Nonbankruptcy Action. I have personally worked on books, records and files, and as to the following facts, I know them to be true of my own knowledge or I have gained knowledge of them from the business records of Movant on behalf of Movant, which were made at or about the time of the events recorded, and which are maintained in the ordinary course of Movant's business at or near the time of the acts, conditions or events to which they relate. Any such document was prepared in the ordinary course of business of Movant by a person who had personal knowledge of the event being recorded and had or has a business duty to record accurately such event. The business records are available for inspection and copies can be submitted to the court if required.

3. In the Nonbankruptcy Action, Movant is:

   ☐ Plaintiff
   ☐ Defendant
   ☐ Other (*specify):*

4. The Nonbankruptcy Action is pending as:

   a. *Name of Nonbankruptcy Action*:
   b. *Docket number*:
   c. *Nonbankruptcy court or agency where Nonbankruptcy Action is pending*:

5. **Procedural Status of Nonbankruptcy Action**:

   a. The Claims are:

   b. True and correct copies of the documents filed in the Nonbankruptcy Action are attached as Exhibit _____.

   c. The Nonbankruptcy Action was filed on *(date*) _____.

   d. Trial or hearing began/is scheduled to begin on (*date*) _____.

   e. The trial or hearing is estimated to require _____ days (*specify*).

   f. Other plaintiffs in the Nonbankruptcy Action are (*specify*):

g. Other defendants in the Nonbankruptcy Action are (*specify*):

6. **Grounds for relief from stay:**

a. ☐ Movant seeks recovery primarily from third parties and agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or the Debtor's bankruptcy estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.

b. ☐ Mandatory abstention applies under 28 U.S.C. § 1334(c)(2), and Movant agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or the Debtor's bankruptcy estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.

c. ☐ Movant seeks recovery only from applicable insurance, if any, and waives any deficiency or other claim against the Debtor or property of the Debtor's bankruptcy estate. The insurance carrier and policy number are (*specify*):

d. ☐ The Nonbankruptcy Action can be tried more expeditiously in the nonbankruptcy forum.

(1) ☐ It is currently set for trial on (*date*) _____.

(2) ☐ It is in advanced stages of discovery and Movant believes that it will be set for trial by (*date*) _____. The basis for this belief is (*specify*):

(3) ☐ The Nonbankruptcy Action involves non-debtor parties and a single trial in the nonbankruptcy forum is the most efficient use of judicial resources.

e. ☐ The bankruptcy case was filed in bad faith specifically to delay or interfere with the prosecution of the Nonbankruptcy Action.

(1) ☐ Movant is the only creditor, or one of very few creditors, listed or scheduled in the Debtor's case commencement documents.

(2) ☐ The timing of the filing of the bankruptcy petition indicates it was intended to delay or interfere with the Nonbankruptcy Action based upon the following facts (*specify*):

(3) ☐ Multiple bankruptcy cases affecting the Property include:

(A) Case name:
Case number: Chapter:
Date filed: Date discharged: Date dismissed:
Relief from stay regarding this Nonbankruptcy Action ☐ was ☐ was not granted.

(B) Case name:
Case number: Chapter:
Date filed: Date discharged: Date dismissed:
Relief from stay regarding this Nonbankruptcy Action ☐ was ☐ was not granted.

(C) Case name:
Case number: Chapter:
Date filed: Date discharged: Date dismissed:
Relief from stay regarding this Nonbankruptcy Action ☐ was ☐ was not granted.

☐ See attached continuation page for information about other bankruptcy cases affecting the Nonbankruptcy Action.

☐ See attached continuation page for additional facts establishing that this case was filed in bad faith.

f. ☐ See attached continuation page for other facts justifying relief from stay.

7. ☐ Actions taken in the Nonbankruptcy Action after the bankruptcy petition was filed are specified in the attached supplemental declaration(s).

a. ☐ These actions were taken before Movant knew the bankruptcy petition had been filed, and Movant would have been entitled to relief from stay to proceed with these actions.

b. ☐ Movant knew the bankruptcy case had been filed, but Movant previously obtained relief from stay to proceed with the Nonbankruptcy Action enforcement actions in prior bankruptcy cases affecting the Property as set forth in Exhibit ____

c. ☐ For other facts justifying annulment, see attached continuation page.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

_____	_____	_____
Date	*Printed name*	*Signature*

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (with supporting declarations) (ACTION IN NONBANKRUPTCY FORUM)** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date	*Printed Name*	*Signature*

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address	FOR COURT USE ONLY
☐ *Individual appearing without attorney* ☐ *Attorney for:*	

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - **SELECT DIVISION**

In re:	CASE NO.: CHAPTER: **Select Chapter**
	NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (with supporting declarations) (PERSONAL PROPERTY)
Debtor(s).	DATE: TIME: COURTROOM:

Movant:

1. **Hearing Location**:

☐ 255 East Temple Street, Los Angeles, CA 90012
☐ 21041 Burbank Boulevard, Woodland Hills, CA 91367
☐ 3420 Twelfth Street, Riverside, CA 92501
☐ 411 West Fourth Street, Santa Ana, CA 92701
☐ 1415 State Street, Santa Barbara, CA 93101

2. Notice is given to the Debtor and trustee (if any)(Responding Parties), their attorneys (if any), and other interested parties that on the date and time and in the courtroom stated above, Movant will request that this court enter an order granting relief from the automatic stay, as to Debtor and Debtor's bankruptcy estate on the grounds set forth in the attached motion.

3. To file a response to the motion, you may obtain an approved court form at www.cacb.uscourts.gov/forms for use in preparing your response (optional LBR form F 4001-1.RFS.RESPONSE), or you may prepare your response using the format required by LBR 9004-1 and the Court Manual.

4. When serving a response to the motion, serve a copy of it upon the Movant's attorney (or upon Movant, if the motion was filed by an unrepresented individual) at the address set forth above.

5. If you fail to timely file and serve a written response to the motion, or fail to appear at the hearing, the court may deem such failure as consent to granting of the motion.

6. ☐ This motion is being heard on REGULAR NOTICE pursuant to LBR 9013-1(d). If you wish to oppose this motion, you must file a written response to this motion with the court and serve a copy of it upon the Movant's attorney (or upon Movant, if the motion was filed by an unrepresented individual) at the address set forth above no less than 14 days before the hearing and appear at the hearing of this motion.

7. ☐ This motion is being heard on SHORTENED NOTICE pursuant to LBR 9075-1(b). If you wish to oppose this motion, you must file and serve a response no later than (*date*) _____ and (*time*) _____; and, you may appear at the hearing.

   a. ☐ An application for order setting hearing on shortened notice was not required (according to the calendaring procedures of the assigned judge).

   b. ☐ An application for order setting hearing on shortened notice was filed and was granted by the court and such motion and order have been or are being served upon the Debtor and upon the trustee (if any).

   c. ☐ An application for order setting hearing on shortened notice and remains pending. After the court has ruled on that application, you will be served with another notice or an order that will specify the date, time and place of the hearing on the attached motion and the deadline for filing and serving a written opposition to the motion.

Date: _____

_____
Printed name of law firm (if applicable)

_____
Printed name of individual Movant or attorney for Movant

_____
Signature of individual Movant or attorney for Movant

MOTION FOR RELIEF FROM THE AUTOMATIC STAY AS TO PERSONAL PROPERTY

1. Movant has a perfected security interest in the Property.

2. **The Property at Issue (Property):**

   a. ☐ Vehicle (*year, manufacturer, type, and model*):

   Vehicle Identification Number:
   Location of vehicle (if known):

   b. ☐ Equipment (*manufacturer, type, and characteristics*):

   Serial number(s):

   Location (if known):

   c. ☐ Other Personal Property (*type, identifying information, and location*):

3. **Bankruptcy Case History:**

   a. ☐ A voluntary bankruptcy petition ☐ An involuntary bankruptcy petition under chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was filed on (*date*) _____.

   b. ☐ An order to convert this case to chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on (*date*) _____.

   c. ☐ Plan was confirmed on (*date*) _____.

4. **Grounds for Relief from Stay:**

   a. ☐ Pursuant to 11 U.S.C. § 362(d)(1), cause exists to grant Movant the requested relief from stay as follows:

   (1) ☐ Movant's interest in the Property is not adequately protected.

   (A) ☐ Movant's interest in the Property is not protected by an adequate equity cushion.

   (B) ☐ The fair market value of the Property is declining and payments are not being made to Movant sufficient to protect Movant's interest against that decline.

   (C) ☐ Proof of insurance regarding the Property has not been provided to Movant, despite the Debtor's obligation to insure the collateral under the terms of Movant's contract with Debtor.

   (D) ☐ Other (*see attached continuation page*).

   (2) ☐ The bankruptcy case was filed in bad faith.

   (A) ☐ Movant is the only creditor, or one of very few creditors, listed or scheduled in the Debtor's case commencement documents.

(B) ☐ The Property was transferred to the Debtor either just before the bankruptcy filing or after the filing.

(C) ☐ A non-individual entity was created just prior to the bankruptcy petition date for the sole purpose of filing this bankruptcy case.

(D) ☐ Other bankruptcy cases were filed in which an interest in the Property was asserted.

(E) ☐ The Debtor filed only a few case commencement documents with the bankruptcy petition. Schedules and statement of financial affairs (or chapter 13 plan, if appropriate) have not been filed.

(3) ☐ (*Chapter 12 or 13 cases only*) All payments on account of the Property are being made through the plan and plan payments have not been made to the chapter 12 or chapter 13 trustee for payments due ☐ postpetition preconfirmation ☐ postpetition postconfirmation.

(4) ☐ The lease has matured, been rejected or deemed rejected by operation of law.

(5) ☐ The Debtor filed a statement of intention that indicates the Debtor intends to surrender the Property.

(6) ☐ Movant regained possession of the Property on (*date*) _____, which is ☐ prepetition ☐ postpetition.

(7) ☐ For other cause for relief from stay, see attached continuation page.

b. ☐ Pursuant to 11 U.S.C. § 362(d)(2)(A), the Debtor has no equity in the Property; and, pursuant to 11 U.S.C. § 362(d)(2)(B), the Property is not necessary for an effective reorganization.

5. **Grounds for Annulment of the Stay.** Movant took postpetition actions against the Property or the Debtor.

a. ☐ These actions were taken before Movant knew that the bankruptcy petition had been filed and Movant would have been entitled to relief from stay to proceed with those actions,

b. ☐ Movant knew the bankruptcy case had been filed, but Movant previously obtained relief from stay to proceed with these enforcement actions,

c. ☐ Other (*specify*):

6. ☐ **Evidence in Support of Motion:** ***(Declaration(s) must be signed under penalty of perjury and attached to this motion)***

a. The PERSONAL PROPERTY DECLARATION on page 6 of this motion.

b. ☐ Supplemental declaration(s).

c. ☐ The statements made by the Debtor under penalty of perjury concerning Movant's claims and the Property as set forth in the Debtor's case commencement documents. Authenticated copies of the relevant portions of the case commencement documents are attached as Exhibit(s) _____.

d. ☐ Other:

7. **An optional Memorandum of Points and Authorities is attached to this motion.**

Movant requests the following relief:

1. Relief from the stay is granted under: ☐ 11 U.S.C. § 362(d)(1) ☐ 11 U.S.C. § 362(d)(2)

2. ☐ Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to repossess and sell the Property.

3. ☐ Confirmation that there is no stay in effect.

4. ☐ The stay is annulled retroactive to the petition date. Any postpetition actions taken by Movant to enforce its remedies regarding the Property do not constitute a violation of the stay.

5. ☐ The co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a) is terminated, modified or annulled as to the co-debtor, on the same terms and conditions as to the Debtor.

6. ☐ The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

7. ☐ The order is binding in any other bankruptcy case purporting to affect the Property filed not later than 2 years after the date of entry of such order, except that a debtor in a subsequent case may move for relief from the order based upon changed circumstances or for good cause shown, after notice and hearing.

8. ☐ The order is binding and effective in any bankruptcy case commenced by or against the Debtor for a period of 180 days, so that no further automatic stay shall arise in that case as to the Property.

9. ☐ The order is binding and effective in any bankruptcy case commenced by or against any debtor who claims any interest in the Property for a period of 180 days, so that no further stay shall arise in that case as to the Property.

10. ☐ The order is binding and effective in any future bankruptcy case, no matter who the debtor may be ☐ without further notice, or ☐ upon recording of a copy of this order or giving appropriate notice of its entry in compliance with applicable nonbankruptcy law.

11. ☐ If relief from stay is not granted, the court orders adequate protection.

12. ☐ See continuation page for other relief requested

Date: _____

_____
Print name of law firm

_____
Print name of individual Movant or attorney for Movant

_____
Signature of individual Movant or attorney for Movant

PERSONAL PROPERTY DECLARATION

I, (*name of declarant*) _____, declare:

1. I have personal knowledge of the matters set forth in this declaration and, if called upon to testify, I could and would competently testify thereto. I am over 18 years of age. I have knowledge regarding Movant's interest in the Property (*specify*):

   a. ☐ I am the Movant.

   b. ☐ I am employed by Movant as (*title and capacity*):

   c. ☐ Other (*specify*):

2. a. ☐ I am one of the custodians of the books, records and files of Movant that pertain to loans, leases, or extensions of credit given to Debtor concerning the Property. I have personally worked on books, records and files, and as to the following facts, I know them to be true of my own knowledge or I have gained knowledge of them from the business records of Movant on behalf of Movant, which were made at or about the time of the events recorded, and which are maintained in the ordinary course of Movant's business at or near the time of the acts, conditions or events to which they relate. Any such document was prepared in the ordinary course of business of Movant by a person who had personal knowledge of the event being recorded and had or has a business duty to record accurately such event. The business records are available for inspection and copies can be submitted to the court if required.

   b. ☐ Other (see attached):

3. The Property is:

   a. ☐ Vehicle (*year, manufacturer, type, model and year*):

   Vehicle Identification Number:
   Location of vehicle (if known):

   b. ☐ Equipment (*manufacturer, type, and characteristics*):

   Serial number(s):
   Location (if known):

   c. ☐ Other personal property (*type, identifying information, and location*):

4. The nature of Debtor's interest in the Property is:

   a. ☐ Sole owner

   b. ☐ Co-owner (*specify)*:

   c. ☐ Lessee

   d. ☐ Other (*specify*):

   e. ☐ Debtor ☐ did ☐ did not list the Property in the schedules filed in this case.

5. ☐ The lease matured or was rejected on (*date*) _____:

   a. ☐ rejected

      (1) ☐ by operation of law.

      (2) ☐ by order of the court.

   b. ☐ matured.

6. Movant has a perfected security interest in the Property.

   a. ☐ A true and correct copy of the promissory note or other document that evidences the debt owed by the Debtor to Movant is attached as Exhibit _____.

   b. ☐ The Property is a motor vehicle, boat, or other personal property for which a certificate of title is provided for by state law. True and correct copies of the following items are attached to this motion:

      (1) ☐ Certificate of title ("pink slip") (Exhibit _____).

      (2) ☐ Vehicle or other lease agreement (Exhibit _____).

      (3) ☐ Security agreement (Exhibit _____).

      (4) ☐ Other evidence of a security interest (Exhibit _____).

   c. ☐ The Property is equipment, intangibles, or other personal property for which a certificate of title is not provided for by state law. True and correct copies of the following items are attached to this motion:

      (1) ☐ Security agreement (Exhibit _____).

      (2) ☐ UCC-1 financing statement (Exhibit _____).

      (3) ☐ UCC financing statement search results (Exhibit _____).

      (4) ☐ Recorded or filed leases (Exhibit _____).

      (5) ☐ Other evidence of perfection of a security interest (Exhibit _____).

   d. ☐ The Property is consumer goods. True and correct copies of the following items are attached to this motion:

      (1) ☐ Credit application (Exhibit _____).

      (2) ☐ Purchase agreement (Exhibit _____).

      (3) ☐ Account statement showing payments made and balance due (Exhibit _____).

      (4) ☐ Other evidence of perfection of a security interest (*if necessary under state law*) (Exhibit _____).

   e. ☐ Other liens against the Property are attached as Exhibit _____.

7. Status of Movant's debt:

   a. The amount of the monthly payment: $ _____.

   b. Number of payments that became due and were not tendered: ☐ prepetition ☐ postpetition.

   c. Total amount in arrears: $ _____.

   d. Last payment received on (*date*): _____.

   e. Future payments due by the anticipated hearing date (*if applicable*): _____
   An additional payment of $ _____ will come due on (*date*) _____, and on the _____ day of each month thereafter. If the payment is not received by the _____ day of the month, a late charge of $ _____ will be charged under the terms of the loan.

8. ☐ Attached as Exhibit _____ is a true and correct copy of a POSTPETITION payment history that accurately reflects the dates and amounts of all payments made by the Debtor since the petition date.

9. Amount of Movant's debt:

   a. Principal:..... $ _____
   b. Accrued interest: ..... $ _____
   c. Costs (attorney's fees, late charges, other costs):..... $ _____
   d. Advances (property taxes, insurance): ..... $ _____
   e. TOTAL CLAIM as of _____:..... $ _____

10. ☐ (*Chapter 7 and 11 cases only*) Valuation: The fair market value of the Property is: $ _____.
    This valuation is based upon the following supporting evidence:

    a. ☐ This is the value stated for property of this year, make, model, and general features in the reference guide most commonly used source for valuation data used by Movant in the ordinary course of its business for determining the value of this type of property. True and correct copies of the relevant excerpts of the most recent edition of the reference guide are attached as Exhibit _____.

    b. ☐ This is the value determined by an appraisal or other expert evaluation. True and correct copies of the expert's report and/or declaration are attached as Exhibit _____.

    c. ☐ The Debtor's admissions in the Debtor's schedules filed in the case. True and correct copies of the relevant portions of the Debtor's schedules are attached as Exhibit _____.

    d. ☐ Other basis for valuation (*specify*):

NOTE: If valuation is contested, supplemental declarations providing additional foundation for the opinions of value should be submitted.

11. Calculation of equity in Property:

    a. ☐ **11 U.S.C. § 362(d)(1) - Equity Cushion:**

    I calculate that the value of the "equity cushion" in the Property exceeding Movant's debt and any lien(s) senior to Movant's debt is $ _____ and is _____% of the fair market value of the Property.

b. ☐ **11 U.S.C. § 362(d)(2)(A) - Equity**:

By subtracting the total amount of all liens on the Property from the value of the Property as set forth in Paragraph 10 above, I calculate that the Debtor's equity in the Property is $ _____.

12. ☐ The fair market value of the Property is declining because:

13. ☐ The Debtor's intent is to surrender the Property. A true and correct copy of the Debtor's statement of intentions is attached as Exhibit _____.

14. ☐ Movant regained possession of the Property on (*date*) _____, which is: ☐ prepetition ☐ postpetition.

15. ☐ (*Chapter 12 or 13 cases only*) Status of Movant's debt and other bankruptcy case information:

a. The 341(a) meeting of creditors is currently scheduled for (or concluded on) (*date*) _____
A plan confirmation hearing is currently scheduled for (or concluded on) (*date*) _____
The plan was confirmed on (*if applicable*) (*date*) _____

b. Postpetition preconfirmation payments due BUT REMAINING UNPAID after the filing of the case:

Number of Payments	Number of Late Charges	Amount of Each Payment or Late Charge	Total
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$

(See attachment for additional breakdown of information attached as Exhibit _____.)

c. Postconfirmation payments due BUT REMAINING UNPAID after the plan confirmation date (*if applicable*):

Number of Payments	Number of Late Charges	Amount of Each Payment or Late Charge	Total
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$

d. Postpetition advances or other charges due but unpaid: $
(*For details of type and amount, see Exhibit* _____)

e. Attorneys' fees and costs: $
(*For details of type and amount, see Exhibit* _____)

f. Less suspense account or partial paid balance: $ [ ]

TOTAL POSTPETITION DELINQUENCY: $

g. ☐ The entire claim is provided for in the chapter 12 or 13 plan and postpetition plan payments are delinquent. The plan payment history is attached as Exhibit _____. See attached declaration(s) of chapter 12 trustee or 13 trustee regarding receipt of payments under the plan (*attach LBR form F 4001-1.DEC.AGENT.TRUSTEE*).

16. ☐ Proof of insurance regarding the Property has not been provided to Movant, despite the Debtor's obligation to insure the collateral under the terms of Movant's contract with Debtor.

17. ☐ The bankruptcy case was filed in bad faith:

a. ☐ Movant is the only creditor or one of few creditors listed in the Debtor's case commencement documents.

b. ☐ Other bankruptcy cases have been filed in which an interest in the Property was asserted.

c. ☐ The Debtor filed only a few case commencement documents. Schedules and a statement of financial affairs (or chapter 13 plan, if appropriate) have not been filed.

d. ☐ Other (*specify*):

18. ☐ The filing of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors that involved:

a. ☐ The transfer of all or part ownership of, or other interest in, the Property without the consent of Movant or court approval. See attached continuation page for facts establishing the scheme.

b. ☐ Multiple bankruptcy cases affecting the Property:

(1) Case name: _____
Chapter: _____ Case number: _____
Date filed: _____ Date discharged: _____ Date dismissed: _____
Relief from stay regarding the Property ☐ was ☐ was not granted.

(2) Case name: _____
Chapter: _____ Case number: _____
Date filed: _____ Date discharged: _____ Date dismissed: _____
Relief from stay regarding the Property ☐ was ☐ was not granted.

(3) Case name: _____
Chapter: _____ Case number: _____
Date filed: _____ Date discharged: _____ Date dismissed: _____
Relief from stay regarding the Property ☐ was ☐ was not granted.

☐ See attached continuation page for more information about other bankruptcy cases affecting the Property.

☐ See attached continuation page for additional facts establishing that the multiple bankruptcy cases were part of a scheme to delay, hinder, and defraud creditors.

19. ☐ Enforcement actions taken after the bankruptcy petition was filed are specified in the attached supplemental declaration(s).

a. ☐ These actions were taken before Movant knew the bankruptcy case had been filed, and Movant would have been entitled to relief from stay to proceed with these actions.

b. ☐ Although Movant knew the bankruptcy case was filed, Movant previously obtained relief from stay to proceed with these enforcement actions in prior bankruptcy cases affecting the Property as set forth in Exhibit _____.

c. ☐ For other facts justifying annulment, see attached continuation page.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

_____	_____	_____
Date	*Printed Name*	*Signature*

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (with supporting declarations) (PERSONAL PROPERTY)** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date	*Printed Name*	*Signature*

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address ☐ *Respondent appearing without attorney* ☐ *Attorney for Respondent*:	FOR COURT USE ONLY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - **SELECT DIVISION**

In re: Debtor(s).	CASE NO.: CHAPTER: **Select Chapter** **RESPONSE TO MOTION REGARDING THE AUTOMATIC STAY AND DECLARATION(S) IN SUPPORT** DATE: TIME: COURTROOM: PLACE:

Movant:

Respondent: ☐ Debtor ☐ trustee ☐ other:

NOTE REGARDING FILING AND SERVICE OF RESPONSE, EXHIBITS AND DECLARATIONS:

A copy of the Response, exhibit(s) and declaration(s) must be served upon:

(1) Movant's attorney (or Movant, if Movant does not have an attorney);
(2) the trustee; and
(3) the judge who presides over this bankruptcy case.

Then the document must be filed with the court.

1. ☐ **NONOPPOSITION**

The Respondent does not oppose the granting of the Motion.

2. ☐ **LIMITED OPPOSITION**

a. ☐ Respondent opposes the Motion only to the extent that it seeks immediate relief from stay. Respondent requests that no lock out, foreclosure, or repossession take place before (*date*): _____ and the reason for this request is (*specify*):

b. ☐ As set forth in the attached declaration of the Respondent or the Debtor, the motion is opposed only to the extent that it seeks a specific finding that the Debtor was involved in a scheme to hinder, delay or defraud creditors.

The Debtor:

(1) ☐ has no knowledge of the Property.
(2) ☐ has no interest in the Property.
(3) ☐ has no actual possession of the Property.
(4) ☐ was not involved in the transfer of the Property.

c. ☐ Respondent opposes the Motion and will request a continuance of the hearing since there is an application for a loan modification under consideration at this time. Evidence of a pending loan modification is attached as Exhibit _____.

3. ☐ **OPPOSITION:** The Respondent opposes granting of the Motion for the reasons set forth below.

a. ☐ The Motion was not properly served (*specify*):

(1) ☐ Not all of the required parties were served.
(2) ☐ There was insufficient notice of the hearing.
(3) ☐ An incorrect address for service of the Motion was used for (*specify*):

b. ☐ Respondent disputes the allegations/evidence contained in the Motion and contends as follows:

(1) ☐ The value of the Property is $ _____, based upon (*specify*):

(2) ☐ Total amount of debt (loans) on the Property is $ _____.

(3) ☐ More payments have been made to Movant than the Motion accounts for. True and correct copies of canceled checks proving the payments that have been made are attached as Exhibit _____.

(4) ☐ There is a loan modification agreement in effect that lowered the amount of the monthly payments. A true and correct copy of the loan modification agreement is attached as Exhibit _____.

(5) ☐ The Property is necessary for an effective reorganization. Respondent filed or intends to file a plan of reorganization that requires use of the Property. A true and correct copy of the plan is attached as Exhibit _____.

(6) ☐ The Property is fully provided for in the chapter 13 plan and all postpetition plan payments are current. A true and correct copy of the chapter 13 plan is attached as Exhibit _____ and proof that the plan payments are current through the chapter 13 trustee is attached as Exhibit _____.

(7) ☐ The Property is insured. Evidence of current insurance is attached as Exhibit _____.

(8) ☐ Movant's description of the status of the unlawful detainer proceeding is not accurate.

(9) ☐ Respondent denies that this bankruptcy case was filed in bad faith.

(10) ☐ The Debtor will be prejudiced if the Nonbankruptcy Action is allowed to continue the nonbankruptcy forum.

(11) ☐ Other (*specify*):

c. ☐ Respondent asserts the following as shown in the declaration(s) filed with this Response:

(1) ☐ The bankruptcy case was converted from chapter ___ to chapter ___.

(2) ☐ All postpetition arrearages will be cured by the hearing date on this motion.

(3) ☐ The Property is fully provided for in the chapter 13 plan and all postpetition plan payments ☐ are current, or ☐ will be cured by the hearing date on this motion.

(4) ☐ The Debtor has equity in the Property in the amount of $ _____.

(5) ☐ Movant has an equity cushion of $ _____ or _____% which is sufficient to provide adequate protection.

(6) ☐ The Property is necessary for an effective reorganization because (*specify*):

(7) ☐ The motion should be denied because (*specify*):

(8) ☐ An optional memorandum of points and authorities is attached in support of this Response.

4. **EVIDENCE TO AUTHENTICATE EXHIBITS AND TO SUPPORT FACTS INSERTED IN THE RESPONSE:**

Attached are the following documents in support of this Response:

☐ Declaration by the Debtor
☐ Declaration by trustee
☐ Declaration by appraiser
☐ Declaration by the Debtor's attorney
☐ Declaration by trustee's attorney
☐ Other (*specify)*:

Date: _____

_____
Printed name of law firm for Respondent (if applicable)

_____
Printed name of individual Respondent or attorney for Respondent

_____
Signature of individual Respondent or attorney for Respondent

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **RESPONSE TO MOTION REGARDING THE AUTOMATIC STAY AND DECLARATION(S) IN SUPPORT** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

_____	_____	_____
Date	*Printed Name*	*Signature*

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address ☐ *Movant appearing without an attorney* ☐ *Attorney for Movant*	FOR COURT USE ONLY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - **SELECT DIVISION**

In re: Debtor(s).	CASE NO.: CHAPTER: **Select Chapter** **NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (with supporting declarations) (REAL PROPERTY)** DATE: TIME: COURTROOM:

Movant:

1. **Hearing Location**:

   ☐ 255 East Temple Street, Los Angeles, CA 90012
   ☐ 21041 Burbank Boulevard, Woodland Hills, CA 91367
   ☐ 3420 Twelfth Street, Riverside, CA 92501
   ☐ 411 West Fourth Street, Santa Ana, CA 92701
   ☐ 1415 State Street, Santa Barbara, CA 93101

2. Notice is given to the Debtor and trustee (*if any*)(Responding Parties), their attorneys (*if any*), and other interested parties that on the date and time and in the courtroom stated above, Movant will request that this court enter an order granting relief from the automatic stay as to Debtor and Debtor's bankruptcy estate on the grounds set forth in the attached Motion.

3. To file a response to the motion, you may obtain an approved court form at www.cacb.uscourts.gov/forms for use in preparing your response (optional LBR form F 4001-1.RFS.RESPONSE), or you may prepare your response using the format required by LBR 9004-1 and the Court Manual.

4. When serving a response to the motion, serve a copy of it upon the Movant's attorney (or upon Movant, if the motion was filed by an unrepresented individual) at the address set forth above.

5. If you fail to timely file and serve a written response to the motion, or fail to appear at the hearing, the court may deem such failure as consent to granting of the motion.

6. ☐ This motion is being heard on REGULAR NOTICE pursuant to LBR 9013-1(d). If you wish to oppose this motion, you must file and serve a written response to this motion no later than 14 days before the hearing and appear at the hearing.

7. ☐ This motion is being heard on SHORTENED NOTICE pursuant to LBR 9075-1(b). If you wish to oppose this motion, you must file and serve a response no later than (*date*) _____ and (*time*) _____; and, you may appear at the hearing.

   a. ☐ An application for order setting hearing on shortened notice was not required (according to the calendaring procedures of the assigned judge).

   b. ☐ An application for order setting hearing on shortened notice was filed and was granted by the court and such motion and order have been or are being served upon the Debtor and upon the trustee (if any).

   c. ☐ An application for order setting hearing on shortened notice was filed and remains pending. After the court rules on that application, you will be served with another notice or an order that specifies the date, time and place of the hearing on the attached motion and the deadline for filing and serving a written opposition to the motion.

Date: _____

_____
Printed name of law firm (if applicable)

_____
Printed name of individual Movant or attorney for Movant

_____
Signature of individual Movant or attorney for Movant

MOTION FOR RELIEF FROM THE AUTOMATIC STAY AS TO REAL PROPERTY

1. **Movant is the:**

☐ Holder: Movant has physical possession of a promissory note that either (1) names Movant as the payee under the promissory note or (2) is indorsed to Movant, or indorsed in blank, or payable to bearer.

☐ Beneficiary: Movant is either (1) named as beneficiary in the security instrument on the subject property (e.g., mortgage or deed of trust) or (2) is the assignee of the beneficiary.

☐ Servicing agent authorized to act on behalf of the Holder or Beneficiary.

☐ Other (*specify):*

2. **The Property at Issue (Property):**

a. Address:

Street address:
Unit/suite number:
City, state, zip code:

b. Legal description, or document recording number (including county of recording), as set forth in Movant's deed of trust (attached as Exhibit _____):

3. **Bankruptcy Case History:**

a. A ☐ voluntary ☐ involuntary bankruptcy petition under chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was filed on (*date*) _____.

b. ☐ An order to convert this case to chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on (*date*) _____.

c. ☐ A plan, if any, was confirmed on (*date*) _____.

4. **Grounds for Relief from Stay**:

a. ☐ Pursuant to 11 U.S.C. § 362(d)(1), cause exists to grant Movant relief from stay as follows:

(1) ☐ Movant's interest in the Property is not adequately protected.

(A) ☐ Movant's interest in the Property is not protected by an adequate equity cushion.

(B) ☐ The fair market value of the Property is declining and payments are not being made to Movant sufficient to protect Movant's interest against that decline.

(C) ☐ Proof of insurance regarding the Property has not been provided to Movant, despite the Debtor's obligation to insure the collateral under the terms of Movant's contract with the Debtor.

(2) ☐ The bankruptcy case was filed in bad faith.

(A) ☐ Movant is the only creditor, or one of very few creditors, listed or scheduled in the Debtor's case commencement documents.

(B) ☐ The Property was transferred to the Debtor either just before the bankruptcy filing or after the filing.

(C) ☐ A non-individual entity was created just prior to the bankruptcy petition date for the sole purpose of filing this bankruptcy case.

(D) ☐ Other bankruptcy cases have been filed in which an interest in the Property was asserted.

(E) ☐ The Debtor filed only a few case commencement documents with the bankruptcy petition. Schedules and the statement of financial affairs (or chapter 13 plan, if appropriate) have not been filed.

(F) ☐ Other (*see attached continuation page*).

(3) ☐ (*Chapter 12 or 13 cases only)*

(A) ☐ All payments on account of the Property are being made through the plan.
☐ Preconfirmation ☐ Postconfirmation plan payments have not been made to the chapter 12 trustee or chapter 13 trustee.

(B) ☐ Postpetition mortgage payments due on the note secured by a deed of trust on the Property have not been made to Movant.

(4) ☐ The Debtor filed a Statement of Intentions that indicates the Debtor intends to surrender the Property.

(5) ☐ The Movant regained possession of the Property on (*date*) _____,
which is ☐ prepetition ☐ postpetition.

(6) ☐ For other cause for relief from stay, see attached continuation page.

b. ☐ Pursuant to 11 U.S.C. § 362(d)(2)(A), the Debtor has no equity in the Property; and, pursuant to § 362(d)(2)(B), the Property is not necessary to an effective reorganization.

c. ☐ Pursuant to 11 U.S.C. § 362(d)(3), the Debtor has failed, within the later of 90 days after the order for relief or 30 days after the court determined that the Property qualifies as "single asset real estate" as defined in 11 U.S.C. § 101(51B) to file a reasonable plan of reorganization or to commence monthly payments.

d. ☐ Pursuant to 11 U.S.C. § 362(d)(4), the Debtor's filing of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors that involved:

(1) ☐ The transfer of all or part ownership of, or other interest in, the Property without the consent of Movant or court approval; or

(2) ☐ Multiple bankruptcy cases affecting the Property.

5. ☐ **Grounds for Annulment of the Stay.** Movant took postpetition actions against the Property or the Debtor.

a. ☐ These actions were taken before Movant knew the bankruptcy case had been filed, and Movant would have been entitled to relief from the stay to proceed with these actions.

b. ☐ Movant knew the bankruptcy case had been filed, but Movant previously obtained relief from stay to proceed with these enforcement actions in prior bankruptcy cases affecting the Property as set forth in Exhibit _____.

c. ☐ Other (*specify*):

6. **Evidence in Support of Motion: (D*eclaration(s) MUST be signed under penalty of perjury and attached to this motion*)**

a. The REAL PROPERTY DECLARATION on page 6 of this motion.

b. ☐ Supplemental declaration(s).

c. ☐ The statements made by Debtor under penalty of perjury concerning Movant's claims and the Property as set forth in Debtor's case commencement documents. Authenticated copies of the relevant portions of the case commencement documents are attached as Exhibit _____.

d. ☐ Other:

7. ☐ **An optional Memorandum of Points and Authorities is attached to this motion.**

Movant requests the following relief:

1. Relief from the stay is granted under: ☐ 11 U.S.C. § 362(d)(1) ☐ 11 U.S.C. § 362(d)(2) ☐ 11 U.S.C. § 362(d)(3).

2. ☐ Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property.

3. ☐ Movant, or its agents, may, at its option, offer, provide and enter into a potential forebearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the Debtor by telephone or written correspondence to offer such an agreement.

4. ☐ Confirmation that there is no stay in effect.

5. ☐ The stay is annulled retroactive to the bankruptcy petition date. Any postpetition actions taken by Movant to enforce its remedies regarding the Property shall not constitute a violation of the stay.

6. ☐ The co-debtor stay of 11 U.S.C. §1201(a) or § 1301(a) is terminated, modified or annulled as to the co-debtor, on the same terms and conditions as to the Debtor.

7. ☐ The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

8. ☐ A designated law enforcement officer may evict the Debtor and any other occupant from the Property regardless of any future bankruptcy filing concerning the Property for a period of 180 days from the hearing on this Motion:
   ☐ without further notice, or ☐ upon recording of a copy of this order or giving appropriate notice of its entry in compliance with applicable nonbankruptcy law.

9. ☐ Relief from the stay is granted under 11 U.S.C. § 362(d)(4): If recorded in compliance with applicable state laws governing notices of interests or liens in real property, the order is binding in any other case under this title purporting to affect the Property filed not later than 2 years after the date of the entry of the order by the court, except that a debtor in a subsequent case under this title may move for relief from the order based upon changed circumstances or for good cause shown, after notice and hearing.

10. ☐ The order is binding and effective in any bankruptcy case commenced by or against any debtor who claims any interest in the Property for a period of 180 days from the hearing of this Motion:
    ☐ without further notice, or ☐ upon recording of a copy of this order or giving appropriate notice of its entry in compliance with applicable nonbankruptcy law.

11. ☐ The order is binding and effective in any future bankruptcy case, no matter who the debtor may be:
    ☐ without further notice, or ☐ upon recording of a copy of this order or giving appropriate notice of its entry in compliance with applicable nonbankruptcy law.

12. ☐ Upon entry of the order, for purposes of Cal. Civ. Code § 2923.5, the Debtor is a borrower as defined in Cal. Civ. Code § 2920.5(c)(2)(C).

13. ☐ If relief from stay is not granted, adequate protection shall be ordered.

14. ☐ See attached continuation page for other relief requested.

Date: _____

_____
Printed name of law firm (*if applicable)*

_____
Printed name of individual Movant or attorney for Movant

_____
Signature of individual Movant or attorney for Movant

REAL PROPERTY DECLARATION

I, (*print name of Declarant*) _____, declare:

1. I have personal knowledge of the matters set forth in this declaration and, if called upon to testify, I could and would competently testify thereto. I am over 18 years of age. I have knowledge regarding Movant's interest in the real property that is the subject of this Motion (Property) because (*specify*):

   a. ☐ I am the Movant.

   b. ☐ I am employed by Movant as (*state title and capacity*):

   c. ☐ Other (*specify*):

2. a. ☐ I am one of the custodians of the books, records and files of Movant that pertain to loans and extensions of credit given to Debtor concerning the Property. I have personally worked on the books, records and files, and as to the following facts, I know them to be true of my own knowledge or I have gained knowledge of them from the business records of Movant on behalf of Movant. These books, records and files were made at or about the time of the events recorded, and which are maintained in the ordinary course of Movant's business at or near the time of the actions, conditions or events to which they relate. Any such document was prepared in the ordinary course of business of Movant by a person who had personal knowledge of the event being recorded and had or has a business duty to record accurately such event. The business records are available for inspection and copies can be submitted to the court if required.

   b. ☐ Other (*see attached):*

3. The Movant is:

   a. ☐ Holder: Movant has physical possession of a promissory note that (1) names Movant as the payee under the promissory note or (2) is indorsed to Movant, or indorsed in blank, or payable to bearer. A true and correct copy of the note, with affixed allonges/indorsements, is attached as Exhibit _____.

   b. ☐ Beneficiary: Movant is either (1) named as beneficiary in the security instrument on the subject property (e.g.,mortgage or deed of trust) or (2) is the assignee of the beneficiary. True and correct copies of the recorded security instrument and assignments are attached as Exhibit _____.

   c. ☐ Servicing agent authorized to act on behalf of the:

      ☐ Holder.
      ☐ Beneficiary.

   d. ☐ Other (*specify):*

4. a. The address of the Property is:

      Street address:
      Unit/suite no.:
      City, state, zip code:

   b. The legal description of the Property or document recording number (including county of recording) set forth in the Movant's deed of trust is:

5. Type of property (*check all applicable boxes*):

a. ☐ Debtor's principal residence
b. ☐ Other residence
c. ☐ Multi-unit residential
d. ☐ Commercial
e. ☐ Industrial
f. ☐ Vacant land
g. ☐ Other (*specify*):

6. Nature of the Debtor's interest in the Property:

a. ☐ Sole owner
b. ☐ Co-owner(s) (*specify*):
c. ☐ Lienholder (*specify*):
d. ☐ Other (*specify*):
e. ☐ The Debtor ☐ did ☐ did not list the Property in the Debtor's schedules.
f. ☐ The Debtor acquired the interest in the Property by ☐ grant deed ☐ quitclaim deed ☐ trust deed.
The deed was recorded on (*date*) _____.

7. Movant holds a ☐ deed of trust ☐ judgment lien ☐ other (*specify*) _____ that encumbers the Property.

a. ☐ A true and correct copy of the document as recorded is attached as Exhibit _____.
b. ☐ A true and correct copy of the promissory note or other document that evidences the Movant's claim is attached as Exhibit _____.
c. ☐ A true and correct copy of the assignment(s) transferring the beneficial interest under the note and deed of trust to Movant is attached as Exhibit _____.

8. Amount of Movant's claim with respect to the Property:

		PREPETITION	POSTPETITION	TOTAL
a.	Principal:	$	$	$
b.	Accrued interest:	$	$	$
c.	Late charges	$	$	$
d.	Costs (attorney's fees, foreclosure fees, other costs):	$	$	$
e.	Advances (property taxes, insurance):	$	$	$
f.	Less suspense account or partial balance paid:	$[ ]	$[ ]	$[ ]
g.	TOTAL CLAIM as of (*date*):	$	$	$

h. ☐ Loan is all due and payable because it matured on (*date*) _____

9. Status of Movant's foreclosure actions relating to the Property (*fill the date or check the box confirming no such action has occurred*):

a. Notice of default recorded on (*date*) _____ or ☐ none recorded.
b. Notice of sale recorded on (*date*) _____ or ☐ none recorded.
c. Foreclosure sale originally scheduled for (*date*) _____ or ☐ none scheduled.
d. Foreclosure sale currently scheduled for (*date*) _____ or ☐ none scheduled.
e. Foreclosure sale already held on (*date*) _____ or ☐ none held.
f. Trustee's deed upon sale already recorded on (*date*) _____ or ☐ none recorded.

10. Attached (*optional*) as Exhibit _____ is a true and correct copy of a POSTPETITION statement of account that accurately reflects the dates and amounts of all charges assessed to and payments made by the Debtor since the bankruptcy petition date.

11. ☐ (*chapter 7 and 11 cases only*) Status of Movant's loan:

a. Amount of current monthly payment as of the date of this declaration: $_____ for the month of _____ 20___.

b. Number of payments that have come due and were not made: _____. Total amount: $_____

c. Future payments due by time of anticipated hearing date (*if applicable*):

An additional payment of $_____ will come due on (*date*) _____, and on the _____ day of each month thereafter. If the payment is not received within _____ days of said due date, a late charge of $_____ will be charged to the loan.

d. The fair market value of the Property is $_____, established by:

(1) ☐ An appraiser's declaration with appraisal is attached as Exhibit _____.

(2) ☐ A real estate broker or other expert's declaration regarding value is attached as Exhibit _____.

(3) ☐ A true and correct copy of relevant portion(s) of the Debtor's schedules is attached as Exhibit _____.

(4) ☐ Other (*specify*):

e. **Calculation of equity/equity cushion in Property:**

Based upon ☐ a preliminary title report ☐ the Debtor's admissions in the schedules filed in this case, the Property is subject to the following deed(s) of trust or lien(s) in the amounts specified securing the debt against the Property:

	Name of Holder	Amount as Scheduled by Debtor (*if any*)	Amount known to Declarant and Source
1st deed of trust:		$	$
2nd deed of trust:		$	$
3rd deed of trust:		$	$
Judgment liens:		$	$
Taxes:		$	$
Other:		$	$
TOTAL DEBT: $			

f. Evidence establishing the existence of these deed(s) of trust and lien(s) is attached as Exhibit _____ and consists of:

(1) ☐ Preliminary title report.

(2) ☐ Relevant portions of the Debtor's schedules.

(3) ☐ Other (*specify*):

g. ☐ **11 U.S.C. § 362(d)(1) - Equity Cushion:**
I calculate that the value of the "equity cushion" in the Property exceeding Movant's debt and any lien(s) senior to Movant's debt is $_____ and is _____% of the fair market value of the Property.

h. ☐ **11 U.S.C. § 362(d)(2)(A) - Equity:**
By subtracting the total amount of all liens on the Property from the value of the Property as set forth in Paragraph 11(e) above, I calculate that the Debtor's equity in the Property is $_____.

i. ☐ Estimated costs of sale: $_____ (estimate based upon _____% of estimated gross sales price)

j. ☐ The fair market value of the Property is declining because:

12. ☐ (*Chapter 12 and 13 cases only*) Status of Movant's loan and other bankruptcy case information:

a. A 341(a) meeting of creditors is currently scheduled for (*or concluded on*) the following date: _____.
A plan confirmation hearing currently scheduled for (or concluded on) the following date:_____.
A plan was confirmed on the following date (*if applicable*): _____.

b. Postpetition preconfirmation payments due BUT REMAINING UNPAID since the filing of the case:

Number of Payments	Number of Late Charges	Amount of Each Payment or Late Charge	Total
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$

(See attachment for additional breakdown of information attached as Exhibit _____.)

c. Postpetition postconfirmation payments due BUT REMAINING UNPAID since the filing of the case:

Number of Payments	Number of Late Charges	Amount of each Payment or Late Charge	Total
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$
		$	$

d. Postpetition advances or other charges due but unpaid: $
(*For details of type and amount, see Exhibit* _____)

e. Attorneys' fees and costs: $
(*For details of type and amount, see Exhibit* _____)

f. Less suspense account or partial paid balance: $[ ]

TOTAL POSTPETITION DELINQUENCY: $

g. Future payments due by time of anticipated hearing date (*if applicable*): _____.
An additional payment of $_____ will come due on _____, and on the _____ day of each month thereafter. If the payment is not received by the _____ day of the month, a late charge of $_____ will be charged to the loan.

h. Amount and date of the last 3 postpetition payments received from the Debtor in good funds, regardless of how applied (if applicable):

$_____ received on (*date*) _____
$_____ received on (*date*) _____
$_____ received on (*date*) _____

i. ☐ The entire claim is provided for in the chapter 12 or 13 plan and postpetition plan payments are delinquent. A plan payment history is attached as Exhibit _____. See attached declaration(s) of chapter 12 trustee or 13 trustee regarding receipt of payments under the plan (*attach LBR form F 4001-1.DEC.AGENT.TRUSTEE*).

13. ☐ Proof of insurance regarding the Property has not been provided to Movant, despite the Debtor's obligation to insure the collateral under the terms of Movant's contract with the Debtor.

14. ☐ The court determined on (*date*) _____ that the Property qualifies as "single asset real estate" as defined in 11 U.S.C. § 101(51B). More than 90 days have passed since the filing of the bankruptcy petition; more than 30 days have passed since the court determined that the Property qualifies as single asset real estate; the Debtor has not filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or the Debtor has not commenced monthly payments to Movant as required by 11 U.S.C. § 362(d)(3).

15. ☐ The Debtor's intent is to surrender the Property. A true and correct copy of the Debtor's statement of intentions is attached as Exhibit _____.

16. ☐ Movant regained possession of the Property on (*date*) _____, which is ☐ prepetition ☐ postpetition.

17. ☐ The bankruptcy case was filed in bad faith:

a. ☐ Movant is the only creditor or one of few creditors listed in the Debtor's case commencement documents.

b. ☐ Other bankruptcy cases have been filed in which an interest in the Property was asserted.

c. ☐ The Debtor filed only a few case commencement documents. Schedules and a statement of financial affairs (or chapter 13 plan, if appropriate) have not been filed.

d. ☐ Other (*specify*):

18. ☐ The filing of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors that involved:

a. ☐ The transfer of all or part ownership of, or other interest in, the Property without the consent of Movant or court approval. See attached continuation page for facts establishing the scheme.

b. ☐ Multiple bankruptcy cases affecting the Property include:

1. Case name: _____
Chapter: _____ Case number: _____
Date dismissed: _____ Date discharged: _____ Date filed: _____
Relief from stay regarding the Property ☐ was ☐ was not granted.

2. Case name: _____
Chapter: _____ Case number: _____
Date dismissed: _____ Date discharged: _____ Date filed: _____
Relief from stay regarding the Property ☐ was ☐ was not granted.

3. Case name: _____
Chapter: _____ Case number: _____
Date dismissed: _____ Date discharged: _____ Date filed: _____
Relief from stay regarding the Property ☐ was ☐ was not granted.

☐ See attached continuation page for information about other bankruptcy cases affecting the Property.

☐ See attached continuation page for facts establishing that the multiple bankruptcy cases were part of a scheme to delay, hinder, or defraud creditors.

19. ☐ Enforcement actions taken after the bankruptcy petition was filed are specified in the attached supplemental declaration(s).

    a. ☐ These actions were taken before Movant knew the bankruptcy petition had been filed, and Movant would have been entitled to relief from stay to proceed with these actions.

    b. ☐ Movant knew the bankruptcy case had been filed, but Movant previously obtained relief from stay to proceed with these enforcement actions in prior bankruptcy cases affecting the Property as set forth in Exhibit _____.

    c. ☐ For other facts justifying annulment, see attached continuation page.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

_____	_____	_____
Date	*Printed name*	*Signature*

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (with supporting declarations) (REAL PROPERTY)** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

_____	_____	_____
Date	*Printed Name*	*Signature*

Summer Shaw, Esq. (SBN 283598)
SHAW & HANOVER, PC
42600 Cook Street, Ste. 210
Palm Desert, CA 92211
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Email: ss@shaw.law
Attorneys for Plaintiff, Delea Lou Rayburn

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – RIVERSIDE DIVISION

In re: Lee J. Kennedy-Daniels, Debtor.	Case No.: 6:19-bk-21163-SY Adv. No.: 6:20-ap-01028-SY Chapter: 7 **TRIAL BRIEF**
Delea Lou Rayburn, Plaintiffs, v. Lee J. Kennedy-Daniels, Defendant.	**Trial Set to Begin:** **Date: October 12, 2021** **Time: 9:30 a.m.** **Courtroom: 302**

Plaintiff Delea Lou Rayburn alleges as follows:

A. INTRODUCTION

This action for a debt to be excepted from discharge under 11 U.S.C. § 523(a)(6) arises from a traffic collision, but this is not an ordinary negligent accident. As the evidence at trial will demonstrate, the acts of debtor Lee Kennedy-Daniels (the "Debtor") on May 3, 2019, in repeatedly ramming the vehicle in which plaintiff Delea Lou Rayburn (Rayburn) was a passenger -- because that truck was in the way of an enraged man, passing cars illegally while hurrying down a twisting mountain road because he was late for something -- were willful and malicious under the Ninth Circuit subjective intent to injure standard. No person could have acted as he did

without knowing the harm he was causing was substantially certain to occur. His behavior, causing massive injuries, was willful and malicious; he is not entitled to discharge this debt.

B. FACTS

In the late afternoon on May 3, 2019, Rayburn's life partner, Michael Yale, was driving their small pickup truck up Highway 18 from Victorville to Big Bear City (some call this the "backway to Big Bear") with Rayburn in the front passenger seat. In this area, Highway 18 is a narrow two-lane winding mountain road with blind curves and usually a double-yellow line separating the uphill and downhill lanes. About the time Yale passed a concrete plant, he noted a line of cars stacking up behind him and steered his vehicle into a pullout area just beyond the plant to allow them to pass. As they were pausing the truck, Rayburn looked up to see a large Dodge Ram truck (the "Dodge") pull out from the downhill traffic on a blind curve and cross the double-yellow line to pass the cars in front of it. [1] The Dodge driver (the Debtor) contorted his face with surprise and rage when he saw a small passenger vehicle coming right at him in the uphill lane which he suddenly occupied. He swerved left onto the pullout area where Yale's truck was stopping, paused briefly, then accelerated downhill, plowing head first into the smaller truck, driver's side to driver's side, with a high speed impact. If the Debtor's behavior had stopped then, this nondischargeability action would not be pending. But it did not.

After the initial impact, the Dodge's progress downhill was obviously thwarted, but instead of stopping the truck and getting out to assess the damage, the Debtor backed up the Dodge and accelerated forward again, ramming so forcefully into the Yale truck that he began turning the direction of the two vehicles, with this impact directed at the front passenger side of the truck. When he still could not get by and continue down the road away from the scene, the Debtor repeatedly backed off and accelerated forward, ramming the smaller truck again and again, causing major damages and eventually pushing its engine into the inside compartment and onto Rayburn's feet and body. She was immediately and traumatically severely injured. When the Debtor finally stopped ramming Yale's truck, the vehicles had done almost a 180 degree reversal

[1] Delea Rayburn's recollection of exactly what happened is crystal clear, as her testimony at trial will demonstrate. Her description of the events as they unfolded is chilling, with even minute details of the traumatic event embedded in her memory.

in direction, with Yale's truck angling downhill and the Dodge pointed uphill.

With emergency assistance, Rayburn was removed from the truck and lay for a short period of time on the ground while awaiting a helicopter rescue which saved her life. While on the ground, she overheard the Debtor on his cell phone talking to someone, telling them in an irritated voice that he would be late for something but not saying why. This was a man not concerned with the harm he had just caused but rather only with his own self-interest.

Rayburn's injuries were extensive and life-threatening. However, as the Court is aware, the parties have stipulated to a damages award if nondischargeable liability is found by the Court, so this brief will not detail them here nor the out of pocket expenses entailed with Rayburn's lengthy, painful, and complicated recovery, which is still going on. Her testimony will describe that process and her long-term prognosis. Suffice it to say that her life will never be same. The agreed sum of $1 million is well justified by her out of pocket expenses and pain and suffering.

C. DEBTOR'S ACTS WERE WILLFUL AND MALICIOUS

The legal standard to prove a debt is nondischargeable under § 523(a)(6) is well-settled in the Ninth Circuit. Section 523 provides:

> (a) A discharge under section 727,… of this title does not discharge an individual debtor from any debt ---
>
> …
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

As the case law recognizes, a court must analyze the willful and malicious prongs of the dischargeability test separately. *Carrillo v Su (In re Su)*, 290 F. 3d 1140, 1146 (9th Cir. 2002); *Petralia v. Jercich (In re Jercich)*, 238 F. 3d 1202, 1207-09 (9th Cir. 2001). The creditor must prove nondischargeability by a preponderance of the evidence. *Grogan v Garner*, 498 U.S. 279, 286 (1991). When reviewing this evidence, "[i]n addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *In re Su*, 290 F. 3d at 1146 n. 6.

The Supreme Court in *Kawaauhau v Geiger*, 523 U.S. 57 (1998) established that §523(a)(6) applies only to those debts arising from intentionally inflicted injuries:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury…[T]he (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the consequences of an act", not simply "the act itself."

523S. at 61-62 (emphasis in original).

The Ninth Circuit in *Su* further refined this definition by holding that "§ 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *In re Su* at 1142. In other words, when considering all evidence, including circumstantial evidence, a debtor's act is willful if the debtor intended to cause harm *or knew that harm was a substantially certain consequence of his or her behavior*. *Markowitz v Campbell (In re Markowitz),* 190 F. 3d 455 (6th Cir. 1999), cited with favor in *Su* at 1143.

An act is "malicious" when it is "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *In re Jercich*, 238 F. 3d at 1209. The plain meaning of this definition is that the wrongful act must be committed intentionally rather than the injury itself. *Jett v Sicroff (In re Sicroff)*, 401 F. 3d 1101, 1106 (9th Cir. 2005), citing with favor *Murray v Bammer (In re Bammer)*, 131 F. 3d 788, 791 (9th Cir. 1997) for a standard not affected by the *Geiger* decision on willful.

The evidence presented at trial, largely through the sharp recollection of Rayburn, will demonstrate that the acts of the Debtor, when crossing a double yellow line, on a blind curve, and then repeatedly ramming the Dodge into the smaller vehicle where Rayburn was trapped, were both willful and malicious. As noted above, if after the first impact the Debtor had stopped his truck and assessed the damage, Rayburn would not be contending that his acts were willful. But that did not happen. Instead, angered by the obstacle in the path of his journey down the mountain, he backed up the Dodge, revved the engine, and plowed forward into Yale's truck again, and again, and again. The force of this repeated impact gravely exacerbated the injuries

caused to Rayburn, as only these repeated impacts caused the Yale truck's engine to be shoved inside the passenger compartment and onto the feet and legs of Rayburn, crushing them to smithereens. And only those repeated rammings, each of which was the Debtor backing off the collision, revving the engine and again driving forward into the smaller truck, caused the positions of the vehicles to be largely reversed, with Debtor's truck angled slightly uphill and Yale's truck pointed downhill when the debtor finally stopped.

It is inconceivable that the debtor – or any person – would not know that injury was substantially certain to result from his conduct. The decimated condition of Yale's truck after the carnage was completed emphasizes that the Debtor must have known of the damages his intentional acts were inflicting. His actions were willful.

Likewise, the malicious standard is met. All of the debtor's acts were wrongful, from the time he passed over a double yellow line on a blind curve, ran head on into the Yale truck, and backed off and repeatedly accelerated forward into that same truck. The crossing the double yellow line was intentional, doing so on a blind curve was intentional, and the ramming was intentional. He could have stopped after the first impact. The force of the large Dodge truck on the smaller vehicle necessarily was causing damages to it and injuries to those inside. And there is no just cause or excuse for crossing the double yellow line on a blind curve or backing off and accelerating forward, creating mayhem.

The evidence will readily demonstrate that the Debtor acted both willfully and maliciously in injuring Rayburn. Her damages are nondischargeable.

D. THE COURT MAY ENTER A FINAL JUDGMENT WITH LIQUIDATED DAMAGES

The parties have stipulated and the court has ordered that if it determines that the Debtor's liability is nondischargeable, the damages in a judgment will be $1 million. The Ninth Circuit has laid to rest any uncertainty whether the bankruptcy court has the authority to enter a money judgment as a final nondischargeable judgment.

In *Deitz v Ford (In re Deitz)*, 760 F. 3d 1038 (9th Cir. 2014) the Ninth Circuit adopted verbatim the underlying BAP decision which ruled that the bankruptcy court had the jurisdiction

and constitutional authority to enter a money judgment in a nondischargeability adversary. It stated "[i]n our review, we conclude that the well-reasoned majority opinion of the BAP, *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012), correctly sets forth the law and the application of that law as appropriate in this case…..We further note the dischargeability actions are 'central to federal bankruptcy proceedings,' and they are 'necessarily resolved during the process of allowing or disallowing claims against the estate.'…'The dischargeability determination…therefore constitutes a public rights dispute that the bankruptcy courts may decide.'" *Deitz* at 1039, citations omitted.

The Ninth Circuit opinion appended the BAP's published ruling which concluded that the bankruptcy court had appropriately found the nondischargeable damages and entered the final judgment in favor of the creditor. Consequently, this court may insert the stipulated sum of $1 million in a money judgment, which will be final without the need to return to state court for a damages ruling.

E. CONCLUSION

Plaintiff Delea Lou Rayburn respectfully requests this court to find that the debtor Lee Kennedy-Daniels' liability for her damages is nondischargeable under § 523(a)(6) and enter a final money judgment in her favor for $1 million.

Date: October 5, 2021

Respectfully submitted,
SHAW & HANOVER, PC

/s/ Summer Shaw
By: _____
Summer Shaw
Attorneys for Plaintiff

SELECTED STATUTES & RULES FOR:

Relief from Stay, Turnover Issues, Dischargeability of Debts, and Violations of the Discharge Injunction

11 U.S.C.
United States Code, 2011 Edition
Title 11 - BANKRUPTCY
CHAPTER 1 - GENERAL PROVISIONS
Sec. 105 - Power of court
From the U.S. Government Publishing Office, www.gpo.gov

§105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2555; Pub. L. 98–353, title I, §118, July 10, 1984, 98 Stat. 344; Pub. L. 99–554, title II, §203, Oct. 27, 1986, 100 Stat. 3097; Pub. L. 103–394, title I, §104(a), Oct. 22, 1994, 108 Stat. 4108; Pub. L. 109–8, title IV, §440, Apr. 20, 2005, 119 Stat. 114; Pub. L. 111–327, §2(a)(3), Dec. 22, 2010, 124 Stat. 3557.)

Historical and Revision Notes

Senate Report No. 95–989

Section 105 is derived from section 2a (15) of present law [section 11(a)(15) of former title 11], with two changes. First, the limitation on the power of a bankruptcy judge (the power to enjoin a court being reserved to the district judge) is removed as inconsistent with the increased powers and jurisdiction of the new

bankruptcy court. Second, the bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances. The bankruptcy code has ample provision for the appointment of a trustee when needed. Appointment of a receiver would simply circumvent the established procedures.

This section is also an authorization, as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court. As such, *Toucey v. New York Life Insurance Company*, 314 U.S. 118 (1941), is overruled.

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (d)(2), are set out in the Appendix to this title.

AMENDMENTS

2010—Subsec. (d)(2). Pub. L. 111–327 inserted "may" after "Procedure," in introductory provisions.

2005—Subsec. (d). Pub. L. 109–8, §440(1), struck out ", may" after "party in interest" in introductory provisions.

Subsec. (d)(1). Pub. L. 109–8, §440(2), added par. (1) and struck out former par. (1) which read as follows: "hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and".

1994—Subsec. (d). Pub. L. 103–394 added subsec. (d).

1986—Subsec. (a). Pub. L. 99–554 inserted at end "No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

1984—Subsecs. (a), (b). Pub. L. 98–353, §118(1), struck out "bankruptcy" before "court".

Subsec. (c). Pub. L. 98–353, §118(2), added subsec. (c).

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective July 10, 1984, see section 122(a) of Pub. L. 98–353, set out as an Effective Date note under section 151 of Title 28, Judiciary and Judicial Procedure.

11 U.S.C.
United States Code, 2003 Edition
Title 11 - BANKRUPTCY
CHAPTER 3 - CASE ADMINISTRATION
SUBCHAPTER IV - ADMINISTRATIVE POWERS
Sec. 363 - Use, sale, or lease of property
From the U.S. Government Publishing Office, www.gpo.gov

§363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of

this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such

authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(*o*) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2572; Pub. L. 98–353, title III, §442, July 10, 1984, 98 Stat. 371; Pub. L. 99–554, title II, §257(k), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title I, §109, title II, §§214(b), 219(c), title V, §501(d)(8), Oct. 22, 1994, 108 Stat. 4113, 4126, 4129, 4144.)

Historical and Revision Notes

I74legislative statements

Section 363(a) of the House amendment defines "cash collateral" as defined in the Senate amendment. The broader definition of "soft collateral" contained in H.R. 8200 as passed by the House is deleted to remove limitations that were placed on the use, lease, or sale of inventory, accounts, contract rights, general intangibles, and chattel paper by the trustee or debtor in possession.

Section 363(c)(2) of the House amendment is derived from the Senate amendment. Similarly, sections 363(c)(3) and (4) are derived from comparable provisions in the Senate amendment in lieu of the contrary procedure contained in section 363(c) as passed by the House. The policy of the House amendment will generally require the court to schedule a preliminary hearing in accordance with the needs of the debtor to authorize the trustee or debtor in possession to use, sell, or lease cash collateral. The trustee or debtor in possession may use, sell, or lease cash collateral in the ordinary course of business only "after notice and a hearing."

Section 363(f) of the House amendment adopts an identical provision contained in the House bill, as opposed to an alternative provision contained in the Senate amendment.

Section 363(h) of the House amendment adopts a new paragraph (4) representing a compromise between the House bill and Senate amendment. The provision adds a limitation indicating that a trustee or debtor in possession sell jointly owned property only if the property is not used in the production, transmission, or distribution for sale, of electric energy or of natural or synthetic gas for heat, light, or power. This limitation is intended to protect public utilities from being deprived of power sources because of the bankruptcy of a joint owner.

Section 363(k) of the House amendment is derived from the third sentence of section 363(e) of the Senate amendment. The provision indicates that a secured creditor may bid in the full amount of the creditor's allowed claim, including the secured portion and any unsecured portion thereof in the event the creditor is undersecured, with respect to property that is subject to a lien that secures the allowed claim of the sale of the property.

Senate Report No. 95–989

This section defines the right and powers of the trustee with respect to the use, sale or lease of property and the rights of other parties that have interests in the property involved. It applies in both liquidation and reorganization cases.

Subsection (a) defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents in which the estate and an entity other than the estate have an interest, such as a lien or a co-ownership interest. The definition is not restricted to property of the estate that is cash collateral on the date of the filing of the petition. Thus, if "non-cash" collateral is disposed of and the proceeds come within the definition of "cash collateral" as set forth in this subsection, the proceeds would be cash collateral as long as they remain subject to the original lien on the "non-cash" collateral under section

552(b). To illustrate, rents received from real property before or after the commencement of the case would be cash collateral to the extent that they are subject to a lien.

Subsection (b) permits the trustees to use, sell, or lease, other than in the ordinary course of business, property of the estate upon notice and opportunity for objections and hearing thereon.

Subsection (c) governs use, sale, or lease in the ordinary course of business. If the business of the debtor is authorized to be operated under §721, 1108, or 1304 of the bankruptcy code, then the trustee may use, sell, or lease property in the ordinary course of business or enter into ordinary course transactions without need for notice and hearing. This power is subject to several limitations. First, the court may restrict the trustee's powers in the order authorizing operation of the business. Second, with respect to cash collateral, the trustee may not use, sell, or lease cash collateral except upon court authorization after notice and a hearing, or with the consent of each entity that has an interest in such cash collateral. The same preliminary hearing procedure in the automatic stay section applies to a hearing under this subsection. In addition, the trustee is required to segregate and account for any cash collateral in the trustee's possession, custody, or control.

Under subsections (d) and (e), the use, sale, or lease of property is further limited by the concept of adequate protection. Sale, use, or lease of property in which an entity other than the estate has an interest may be effected only to the extent not inconsistent with any relief from the stay granted to that interest's holder. Moreover, the court may prohibit or condition the use, sale, or lease as is necessary to provide adequate protection of that interest. Again, the trustee has the burden of proof on the issue of adequate protection. Subsection (e) also provides that where a sale of the property is proposed, an entity that has an interest in such property may bid at the sale thereof and set off against the purchase price up to the amount of such entity's claim. No prior valuation under section 506(a) would limit this bidding right, since the bid at the sale would be determinative of value.

Subsection (f) permits sale of property free and clear of any interest in the property of an entity other than the estate. The trustee may sell free and clear if applicable nonbankruptcy law permits it, if the other entity consents, if the interest is a lien and the sale price of the property is greater than the amount secured by the lien, if the interest is in bona fide dispute, or if the other entity could be compelled to accept a money satisfaction of the interest in a legal or equitable proceeding. Sale under this subsection is subject to the adequate protection requirement. Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale.

At a sale free and clear of other interests, any holder of any interest in the property being sold will be permitted to bid. If that holder is the high bidder, he will be permitted to offset the value of his interest against the purchase price of the property. Thus, in the most common situation, a holder of a lien on property being sold may bid at the sale and, if successful, may offset the amount owed to him that is secured by the lien on the property (but may not offset other amounts owed to him) against the purchase price, and be liable to the trustee for the balance of the sale price, if any.

Subsection (g) permits the trustee to sell free and clear of any vested or contingent right in the nature of dower or curtesy.

Subsection (h) permits sale of a co-owner's interest in property in which the debtor had an undivided ownership interest such as a joint tenancy, a tenancy in common, or a tenancy by the entirety. Such a sale is permissible only if partition is impracticable, if sale of the estate's interest would realize significantly less for the estate that sale of the property free of the interests of the co-owners, and if the benefit to the estate of such a sale outweighs any detriment to the co-owners. This subsection does not apply to a co-owner's interest in a public utility when a disruption of the utilities services could result.

Subsection (i) provides protections for co-owners and spouses with dower, curtesy, or community property rights. It gives a right of first refusal to the co-owner or spouse at the price at which the sale is to be consummated.

Subsection (j) requires the trustee to distribute to the spouse or co-owner the appropriate portion of the proceeds of the sale, less certain administrative expenses.

Subsection (k) [enacted as (*l*)] permits the trustee to use, sell, or lease property notwithstanding certain bankruptcy or ipso facto clauses that terminate the debtor's interest in the property or that work a forfeiture or modification of that interest. This subsection is not as broad as the anti-ipso facto provision in proposed 11 U.S.C. 541(c)(1).

Subsection (*l*) [enacted as (m)] protects good faith purchasers of property sold under this section from a reversal on appeal of the sale authorization, unless the authorization for the sale and the sale itself were stayed pending appeal. The purchaser's knowledge of the appeal is irrelevant to the issue of good faith.

Subsection (m) [enacted as (n)] is directed at collusive bidding on property sold under this section. It permits the trustee to void a sale if the price of the sale was controlled by an agreement among potential

bidders. The trustees may also recover the excess of the value of the property over the purchase price, and may recover any costs, attorney's fees, or expenses incurred in voiding the sale or recovering the difference. In addition, the court is authorized to grant judgment in favor of the estate and against the collusive bidder if the agreement controlling the sale price was entered into in willful disregard of this subsection. The subsection does not specify the precise measure of damages, but simply provides for punitive damages, to be fixed in light of the circumstances.

References in Text

Section 7A of the Clayton Act, referred to in subsec. (b)(2), is classified to section 18a of Title 15, Commerce and Trade.

Amendments

1994—Subsec. (a). Pub. L. 103–394, §214(b), inserted "and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties" after "property".

Subsec. (b)(2). Pub. L. 103–394, §§109, 501(d)(8)(A), struck out "(15 U.S.C. 18a)" after "Clayton Act" and amended subpars. (A) and (B) generally. Prior to amendment, subpars. (A) and (B) read as follows:

"(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

"(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise."

Subsec. (c)(1). Pub. L. 103–394, §501(d)(8)(B), substituted "1203, 1204, or 1304" for "1304, 1203, or 1204".

Subsec. (e). Pub. L. 103–394, §219(c), inserted at end "This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362)."

1986—Subsec. (c)(1). Pub. L. 99–554, §257(k)(1), inserted reference to sections 1203 and 1204 of this title.

Subsec. (*l*). Pub. L. 99–554, §257(k)(2), inserted reference to chapter 12.

1984—Subsec. (a). Pub. L. 98–353, §442(a), inserted "whenever acquired" after "equivalents" and "and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title" after "interest".

Subsec. (b). Pub. L. 98–353, §442(b), designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 98–353, §442(c), inserted ", with or without a hearing," after "court" and struck out "In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection".

Subsec. (f)(3). Pub. L. 98–353, §442(d), substituted "all liens on such property" for "such interest".

Subsec. (h). Pub. L. 98–353, §442(e), substituted "at the time of" for "immediately before".

Subsec. (j). Pub. L. 98–353, §442(f), substituted "compensation" for "compenation".

Subsec. (k). Pub. L. 98–353, §442(g), substituted "unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder" for "if the holder".

Subsec. (*l*). Pub. L. 98–353, §442(h), substituted "Subject to the provisions of section 365, the trustee" for "The trustee", "condition" for "conditions", "or the taking" for "a taking", and "interest" for "interests".

Subsec. (n). Pub. L. 98–353, §442(i), substituted "avoid" for "void", "avoiding" for "voiding", and "In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection" for "The court may grant judgment in favor of the estate and against any such party that entered into such agreement in willful disregard of this subsection for punitive damages in addition to any recovery under the preceding sentence".

Subsec. (*o*). Pub. L. 98–353, §442(j), added subsec. (*o*).

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

Section Referred to in Other Sections

This section is referred to in sections 106, 303, 361, 507, 541, 542, 552, 553, 557, 1111, 1129, 1205, 1206, 1303, 1304 of this title.

11 U.S.C.
United States Code, 2011 Edition
Title 11 - BANKRUPTCY
CHAPTER 5 - CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II - DEBTOR'S DUTIES AND BENEFITS
Sec. 521 - Debtor's duties
From the U.S. Government Publishing Office, www.gpo.gov

§521. Debtor's duties

(a) The debtor shall—
(1) file—
(A) a list of creditors; and
(B) unless the court orders otherwise—
(i) a schedule of assets and liabilities;
(ii) a schedule of current income and current expenditures;
(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate —
(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or
(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;
(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and
(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and
(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);
(3) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;
(4) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

(5) appear at the hearing required under section 524(d) of this title;

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722; and

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)(A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

(A) at a reasonable cost; and

(B) not later than 7 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13—

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;

a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

(g)(1) A statement referred to in subsection (f)(4) shall disclose—

(A) the amount and sources of the income of the debtor;

(B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and

(C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.

(2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(h) If requested by the United States trustee or by the trustee, the debtor shall provide—

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 7 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

(j)(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2586; Pub. L. 98–353, title III, §§305, 452, July 10, 1984, 98 Stat. 352, 375; Pub. L. 99–554, title II, §283(h), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 109–8, title I, §106(d), title II, §225(b), title III, §§304(1), 305(2), 315(b), 316, title IV, §446(a), title VI, §603(c), title VII, §720, Apr. 20, 2005, 119 Stat. 38, 66, 78, 80, 89, 92, 118, 123, 133; Pub. L. 111–16, §2(5), (6), May 7, 2009, 123 Stat. 1607; Pub. L. 111–327, §2(a)(16), Dec. 22, 2010, 124 Stat. 3559.)

Historical and Revision Notes

LEGISLATIVE STATEMENTS

Section 521 of the House amendment modifies a comparable provision contained in the House bill and Senate amendment. The Rules of Bankruptcy Procedure should provide where the list of creditors is to be filed. In addition, the debtor is required to attend the hearing on discharge under section 524(d).

SENATE REPORT NO. 95–989

This section lists three duties of the debtor in a bankruptcy case. The Rules of Bankruptcy Procedure will specify the means of carrying out these duties. The first duty is to file with the court a list of creditors and, unless the court orders otherwise, a schedule of assets and liabilities and a statement of his financial affairs. Second, the debtor is required to cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties. Finally, the debtor must surrender to the trustee all property of the estate, and any recorded information, including books, documents, records, and papers, relating to property of the estate. This phrase "recorded information, including books, documents, records, and papers," has been used here and throughout the bill as a more general term, and includes such other forms of recorded information as data in computer storage or in other machine readable forms.

The list in this section is not exhaustive of the debtor's duties. Others are listed elsewhere in proposed title 11, such as in section 343, which requires the debtor to submit to examination, or in the Rules of Bankruptcy Procedure, as continued by §404(a) of S. 2266, such as the duty to attend any hearing on discharge, Rule 402(2).

References in Text

Section 3 of the Employee Retirement Income Security Act of 1974, referred to in subsec. (a)(7), is classified to section 1002 of Title 29, Labor.

Sections 530(b)(1) and 529(b)(1) of the Internal Revenue Code of 1986, referred to in subsec. (c), are classified to sections 530(b)(1) and 529(b)(1), respectively, of Title 26, Internal Revenue Code.

Section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, referred to in subsec. (g)(2), is section 315(c) of Pub. L. 109–8, which is set out as a note under this section.

Amendments

2010—Subsec. (a)(2). Pub. L. 111–327, §2(a)(16)(A)(iii), in subpar. (C) substituted "except that" for subpar. (C) designation.

Subsec. (a)(2)(A). Pub. L. 111–327, §2(a)(16)(A)(i), struck out "the debtor shall" after "period fixes," and inserted "and" after semicolon at end.

Subsec. (a)(2)(B). Pub. L. 111–327, §2(a)(16)(A)(ii), struck out "the debtor shall" after "period fixes," and "and" after semicolon at end.

Subsec. (a)(3), (4). Pub. L. 111–327, §2(a)(16)(B), inserted "is" after "auditor".

2009—Subsec. (e)(3)(B). Pub. L. 111–16, §2(5), substituted "7 days" for "5 days".

Subsec. (i)(2). Pub. L. 111–16, §2(6), substituted "7 days" for "5 days".

2005—Pub. L. 109–8, §106(d)(1), designated existing provisions as subsec. (a).

Subsec. (a). Pub. L. 109–8, §304(1), added concluding provisions.

Subsec. (a)(1). Pub. L. 109–8, §315(b)(1), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;".

Subsec. (a)(2). Pub. L. 109–8, §305(2)(A), struck out "consumer" before "debts" in introductory provisions.

Subsec. (a)(2)(B). Pub. L. 109–8, §305(2)(B), substituted "30 days after the first date set for the meeting of creditors under section 341(a)" for "forty-five days after the filing of a notice of intent under this section" and "30-day" for "forty-five day".

Subsec. (a)(2)(C). Pub. L. 109–8, §305(2)(C), inserted ", except as provided in section 362(h)" before semicolon.

Subsec. (a)(3), (4). Pub. L. 109–8, §603(c), inserted "or an auditor serving under section 586(f) of title 28" after "serving in the case".

Subsec. (a)(6). Pub. L. 109–8, §304(1), added par. (6).

Subsec. (a)(7). Pub. L. 109–8, §446(a), added par. (7).

Subsec. (b). Pub. L. 109–8, §106(d)(2), added subsec. (b).

Subsec. (c). Pub. L. 109–8, §225(b), added subsec. (c).

Subsec. (d). Pub. L. 109–8, §305(2)(D), added subsec. (d).

Subsecs. (e) to (h). Pub. L. 109–8, §315(b)(2), added subsecs. (e) to (h).

Subsec. (i). Pub. L. 109–8, §316, added subsec. (i).

Subsec. (j). Pub. L. 109–8, §720, added subsec. (j).

1986—Par. (4). Pub. L. 99–554 inserted ", whether or not immunity is granted under section 344 of this title" after second reference to "estate".

1984—Par. (1). Pub. L. 98–353, §305(2), inserted "a schedule of current income and current expenditures," after "liabilities,".

Pars. (2) to (5). Pub. L. 98–353, §305(1), (3), added par. (2), redesignated former pars. (2) to (4) as (3) to (5), respectively.

Pub. L. 98–353, §452, which directed the insertion of ", whether or not immunity is granted under section 344 of this title" after second reference to "estate" in par. (3) as redesignated above, could not be executed because such reference appeared in par. (4) rather than in par. (3).

Effective Date of 2009 Amendment

Amendment by Pub. L. 111–16 effective Dec. 1, 2009, see section 7 of Pub. L. 111–16, set out as a note under section 109 of this title.

Effective Date of 2005 Amendment

Pub. L. 109–8, title VI, §603(e), Apr. 20, 2005, 119 Stat. 123, provided that: "The amendments made by this section [amending this section, section 727 of this title and section 586 of Title 28, Judiciary and Judicial Procedure, and enacting provisions set out as a note under section 586 of Title 28] shall take effect 18 months after the date of enactment of this Act [Apr. 20, 2005]."

Amendment by sections 106(d), 225(b), 304(1), 305(2), 315(b), 316, 446(a), and 720 of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

Confidentiality of Tax Information

Pub. L. 109–8, title III, §315(c), Apr. 20, 2005, 119 Stat. 91, provided that:

"(1) Not later than 180 days after the date of the enactment of this Act [Apr. 20, 2005], the Director of the Administrative Office of the United States Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section.

"(2) The procedures under paragraph (1) shall include restrictions on creditor access to tax information that is required to be provided under this section.

"(3) Not later than 540 days after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall prepare and submit to the President pro tempore of the Senate and the Speaker of the House of Representatives a report that—

"(A) assesses the effectiveness of the procedures established under paragraph (1); and

"(B) if appropriate, includes proposed legislation to—

"(i) further protect the confidentiality of tax information; and

"(ii) provide penalties for the improper use by any person of the tax information required to be provided under this section."

Providing Requested Tax Documents to the Court

Pub. L. 109–8, title XII, §1228, Apr. 20, 2005, 119 Stat. 200, provided that:

"(a) Chapter 7 Cases.—The court shall not grant a discharge in the case of an individual who is a debtor in a case under chapter 7 of title 11, United States Code, unless requested tax documents have been provided to the court.

"(b) Chapter 11 and Chapter 13 Cases.—The court shall not confirm a plan of reorganization in the case of an individual under chapter 11 or 13 of title 11, United States Code, unless requested tax documents have been filed with the court.

"(c) Document Retention.—The court shall destroy documents submitted in support of a bankruptcy claim not sooner than 3 years after the date of the conclusion of a case filed by an individual under chapter 7, 11, or 13 of title 11, United States Code. In the event of a pending audit or enforcement action, the court may extend the time for destruction of such requested tax documents."

11 U.S.C.
United States Code, 2011 Edition
Title 11 - BANKRUPTCY
CHAPTER 5 - CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II - DEBTOR'S DUTIES AND BENEFITS
Sec. 523 - Exceptions to discharge
From the U.S. Government Publishing Office, www.gpo.gov

§523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case

in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as

long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term “return” means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A [1] of the Higher Education Act of 1965, or under section 733(g) [1] of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such

institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2590; Pub. L. 96–56, §3, Aug. 14, 1979, 93 Stat. 387; Pub. L. 97–35, title XXIII, §2334(b), Aug. 13, 1981, 95 Stat. 863; Pub. L. 98–353, title III, §§307, 371, 454, July 10, 1984, 98 Stat. 353, 364, 375; Pub. L. 99–554, title II, §§257(n), 281, 283(j), Oct. 27, 1986, 100 Stat. 3115–3117; Pub. L. 101–581, §2(a), Nov. 15, 1990, 104 Stat. 2865; Pub. L. 101–647, title XXV, §2522(a), title XXXI, §3102(a), title XXXVI, §3621, Nov. 29, 1990, 104 Stat. 4865, 4916, 4964; Pub. L. 103–322, title XXXII, §320934, Sept. 13, 1994, 108 Stat. 2135; Pub. L. 103–394, title II, §221, title III, §§304(e), (h)(3), 306, 309, title V, §501(d)(13), Oct. 22, 1994, 108 Stat. 4129, 4133–4135, 4137, 4145; Pub. L. 104–134, title I, §101[(a)] [title VIII, §804(b)], Apr. 26, 1996, 110 Stat. 1321, 1321–74; renumbered title I, Pub. L. 104–140, §1(a), May 2, 1996, 110 Stat. 1327; Pub. L. 104–193, title III, §374(a), Aug. 22, 1996, 110 Stat. 2255; Pub. L. 105–244, title IX, §971(a), Oct. 7, 1998, 112 Stat. 1837; Pub. L. 107–204, title VIII, §803, July 30, 2002, 116 Stat. 801; Pub. L. 109–8, title II, §§215, 220, 224(c), title III, §§301, 310, 314(a), title IV, §412, title VII, §714, title XII, §§1209, 1235, title XIV, §1404(a), title XV, §1502(a)(2), Apr. 20, 2005, 119 Stat. 54, 59, 64, 75, 84, 88, 107, 128, 194, 204, 215, 216; Pub. L. 111–327, §2(a)(18), Dec. 22, 2010, 124 Stat. 3559.)

Adjustment of Dollar Amounts

For adjustment of certain dollar amounts specified in this section, that is not reflected in text, see Adjustment of Dollar Amounts note below.

Historical and Revision Notes

legislative statements

Section 523(a)(1) represents a compromise between the position taken in the House bill and the Senate amendment. Section 523(a)(2) likewise represents a compromise between the position taken in the House bill and the Senate amendment with respect to the false financial statement exception to discharge. In order to clarify that a "renewal of credit" includes a "refinancing of credit", explicit reference to a refinancing of credit is made in the preamble to section 523(a)(2). A renewal of credit or refinancing of credit that was obtained by a false financial statement within the terms of section 523(a)(2) is nondischargeable. However, each of the provisions of section 523(a)(2) must be proved. Thus, under section 523(a)(2)(A) a creditor must prove that the debt was obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. Subparagraph (A) is intended to codify current case law e.g., *Neal v. Clark*, 95 U.S. 704 (1887) [24 L. Ed. 586], which interprets "fraud" to mean actual or positive fraud rather than fraud implied in law. Subparagraph (A) is mutually exclusive from subparagraph (B). Subparagraph (B) pertains to the so-called false financial statement. In order for the debt to be nondischargeable, the creditor must prove that the debt was obtained by the use of a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for obtaining money, property, services, or credit reasonably relied; (iv) that the debtor caused to be made or published with intent to deceive. Section 523(a)(2)(B)(iv) is not intended to change from present law since the statement that the debtor causes to be made or published with the intent to deceive automatically includes a statement that the debtor actually makes or publishes with an intent to deceive. Section 523(a)(2)(B) is explained in the House report. Under section 523(a)(2)(B)(i) a discharge is barred only as to that portion of a loan with respect to which a false financial statement is materially false.

In many cases, a creditor is required by state law to refinance existing credit on which there has been no default. If the creditor does not forfeit remedies or otherwise rely to his detriment on a false financial

statement with respect to existing credit, then an extension, renewal, or refinancing of such credit is nondischargeable only to the extent of the new money advanced; on the other hand, if an existing loan is in default or the creditor otherwise reasonably relies to his detriment on a false financial statement with regard to an existing loan, then the entire debt is nondischargeable under section 523(a)(2)(B). This codifies the reasoning expressed by the second circuit in *In re Danns*, 558 F.2d 114 (2d Cir. 1977).

Section 523(a)(3) of the House amendment is derived from the Senate amendment. The provision is intended to overrule *Birkett v. Columbia Bank*, 195 U.S. 345 (1904) [25 S.Ct. 38, 49 L.Ed. 231, 12 Am.Bankr.Rep. 691].

Section 523(a)(4) of the House amendment represents a compromise between the House bill and the Senate amendment.

Section 523(a)(5) is a compromise between the House bill and the Senate amendment. The provision excepts from discharge a debt owed to a spouse, former spouse or child of the debtor, in connection with a separation agreement, divorce decree, or property settlement agreement, for alimony to, maintenance for, or support of such spouse or child but not to the extent that the debt is assigned to another entity. If the debtor has assumed an obligation of the debtor's spouse to a third party in connection with a separation agreement, property settlement agreement, or divorce proceeding, such debt is dischargeable to the extent that payment of the debt by the debtor is not actually in the nature of alimony, maintenance, or support of debtor's spouse, former spouse, or child.

Section 523(a)(6) adopts the position taken in the House bill and rejects the alternative suggested in the Senate amendment. The phrase “willful and malicious injury” covers a willful and malicious conversion.

Section 523(a)(7) of the House amendment adopts the position taken in the Senate amendment and rejects the position taken in the House bill. A penalty relating to a tax cannot be nondischargeable unless the tax itself is nondischargeable.

Section 523(a)(8) represents a compromise between the House bill and the Senate amendment regarding educational loans. This provision is broader than current law which is limited to federally insured loans. Only educational loans owing to a governmental unit or a nonprofit institution of higher education are made nondischargeable under this paragraph.

Section 523(b) is new. The section represents a modification of similar provisions contained in the House bill and the Senate amendment.

Section 523(c) of the House amendment adopts the position taken in the Senate amendment.

Section 523(d) represents a compromise between the position taken in the House bill and the Senate amendment on the issue of attorneys’ fees in false financial statement complaints to determine dischargeability. The provision contained in the House bill permitting the court to award damages is eliminated. The court must grant the debtor judgment or a reasonable attorneys’ fee unless the granting of judgment would be clearly inequitable.

Nondischargeable debts: The House amendment retains the basic categories of nondischargeable tax liabilities contained in both bills, but restricts the time limits on certain nondischargeable taxes. Under the amendment, nondischargeable taxes cover taxes entitled to priority under section 507(a)(6) of title 11 and, in the case of individual debtors under chapters 7, 11, or 13, tax liabilities with respect to which no required return had been filed or as to which a late return had been filed if the return became last due, including extensions, within 2 years before the date of the petition or became due after the petition or as to which the debtor made a fraudulent return, entry or invoice or fraudulently attempted to evade or defeat the tax.

In the case of individuals in liquidation under chapter 7 or in reorganization under chapter 11 of title 11, section 1141(d)(2) incorporates by reference the exceptions to discharge continued in section 523. Different rules concerning the discharge of taxes where a partnership or corporation reorganizes under chapter 11, apply under section 1141.

The House amendment also deletes the reduction rule contained in section 523(e) of the Senate amendment. Under that rule, the amount of an otherwise nondischargeable tax liability would be reduced by the amount which a governmental tax authority could have collected from the debtor's estate if it had filed a timely claim against the estate but which it did not collect because no such claim was filed. This provision is deleted in order not to effectively compel a tax authority to file claim against the estate in “no asset” cases, along with a dischargeability petition. In no-asset cases, therefore, if the tax authority is not potentially penalized by failing to file a claim, the debtor in such cases will have a better opportunity to choose the prepayment forum, bankruptcy court or the Tax Court, in which to litigate his personal liability for a nondischargeable tax.

The House amendment also adopts the Senate amendment provision limiting the nondischargeability of punitive tax penalties, that is, penalties other than those which represent collection of a principal amount of tax liability through the form of a “penalty.” Under the House amendment, tax penalties which are basically

punitive in nature are to be nondischargeable only if the penalty is computed by reference to a related tax liability which is nondischargeable or, if the amount of the penalty is not computed by reference to a tax liability, the transaction or event giving rise to the penalty occurred during the 3-year period ending on the date of the petition.

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This section specifies which of the debtor's debts are not discharged in a bankruptcy case, and certain procedures for effectuating the section. The provision in Bankruptcy Act §17c [section 35(c) of former title 11] granting the bankruptcy courts jurisdiction to determine dischargeability is deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. 1334(b), which is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act §17c. The Rules of Bankruptcy Procedure will specify, as they do today, who may request determinations of dischargeability, subject, of course, to proposed 11 U.S.C. 523(c), and when such a request may be made. Proposed 11 U.S.C. 350, providing for reopening of cases, provides one possible procedure for a determination of dischargeability and related issues after a case is closed.

Subsection (a) lists nine kinds of debts excepted from discharge. Taxes that are excepted from discharge are set forth in paragraph (1). These include claims against the debtor which receive priority in the second, third and sixth categories (§507(a)(3)(B) and (c) and (6)). These categories include taxes for which the tax authority failed to file a claim against the estate or filed its claim late. Whether or not the taxing authority's claim is secured will also not affect the claim's nondischargeability if the tax liability in question is otherwise entitled to priority.

Also included in the nondischargeable debts are taxes for which the debtor had not filed a required return as of the petition date, or for which a return had been filed beyond its last permitted due date (§523(a)(1)(B)). For this purpose, the date of the tax year to which the return relates is immaterial. The late return rule applies, however, only to the late returns filed within three years before the petition was filed, and to late returns filed after the petition in title 11 was filed. For this purpose, the taxable year in question need not be one or more of the three years immediately preceding the filing of the petition.

Tax claims with respect to which the debtor filed a fraudulent return, entry or invoice, or fraudulently attempted to evade or defeat any tax (§523(a)(1)(C)) are included. The date of the taxable year with regard to which the fraud occurred is immaterial.

Also included are tax payments due under an agreement for deferred payment of taxes, which a debtor had entered into with the Internal Revenue Service (or State or local tax authority) before the filing of the petition and which relate to a prepetition tax liability (§523(a)(1)(D)) are also nondischargeable. This classification applies only to tax claims which would have received priority under section 507(a) if the taxpayer had filed a title 11 petition on the date on which the deferred payment agreement was entered into. This rule also applies only to installment payments which become due during and after the commencement of the title 11 case. Payments which had become due within one year before the filing of the petition receive sixth priority, and will be nondischargeable under the general rule of section 523(a)(1)(A).

The above categories of nondischargeability apply to customs duties as well as to taxes.

Paragraph (2) provides that as under Bankruptcy Act §17a(2) [section 35(a)(2) of former title 11], a debt for obtaining money, property, services, or a refinancing extension or renewal of credit by false pretenses, a false representation, or actual fraud, or by use of a statement in writing respecting the debtor's financial condition that is materially false, on which the creditor reasonably relied, and which the debtor made or published with intent to deceive, is excepted from discharge. This provision is modified only slightly from current section 17a(2). First, “actual fraud” is added as a ground for exception from discharge. Second, the creditor must not only have relied on a false statement in writing, but the reliance must have been reasonable. This codifies case law construing present section 17a(2). Third, the phrase “in any manner whatsoever” that appears in current law after “made or published” is deleted as unnecessary, the word “published” is used in the same sense that it is used in defamation cases.

Unscheduled debts are excepted from discharge under paragraph (3). The provision, derived from section 17a(3) [section 35(a)(3) of former title 11], follows current law, but clarifies some uncertainties generated by the case law construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case.

Paragraph (4) excepts debts for fraud incurred by the debtor while acting in a fiduciary capacity or for defalcation, embezzlement, or misappropriation.

Paragraph (5) provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902), held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

Paragraph (6) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (42 U.S.C. 656(b)) by section 326 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law. Thus, cases such as *In re Waller*, 494 F.2d 447 (6th Cir. 1974), are overruled, and the result in cases such as *Fife v. Fife*, 1 Utah 2d 281, 265 P.2d 642 (1952) is followed. The proviso, however, makes nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations as to whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.

Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also nondischargeable (sec. 523(a)(7)). These latter liabilities cover those which, but are penal in nature, as distinct from so-called "pecuniary loss" penalties which, in the case of taxes, involve basically the collection of a tax under the label of a "penalty." This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision reflects the existing position of the Internal Revenue Service as to tax penalties imposed by the Internal Revenue Code (Rev.Rul. 68–574, 1968–2 C.B. 595).

Paragraph (8) follows generally current law and excerpts from discharge student loans until such loans have been due and owing for five years. Such loans include direct student loans as well as insured and guaranteed loans. This provision is intended to be self-executing and the lender or institution is not required to file a complaint to determine the nondischargeability of any student loan.

Paragraph (9) excepts from discharge debts that the debtor owed before a previous bankruptcy case concerning the debtor in which the debtor was denied a discharge other than on the basis of the six-year bar.

Subsection (b) of this section permits discharge in a bankruptcy case of an unscheduled debt from a prior case. This provision is carried over from Bankruptcy Act §17b [section 35(b) of former title 11]. The result dictated by the subsection would probably not be different if the subsection were not included. It is included nevertheless for clarity.

Subsection (c) requires a creditor who is owed a debt that may be excepted from discharge under paragraph (2), (4), or (5), (false statements, defalcation or larceny misappropriation, or willful and malicious injury) to initiate proceedings in the bankruptcy court for an exception to discharge. If the creditor does not act, the debt is discharged. This provision does not change current law.

Subsection (d) is new. It provides protection to a consumer debtor that dealt honestly with a creditor who sought to have a debt excepted from discharge on the ground of falsity in the incurring of the debt. The debtor may be awarded costs and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the court finds that the proceeding was frivolous or not brought by its creditor in good faith.

The purpose of the provision is to discourage creditors from initiating proceedings to obtaining a false financial statement exception to discharge in the hope of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start and are contrary to the spirit of the bankruptcy laws.

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Subsection (a) lists eight kinds of debts excepted from discharge. Taxes that are entitled to priority are excepted from discharge under paragraph (1). In addition, taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat, or with respect to which a return (if required) was not filed or was not filed after the due date and after one year before the bankruptcy case are excepted from discharge. If the taxing authority's claim has been disallowed, then it would be barred by the more modern rules of collateral estoppel from reasserting that claim against the debtor after the case was closed. See Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures, 88 Harv.L.Rev. 1360, 1388 (1975).

As under Bankruptcy Act §17a(2) [section 35(a)(2) of former title 11], debt for obtaining money, property, services, or an extension or renewal of credit by false pretenses, a false representation, or actual fraud, or by use of a statement in writing respecting the debtor's financial condition that is materially false, on which the creditor reasonably relied, and that the debtor made or published with intent to deceive, is excepted from discharge. This provision is modified only slightly from current section 17a(2). First, "actual fraud" is added as a grounds for exception from discharge. Second, the creditor must not only have relied on a false statement in writing, the reliance must have been reasonable. This codifies case law construing this provision. Third, the phrase "in any manner whatsoever" that appears in current law after "made or published" is deleted as unnecessary. The word "published" is used in the same sense that it is used in slander actions.

Unscheduled debts are excepted from discharge under paragraph (3). The provision, derived from section 17a(3) [section 35(a)(3) of former title 11], follows current law, but clarifies some uncertainties generated by the case law construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case.

Paragraph (4) excepts debts for embezzlement or larceny. The deletion of willful and malicious conversion from §17a(2) of the Bankruptcy Act [section 35(a)(2) of former title 11] is not intended to effect a substantive change. The intent is to include in the category of non-dischargeable debts a conversion under which the debtor willfully and maliciously intends to borrow property for a short period of time with no intent to inflict injury but on which injury is in fact inflicted.

Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (42 U.S.C. 656(b)) by section 327 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. See Hearings, pt. 2, at 942. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy laws, not State law. Thus, cases such as *In re Waller*, 494 F.2d 447 (6th Cir. 1974); Hearings, pt. 3, at 1308–10, are overruled, and the result in cases such as *Fife v. Fife*, 1 Utah 2d 281, 265 P.2d 642 (1952) is followed. This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement. See Hearings, pt. 3, at 1287–1290.

Paragraph (6) excepts debts for willful and malicious injury by the debtor to another person or to the property of another person. Under this paragraph, "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell*, 193 U.S. 473 (1902) [24 S.Ct. 505, 48 L.Ed. 754, 11 Am.Bankr.Rep. 568], held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

Paragraph (7) excepts from discharge a debt for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, that is not compensation for actual pecuniary loss.

Paragraph (8) [enacted as (9)] excepts from discharge debts that the debtor owed before a previous bankruptcy case concerning the debtor in which the debtor was denied a discharge other than on the basis of the six-year bar.

Subsection (d) is new. It provides protection to a consumer debtor that dealt honestly with a creditor who sought to have a debt excepted from discharge on grounds of falsity in the incurring of the debt. The debtor is entitled to costs of and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the creditor initiated the proceeding and the debt was determined to be dischargeable. The court is permitted to award any actual pecuniary loss that the debtor may have suffered as a result of the proceeding (such as loss of a day's pay). The purpose of the provision is to discourage creditors from initiating false financial statement exception to discharge actions in the hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start.

References in Text

The Internal Revenue Code of 1986, referred to in subsec. (a), is classified generally to Title 26, Internal Revenue Code.

Section 103 of the Truth in Lending Act, referred to in subsec. (a)(2)(C)(ii)(I), is classified to section 1602 of Title 15, Commerce and Trade.

The Bankruptcy Act, referred to in subsecs. (a)(10) and (b), is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11. Sections 14c and 17a of the Bankruptcy Act were

classified to sections 32(c) and 35(a) of former Title 11.

Section 408(b)(1) of the Employee Retirement Income Security Act of 1974, referred to in subsec. (a)(18)(A), is classified to section 1108(b)(1) of Title 29, Labor.

Section 3(a)(47) of the Securities Exchange Act of 1934, referred to in subsec. (a)(19)(A)(i), is classified to section 78c(a)(47) of Title 15, Commerce and Trade.

Section 439A of the Higher Education Act of 1965, referred to in subsec. (b), was classified to section 1087–3 of Title 20, Education, and was repealed by Pub. L. 95–598, title III, §317, Nov. 6, 1978, 92 Stat. 2678.

Section 733(g) of the Public Health Service Act, referred to in subsec. (b), was repealed by Pub. L. 95–598, title III, §327, Nov. 6, 1978, 92 Stat. 2679. A subsec. (g), containing similar provisions, was added to section 733 by Pub. L. 97–35, title XXVII, §2730, Aug. 13, 1981, 95 Stat. 919. Section 733 was subsequently omitted in the general revision of subchapter V of chapter 6A of Title 42, The Public Health and Welfare, by Pub. L. 102–408, title I, §102, Oct. 13, 1992, 106 Stat. 1994. See section 292f(g) of Title 42.

AMENDMENTS

2010—Subsec. (a)(2)(C)(ii)(II). Pub. L. 111–327, §2(a)(18)(A), substituted semicolon for period at end.

Subsec. (a)(3). Pub. L. 111–327, §2(a)(18)(B), substituted "521(a)(1)" for "521(1)" in introductory provisions.

2005—Pub. L. 109–8, §1209(1), transferred par. (15) and inserted it after subsec. (a)(14A). See 1994 Amendments note below.

Pub. L. 109–8, §215(3), in par. (15), inserted "to a spouse, former spouse, or child of the debtor and" before "not of the kind" and "or" after "court of record," and substituted a semicolon for "unless—

"(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

"(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;".

Subsec. (a). Pub. L. 109–8, §714(2), inserted at end "For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law."

Subsec. (a)(1)(A). Pub. L. 109–8, §1502(a)(2), substituted "507(a)(3)" for "507(a)(2)".

Subsec. (a)(1)(B). Pub. L. 109–8, §714(1)(A), inserted "or equivalent report or notice," after "a return," in introductory provisions.

Subsec. (a)(1)(B)(i). Pub. L. 109–8, §714(1)(B), inserted "or given" after "filed".

Subsec. (a)(1)(B)(ii). Pub. L. 109–8, §714(1)(C), inserted "or given" after "filed" and ", report, or notice" after "return".

Subsec. (a)(2)(C). Pub. L. 109–8, §310, amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for 'luxury goods or services' incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; 'luxury goods or services' do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;".

Subsec. (a)(5). Pub. L. 109–8, §215(1)(A), added par. (5) and struck out former par. (5) which read as follows: "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

"(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

"(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;"

Subsec. (a)(8). Pub. L. 109–8, §220, added par. (8) and struck out former par. (8) which read as follows: "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;".

Subsec. (a)(9). Pub. L. 109–8, §1209(2), substituted "motor vehicle, vessel, or aircraft" for "motor vehicle".

Subsec. (a)(14A). Pub. L. 109–8, §314(a), added par. (14A).

Subsec. (a)(14B). Pub. L. 109–8, §1235, added par. (14B).

Subsec. (a)(16). Pub. L. 109–8, §412, struck out "dwelling" after "debtor's interest in a" and "housing" after "share of a cooperative" and substituted "ownership," for "ownership or" and "or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot," for "but only if such fee or assessment is payable for a period during which—

"(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

"(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,".

Subsec. (a)(17). Pub. L. 109–8, §301, substituted "on a prisoner by any court" for "by a court" and "subsection (b) or (f)(2) of section 1915" for "section 1915(b) or (f)" and inserted "(or a similar non-Federal law)" after "title 28" in two places.

Subsec. (a)(18). Pub. L. 109–8, §224(c), added par. (18).

Pub. L. 109–8, §215(1)(B), struck out par. (18) which read as follows: "owed under State law to a State or municipality that is—

"(A) in the nature of support, and

"(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.); or".

Subsec. (a)(19)(B). Pub. L. 109–8, §1404(a), inserted ", before, on, or after the date on which the petition was filed," after "results" in introductory provisions.

Subsec. (c)(1). Pub. L. 109–8, §215(2), substituted "or (6)" for "(6), or (15)" in two places.

Subsec. (e). Pub. L. 109–8, §1209(3), substituted "an insured" for "a insured".

2002—Subsec. (a)(19). Pub. L. 107–204 added par. (19).

1998—Subsec. (a)(8). Pub. L. 105–244 substituted "stipend, unless" for "stipend, unless—" and struck out "(B)" before "excepting such debt" and subpar. (A) which read as follows: "such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or".

1996—Subsec. (a)(5)(A). Pub. L. 104–193, §374(a)(4), substituted "section 408(a)(3)" for "section 402(a)(26)".

Subsec. (a)(17). Pub. L. 104–134 added par. (17).

Subsec. (a)(18). Pub. L. 104–193, §374(a)(1)–(3), added par. (18).

1994—Par. (15). Pub. L. 103–394, §304(e)[(1)], amended this section by adding par. (15) at the end. See 2005 Amendment note above.

Subsec. (a). Pub. L. 103–394, §501(d)(13)(A)(i), substituted "1141," for "1141,," in introductory provisions.

Subsec. (a)(1)(A). Pub. L. 103–394, §304(h)(3), substituted "507(a)(8)" for "507(a)(7)".

Subsec. (a)(2)(C). Pub. L. 103–394, §§306, 501(d)(13)(A)(ii), substituted "$1,000 for" for "$500 for", "60" for "forty" after "incurred by an individual debtor on or within", and "60" for "twenty" after "obtained by an individual debtor on or within", and struck out "(15 U.S.C. 1601 et seq.)" after "Protection Act".

Subsec. (a)(11). Pub. L. 103–322, §320934(1), struck out "or" after semicolon at end.

Subsec. (a)(12). Pub. L. 103–322, §320934(2), which directed the substitution of "; or" for a period at end of par. (12), could not be executed because a period did not appear at end.

Subsec. (a)(13). Pub. L. 103–394, §221(1), substituted semicolon for period at end.

Pub. L. 103–322, §320934(3), added par. (13).

Subsec. (a)(14). Pub. L. 103–394, §221(2), added par. (14).

Subsec. (a)(16). Pub. L. 103–394, §309, added par. (16).

Subsec. (b). Pub. L. 103–394, §501(d)(13)(B), struck out "(20 U.S.C. 1087–3)" after "Act of 1965" and "(42 U.S.C. 294f)" after "Service Act".

Subsec. (c)(1). Pub. L. 103–394, §304(e)(2), substituted "(6), or (15)" for "or (6)" in two places.

Subsec. (e). Pub. L. 103–394, §501(d)(13)(C), substituted "insured depository institution" for "depository institution or insured credit union".

1990—Subsec. (a)(8). Pub. L. 101–647, §3621, substituted "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless" for "for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless" in introductory provisions and amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or".

Subsec. (a)(9). Pub. L. 101–581 and Pub. L. 101–647, §3102(a), identically amended par. (9) generally. Prior to amendment, par. (9) read as follows: "to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred; or".

Subsec. (a)(11), (12). Pub. L. 101–647, §2522(a)(1), added pars. (11) and (12).

Subsec. (c). Pub. L. 101–647, §2522(a)(3), designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 101–647, §2522(a)(2), added subsec. (e).

1986—Subsec. (a). Pub. L. 99–554, §257(n), inserted reference to sections 1228(a) and 1228(b) of this title.

Subsec. (a)(1)(A). Pub. L. 99–554, §283(j)(1)(A), substituted "507(a)(7)" for "507(a)(6)".

Subsec. (a)(5). Pub. L. 99–554, §281, struck out the comma after "decree" and inserted ", determination made in accordance with State or territorial law by a governmental unit," after "record".

Subsec. (a)(9), (10). Pub. L. 99–554, §283(j)(1)(B), redesignated par. (9) relating to debts incurred by persons driving while intoxicated, added by Pub. L. 98–353, as (10).

Subsec. (b). Pub. L. 99–554, §283(j)(2), substituted "Service" for "Services".

1984—Subsec. (a)(2). Pub. L. 98–353, §454(a)(1), in provisions preceding subpar. (A), struck out "obtaining" after "for", and substituted "refinancing of credit, to the extent obtained" for "refinance of credit,".

Subsec. (a)(2)(A). Pub. L. 98–353, §307(a)(1), struck out "or" at end.

Subsec. (a)(2)(B). Pub. L. 98–353, §307(a)(2), inserted "or" at end.

Subsec. (a)(2)(B)(iii). Pub. L. 98–353, §454(a)(1)(A), struck out "obtaining" before "such".

Subsec. (a)(2)(C). Pub. L. 98–353, §307(a)(3), added subpar. (C).

Subsec. (a)(5). Pub. L. 98–353, §454(b)(1), inserted "or other order of a court of record" after "divorce decree," in provisions preceding subpar. (A).

Subsec. (a)(5)(A). Pub. L. 98–353, §454(b)(2), inserted ", or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State".

Subsec. (a)(8). Pub. L. 98–353, §§371(1), 454(a)(2), struck out "of higher education" after "a nonprofit institution of" and struck out "or" at end.

Subsec. (a)(9). Pub. L. 98–353, §371(2), added the par. (9) relating to debts incurred by persons driving while intoxicated.

Subsec. (c). Pub. L. 98–353, §454(c), inserted "of a kind" after "debt".

Subsec. (d). Pub. L. 98–353, §307(b), substituted "the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust" for "the court shall grant judgment against such creditor and in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding to determine dischargeability, unless such granting of judgment would be clearly inequitable".

1981—Subsec. (a)(5)(A). Pub. L. 97–35 substituted "law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act);" for "law, or otherwise;".

1979—Subsec. (a)(8). Pub. L. 96–56 substituted "for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education" for "to a governmental unit, or a nonprofit institution of higher education, for an educational loan" in the provisions preceding subpar. (A) and inserted "(exclusive of any applicable suspension of the repayment period)" after "before five years" in subpar. (A).

Effective Date of 2005 Amendment

Pub. L. 109–8, title XIV, §1404(b), Apr. 20, 2005, 119 Stat. 215, provided that: "The amendment made by subsection (a) [amending this section] is effective beginning July 30, 2002."

Amendment by sections 215, 220, 224(c), 301, 310, 314(a), 412, 714, 1209, 1235, and 1502(a)(2) of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date of 1998 Amendment

Pub. L. 105–244, title IX, §971(b), Oct. 7, 1998, 112 Stat. 1837, provided that: "The amendment made by subsection (a) [amending this section] shall apply only with respect to cases commenced under title 11, United States Code, after the date of enactment of this Act [Oct. 7, 1998]."

Effective Date of 1996 Amendment

Section 374(c) of Pub. L. 104–193 provided that: "The amendments made by this section [amending this section and section 656 of Title 42, The Public Health and Welfare] shall apply only with respect to cases commenced under title 11 of the United States Code after the date of the enactment of this Act [Aug. 22, 1996]."

For provisions relating to effective date of title III of Pub. L. 104–193, see section 395(a)–(c) of Pub. L. 104–193, set out as a note under section 654 of Title 42, The Public Health and Welfare.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

Effective Date of 1990 Amendments

Section 3104 of title XXXI of Pub. L. 101–647 provided that:

"(a) Effective Date.—This title and the amendments made by this title [amending this section and section 1328 of this title and enacting provisions set out as a note under section 101 of this title] shall take effect on the date of the enactment of this Act [Nov. 29, 1990].

"(b) Application of Amendments.—The amendments made by this title [amending this section and section 1328 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act."

Amendment by section 3621 of Pub. L. 101–647 effective 180 days after Nov. 29, 1990, see section 3631 of Pub. L. 101–647, set out as an Effective Date note under section 3001 of Title 28, Judiciary and Judicial Procedure.

Section 4 of Pub. L. 101–581 provided that:

"(a) Effective Date.—This Act and the amendments made by this Act [amending this section and section 1328 of this title and enacting provisions set out as a note under section 101 of this title] shall take effect on the date of the enactment of this Act [Nov. 15, 1990].

"(b) Application of Amendments.—The amendments made by this Act [amending this section and section 1328 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act."

Effective Date of 1986 Amendment

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by sections 281 and 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

Effective Date of 1981 Amendment

Amendment by Pub. L. 97–35 effective Aug. 13, 1981, see section 2334(c) of Pub. L. 97–35, set out as a note under section 656 of Title 42, The Public Health and Welfare.

ADJUSTMENT OF DOLLAR AMOUNTS

The dollar amounts specified in this section were adjusted by notices of the Judicial Conference of the United States pursuant to section 104 of this title as follows:

By notice dated Feb. 19, 2010, 75 F.R. 8747, effective Apr. 1, 2010, in subsec. (a)(2)(C)(i)(I), dollar amount "550" was adjusted to "600" and, in subsec. (a)(2)(C)(i)(II), dollar amount "825" was adjusted to "875". See notice of the Judicial Conference of the United States set out as a note under section 104 of this title.

By notice dated Feb. 7, 2007, 72 F.R. 7082, effective Apr. 1, 2007, in subsec. (a)(2)(C)(i)(I), dollar amount "500" was adjusted to "550" and, in subsec. (a)(2)(C)(i)(II), dollar amount "750" was adjusted to "825".

By notice dated Feb. 18, 2004, 69 F.R. 8482, effective Apr. 1, 2004, in subsec. (a)(2)(C), dollar amount "1,150" was adjusted to "1,225" each time it appeared.

By notice dated Feb. 13, 2001, 66 F.R. 10910, effective Apr. 1, 2001, in subsec. (a)(2)(C), dollar amount "1,075" was adjusted to "1,150" each time it appeared.

By notice dated Feb. 3, 1998, 63 F.R. 7179, effective Apr. 1, 1998, in subsec. (a)(2)(C), dollar amount "1,000" was adjusted to "1,075" each time it appeared.

[1] *See References in Text note below.*

11 U.S.C.
United States Code, 1997 Edition
Title 11 - BANKRUPTCY
CHAPTER 5 - CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II - DEBTOR'S DUTIES AND BENEFITS
Sec. 524 - Effect of discharge
From the U.S. Government Publishing Office, www.gpo.gov

§524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) [1] of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement

not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor—

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of—

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable

with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term “related party” means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—
(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;
(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and
(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.
(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.
(h) Application to Existing Injunctions.—For purposes of subsection (g)—
(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—
(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);
(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and
(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—
(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and
(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2592; Pub. L. 98–353, title III, §§308, 455, July 10, 1984, 98 Stat. 354, 376; Pub. L. 99–554, title II, §§257(*o*), 282, 283(k), Oct. 27, 1986, 100 Stat. 3115–3117; Pub. L. 103–394, title I, §§103, 111(a), title V, §501(d)(14), Oct. 22, 1994, 108 Stat. 4108, 4113, 4145.)

Historical and Revision Notes

I74legislative statements
Section 524(a) of the House amendment represents a compromise between the House bill and the Senate amendment. Section 524(b) of the House amendment is new, and represents standards clarifying the operation of section 524(a)(3) with respect to community property.
Sections 524(c) and (d) represent a compromise between the House bill and Senate amendment on the issue of reaffirmation of a debt discharged in bankruptcy. Every reaffirmation to be enforceable must be approved

by the court, and any debtor may rescind a reaffirmation for 30 days from the time the reaffirmation becomes enforceable. If the debtor is an individual the court must advise the debtor of various effects of reaffirmation at a hearing. In addition, to any extent the debt is a consumer debt that is not secured by real property of the debtor reaffirmation is permitted only if the court approves the reaffirmation agreement, before granting a discharge under section 727, 1141, or 1328, as not imposing a hardship on the debtor or a dependent of the debtor and in the best interest of the debtor; alternatively, the court may approve an agreement entered into in good faith that is in settlement of litigation of a complaint to determine dischargeability or that is entered into in connection with redemption under section 722. The hearing on discharge under section 524(d) will be held whether or not the debtor desires to reaffirm any debts.

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Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, including telephone calls, letters, and personal contacts, to collect, recover, or offset any discharged debt as a personal liability of the debtor, or from property of the debtor, whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act §14f [section 32(f) of former title 11] to cover any act to collect, such as dunning by telephone or letter, or indirectly through friends, relatives, or employers, harassment, threats of repossession, and the like. The change is consonant with the new policy forbidding binding reaffirmation agreements under proposed 11 U.S.C. 524(b), and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that. The language "whether or not discharge of such debt is waived" is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section. It is directed at waiver of discharge of a particular debt, not waiver of discharge in toto as permitted under section 727(a)(9).

Subsection (a) also codifies the split discharge for debtors in community property states. If community property was in the estate and community claims were discharged, the discharge is effective against community creditors of the nondebtor spouse as well as of the debtor spouse.

Subsection (b) gives further effect to the discharge. It prohibits reaffirmation agreements after the commencement of the case with respect to any dischargeable debt. The prohibition extends to agreements the consideration for which in whole or in part is based on a dischargeable debt, and it applies whether or not discharge of the debt involved in the agreement has been waived. Thus, the prohibition on reaffirmation agreements extends to debts that are based on discharged debts. Thus, "second generation" debts, which included all or a part of a discharged debt could not be included in any new agreement for new money. This subsection will not have any effect on reaffirmations of debts discharged under the Bankruptcy Act [former title 11]. It will only apply to discharges granted if commenced under the new title 11 bankruptcy code.

Subsection (c) grants an exception to the anti-reaffirmation provision. It permits reaffirmation in connection with the settlement of a proceeding to determine the dischargeability of the debt being reaffirmed, or in connection with a redemption agreement permitted under section 722. In either case, the reaffirmation agreement must be entered into in good faith and must be approved by the court.

Subsection (d) provides the discharge of the debtor does not affect co-debtors or guarantors.

REFERENCES IN TEXT

The Bankruptcy Act, referred to in subsec. (b)(1), is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11.

The date of the enactment of this subsection, referred to in subsec. (g)(7), is the date of enactment of Pub. L. 103–394, which enacted subsec. (g) and was approved Oct. 22, 1994.

The date of the enactment of this Act, referred to in subsec. (h), probably means the date of enactment of Pub. L. 103–394, which enacted subsec. (h) and was approved Oct. 22, 1994.

AMENDMENTS

1994—Subsec. (a)(3). Pub. L. 103–394, §501(d)(14)(A), substituted "1328(a)(1)" for "1328(c)(1)". See 1986 Amendment note below.

Subsec. (c)(2). Pub. L. 103–394, §103(a)(1), designated existing provisions as subpar. (A), inserted "and" at end, and added subpar. (B).

Subsec. (c)(3). Pub. L. 103–394, §103(a)(2), struck out "such agreement" after "which states that" in introductory provisions, struck out "and" at end of subpar. (A), inserted "such agreement" in subpars. (A) and (B), and added subpar. (C).

Subsec. (c)(4). Pub. L. 103–394, §501(d)(14)(B), substituted "rescission" for "recission".

Subsec. (d). Pub. L. 103–394, §103(b), inserted "and was not represented by an attorney during the course of negotiating such agreement" after "this section" in introductory provisions.

Subsec. (d)(1)(B)(ii). Pub. L. 103–394, §501(d)(14)(C), inserted "and" at end.

Subsecs. (g), (h). Pub. L. 103–394, §111(a), added subsecs. (g) and (h).

1986—Subsec. (a)(1). Pub. L. 99–554, §257(*o*)(1), inserted reference to section 1228 of this title.

Subsec. (a)(3). Pub. L. 99–554, §257(*o*)(2), which directed the substitution of ", 1228(a)(1), or 1328(a)(1)" for "or 1328(a)(1)" was executed by making the substitution for "or 1328(c)(1)" to reflect the probable intent of Congress. See 1994 Amendment note above.

Subsec. (c)(1). Pub. L. 99–554, §257(*o*)(1), inserted reference to section 1228 of this title.

Subsec. (d). Pub. L. 99–554, §257(*o*)(1), inserted reference to section 1228 of this title.

Pub. L. 99–554, §282, substituted "shall" for "may" before "hold" in first sentence, inserted "any" after "At" in second sentence, and inserted "the court shall hold a hearing at which the debtor shall appear in person and" after "then" in third sentence.

Subsec. (d)(2). Pub. L. 99–554, §283(k), substituted "section" for "subsection" after "subsection (c)(6) of this".

1984—Subsec. (a)(2). Pub. L. 98–353, §§308(a), 455, struck out "or from property of the debtor," before "whether or not discharge", and substituted "an act" for "any act".

Subsec. (a)(3). Pub. L. 98–353, §455, substituted "an act" for "any act".

Subsec. (c)(2). Pub. L. 98–353, §308(b)(1), (3), added par. (2). Former par. (2), which related to situations where the debtor had not rescinded the agreement within 30 days after the agreement became enforceable, was struck out.

Subsec. (c)(3), (4). Pub. L. 98–352, §308(b)(3), added pars. (3) and (4). Former pars. (3) and (4) redesignated (5) and (6), respectively.

Subsec. (c)(5). Pub. L. 98–353, §308(b)(2), redesignated former par. (3) as (5).

Subsec. (c)(6). Pub. L. 98–353, §308(b)(2), (4), redesignated former par. (4) as (6) and generally amended par. (6), as so redesignated, thereby striking out provisions relating to court approval of such agreements as are entered into in good faith and are in settlement of litigation under section 523 of this title or provide for redemption under section 722 of this title.

Subsec. (d)(2). Pub. L. 98–353, §308(c), substituted "subsection (c)(6)" for "subsection (c)(4)".

Subsec. (f). Pub. L. 98–353, §308(d), added subsec. (f).

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and, except with respect to amendment by section 111(a) of Pub. L. 103–394, amendment by Pub. L. 103–394 not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

Effective Date of 1986 Amendment

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by sections 282 and 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

Construction

Section 111(b) of Pub. L. 103–394 provided that: "Nothing in subsection (a), or in the amendments made by subsection (a) [amending this section], shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."

Section Referred to in Other Sections

This section is referred to in sections 106, 108, 341, 521, 901 of this title.

[1] *See 1986 and 1994 Amendment notes below.*

11 U.S.C.
United States Code, 2011 Edition
Title 11 - BANKRUPTCY
CHAPTER 5 - CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER III - THE ESTATE
Sec. 541 - Property of the estate
From the U.S. Government Publishing Office, www.gpo.gov

§541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law —

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2)

of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2594; Pub. L. 98–353, title III, §§363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub. L. 101–508, title III, §3007(a)(2), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 102–486, title XXX, §3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub. L. 103–394, title II, §§208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129; Pub. L. 109–8, title II, §225(a), title III, §323, title XII, §§1212, 1221(c), 1230, Apr. 20, 2005, 119 Stat. 65, 97, 194, 196, 201; Pub. L. 111–327, §2(a)(22), Dec. 22, 2010, 124 Stat. 3560.)

Adjustment of Dollar Amounts

For adjustment of certain dollar amounts specified in this section, that is not reflected in text, see Adjustment of Dollar Amounts note below.

Historical and Revision Notes

LEGISLATIVE STATEMENTS

Section 541(a)(7) is new. The provision clarifies that any interest in property that the estate acquires after the commencement of the case is property of the estate; for example, if the estate enters into a contract, after the commencement of the case, such a contract would be property of the estate. The addition of this provision by the House amendment merely clarifies that section 541(a) is an all-embracing definition which includes charges on property, such as liens held by the debtor on property of a third party, or beneficial rights and interests that the debtor may have in property of another. However, only the debtor's interest in such property becomes property of the estate. If the debtor holds bare legal title or holds property in trust for another, only those rights which the debtor would have otherwise had emanating from such interest pass to the estate under section 541. Neither this section nor section 545 will affect various statutory provisions that give a creditor a lien that is valid both inside and outside bankruptcy against a bona fide purchaser of property from the debtor, or that creates a trust fund for the benefit of creditors meeting similar criteria. See Packers and Stockyards Act §206, 7 U.S.C. 196 (1976).

Section 541(c)(2) follows the position taken in the House bill and rejects the position taken in the Senate amendment with respect to income limitations on a spend-thrift trust.

Section 541(d) of the House amendment is derived from section 541(e) of the Senate amendment and reiterates the general principle that where the debtor holds bare legal title without any equitable interest, that the estate acquires bare legal title without any equitable interest in the property. The purpose of section 541(d) as applied to the secondary mortgage market is identical to the purpose of section 541(e) of the Senate amendment and section 541(d) will accomplish the same result as would have been accomplished by section 541(e). Even if a mortgage seller retains for purposes of servicing legal title to mortgages or interests in mortgages sold in the secondary mortgage market, the trustee would be required by section 541(d) to turn over the mortgages or interests in mortgages to the purchaser of those mortgages.

The seller of mortgages in the secondary mortgage market will often retain the original mortgage notes and related documents and the seller will not endorse the notes to reflect the sale to the purchaser. Similarly, the purchaser will often not record the purchaser's ownership of the mortgages or interests in mortgages under State recording statutes. These facts are irrelevant and the seller's retention of the mortgage documents and the purchaser's decision not to record do not change the trustee's obligation to turn the mortgages or interests in mortgages over to the purchaser. The application of section 541(d) to secondary mortgage market transactions will not be affected by the terms of the servicing agreement between the mortgage servicer and the purchaser of the mortgages. Under section 541(d), the trustee is required to recognize the purchaser's title to the mortgages or interests in mortgages and to turn this property over to the purchaser. It makes no difference

whether the servicer and the purchaser characterize their relationship as one of trust, agency, or independent contractor.

The purpose of section 541(d) as applied to the secondary mortgage market is therefore to make certain that secondary mortgage market sales as they are currently structured are not subject to challenge by bankruptcy trustees and that purchasers of mortgages will be able to obtain the mortgages or interests in mortgages which they have purchased from trustees without the trustees asserting that a sale of mortgages is a loan from the purchaser to the seller.

Thus, as section 541(a)(1) clearly states, the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. To the extent such an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the debtor are not effective against the estate.

Property of the estate: The Senate amendment provided that property of the estate does not include amounts held by the debtor as trustee and any taxes withheld or collected from others before the commencement of the case. The House amendment removes these two provisions. As to property held by the debtor as a trustee, the House amendment provides that property of the estate will include whatever interest the debtor held in the property at the commencement of the case. Thus, where the debtor held only legal title to the property and the beneficial interest in that property belongs to another, such as exists in the case of property held in trust, the property of the estate includes the legal title, but not the beneficial interest in the property.

As to withheld taxes, the House amendment deletes the rule in the Senate bill as unnecessary since property of the estate does not include the beneficial interest in property held by the debtor as a trustee. Under the Internal Revenue Code of 1954 (section 7501) [26 U.S.C. 7501], the amounts of withheld taxes are held to be a special fund in trust for the United States. Where the Internal Revenue Service can demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement of the case, then if a trust is created, those amounts are not property of the estate. Compare *In re Shakesteers Coffee Shops*, 546 F.2d 821 (9th Cir. 1976) with *In re Glynn Wholesale Building Materials, Inc*. (S.D. Ga. 1978) and *In re Progress Tech Colleges, Inc*., 42 Aftr 2d 78–5573 (S.D. Ohio 1977).

Where it is not possible for the Internal Revenue Service to demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement of the case, present law generally includes amounts of withheld taxes as property of the estate. See, e.g., *United States v. Randall*, 401 U.S. 513 (1973) [91 S. Ct. 991, 28 L.Ed.2d 273] and *In re Tamasha Town and Country Club*, 483 F.2d 1377 (9th Cir. 1973). Nonetheless, a serious problem exists where "trust fund taxes" withheld from others are held to be property of the estate where the withheld amounts are commingled with other assets of the debtor. The courts should permit the use of reasonable assumptions under which the Internal Revenue Service, and other tax authorities, can demonstrate that amounts of withheld taxes are still in the possession of the debtor at the commencement of the case. For example, where the debtor had commingled that amount of withheld taxes in his general checking account, it might be reasonable to assume that any remaining amounts in that account on the commencement of the case are the withheld taxes. In addition, Congress may consider future amendments to the Internal Revenue Code [title 26] making clear that amounts of withheld taxes are held by the debtor in a trust relationship and, consequently, that such amounts are not property of the estate.

SENATE REPORT NO. 95–989

This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act §70a(6) [section 110(a)(6) of former title 11]), and all other forms of property currently specified in section 70a of the Bankruptcy Act §70a [section 110(a) of former title 11], as well as property recovered by the trustee under section 542 of proposed title 11, if the property recovered was merely out of the possession of the debtor, yet remained "property of the debtor." The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or lease-hold interest, for example. The result of *Segal v. Rochelle*, 382 U.S. 375 (1966), is followed, and the right to a refund is property of the estate.

Though this paragraph will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case. For example, if the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had. But see proposed 11 U.S.C. 108, which would

permit the trustee a tolling of the statute of limitations if it had not run before the date of the filing of the petition.

Paragraph (1) has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate. The broad jurisdictional grant in proposed 28 U.S.C. 1334 would have the effect of overruling *Lockwood* independently of the change made by this provision.

Paragraph (1) also has the effect of overruling *Lines v. Frederick*, 400 U.S. 18 (1970).

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. This section and proposed 11 U.S.C. 545 also will not affect various statutory provisions that give a creditor of the debtor a lien that is valid outside as well as inside bankruptcy, or that creates a trust fund for the benefit of a creditor of the debtor. See Packers and Stockyards Act §206, 7 U.S.C. 196.

Bankruptcy Act §8 [section 26 of former title 11] has been deleted as unnecessary. Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to property of the state, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.

The estate also includes the interests of the debtor and the debtor's spouse in community property, subject to certain limitations; property that the trustee recovers under the avoiding powers; property that the debtor acquires by bequest, devise, inheritance, a property settlement agreement with the debtor's spouse, or as the beneficiary of a life insurance policy within 180 days after the petition; and proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earning from services performed by an individual debtor after the commencement of the case. Proceeds here is not used in a confining sense, as defined in the Uniform Commercial Code, but is intended to be a broad term to encompass all proceeds of property of the estate. The conversion in form of property of the estate does not change its character as property of the estate.

Subsection (b) excludes from property of the estate any power, such as a power of appointment, that the debtor may exercise solely for the benefit of an entity other than the debtor. This changes present law which excludes powers solely benefiting other persons but not other entities.

Subsection (c) invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate. The provisions invalidated are those that restrict or condition transfer of the debtor's interest, and those that are conditioned on the insolvency or financial condition of the debtor, on the commencement of a bankruptcy case, or on the appointment of a custodian of the debtor's property. Paragraph (2) of subsection (c), however, preserves restrictions on a transfer of a spendthrift trust that the restriction is enforceable nonbankruptcy law to the extent of the income reasonably necessary for the support of a debtor and his dependents.

Subsection (d) [enacted as (e)], derived from section 70c of the Bankruptcy Act [section 110(c) of former title 11], gives the estate the benefit of all defenses available to the debtor as against an entity other than the estate, including such defenses as statutes of limitations, statutes of frauds, usury, and other personal defenses, and makes waiver by the debtor after the commencement of the case ineffective to bind the estate.

Section 541(e) [enacted as (d)] confirms the current status under the Bankruptcy Act [former title 11] of bona fide secondary mortgage market transactions as the purchase and sale of assets. Mortgages or interests in mortgages sold in the secondary market should not be considered as part of the debtor's estate. To permit the efficient servicing of mortgages or interests in mortgages the seller often retains the original mortgage notes and related documents, and the purchaser records under State recording statutes the purchaser's ownership of the mortgages or interests in mortgages purchased. Section 541(e) makes clear that the seller's retention of the mortgage documents and the purchaser's decision not to record do not impair the asset sale character of secondary mortgage market transactions. The committee notes that in secondary mortgage market transactions the parties may characterize their relationship as one of trust, agency, or independent contractor. The

characterization adopted by the parties should not affect the statutes in bankruptcy on bona fide secondary mortgage market purchases and sales.

References in Text

The Higher Education Act of 1965, referred to in subsec. (b)(3), is Pub. L. 89–329, Nov. 8, 1965, 79 Stat. 1219, which is classified generally to chapter 28 (§1001 et seq.) of Title 20, Education, and part C (§2751 et seq.) of subchapter I of chapter 34 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 20 and Tables.

The Internal Revenue Code of 1986, referred to in subsecs. (b)(5) to (7) and (f), is classified generally to Title 26, Internal Revenue Code.

The Employee Retirement Income Security Act of 1974, referred to in subsec. (b)(7)(A)(i)(I), (B)(i)(I), is Pub. L. 93–406, Sept. 2, 1974, 88 Stat. 829, as amended. Title I of the Act is classified generally to subchapter I (§1001 et seq.) of chapter 18 of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 29 and Tables.

Amendments

2010—Subsec. (b)(6)(B). Pub. L. 111–327 substituted "section 529(b)(6)" for "section 529(b)(7)".

2005—Subsec. (b)(4). Pub. L. 109–8, §225(a)(1)(A), struck out "or" at end.

Subsec. (b)(4)(B)(ii). Pub. L. 109–8, §1212, inserted "365 or" before "542".

Subsec. (b)(5), (6). Pub. L. 109–8, §225(a)(1)(C), added pars. (5) and (6). Former par. (5) redesignated (9).

Subsec. (b)(7). Pub. L. 109–8, §323, added par. (7).

Subsec. (b)(8). Pub. L. 109–8, §1230, added par. (8).

Subsec. (b)(9). Pub. L. 109–8, §225(a)(1)(B), redesignated par. (5) as (9).

Subsec. (e). Pub. L. 109–8, §225(a)(2), added subsec. (e).

Subsec. (f). Pub. L. 109–8, §1221(c), added subsec. (f).

1994—Subsec. (b)(4). Pub. L. 103–394, §208(b), designated existing provisions of subpar. (A) as cl. (i) of subpar. (A), redesignated subpar. (B) as cl. (ii) of subpar. (A), substituted "the interest referred to in clause (i)" for "such interest", substituted "; or" for period at end of cl. (ii), and added subpar. (B).

Pub. L. 103–394, §223(2), which directed the amendment of subsec. (b)(4) by striking out period at end and inserting "; or", was executed by inserting "or" after semicolon at end of subsec. (b)(4)(B)(ii), as added by Pub. L. 103–394, §208(b)(3), to reflect the probable intent of Congress.

Subsec. (b)(5). Pub. L. 103–394, §223, added par. (5).

1992—Subsec. (b). Pub. L. 102–486 added par. (4) and closing provisions.

1990—Subsec. (b)(3). Pub. L. 101–508 added par. (3).

1984—Subsec. (a). Pub. L. 98–353, §456(a)(1), (2), struck out "under" after "under" and inserted "and by whomever held" after "located".

Subsec. (a)(3). Pub. L. 98–353, §456(a)(3), inserted "329(b), 363(n),".

Subsec. (a)(5). Pub. L. 98–353, §456(a)(4), substituted "Any" for "An".

Subsec. (a)(6). Pub. L. 98–353, §456(a)(5), substituted "or profits" for "and profits".

Subsec. (b). Pub. L. 98–353, §363(a), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor."

Subsec. (c)(1). Pub. L. 98–353, §456(b)(1), inserted "in an agreement, transfer, instrument, or applicable nonbankruptcy law".

Subsec. (c)(1)(B). Pub. L. 98–353, §456(b)(2), substituted "taking" for "the taking", and inserted "before such commencement" after "custodian".

Subsec. (d). Pub. L. 98–353, §456(c), inserted "(1) or (2)" after "(a)".

Subsec. (e). Pub. L. 98–353, §456(d), struck out subsec. (e) which read as follows: "The estate shall have the benefit of any defense available to the debtor as against an entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate."

Effective Date of 2005 Amendment

Amendment by section 1221(c) of Pub. L. 109–8 applicable to cases pending under this title on Apr. 20, 2005, or filed under this title on or after Apr. 20, 2005, with certain exceptions, see section 1221(d) of Pub. L. 109–8, set out as a note under section 363 of this title.

Amendment by sections 225(a), 323, 1212, and 1230 of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as

otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

Effective Date of 1992 Amendment

Amendment by Pub. L. 102–486 effective Oct. 24, 1992, but not applicable with respect to cases commenced under this title before Oct. 24, 1992, see section 3017(c) of Pub. L. 102–486, set out as a note under section 101 of this title.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

Adjustment of Dollar Amounts

The dollar amounts specified in this section were adjusted by notices of the Judicial Conference of the United States pursuant to section 104 of this title as follows:

By notice dated Feb. 19, 2010, 75 F.R. 8747, effective Apr. 1, 2010, in subsec. (b)(5)(C), (6)(C), dollar amount "5,475" was adjusted to "5,850". See notice of the Judicial Conference of the United States set out as a note under section 104 of this title.

By notice dated Feb. 7, 2007, 72 F.R. 7082, effective Apr. 1, 2007, in subsec. (b)(5)(C), (6)(C), dollar amount "5,000" was adjusted to "5,475".

11 U.S.C.
United States Code, 2015 Edition
Title 11 - BANKRUPTCY
CHAPTER 5 - CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER III - THE ESTATE
Sec. 542 - Turnover of property to the estate
From the U.S. Government Publishing Office, www.gpo.gov

§542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2595; Pub. L. 98–353, title III, §457, July 10, 1984, 98 Stat. 376; Pub. L. 103–394, title V, §501(d)(16), Oct. 22, 1994, 108 Stat. 4146.)

Historical and Revision Notes

Legislative Statements

Section 542(a) of the House amendment modifies similar provisions contained in the House bill and the Senate amendment treating with turnover of property to the estate. The section makes clear that any entity, other than a custodian, is required to deliver property of the estate to the trustee or debtor in possession whenever such property is acquired by the entity during the case, if the trustee or debtor in possession may use, sell, or lease the property under section 363, or if the debtor may exempt the property under section 522, unless the property is of inconsequential value or benefit to the estate. This section is not intended to require an entity to deliver property to the trustee if such entity has obtained an order of the court authorizing the entity to retain possession, custody or control of the property.

The House amendment adopts section 542(c) of the House bill in preference to a similar provision contained in section 542(c) of the Senate amendment. Protection afforded by section 542(c) applies only to the transferor or payor and not to a transferee or payee receiving a transfer or payment, as the case may be. Such transferee or payee is treated under section 549 and section 550 of title 11.

The extent to which the attorney client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis.

SENATE REPORT NO. 95–989

Subsection (a) of this section requires anyone holding property of the estate on the date of the filing of the petition, or property that the trustee may use, sell, or lease under section 363, to deliver it to the trustee. The subsection also requires an accounting. The holder of property of the estate is excused from the turnover requirement of this subsection if the property held is of inconsequential value to the estate. However, this provision must be read in conjunction with the remainder of the subsection, so that if the property is of inconsequential monetary value, yet has a significant use value for the estate, the holder of the property would not be excused from turnover.

Subsection (b) requires an entity that owes money to the debtor as of the date of the petition, or that holds money payable on demand or payable on order, to pay the money to the order of the trustee. An exception is made to the extent that the entity has a valid right of setoff, as recognized by section 553.

Subsection (c) provides an exception to subsections (a) and (b). It protects an entity that has neither actual notice nor actual knowledge of the case and that transfers, in good faith, property that is deliverable or payable to the trustee to someone other than to the estate or on order of the estate. This subsection codifies the result of *Bank of Marin v. England*, 385 U.S. 99 (1966), but does not go so far as to permit bank setoff in violation of the automatic stay, proposed 11 U.S.C. 362(a)(7), even if the bank offsetting the debtor's balance has no knowledge of the case.

Subsection (d) protects life insurance companies that are required by contract to make automatic premium loans from property that might otherwise be property of the estate.

Subsection (e) requires an attorney, accountant, or other professional that holds recorded information relating to the debtor's property or financial affairs, to surrender it to the trustee. This duty is subject to any applicable claim of privilege, such as attorney-client privilege. It is a new provision that deprives accountants and attorneys of the leverage that they have today, under State law lien provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate.

AMENDMENTS

1994—Subsec. (e). Pub. L. 103–394 substituted "to" for "to to" after "financial affairs,".

1984—Subsec. (e). Pub. L. 98–353 inserted "to turn over or" before "disclose".

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

11 U.S.C.
United States Code, 2010 Edition
Title 11 - BANKRUPTCY
CHAPTER 7 - LIQUIDATION
SUBCHAPTER I - OFFICERS AND ADMINISTRATION
Sec. 704 - Duties of trustee
From the U.S. Government Publishing Office, www.gpo.gov

§704. Duties of trustee

(a) The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that—

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

(b)(1) With respect to a debtor who is an individual in a case under this chapter—

(A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and

(B) not later than 7 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.

(2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the

bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor's case should be presumed to be an abuse under section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or

(B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals.

(c)(1) In a case described in subsection (a)(10) to which subsection (a)(10) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (a)(10) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title;

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency; and

(iii) include in the notice provided under clause (i) an explanation of the rights of such holder to payment of such claim under this chapter;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 727, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2605; Pub. L. 98–353, title III, §§311(a), 474, July 10, 1984, 98 Stat. 355, 381; Pub. L. 99–554, title II, §217, Oct. 27, 1986, 100 Stat. 3100; Pub. L. 109–8, title I, §102(c), title II, §219(a), title IV, §446(b), title XI, §1105(a), Apr. 20, 2005, 119 Stat. 32, 55, 118, 192; Pub. L. 111–16, §2(7), May 7, 2009, 123 Stat. 1607; Pub. L. 111–327, §2(a)(24), Dec. 22, 2010, 124 Stat. 3560.)

Historical and Revision Notes

I74legislative statements

Section 704(8) of the Senate amendment is deleted in the House amendment. Trustees should give constructive notice of the commencement of the case in the manner specified under section 549(c) of title 11.

SENATE REPORT NO. 95–989

The essential duties of the trustee are enumerated in this section. Others, or elaborations on these, may be prescribed by the Rules of Bankruptcy Procedure to the extent not inconsistent with those prescribed by this section. The duties are derived from section 47a of the Bankruptcy Act [section 75(a) of former title 11].

The trustee's principal duty is to collect and reduce to money the property of the estate for which he serves, and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. He

must be accountable for all property received, and must investigate the financial affairs of the debtor. If a purpose would be served (such as if there are assets that will be distributed), the trustee is required to examine proofs of claims and object to the allowance of any claim that is improper. If advisable, the trustee must oppose the discharge of the debtor, which is for the benefit of general unsecured creditors whom the trustee represents.

The trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest. If the business of the debtor is authorized to be operated, then the trustee is required to file with governmental units charged with the responsibility for collection or determination of any tax arising out of the operation of the business periodic reports and summaries of the operation, including a statement of receipts and disbursements, and such other information as the court requires. He is required to give constructive notice of the commencement of the case in the manner specified under section 342(b).

References in Text

Section 3 of the Employee Retirement Income Security Act of 1974, referred to in subsec. (a)(11), is classified to section 1002 of Title 29, Labor.

Sections 464 and 466 of the Social Security Act, referred to in subsec. (c)(1)(A)(i), are classified to sections 664 and 666, respectively, of Title 42, The Public Health and Welfare.

Amendments

2010—Subsec. (a)(3). Pub. L. 111–327 substituted “521(a)(2)(B)” for “521(2)(B)”.

2009—Subsec. (b)(1)(B). Pub. L. 111–16 substituted “7 days” for “5 days”.

2005—Pub. L. 109–8, §102(c)(1), designated existing provisions as subsec. (a).

Subsec. (a)(10). Pub. L. 109–8, §219(a)(1), added par. (10).

Subsec. (a)(11). Pub. L. 109–8, §446(b), added par. (11).

Subsec. (a)(12). Pub. L. 109–8, §1105(a), added par. (12).

Subsec. (b). Pub. L. 109–8, §102(c)(2), added subsec. (b).

Subsec. (c). Pub. L. 109–8, §219(a)(2), added subsec. (c).

1986—Par. (8). Pub. L. 99–554, §217(1), inserted “, with the United States trustee,” after “with the court” and “the United States trustee or” after “information as”.

Par. (9). Pub. L. 99–554, §217(2), inserted “with the United States trustee” after “court”.

1984—Par. (1). Pub. L. 98–353, §474, substituted “close such estate” for “close up such estate”.

Pars. (3) to (9). Pub. L. 98–353, §311(a), added par. (3) and redesignated former pars. (3) to (8) as (4) to (9), respectively.

Effective Date of 2009 Amendment

Amendment by Pub. L. 111–16 effective Dec. 1, 2009, see section 7 of Pub. L. 111–16, set out as a note under section 109 of this title.

Effective Date of 2005 Amendment

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date of 1986 Amendment

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

Cases re:
Motions for Relief from Stay, Turnover, 523 actions, and Violations of the Discharge Injunction

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TAGGART *v.* LORENZEN, EXECUTOR OF THE ESTATE OF BROWN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–489. Argued April 24, 2019—Decided June 3, 2019

Petitioner Bradley Taggart formerly owned an interest in an Oregon company. That company and two of its other owners, who are among the respondents here, filed suit in Oregon state court, claiming that Taggart had breached the company's operating agreement. Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code. At the conclusion of that proceeding, the Federal Bankruptcy Court issued a discharge order that released Taggart from liability for most prebankruptcy debts. After the discharge order issued, the Oregon state court entered judgment against Taggart in the prebankruptcy suit and awarded attorney's fees to respondents. Taggart returned to the Federal Bankruptcy Court, seeking civil contempt sanctions against respondents for collecting attorney's fees in violation of the discharge order. The Bankruptcy Court ultimately held respondents in civil contempt. The Bankruptcy Appellate Panel vacated the sanctions, and the Ninth Circuit affirmed the panel's decision. Applying a subjective standard, the Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief if unreasonable." 888 F. 3d 438, 444.

Held: A court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. Pp. 4–11.

(a) This conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___. Here, the bankruptcy statutes specifying that a discharge order "operates as an injunction," 11 U. S. C. §524(a)(2), and that a court

Syllabus

may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions. In cases outside the bankruptcy context, this Court has said that civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618. This standard is generally an objective one. A party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. Subjective intent, however, is not always irrelevant. Civil contempt sanctions may be warranted when a party acts in bad faith, and a party's good faith may help to determine an appropriate sanction. These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. Under the fair ground of doubt standard, civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope. Pp. 5–7.

(b) The standard applied by the Ninth Circuit is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. Taggart, meanwhile, argues for a standard that would operate much like a strict-liability standard. But his proposal often may lead creditors to seek advance determinations as to whether debts have been discharged, creating the risk of additional federal litigation, additional costs, and additional delays. His proposal, which follows the standard some courts have used to remedy violations of automatic stays, also ignores key differences in text and purpose between the statutes governing automatic stays and discharge orders. Pp. 7–11.

888 F. 3d 438, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 18–489

BRADLEY WESTON TAGGART, PETITIONER *v.* SHELLEY A. LORENZEN, EXECUTOR OF THE ESTATE OF STUART BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 3, 2019]

JUSTICE BREYER delivered the opinion of the Court.

At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts. This order, known as a discharge order, bars creditors from attempting to collect any debt covered by the order. See 11 U. S. C. §524(a)(2). The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection.

The Bankruptcy Court, in holding the creditors here in civil contempt, applied a standard that it described as akin to "strict liability" based on the standard's expansive scope. *In re Taggart*, 522 B. R. 627, 632 (Bkrtcy. Ct. Ore. 2014). It held that civil contempt sanctions are permissible, irrespective of the creditor's beliefs, so long as the creditor was "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d 1384, 1390 (CA11 1996)). The Court of Appeals for the Ninth Circuit, however, disagreed with

that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim." *In re Taggart*, 888 F. 3d 438, 444 (2018). That is so, the Court of Appeals held, "even if the creditor's belief is unreasonable." *Ibid.*

We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

I

Bradley Taggart, the petitioner, formerly owned an interest in an Oregon company, Sherwood Park Business Center. That company, along with two of its other owners, brought a lawsuit in Oregon state court, claiming that Taggart had breached the Business Center's operating agreement. (We use the name "Sherwood" to refer to the company, its two owners, and—in some instances—their former attorney, who is now represented by the executor of his estate. The company, the two owners, and the executor are the respondents in this case.)

Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code, which permits insolvent debtors to discharge their debts by liquidating assets to pay creditors. See 11 U. S. C. §§704(a)(1), 726. Ultimately, the Federal Bankruptcy Court wound up the proceeding and issued an order granting him a discharge. Taggart's discharge order, like many such orders, goes no further than the statute: It simply says that the debtor "shall be granted a discharge under §727." App. 60; see United

States Courts, Order of Discharge: Official Form 318 (Dec. 2015), http:/ /www.uscourts.gov / sites / default / files /form _ b318_0.pdf (as last visited May 31, 2019). Section 727, the statute cited in the discharge order, states that a discharge relieves the debtor "from all debts that arose before the date of the order for relief," "[e]xcept as provided in section 523." §727(b). Section 523 then lists in detail the debts that are exempt from discharge. §§523(a)(1)–(19). The words of the discharge order, though simple, have an important effect: A discharge order "operates as an injunction" that bars creditors from collecting any debt that has been discharged. §524(a)(2).

After the issuance of Taggart's federal bankruptcy discharge order, the Oregon state court proceeded to enter judgment against Taggart in the prebankruptcy suit involving Sherwood. Sherwood then filed a petition in state court seeking attorney's fees that were incurred *after* Taggart filed his bankruptcy petition. All parties agreed that, under the Ninth Circuit's decision in *In re Ybarra*, 424 F. 3d 1018 (2005), a discharge order would normally cover and thereby discharge postpetition attorney's fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor "'returned to the fray'" after filing for bankruptcy. *Id.*, at 1027. Sherwood argued that Taggart had "returned to the fray" postpetition and therefore was liable for the postpetition attorney's fees that Sherwood sought to collect. The state trial court agreed and held Taggart liable for roughly $45,000 of Sherwood's postpetition attorney's fees.

At this point, Taggart returned to the Federal Bankruptcy Court. He argued that he had not returned to the state-court "fray" under *Ybarra*, and that the discharge order therefore barred Sherwood from collecting postpetition attorney's fees. Taggart added that the court should hold Sherwood in civil contempt because Sherwood had violated the discharge order. The Bankruptcy Court did

not agree. It concluded that Taggart had returned to the fray. Finding no violation of the discharge order, it refused to hold Sherwood in civil contempt.

Taggart appealed, and the Federal District Court held that Taggart had not returned to the fray. Hence, it concluded that Sherwood violated the discharge order by trying to collect attorney's fees. The District Court remanded the case to the Bankruptcy Court.

The Bankruptcy Court, noting the District Court's decision, then held Sherwood in civil contempt. In doing so, it applied a standard it likened to "strict liability." 522 B. R., at 632. The Bankruptcy Court held that civil contempt sanctions were appropriate because Sherwood had been "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d, at 1390). The court awarded Taggart approximately $105,000 in attorney's fees and costs, $5,000 in damages for emotional distress, and $2,000 in punitive damages.

Sherwood appealed. The Bankruptcy Appellate Panel vacated these sanctions, and the Ninth Circuit affirmed the panel's decision. The Ninth Circuit applied a very different standard than the Bankruptcy Court. It concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. Because Sherwood had a "good faith belief" that the discharge order "did not apply" to Sherwood's claims, the Court of Appeals held that civil contempt sanctions were improper. *Id.*, at 445.

Taggart filed a petition for certiorari, asking us to decide whether "a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt." Pet. for Cert. I. We granted certiorari.

II

The question before us concerns the legal standard for

holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order. Two Bankruptcy Code provisions aid our efforts to find an answer. The first, section 524, says that a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset" a discharged debt. 11 U. S. C. §524(a)(2). The second, section 105, authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." §105(a).

In what circumstances do these provisions permit a court to hold a creditor in civil contempt for violating a discharge order? In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.

A

Our conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___ (2018) (slip op., at 13) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)); see *Field* v. *Mans*, 516 U. S. 59, 69–70 (1995) (applying that principle to the Bankruptcy Code). Here, the statutes specifying that a discharge order "operates as an injunction," §524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions.

That "old soil" includes the "potent weapon" of civil contempt. *Longshoremen* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967). Under traditional princi-

ples of equity practice, courts have long imposed civil contempt sanctions to "coerce the defendant into compliance" with an injunction or "compensate the complainant for losses" stemming from the defendant's noncompliance with an injunction. *United States* v. *Mine Workers*, 330 U. S. 258, 303–304 (1947); see D. Dobbs & C. Roberts, Law of Remedies §2.8, p. 132 (3d ed. 2018); J. High, Law of Injunctions §1449, p. 940 (2d ed. 1880).

The bankruptcy statutes, however, do not grant courts unlimited authority to hold creditors in civil contempt. Instead, as part of the "old soil" they bring with them, the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.

In cases outside the bankruptcy context, we have said that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618 (1885) (emphasis added). This standard reflects the fact that civil contempt is a "severe remedy," *ibid.*, and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt, *Schmidt* v. *Lessard*, 414 U. S. 473, 476 (1974) (*per curiam*). See *Longshoremen*, *supra*, at 76 (noting that civil contempt usually is not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid"); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party's attempt at compliance was "reasonable").

This standard is generally an *objective* one. We have explained before that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively un-

reasonable. As we said in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187 (1949), "[t]he absence of wilfulness does not relieve from civil contempt." *Id.*, at 191.

We have not held, however, that subjective intent is always irrelevant. Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith. See *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 50 (1991). Thus, in *McComb*, we explained that a party's "record of continuing and persistent violations" and "persistent contumacy" justified placing "the burden of any uncertainty in the decree . . . on [the] shoulders" of the party who violated the court order. 336 U. S., at 192–193. On the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction. Cf. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 801 (1987) ("[O]nly the least possible power adequate to the end proposed should be used in contempt cases" (quotation altered)).

These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. The typical discharge order entered by a bankruptcy court is not detailed. See *supra*, at 2–3. Congress, however, has carefully delineated which debts are exempt from discharge. See §§523(a)(1)–(19). Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.

B

The Solicitor General, *amicus* here, agrees with the fair ground of doubt standard we adopt. Brief for United States as *Amicus Curiae* 13–15. And the respondents stated at oral argument that it would be appropriate for courts to apply that standard in this context. Tr. of Oral

Arg. 43. The Ninth Circuit and petitioner Taggart, however, each believe that a different standard should apply.

As for the Ninth Circuit, the parties and the Solicitor General agree that it adopted the wrong standard. So do we. The Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. But this standard is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

Taggart, meanwhile, argues for a standard like the one applied by the Bankruptcy Court. This standard would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the actions that violated the order. Brief for Petitioner 19; cf. 522 B. R., at 632 (applying a similar standard). Because most creditors are aware of discharge orders and intend the actions they take to collect a debt, this standard would operate much like a strict-liability standard. It would authorize civil contempt sanctions for a violation of a discharge order regardless of the creditor's subjective beliefs about the scope of the discharge order, and regardless of whether there was a reasonable basis for concluding that the creditor's conduct did not violate the order. Taggart argues that such a standard would help the debtor obtain the "fresh start" that bankruptcy promises. He adds that a standard resembling strict liability would be fair to creditors because creditors who are unsure whether a debt has been discharged can head to federal bankruptcy court and

obtain an advance determination on that question before trying to collect the debt. See Fed. Rule Bkrtcy. Proc. 4007(a).

We doubt, however, that advance determinations would provide a workable solution to a creditor's potential dilemma. A standard resembling strict liability may lead risk-averse creditors to seek an advance determination in bankruptcy court even where there is only slight doubt as to whether a debt has been discharged. And because discharge orders are written in general terms and operate against a complex statutory backdrop, there will often be at least some doubt as to the scope of such orders. Taggart's proposal thus may lead to frequent use of the advance determination procedure. Congress, however, expected that this procedure would be needed in only a small class of cases. See 11 U. S. C. §523(c)(1) (noting only three categories of debts for which creditors must obtain advance determinations). The widespread use of this procedure also would alter who decides whether a debt has been discharged, moving litigation out of state courts, which have concurrent jurisdiction over such questions, and into federal courts. See 28 U. S. C. §1334(b); Advisory Committee's 2010 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 8, 28 U. S. C. App., p. 776 (noting that "whether a claim was excepted from discharge" is "in most instances" not determined in bankruptcy court).

Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual'" resolution of bankruptcy cases "'within a limited period.'" *Katchen* v. *Landy*, 382 U. S. 323, 328 (1966) (quoting *Ex parte Christy*, 3 How. 292, 312 (1844)). These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

Taggart also notes that lower courts often have used a standard akin to strict liability to remedy violations of automatic stays. See Brief for Petitioner 21. An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U. S. C. §362(k)(1). This language, however, differs from the more general language in section 105(a). *Supra*, at 5. The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but "'whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57 (2007) (quoting *Bryan* v. *United States*, 524 U. S. 184, 191 (1998)). We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.)

III

We conclude that the Court of Appeals erred in applying a subjective standard for civil contempt. Based on the traditional principles that govern civil contempt, the proper standard is an objective one. A court may hold a creditor in civil contempt for violating a discharge order where there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order. In our view, that standard strikes the "careful

balance between the interests of creditors and debtors" that the Bankruptcy Code often seeks to achieve. *Clark* v. *Rameker*, 573 U. S. 122, 129 (2014).

Because the Court of Appeals did not apply the proper standard, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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290 F.3d 1140
In re Nancy Shao SU; In re Louis C. Su, a/k/a Chienlu Su, Debtors.
Dora Carrillo, Appellant,
v.
Louis C. SU, Appellee.
No. 01-55656.
United States Court of Appeals, Ninth Circuit.
Submitted February 15, 2002.*
Filed May 20, 2002.

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Jerome Marks, San Francisco, CA, for the appellant.

Stanley A. Zlotoff, San Jose, CA, for the appellee.

Norma L. Hammes, Gold & Hammes, San Jose, CA, and John Rao, National Consumer Law Center, Boston, MA, for amicus curiae National Association of Consumer Bankruptcy Attorneys, urging affirmance.

Appeal from the Ninth Circuit, Bankruptcy Appellate Panel; Greenwald, Russell, and Ryan, Bankruptcy Judges, Presiding.

Before BEEZER, TASHIMA, and GRABER, Circuit Judges.

OPINION

TASHIMA, Circuit Judge.

Dora Carrillo ("Carrillo") filed an adversary complaint in Louis Su's ("Su") Chapter 7 bankruptcy case to determine the dischargeability of debt owed to her by Su. The bankruptcy court held that Su's debt to Carrillo was nondischargeable. The Bankruptcy Appellate Panel ("BAP") reversed, holding that the bankruptcy court erred by applying the incorrect legal standard. Carrillo appeals, arguing that the bankruptcy court correctly applied the law and that Su's debt is nondischargeable. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm the BAP.

I. FACTUAL BACKGROUND

On August 21, 1997, shortly before 8 a.m., Carrillo was lawfully crossing a major downtown San Francisco intersection while walking to work. Su, who was driving a 14-passenger van, sped into the intersection against a red light, traveling 37 miles per hour in a 25-mile-per-hour zone, nearly five seconds after the light had turned red. He crashed into a car that was lawfully in the intersection and then careened into Carrillo, severely injuring her.

Carrillo subsequently sued Su in state court for compensatory and punitive damages, alleging that "[h]is conduct ... was wanton, willful and malicious, and such acts were intentionally done with reckless disregard of the consequences, necessarily producing permanent injury and harm to plaintiff, without just cause or excuse." The jury found that Su was negligent, that his negligence resulted in Carrillo's injuries, and that he was guilty of malice by clear and convincing evidence. "Malice" was defined by the state court either as conduct intended to cause injury to the plaintiff or as despicable conduct carried on with a willful and conscious disregard for the safety and rights of others. The jury awarded Carrillo $130,000 in economic damages and $400,000 in non-economic

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damages; no punitive damages were awarded.

After this judgment was entered against him, Su filed a Chapter 7 bankruptcy petition. In her adversary proceeding, Carrillo alleged that her judgment against Su was not dischargeable because 11 U.S.C. § 523(a)(6) ("§ 523(a)(6)") excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Relying on *Miller v. J.D. Abrams Inc. (In re Miller),* 156 F.3d 598, 606 (5th Cir.1998), which held that injuries

are considered willful and malicious under § 523(a)(6) when the debtor possesses "either an objective substantial certainty of harm or a subjective motive to cause harm," the bankruptcy court held that Su's debt to Carrillo was nondischargeable because there was "by [an] objective standard, a substantial certainty" of harm when Su drove his van through a red light at an intersection known to be heavily congested with traffic.

After the bankruptcy court's decision, and while the case was pending before the BAP, this court decided *Petralia v. Jercich (In re Jercich),* 238 F.3d 1202 (9th Cir.), *cert. denied,* 533 U.S. 930, 121 S.Ct. 2552, 150 L.Ed.2d 718 (2001). *In re Jercich* held that § 523(a)(6)'s willful injury requirement is met "when it is shown either that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct." *Id.* at 1208.

Based largely on *In re Jercich,* the BAP reversed the bankruptcy court. *See Su v. Carrillo (In re Su),* 259 B.R. 909, 914 (9th Cir. B.A.P. 2001). According to the BAP, the bankruptcy court's use of an objective substantial certainty standard was inconsistent with the subjective substantial certainty standard articulated in *In re Jercich. Id.*

II. STANDARD OF REVIEW

We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Am. Law Ctr. v. Stanley (In re Jastrem),* 253 F.3d 438, 441 (9th Cir.2001); *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.),* 177 F.3d 774, 782 (9th Cir.1999). Whether a claim is nondischargeable presents mixed issues of law and fact and is reviewed de novo. *Murray v. Bammer (In re Bammer),* 131 F.3d 788, 791-92 (9th Cir.1997) (en banc). The bankruptcy court's interpretation of the Bankruptcy Code is reviewed de novo. *State Bar v. Taggart (In re Taggart),* 249 F.3d 987, 990 (9th Cir.2001). Decisions of the BAP are reviewed de novo. *Cool Fuel, Inc. v. Bd. of Equalization (In re Cool Fuel, Inc.),* 210 F.3d 999, 1001 (9th Cir.2000). We independently review a bankruptcy court's ruling on appeal from the BAP. *In re Taggart,* 249 F.3d at 990; *In re Cool Fuel,* 210 F.3d at 1001-02.

III. DISCUSSION

Section 523(a)(6) of the Bankruptcy Code provides: "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — .... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." The question presented on appeal is whether a finding of "willful and malicious injury" must be based on the debtor's subjective knowledge or intent or whether such a finding can be predicated upon an objective evaluation of the debtor's conduct. We hold that § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct.

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A. Willfulness

In *Kawaauhau v. Geiger,* 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), the Supreme Court established that § 523(a)(6) does not apply to those debts arising from unintentionally inflicted injuries:

The word "willful" in (a)(6) modifies the word "injury," indicating that non-dischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." .... [T]he (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act", not simply "the act itself."

523 U.S. at 61-62, 118 S.Ct. 974 (citation omitted). Thus, *Geiger* held that debts arising out of a medical malpractice judgment were dischargeable, even though the plaintiff alleged that Dr. Geiger had intentionally rendered inadequate medical care, and that this necessarily led to her injury. *Geiger* concluded that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64, 118 S.Ct. 974.

Both parties agree that a "deliberate or intentional injury" is required for § 523(a)(6) to render a debt non-dischargeable. The question we must decide is the state of mind that is required to satisfy § 523(a)(6)'s willful injury requirement. According to the Restatement, an action is intentional if an actor subjectively "desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1964). The *Geiger* Court, however, did not expressly adopt this subjective Restatement formulation,[1] and the lower courts have differed over whether to adopt a strict subjective test when applying § 523(a)(6).

The Sixth Circuit's interpretation of § 523(a)(6) exemplifies the strict subjective approach, in which a debt is nondischargeable under § 523(a)(6) only if the debtor intended to cause harm or knew that harm was a substantially certain consequence of his or her behavior. In *Markowitz v. Campbell (In re Markowitz),* 190 F.3d 455 (6th Cir.1999), the debt arose from a legal malpractice action against the debtor. The creditor argued that the debt was nondischargeable under § 523(a)(6)'s "willful and malicious injury" provision. While *In re Markowitz* acknowledged that *Geiger* had not expressly adopted the Restatement's subjective "substantially certain" language, it nonetheless concluded that "from the Court's language and analysis in *Geiger,* we now hold that unless `the actor desires to cause consequences of his act, or... believes that the consequences are substantially certain to result from it,' he has not committed a `willful and malicious injury' as defined under § 523(a)(6)." *Id.* at 464 (quoting RESTATEMENT (SECOND) OF TORTS § 8A (1964)).

Conversely, the Fifth Circuit's interpretation of § 523(a)(6) exemplifies the objective

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approach, in which debt is nondischargeable under § 523(a)(6) either if there is a subjective intent to cause an injury or if there is an objective substantial certainty of harm. In *In re Miller,* the creditor sought a determination that a state court judgment for misuse of trade secrets constituted a nondischargeable debt. While acknowledging that *Geiger* "certainly eliminates the possibility that `willful' encompasses negligence or recklessness," *In re Miller* held that "the label `intentional tort' is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. Rather, either objective substantial certainty or subjective motive meets the Supreme Court's definition of `willful ... injury' in § 523(a)(6)." 156 F.3d at 603.

While this difference between the objective approach taken by the Fifth Circuit and the subjective approach taken by the Sixth Circuit is evident from *In re Miller* and *In re Markowitz,* this difference has been overlooked by courts in the Ninth Circuit when evaluating § 523(a)(6) claims. For example, in *Baldwin v. Kilpatrick (In re Baldwin),* 245 B.R. 131 (9th Cir.2000), *aff'd,* 249 F.3d 912 (9th Cir.2001), a creditor who had obtained a state court judgment against the debtor for assault and battery brought an adversary proceeding to except that judgment debt from discharge under § 523(a)(6). Because the debtor "was an active participant in the violent striking" of the creditor, the BAP easily found that the assault and battery judgment stemmed from a "willful and malicious injury" to creditor's person and, therefore, was nondischargeable. *Id.* at 137. In so holding, however, the BAP declared: "The Fifth Circuit [in *In re Miller*] held that ... `either objective substantial certainty or subjective motive meets the Supreme Court's definition of `willful ... injury' in § 523(a)(6).' The Sixth Circuit [in *In re Markowitz*] has also adopted this approach. We

similarly adopt this standard." *Id.* at 136 (citations omitted).[2]

This court too committed a similar oversight when it examined, for the first time, the question of intent in the context of § 523(a)(6)'s willful injury requirement. In *In re Jercich,* a creditor who had obtained a state court judgment for unpaid wages against his former employer, a Chapter 7 debtor, sought to except that judgment debt from discharge pursuant to § 523(a)(6). Focusing on the subjective intent of the employer, this court held "that under *Geiger,* the willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct." 238 F.3d at 1208. Given that the employer in *In re Jercich* knew both that he owed wages to his employee and that his failure to pay those wages would, with substantial certainty, harm his employee, this court concluded that the debt owed the employee was nondischargeable under § 523(a)(6). *Id.* at 1208-09.

The holding in *In re Jercich* is clear: § 523(a)(6) renders debt nondischargeable when there is either a subjective intent to harm, or a subjective belief that harm is substantially certain. Unfortunately,

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however, the opinion also states that the subjective inquiry it endorsed is "consistent with the approaches taken by the Fifth and Sixth Circuits," in *In re Miller* and *In re Markowitz. Id.* We believe that this claim of consistency is not completely accurate.[3] Nonetheless, Carrillo seizes on this misstatement to rationalize the bankruptcy court's heavy reliance on *In re Miller*. Carrillo's argument fails, however, because the holding of *In re Jercich,* which sets out the scope of § 523(a)(6)'s willful injury requirement, expressly articulates only a subjective dimension. Because the bankruptcy court focused exclusively on the objective substantial certainty of harm stemming from Su's driving, but did not consider Su's subjective intent to cause harm or knowledge that harm was substantially certain, we agree with the BAP that the bankruptcy court applied the incorrect legal standard. Thus, this proceeding must be remanded to the bankruptcy court for consideration of Carrillo's nondischargeability claim under the subjective framework articulated in *In re Jercich*.

We believe, further, that failure to adhere strictly to the limitation expressly laid down by *In re Jercich* will expand the scope of nondischargeable debt under § 523(a)(6) far beyond what Congress intended. By its very terms, the objective standard disregards the particular debtor's state of mind and considers whether an objective, reasonable person would have known that the actions in question were substantially certain to injure the creditor. In its application, this standard looks very much like the "reckless disregard" standard used in negligence.[4] That the Bankruptcy

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Code's legislative history makes it clear that Congress did not intend § 523(a)(6)'s willful injury requirement to be applied so as to render nondischargeable any debt incurred by reckless behavior,[5] reinforces application of the subjective standard. The subjective standard correctly focuses on the debtor's state of mind and precludes application of § 523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain.[6]

B. *Maliciousness*

The BAP correctly observed that in *In re Jercich,* we treated the "malicious" injury requirement of § 523(a)(6) as separate from the "willful" requirement. According to *In re Jercich:* "A `malicious' injury involves `(1) a wrongful act, (2) done

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intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" 238 F.3d at 1209 (quoting *In re Bammer,* 131 F.3d at 791); *see also id.* at 1209 n. 36 (emphasizing that the "maliciousness standard — and in particular our `just cause and excuse' prong — survived *Geiger*" and distinguishing *In re Miller,* where "the `just cause or excuse' standard has been displaced by *Geiger* and ... [where] the `willful' and `malicious' prongs [have been collapsed] into a single inquiry").

The bankruptcy court, however, made no findings regarding malice. In fact, it conflated the "willful" and "malicious" prongs in its § 523(a)(6) analysis. While Carrillo contends that the four factors can be ascertained by examining the record, we decline to make the independent malice inquiry required by *In re Jercich* in the first instance. Therefore, on remand, the bankruptcy court should also make appropriate findings on the issue of malice.

IV. CONCLUSION

For the foregoing reasons, we hold that the BAP correctly concluded that § 523(a)(6)'s willful injury requirement is governed by a subjective standard. Accordingly, we affirm the order of the BAP reversing the bankruptcy court and remanding the adversary proceeding for further proceedings.

AFFIRMED.

Notes:

* The panel unanimously finds this case appropriate for decision without oral argument. *See* Fed. R.App. P. 34(a)(2)(C).

1. While the *Geiger* Court did not focus on this section of the Restatement (dealing with situations in which an actor is "substantially certain" that harm will result from his acts), the Eighth Circuit opinion that the Court affirmed addressed this Restatement provision in some detail, equating § 523(a)(6) with intentional torts and defining such torts as actions where an actor subjectively desires to cause an injury or believes that an injury is substantially certain to result from his or her acts. *Geiger v. Kawaauhau (In re Geiger),* 113 F.3d 848, 852 (8th Cir.1997) (en banc), *aff'd,* 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998).

2. In this case, the BAP correctly observed that *In re Baldwin* endorsed the *In re Miller* test without recognizing the distinction between the Fifth and Sixth Circuits' objective and subjective approaches. *See In re Su,* 259 B.R. at 913 ("The key difference between the *Miller* and *Markowitz* holdings is that *Markowitz* followed the Restatement's requirement that the debtor *believe* that his actions will with substantial certainty cause injury, while in *Miller* the subjective belief of the debtor as to the certainty of the harm was not controlling. A number of courts have failed to recognize this distinction. In *In re Baldwin,* we also ignored this important distinction.") (citations omitted).

3. *In re Jercich's* claim of consistency, however, is not completely inaccurate either. *In re Jercich* merely observed that its holding — that an individual who intends to harm someone, or who believes that harm is substantially certain, cannot discharge via bankruptcy any liability stemming from those actions — was consistent with *In re Miller* and *In re Markowitz*. While that observation is somewhat misleading, it is not technically incorrect. The objective test is broader than the subjective one, allowing nondischargeability either with subjective intent/knowledge *or* with objective substantial certainty. Thus, *In re Jercich's* holding that "the willful requirement of § 523(a)(6) is met" when there is subjective intent to cause harm, or knowledge that harm is substantially certain, technically is consistent with *In re Miller*. What *In re Jercich* fails to crystalize, however, is that this court expressly avoided articulating an objective dimension to its holding and, by implication, limited the scope of § 523(a)(6) nondischargeability to those situations in which the debtor possesses subjective intent to cause

harm or knowledge that harm is substantially certain to result from his actions.

4. According to the Restatement, recklessness is defined as follows:

Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know ... of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1977); *see also* 2 Cal. Jury Instructions Civil, BAJI 12.77 (8th ed.1994) (similarly defining conduct in reckless disregard under California law). Of course, this recklessness standard is analytically distinct from *In re Miller's* objective approach, in that the objective, reasonable debtor under *In re Miller* must be *substantially certain* that harm will result; simply "appreciat[ing] the high degree of risk involved" is not enough. Nevertheless, *in its application,* the objective *In re Miller* approach far too closely resembles recklessness. For example, Carrillo argues in great detail that Su's decision to run the red light was, objectively speaking, substantially certain to injure Carrillo. This characterization, however, conflates Su's unreasonable acceptance of "the high degree of risk involved" with an objective substantial certainty that harm would result. It is highly unlikely that Su was subjectively certain that harm would result, for if he were, he most likely would not have run the light and thrown both his life and others into *certain* peril. *See, e.g., Alexander v. Donnelly (In re Donnelly),* 6 B.R. 19, 23 (Bankr.D.Or., 1980) (finding that driving recklessly while intoxicated did not render the ultimate injury substantially certain because "[i]t would not have been possible for the defendant to have caused physical harm to the plaintiff in this fashion without equally great danger that she would also cause physical harm to herself and to her automobile"). Rather, Su likely performed a maneuver that carried with it a very high degree of risk, but one that he hoped could be navigated safely. If this action were found to possess an objective substantial certainty of harm, as Carillo argues, the line separating intent and recklessness would lose its meaning.

5. The Senate Committee Report accompanying the Bankruptcy Code's "willful and malicious injury" language, for example, reads:

Paragraph (5) provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell,* 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904), held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

S. REP. NO. 95-989, at 79 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865.

6. To be clear, when we speak of "actual knowledge" we are not suggesting that a court must simply take the debtor's word for his state of mind. In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action. *See, e.g., Spokane Ry. Credit Union v. Endicott (In re Endicott),* 254 B.R. 471, 477 n. 9 (Bankr.D.Idaho, 2000) ("The use of the term `objective' is not talismanic nor at odds with *Geiger* if it is viewed as simply recognizing that a debtor will have to deal with any direct or circumstantial evidence which would indicate that he must have had a substantially certain belief that his act would injure, notwithstanding any subjective denial of such knowledge."). This approach, however, remains fundamentally subjective in that it retains its focus on what was actually going

through the mind of the debtor at the time he acted.

This subjective approach explains how courts have typically resolved the applicability of § 523(a)(6) in the context of motor vehicle accidents. When car accidents occur and there is no evidence, beyond evidence of (at times) extreme recklessness, that the driver expressly sought to crash into another, § 523(a)(6)'s nondischargeability provision typically has been found inapplicable. *See Madden v. Fate (In re Fate),* 100 B.R. 141 (Bankr.D.Mass. 1989); *Mugge v. Roemer (In re Roemer),* 76 B.R. 126 (Bankr.S.D.Ill.1987); *Cooper v. Noller (In re Noller),* 56 B.R. 36 (Bankr.E.D.Wis.1985); *In re Donnelly,* 6 B.R. at 23. When, however, the evidence demonstrates that the driver purposefully crashed his car into another's, § 523(a)(6) applies and the driver's debt stemming from that "accident" is nondischargeable. *See Stubbs v. Mode (In re Mode),* 231 B.R. 295 (Bankr.E.D.Ark. 1999); *Grange Mut. Cas. Co. v. Chapman (In re Chapman),* 228 B.R. 899 (Bankr.N.D.Ohio 1998).

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514 B.R. 1

**In re KVN CORPORATION, INC., Debtor.
Linda S. Green, Chapter 7 Trustee, Appellant.**

**BAP No. NC–13–1318–JuKuD.
Bankruptcy No.13–10477.**

United States Bankruptcy Appellate Panel of the Ninth Circuit.

**Submitted Without Oral Argument on July 11, 2014.[*]
Filed July 29, 2014.**

[514 B.R. 3]

Jean Barnier, Esq., on brief, Sonoma, CA, for appellant Linda S. Green.

Before: JURY, KURTZ, and DUNN, Bankruptcy Judges.

OPINION

JURY, Bankruptcy Judge.

Linda S. Green, chapter 7 [1] trustee (Trustee) in the bankruptcy estate of KVN Corporation, Inc. (KVN or debtor), filed a motion seeking approval of a stipulation between Trustee and Wilshire State Bank (Bank) which contemplated a sale of the Bank's fully encumbered property in exchange for a carve out from the lien proceeds paid to the bankruptcy estate. The bankruptcy court denied the motion and Trustee's later filed motion for reconsideration. This appeal followed. For the reasons discussed below, we VACATE and REMAND this matter to the bankruptcy court for proceedings consistent with this decision.

I. FACTS

The essential facts are few and undisputed. KVN owned a sporting goods store. KVN was indebted to the Bank under the terms of a note in the original principal sum of $915,000. The note was secured by KVN's real property and by substantially all of its business assets.

On March 8, 2013, KVN filed its chapter 7 petition and Green was appointed chapter 7 trustee. In Schedule A, debtor listed inventory including "liquor, gun, ammunition, cleaning kits, and fishing reels" with a value of $28,950. Debtor failed to reflect the Bank's security interest in the inventory, but listed the Bank as a secured creditor against its real property in Schedule D. At the time of the filing, debtor owed the Bank approximately $309,569. In Schedule F, debtor listed unsecured claims in the amount of $107,565. After the filing, Trustee removed rifles and guns from debtor's store and placed them in a gun storage locker at the cost of $25 per day. Trustee employed an auctioneer to conduct a public sale of these assets, which would likely bring $10,000. After reviewing public records, Trustee learned that the Bank held a perfected UCC–1 on all of debtor's inventory, including the firearms. Trustee contacted the Bank and informed it that the firearms had been removed for safekeeping and that the Bank could retrieve them.

In late April 2013, the Bank contacted Trustee and requested her assistance in selling the firearms through the auctioneer she had employed. The Bank agreed that it would pay for the storage costs and split the net proceeds with the bankruptcy estate. Trustee agreed based on her belief that the transaction would net between $4,200 to $4,400 for the benefit of unsecured creditors. Trustee and the Bank entered into a stipulation setting forth these terms.

Trustee subsequently filed a motion seeking approval of the stipulation from the bankruptcy court. At the May 10, 2013 hearing, the bankruptcy court denied Trustee's motion. Initially, the court made reference to Charles Duck, a former trustee in the Northern District of California, who "had a habit of making deals with

[514 B.R. 4]

secured creditors even though there was no equity he would sell the—he would liquidate the asset and have various types of arrangements for sharing the proceeds. And I put a stop to that many years ago." [2] The court further opined:

[T]he role of a chapter 7 trustee is to closely examine the secured creditor's security interest and defeat it, if the trustee can. And, if not, turn the asset over to the secured creditor. It is a slippery slope, to my mind, when the debtor and the secured creditor start making deals. I do not believe it's the appropriate role of a chapter 7 trustee to liquidate fully-encumbered assets.

Counsel for Trustee and the Bank both emphasized that there was full disclosure, everything was above board, and there would be a return to the unsecured creditors. The Bank's counsel further explained that the auctioneer hired by Trustee had the expertise to sell the firearms in a lawful manner which caused it to agree to release its lien on fifty percent of the proceeds. The bankruptcy court responded: "I have no problem if your client wants to waive its security, and the trustee can liquidate it in the ordinary course. I just have a problem with the sharing arrangement." The court opined that "arrangements like this are dangerous because they can lead to improper activity." The court concluded: "So in this particular case I do not believe that the benefits to the estate outweigh my concerns for the proper role of the trustee and the bankruptcy system." On May 15, 2013, the bankruptcy court entered the order denying approval of the stipulation.

Trustee moved for reconsideration. Trustee argued that there was nothing in the bankruptcy code which prevented her from entering into agreements with secured creditors or that stated a chapter 7 trustee's proper role was to liquidate only unsecured assets. Trustee further asserted that there was nothing in the agreement between her and the Bank which suggested the parties were acting in an improper manner. Trustee noted that § 506(c) provided authority that administrative expenses could be paid from the sale of secured assets even if there was no benefit to unsecured creditors and when the secured creditor caused or consented to the expense. *See Compton Impressions, Ltd. v. Queen City Bank, N.A. (In re Compton Impressions, Ltd.),* 217 F.3d 1256 (9th Cir.2000).

On June 14, 2013, the bankruptcy court heard the matter and took it under advisement. Two days later, the bankruptcy court issued its Memorandum of Decision and denied Trustee's motion for reconsideration. The bankruptcy court opined that arrangements between trustees and secured creditors raised a presumption of impropriety and found that Trustee had not rebutted that presumption. On June 17, 2013, the court entered the order denying Trustee's motion for reconsideration. Trustee timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (N) and (O). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether the bankruptcy court abused its discretion by denying approval of the

[514 B.R. 5]

stipulation between Trustee and the Bank which contemplated a sale of the Bank's fully encumbered property in exchange for a carve out from the lien proceeds to the bankruptcy estate.

IV. STANDARD OF REVIEW

The bankruptcy court's decision denying approval of the stipulation between Trustee and the Bank is reviewed for abuse of discretion. *A & A Sign Co. v. Maughan,* 419 F.2d 1152, 1155 (9th Cir.1969). A bankruptcy court abuses its discretion when it applies the incorrect legal rule or its application of the correct legal rule is "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the

record." *United States v. Loew,* 593 F.3d 1136, 1139 (9th Cir.2010).

V. DISCUSSION

A. The General Rule Is That The Sale Of Fully Encumbered Property Is Prohibited.

We begin with an overview of the chapter 7 trustee's duties under § 704 and his or her power to sell under § 363. Under § 704(a)(1), a chapter 7 trustee has the duty to "collect and reduce to money the property of the estate for which such trustee serves...." To fulfill this duty, the trustee's "primary job is to marshal and sell the assets, so that those assets can be distributed to the estate's creditors." *U.S. Tr. v. Joseph (In re Joseph),* 208 B.R. 55, 60 (9th Cir.BAP1997). Indeed, a core power of a bankruptcy trustee under § 363(b) is the right to sell "property of the estate" for the benefit of a debtor's creditors. *See*§ 363(b)(1) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate...."). Under § 363(f)(2), a bankruptcy trustee may sell property of the estate free and clear of a lien or other interest where the holder of the lien or interest consents.

It is universally recognized, however, that the sale of a fully encumbered asset is generally prohibited. *Carey v. Pauline (In re Pauline),* 119 B.R. 727, 728 (9th Cir. BAP 1990); *In re Scimeca Found., Inc.,* 497 B.R. 753, 781 (Bankr.E.D.Pa.2013) ("It is generally recognized that a chapter 7 trustee should not liquidate fully encumbered assets, for such action yields no benefit to unsecured creditors.") (citing *Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.),* 816 F.2d 238, 245–46 (6th Cir.1987)); *In re Covington,* 368 B.R. 38, 41 (Bankr.E.D.Cal.2006) ("[W]hen an asset is fully encumbered by a lien, it is considered improper for a chapter 7 trustee to liquidate the asset."); *In re Feinstein Family P'ship,* 247 B.R. 502, 507 (Bankr.M.D.Fla.2000) ("Clearly, the Code never contemplated that a Chapter 7 trustee should act as a liquidating agent for secured creditors who should liquidate their own collateral."); *In re Preston Lumber Corp.,* 199 B.R. 415, 416 (Bankr.N.D.Cal.1996) (actual conflict of interest arises when the trustee sees he can make more money for himself by liquidating collateral for a secured creditor than he can by asserting a claim against the secured creditor on behalf of the estate); *In re Tobin,* 202 B.R. 339, 340 (Bankr.D.R.I.1996) ("The mission of the Chapter 7 trustee is also to enhance the debtor's estate for the benefit of unsecured creditors.").

The prohibition against the sale of fully encumbered property is also embedded in the official Handbook for Chapter 7 Trustees in several places:

Generally, a trustee should not sell property subject to a security interest unless the sale generates funds for the benefit of unsecured creditors. A secured creditor

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can protect its own interests in the collateral subject to the security interest.

U.S. DOJ Exec. Office for U.S. Trs., Handbook for Chapter 7 Trustees at 4–16 (2012) (hereinafter, Handbook). The Handbook also provides:

A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals, or unduly delay the resolution of the case. The trustee must be guided by this fundamental principle when acting as trustee. Accordingly, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors, including unsecured priority creditors, before administering a case as an asset case. 28 U.S.C. § 586.

Id. at 4–1. Finally,

[i]n asset cases, when the property is fully encumbered and of nominal value to the estate, the trustee must immediately abandon the asset and contact the secured creditor immediately so that the secured creditor can obtain insurance or otherwise protect its own interest in the property. [§§] 554, 704.

Id. at 4–7. Taken together, the above-referenced authorities stand for the proposition that sales of fully encumbered assets are generally improper. In that instance, the trustee's proper function is to abandon the property, not administer it, because the sale would yield no benefit to unsecured creditors.

In fact, " 'the principle of abandonment was developed ... to protect the bankruptcy estate from the various costs and burdens of having to administer property which could not conceivably benefit *unsecured* creditors of the estate.' " *In re Pauline,* 119 B.R. at 728; *see also In re K.C. Mach. & Tool Co.,* 816 F.2d at 246 ("[I]n enacting § 554, Congress was aware of the claim that formerly some trustees took burdensome or valueless property into the estate and sold it in order to increase their commissions."). However, "[a]bandonment should not be ordered where the benefit of administering the asset exceeds the cost of doing so.... Absent an attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should very rarely be ordered." *In re K.C. Mach. & Tool Co.,* 816 F.2d at 246; *see also Vu v. Kendall (In re Vu),* 245 B.R. 644, 647–48 (9th Cir. BAP 2000).

B. There Is No Per Se Rule That Bans Carve–Out Agreements.

Despite the general rule prohibiting the sale of fully encumbered property, chapter 7 trustees may seek to justify the sale through a negotiated carve-out agreement with the secured creditor. A carve-out agreement is generally understood to be "an agreement by a party secured by all or some of the assets of the estate to allow some portion of its lien proceeds to be paid to others, i.e., to carve out its lien position." *Costa v. Robotic Vision Sys., Inc. (In re Robotic Vision Sys., Inc.),* 367 B.R. 232, 237 n. 23 (1st Cir. BAP 2007); *see also In re Besset,* 2012 WL 6554706, at *5 n. 5 (9th Cir. BAP 2012). There is no per se rule that bans this type of contractual arrangement: "[C]reditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including to share them with other creditors."

[514 B.R. 7]

Official Unsecured Creditors Comm. v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305, 1313 (1st Cir.1992).[3]

The Handbook also provides some guidance on carve-out agreements in the context of a sale:

A trustee may sell assets only if the sale will result in a meaningful distribution to creditors. In evaluating whether an asset has equity, the trustee must determine whether there are valid liens against the asset and whether the value of the asset exceeds the liens. The trustee may seek a 'carve-out' from a secured creditor and sell the property at issue if the 'carve-out' will result in a meaningful distribution to creditors.... If the sale will not result in a meaningful distribution to creditors, the trustee must abandon the asset.

Handbook at 4–14.

C. The Genesis Of The Bankruptcy Court's "Presumption Of Impropriety" Is Based On Past Abuses Of Carve–Out Agreements Such As This.

Although there is no per se ban on carve-out agreements, agreements such as the one before us have been reviewed under a standard of heightened scrutiny due to past abuses. One court noted:

It is not rare that trustees of Chapter 7 estates are approached by secured creditors who seek the trustee's help to liquidate fully encumbered collateral. They realize that before the trustee is

willing to go along with the proposition the secured creditor must put a little sweetener in the deal by agreeing to pay sufficient sums to compensate the trustee and to pay other costs of administration. The more sophisticated trustee may demand that the secured creditor throw in a pittance to pay a meaningless dividend to unsecured creditors, making the arrangement more palatable to the court. The proposition is very attractive from the secured creditor's point of view and economically sound because it may stave off a possible attempt by the trustee to seek to surcharge the collateral and, most importantly, save the potentially expensive cost of a foreclosure suit. The offered deal is also attractive to the trustee because it assures that he or she will earn a commission in an otherwise no asset case and may seek a commission based on the gross sales price and not on the net distributed to parties of interest.

In re Feinstein Family P'ship, 247 B.R. at 507; *see also In re Pauline,* 119 B.R. at 728 ("Some of the early cases condemned this particular practice [,] ... and decried the practice of selling burdensome or valueless property simply to obtain a fund for their own administrative expenses.") (citing *Standard Brass Corp. v. Farmers Nat'l Bank,* 388 F.2d 86 (7th Cir.1967); *Miller v. Klein (In re Miller),* 95 F.2d 441 (7th Cir.1938); and *Seaboard Nat'l Bank v. Rogers Milk Prods. Co.,* 21 F.2d 414 (2d Cir.1927)). Against this historical backdrop, coupled with the bankruptcy court's first-hand experience with Mr. Duck, there is support for the bankruptcy court's conclusion that a presumption of impropriety arises under these circumstances.

We do not agree with Trustee's argument that the literal text of §§ 704(a)(1), 506(c), and 363(f)(2) "compels the conclusion that the 'presumption of impropriety' suggested by the bankruptcy court ... was error." The issue presented in this appeal is not simply a matter of interpreting any of these statutes where the "plain language" applies. If this were the case, we could ignore the well-settled case law,

[514 B.R. 8]

including our own, that espouses the proposition that a sale of fully encumbered property is generally inappropriate because there is no benefit to unsecured creditors. We would also undermine the guidance provided to chapter 7 trustees in the Handbook, which Trustee fails even to mention in this appeal.

Further, in our view, § 506(c) does not apply under these circumstances. Substantively, the elements that Trustee must prove for a § 506(c) claim are different from those needed to justify a sale of fully encumbered property in connection with a carve-out agreement. *See Central Bank of Mont. v. Cascade Hydraulics & Util. Serv., Inc. (In re Cascade Hydraulics & Util. Serv., Inc.),* 815 F.2d 546, 548 (9th Cir.1987). (under § 506(c) the trustee must show that the expenses incurred were reasonable, necessary, and beneficial to the secured creditor and to satisfy the benefit part of the test, the trustee must "establish in quantifiable terms that [she] expended funds directly to protect and preserve the collateral."); *compare In re Bunn–Rodemann,* 491 B.R. 132 (Bankr.E.D.Cal.2013) (finding "incentive payment" arrangement between secured creditor and trustee for sale of fully encumbered real property "consistent" with § 506(c)).

Of course, the presumption of impropriety is a rebuttable one. To rebut the presumption, the case law directs the following inquiry: Has the trustee fulfilled his or her basic duties? Is there a benefit to the estate; i.e., prospects for a meaningful distribution to unsecured creditors? Have the terms of the carve-out agreement been fully disclosed to the bankruptcy court? If the answer to these questions is in the affirmative, then the presumption of impropriety can be overcome.

The bankruptcy court made no findings with respect to these questions. However, in answering the first and third questions the basic and undisputed facts are not fairly susceptible of diverse inferences. *See Commercial Paper Holders v. Hine (Matter of Beverly Hills*

Bancorp), 752 F.2d 1334, 1338 (9th Cir.1984) ("Although remand generally is required for findings of fact, remand is not necessary when the trial court fails to make such findings and the facts in the record are undisputed."). The record shows that Trustee fulfilled her basic duties. She examined the Bank's asserted security interest against the firearms and found its lien valid. *See* Handbook at 4–5. She then informed the Bank where the firearms were so it could retrieve its collateral. *See* Handbook at 4–7. In addition, Trustee fully disclosed the terms of the carve-out agreement to the bankruptcy court and the creditor body, which is contrary to any inference of a secret side deal between Trustee and the Bank. Therefore, it does not follow that Trustee was administering the asset for primarily her own benefit. *See* Handbook at 4–1. However, whether $5,000 from the lien proceeds will result in a meaningful distribution to the unsecured creditors is a question of fact that is, on this sparse record, susceptible of diverse inferences resulting in different conclusions. Because the bankruptcy court's decision to approve the stipulation is a matter committed to the court's discretion, we find it necessary to remand for factual findings on this issue.

D. The Case Law Cited By The Bankruptcy Court In Support Of Its Decision Is Distinguishable.

The bankruptcy court cited *In re Pauline, In re Preston Lumber*, and *In re Covington* in support of its decision denying approval of the stipulation. Collectively, these cases stand for the proposition that overencumbered property generally should be abandoned, not administered,

[514 B.R. 9]

because there is no benefit to unsecured creditors. As noted above, most courts recognize this general rule. Furthermore, in each case, the court found the trustee's actions inappropriate under the circumstances of the case. However, none of these cases support the bankruptcy court's decision in this case.

In *Pauline,* the chapter 7 trustee decided to abandon the debtor's home and then reversed his decision, stating his intention to sell it. The debtor moved to compel the trustee to abandon the property. After considering the motion, the bankruptcy court required the trustee to find a buyer for the debtor's home within 60 days at a price sufficient to satisfy all liens on the home plus the allowed amount of the debtor's homestead exemption, in the absence of which the debtor's home would be deemed abandoned. *In re Pauline,* 119 B.R. at 728. On appeal, the Panel affirmed the bankruptcy court's decision in part, because (1) the IRS did not ask the trustee to sell the property for the IRS' benefit, and (2) the trustee apparently had "engaged in ... conduct designed to enhance the size of his bank account rather than the size of the funds available for the debtor's unsecured creditors...." *Id.* at 728. Unlike in *Pauline,* the Bank here supports Trustee's sale due to the auctioneer's expertise in selling the firearms in a lawful manner and, as discussed above, a sale will benefit unsecured creditors, not just increase the fees paid to Trustee.[4]

The holding in *In re Preston Lumber Corp.* also does not drive the outcome in this case. There, the secured creditor, Sumitomo Bank and the debtor's industrial lessor had a dispute as to the priority of their lien rights in fully encumbered sawmill equipment and rolling stock. Sumitomo convinced the chapter 7 trustee to sell the assets free and clear of liens, in exchange for a pre-fixed commission for the trustee and $35,000 fee for the trustee's attorney. The bankruptcy court found the arrangement "highly improper" on the grounds that (1) there was no resulting benefit to the estate and (2) the trustee and his counsel were motivated by personal gain. *In re Preston Lumber Corp.,* 199 B.R. at 416–17. The case is distinguishable on its face because, as discussed above, there is no evidence here that Trustee was motivated by personal gain and there likely is a resulting benefit to unsecured creditors arising out of the sale.

Lastly, *In re Covington,* 368 B.R. 38, is inapposite. Because the debtor in Covington owed a domestic support obligation, the trustee argued

that § 522(c)(1) required the disallowance of the debtor's exemption in a bank deposit and an automobile to permit those assets to be liquidated and the proceeds paid to the holder of the domestic support obligation claim. The bankruptcy court rejected this argument, noting that "§ 522(c)(1) does not provide for the disallowance of an exemption. Rather, it provides that property exempted by the debtor is nonetheless liable for a domestic support obligation. Disallowance of the exemption is not a predicate to the enforcement of a domestic support obligation." *Id.* at 40–41. The court also denied the trustee's request to sell the assets because (1) the property was removed from the bankruptcy estate since it was exempt and thus there was no property of the estate to administer and (2) although the assets were not fully encumbered, the trustee sought to sell the assets for the benefit of one creditor rather than for unsecured creditors generally.

[514 B.R. 10]

Id. at 41. "Given that the Madera County Child Support Department is collecting the claim for the benefit of the claim holder, it is clear that the assistance of the trustee, which would come at a price, is unnecessary. By enforcing the domestic support obligation in state court, the trustee's administrative expenses will be avoided." *Id.* Unlike *Covington,* the asset here is not exempt and Trustee is liquidating the asset for the general unsecured creditor body.

VI. CONCLUSION

For the reasons stated, we VACATE and REMAND this matter to the bankruptcy court for proceedings consistent with this decision.

Notes:

[*] On June 18, 2014, this Panel entered an order determining that this appeal was suitable for submission without oral argument.

[1.] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and "Rule" references are to the Federal Rules of Bankruptcy Procedure.

[2.] Charles Duck is a former bankruptcy trustee who was convicted for embezzling more than $1.9 million from various bankruptcy estates in late 1989. *See Dickinson v. Duck (In re Duck),* 122 B.R. 403, 404 (Bankr.N.D.Cal.1990). The bankruptcy court made clear that it was not equating Ms. Green with Mr. Duck.

[3.] The SPM court also held that the bankruptcy court had no authority to control how the secured creditor disposed of the proceeds once it received them. *Id.* at 1313.

[4.] Whether or not Trustee will be awarded fees from the eventual sale of the firearms was not at issue before the bankruptcy court nor is it relevant to our analysis in this appeal. The bankruptcy court may consider the appropriate fee at a hearing on compensation.

40 B.R. 795 (1984)

In re Gene CURTIS, fdba G & B Investment, fdba GBI Investment, dba Western Syndications, and Bonnie Curtis, fdba G & B Investment, fdba GBI Investment, Debtors.

Bankruptcy No. 83A-02417.

United States Bankruptcy Court, D. Utah, C.D.

June 11, 1984.

[40 BR 796]

Robert B. Sykes, Salt Lake City, Utah, for Stewart D. Burton and Dorothy B. Burton, Paul L. Wood and Cheren Wood.

Nicholas F. McKean and R. Kimball Mosier, Mosier & McKean, Salt Lake City, Utah, for Gene Curtis and Bonnie Curtis.

[40 BR 797]

MEMORANDUM OPINION

JOHN H. ALLEN, Bankruptcy Judge.

This matter comes before the Court upon the motion of Stewart D. Burton, Dorothy B. Burton, Paul L. Wood and Cheren Wood (hereinafter "movants") to modify the automatic stay provided in 11 U.S.C. § 362(a) in order to join the debtors as defendants in a pending state court proceeding. A complete review of the record in this case and a weighing of all of the relevant factors indicates that relief from the stay should not be granted.

FACTUAL AND PROCEDURAL BACKGROUND

The debtors, Gene and Bonnie Curtis, filed their joint petition under Chapter 11 on September 6, 1983. On October 11, 1983, movants commenced a civil action in the Third Judicial District Court of Salt Lake County, Utah, against several persons with whom the debtors were alleged to have been associated in connection with an agreement to exchange property, which was executed in 1982. The complaint generally alleges that Gene Curtis negotiated the transaction on behalf of the defendants, and that he and the defendants made fraudulent representations and concealed material facts concerning the property exchange. On October 12, 1983, movants sought relief from the automatic stay to permit them to join the debtors as parties defendant and sue them for fraud, negligent misrepresentation and breach of contract in that proceeding.[1]

A hearing was held on November 7, 1983, to consider the stay motion. After considering the memoranda and arguments of counsel, the Court denied the motion. However, on January 31, 1984, this court entered an order authorizing movants to depose the debtors and call them as witnesses in the state court action.

Movants sought leave to appeal the order denying their motion for relief from the stay,[2] and the district court granted leave to appeal. Briefs were submitted and oral argument was heard on March 27, 1984. On April 3, 1984, the district court entered a memorandum decision and order vacating this Court's order denying relief from the automatic stay.[3] The district court found that the record did not show that this Court had weighed all of the relevant factors in denying the motion for relief from the stay.[4] The district court remanded the case with instructions to consider such factors and balance the hardships to the parties.

On remand, this Court held an evidentiary hearing to reconsider movant's request for relief from the stay in light of the district court's decision. At the hearing movants were afforded an opportunity to be heard on the question of modification of the stay, to present evidence, and to argue the law. Movants presented no evidence in support of their motion, but urged the court to consider three factors in making its determination. First, it was argued that judicial

economy favored modification since substantial discovery had already been completed in the state court action and a state court judgment would be res judicata in a subsequent dischargeability proceeding in the bankruptcy court. Second, it was argued that the financial hardship to the movants warranted relief.

[40 BR 798]

Movants considered the costs of having to litigate in two forums to be prohibitively expensive. Third, counsel expressed concern that prejudicial delay would result if the case had to be decided in a jury trial in the district court under the Emergency Rule.[5] In response, the debtors contended that movants failed to meet their burden of proof. It was argued that no showing was made that a denial of relief would cause great hardship to movants, or that they would be prejudiced by an adjudication of their claims in the bankruptcy court. The debtors further argued that the state court's determination on the issue of fraud would not be res judicata in a dischargeability proceeding in the bankruptcy court, and would have to be relitigated. The debtors argued that the time and expense of litigating liability in state court and dischargeability in the bankruptcy court would cause great prejudice to the administration of the Chapter 11 case.

DISCUSSION

1. Relief from the Automatic Stay "For Cause" Other Than Lack of Adequate Protection

Movants' request for relief from the automatic stay is governed by Section 362(d)(1) of the Bankruptcy Code, which provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause . . .

The automatic stay is, of course, one of the fundamental debtor protections under the Bankruptcy Code. H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), 1978 U.S.Code Cong. & Admin.News, 5787, p. 6296. *See* 2 COLLIER ON BANKRUPTCY ¶ 362.04 (15th ed. 1984); 1 W. Norton, BANKRUPTCY LAW AND PRACTICE § 20.04 (1981); R. Aaron, BANKRUPTCY LAW FUNDAMENTALS § 5.01 (1984); Kennedy, "Automatic Stays Under the New Bankruptcy Law," 12 U.Mich.J.L.Ref. 1, 10-24 (1978). Its primary purpose is to protect the debtor and its estate from creditors. S.Rep. No. 95-989, 95th Cong., 2d Sess. 52 (1978), 1978 U.S.Code Cong. & Admin.News, p. 5838.

The automatic stay is intended "to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. The stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another." *Fidelity Mortgage Investors v. Camelia Builders, Inc.,* 550 F.2d 47, 55 (2nd Cir.1976), *cert. denied* 429 U.S. 1093, 97 S.Ct. 1107, 51 L.Ed.2d 540 (1977). The automatic stay implements two goals. First, it prevents the diminution or dissipation of the assets of the debtor's estate during the pendency of the bankruptcy case. Second, it enables the debtor to avoid the multiplicity of claims against the estate arising in different forums.

[40 BR 799]

In re Larkham, 31 B.R. 273, 276, 10 B.C.D. 1093 (Bkrtcy.D.Vt.1983). Stated differently, the policy underlying the automatic stay is to protect the debtor's estate from "the chaos and wasteful depletion resulting from multifold, uncoordinated and possibly conflicting litigation." *In re Frigitemp. Corp.,* 8 B.R. 284, 289 (S.D.N.Y.1981).

Congress recognized that in some circumstances it would be appropriate to modify

the automatic stay "for cause" to permit an action to proceed before another tribunal. The term "cause" is not defined in the Bankruptcy Code. *In re Curlew Valley Associates,* No. 80-00876 (transcript of hearing, page 27) (Bkrtcy.D.Utah April 3, 1981).[6] The decision is necessarily one involving an exercise of the court's discretion. *See In re Olmstead,* 608 F.2d 1365, 1367 (10th Cir.1979) (where the court found that it is within the bankruptcy court's discretion to determine how a contingent or unliquidated claim will be liquidated, whether by judgment of another court or by its own determination). The bankruptcy court exercises the power to modify or vacate the stay "according to the particular circumstances of the case and is to be guided by considerations that under the law make for the ascertainment of what is just to the claimants, the debtor and the estate." *Foust v. Munson Steamship Lines,* 299 U.S. 77, 83, 57 Ct. 90, 93, 81 L.Ed. 49 (1936).

The House Report accompanying H.R. 8200 illustrates several situations in which it might be appropriate to modify the stay to permit litigation in another forum:

> 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 postpetition 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.

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 343-44 (1977), 1978 U.S.Code Cong. & Admin.News, p. 6300. *See also* S.Rep. No. 95-989, 95th Cong., 2d Sess. 52 (1978), 1978 U.S.Code Cong. & Admin.News, p. 5838. The legislative history of Section 362(d)(1) thus suggests that Congress intended to limit relief from the stay to a fairly narrow category of circumstances bearing little relationship to the bankruptcy case or to the purpose of the stay.

2. *Factors Applicable to Determining Whether to Modify the Stay to Permit Litigation Against the Debtor in Another Forum*

Although Section 362 does not attempt to define the parameters of the term "for cause," case law under the Code has recognized certain relevant factors which may be considered in making a determination of whether or not to modify the stay to permit litigation against the debtor to proceed in another forum:

> (1) Whether the relief will result in a partial or complete resolution of the issues. *In re Cloud Nine, Ltd.,* 3 B.R.

[40 BR 800]

> 202, 204, 5 B.C.D. 1377 (Bkrtcy.D.N.M. 1980).
>
> (2) The lack of any connection with or interference with the bankruptcy case. *In re Penn-Dixie Industries, Inc.,* 6 B.R. 832, 7 B.C.D. 56 (Bkrtcy.S.D.N.Y.1980). *See In re Adams,* 27 B.R. 582, 585, 8 C.B.C.2d 843 (D.Del.1983);

H.R.Rep. No. 95-595, *supra,* at 343-44.

(3) Whether the foreign proceeding involves the debtor as a fiduciary. *In re Bailey,* 11 B.R. 199, 201 (Bkrtcy.E.D.Va. 1981). *See* H.R.Rep. No. 95-595, *supra,* at 343-44.

(4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases. *Matter of Gary Aircraft Corp.,* 698 F.2d 775, 784 (5th Cir.1983) (bankruptcy court should defer liquidation of a government contracting dispute to the Board of Contract Appeals); *In re Vogue Instrument Corp.,* 31 B.R. 87 (Bkrtcy.E.D.N.Y.1983); *In re Good Hope Industries, Inc.,* 16 B.R. 719, 722-23 (Bkrtcy.D.Mass.1982); *In re Terry,* 12 B.R. 578, 582-83, 7 B.C.D. 1218 (Bkrtcy.E.D.Wis.1981) (vacating automatic stay to permit state patient compensation panel to adjudicate "wrongful life" malpractice claim against the debtor). *See Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 483, 60 S.Ct. 628, 630, 84 L.Ed. 876 (1940) (unsettled questions of state property law may be submitted to state courts); *In re Lahman Mfg. Co., Inc.,* 31 B.R. 195, 198-99, 10 B.C.D. 1210 (Bkrtcy.D.S. D.1983).

(5) Whether the debtor\'s insurance carrier has assumed full financial responsibility for defending the litigation. *Matter of Holtkamp,* 669 F.2d 505, 508-09 (7th Cir.1982). *See In re Honosky,* 6 B.R. 667, 669, 7 B.C.D. 50 (Bkrtcy.S.D.W. Va.1980); 2 COLLIER ON BANKRUPTCY ¶ 362.073, at 362-49 (15th ed. 1983).

(6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question. *See In re Mego International, Inc.,* 28 B.R. 324, 326, 10 B.C.D. 424, 425 (Bkrtcy.S.D.N.Y. 1983).

(7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors\' committee and other interested parties. *See In re Cloud Nine, Ltd., supra,* 3 B.R. at 204 (Bkrtcy.D.N.M.1980).

(8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c). *See In re Lockwood,* 14 B.R. 374, 380-82 (Bkrtcy.E.D.N.Y.1981).

(9) Whether movant\'s success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f). *Builders and Remodelers, Inc. v. Hanson,* 20 B.R. 440, 442 (Bkrtcy.D.Minn.1982).

(10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties. *In re Pemberton Pub. Inc.,* 16 B.R. 275, 277, 8 B.C.D. 801 (Bkrtcy.D.Mass.1981). *See In re Ozai,* 34 B.R. 764 (Bkrtcy.App. Pan. 9th Cir.1983).

(11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial. *In re Fiedler,* 34 B.R. 602, 604 (Bkrtcy.D.Colo. 1983).

> (12) The impact of the stay on the parties and the "balance of hurt." *In re San Clemente Estates,* 5 B.R. 605, 611, 6 B.C.D. 838 (Bkrtcy.S.D.Cal.1980); *Matter of McGraw,* 18 B.R. 140, 141-42, 6 C.B.C.2d 257 (Bkrtcy.W.D.Wis.1982). *See In re Hoffman,* 33 B.R. 937, 941 (Bkrtcy.W. D.Okla.1983); *In re Saxon Industries,* 33 B.R. 54, 56 (Bkrtcy.S.D.N.Y.1983); *In re Terry, supra,* 12 B.R. 578. *In re Penn-Dixie Industries, Inc., supra,* 6 B.R. at 837. *In re Honosky, supra,* 6 B.R. at 669.

In considering the foregoing factors, it must be borne in mind that the process of determining the allowance of claims is of basic importance to the administration of a bankruptcy estate. *Gardner v. New Jersey,* 329 U.S. 565, 573-74, 67

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S.Ct. 467, 471-72, 91 L.Ed. 504 (1947); *Lesser v. Gray,* 236 U.S. 70, 74, 35 S.Ct. 227, 228, 59 L.Ed. 471 (1915) ("A bankruptcy court in which an estate is being administered has full power to inquire into the validity of any alleged debt or obligation of the bankruptcy upon which a claim or demand against the estate is based. This is essential to the performance of the duties imposed upon it."); *United States Fidelity & Guaranty Co. v. Bray,* 225 U.S. 205, 217, 32 S.Ct. 620, 625, 56 L.Ed. 1055 (1915) ("The jurisdiction of the bankruptcy courts in all `proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims. . . ."). The Bankruptcy Code and Rules implement a speedy, efficient and economical method for the determination and allowance of claims.[7]

3. *The Burden of Proof*

The parties disagree on the issue of who bears the burden of proof. Movants contend that upon making a prima facie showing of "cause," the burden shifts to the debtors to show that they would be greatly prejudiced if relief were granted. The debtors argue that movants must show that modifying the stay will occasion no "great prejudice" to the debtors or their estate, and the hardship to movants of continuing the stay "considerably outweighs" the hardship to the debtor that would result from modification. In vacating this Court's order denying the motion for relief from the stay, the district court directed that consideration be given to "all of the relevant factors," including prejudice to the estate and a balancing of the relative hardships.[8] However, the district court did not address the issue of who would bear the burden of proof on these questions.

Under the Bankruptcy Act of 1898 the ultimate burden of proving prejudice to administration of the debtor's estate was placed on the debtor. *See Foust v. Munson Steamship Lines, supra,* 299 U.S. at 77, 57 S.Ct. at 90; *In re Kane,* 27 B.R. 902, 905 (Bkrtcy.M.D.Pa.1983); *In re Washington Funding Corp.,* 13 B.R. 216, 221 (Bkrtcy.E.D.N.Y.1981). In a leading article on the automatic stay under the Act, Professor Frank Kennedy considered the burden of proof as follows:

> All the stay rules authorize the court "for cause shown" to terminate, annul, modify, or condition the stay. The rules require a party seeking continuation of any stay against lien enforcement, however,

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> to show that he is entitled to the extension of the protection. It is not easy to reconcile the requirement of a showing of cause for modification of the stay with the requirement of a showing of entitlement for its continuation. It has been suggested that the burden of proof rests on the

> party seeking continuation of the stay, whether or not lien enforcement is involved. The legislative developments reflected in the amendments of the Bankruptcy Act from 1960 to 1970, however, support the view that the burden of proof as well as the initiative should rest on the party seeking relief from the stay against in personam actions of the kinds mentioned in Rule 401(a). As pointed out in the Advisory Committee\'s Note to Rule 401, "facts providing a justification for modifying the stay will ordinarily be more easily provable by the creditor than disprovable by the bankrupt."

Kennedy, "The Automatic Stay in Bankruptcy," 11 U.Mich.J.L.Ref. 175, 226-27 (1978) (footnotes omitted).

In *In re the Overmeyer Company, Inc.,* 2 B.C.D. 992, 10 C.B.C. 389 (Bkrtcy.S.D.N. Y.1976), a secured creditor sought relief from the automatic stay under Rule 11-44(a)[9] in order to sell certain corporate stock pledged by the debtor. The court held that a creditor seeking relief from the automatic stay must meet the initial burden of showing cause why continuance of the stay would cause irreparable damage. Upon such showing, the burden shifts to the debtor to demonstrate its entitlement to continuation of the stay. *Id.* at 993, 10 C.B.C. at 393. In *In re Kane,* 27 B.R. 902 (Bkrtcy.M.D.Pa.1983), decided under the Bankruptcy Code, the court followed *Overmeyer,* holding that Section 362(d)(1) requires a party seeking relief to establish a prima facie case for such relief.

Under the Bankruptcy Code, the burden of proof in stay litigation is governed by 11 U.S.C. § 362(g). That subsection states:

> (g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—
>
> (1) the party requesting such relief has the burden of proof on the issue of the debtor\'s equity in property; and
>
> (2) the party opposing such relief has the burden of proof on all other issues.

Most cases arising under Section 362(d)(1) involve creditors holding secured claims who allege that there is insufficient equity in the collateral to adequately protect their interests. The legislative history contemplates this situation, but does not speak to the question of the burden of proof where relief from the stay is sought "for cause" other than for lack of adequate protection. *See* H.R.Rep. No. 95-595, *supra,* at 344; S.Rep. No. 95-989, *supra,* at 54; 124 Cong.Rec. H11093, H11108 (daily ed. Sept. 28, 1978) (remarks of Representative Edwards); 124 Cong.Rec. S17409, S17425 (daily ed. Oct. 6, 1978) (remarks of Senator DeConcini). Collier observes that "to some extent, the Code attempts to follow the practice in the former Rules by requiring a showing of cause by the party requesting relief under Section 362(d)(1) and then in Section 362(g) placing the burden of proof (risk of non persuasion) on the party opposing relief for all issues other than that of `the debtor's equity in property.'" 2 COLLIER ON BANKRUPTCY ¶ 362.10, at 362-58 (15th ed. 1984).

This Court holds that one who seeks relief from the automatic stay must, in the first instance, establish a legally sufficient basis, *i.e.,* "cause," for such relief.[10]

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The burden then lies with the debtor to demonstrate that it is entitled to the stay. *See In re Kane, supra,* 27 B.R. at 902; *In re the Overmeyer Company, Inc., supra,* 2 B.C.D. at 992; 2 COLLIER ON BANKRUPTCY, *supra,* at ¶ 362.10. *See also In re Ludwig Honold Mfg. Co.,* 33 B.R. 722, 723 (Bkrtcy.E.D.Pa.1983); *In re Ram Mfg., Inc.,* 32 B.R. 969, 971 (Bkrtcy.E. D.Pa.1983); *In re Food Fair, Stores, Inc.,* 16 B.R.

387, 291 (Bkrtcy.S.D.N.Y.1982); *In re Wynn Homes, Inc.,* 14 B.R. 520, 522-23 (Bkrtcy.D.Mass.1981); *In re Rutter,* 9 B.R. 878, 879 (Bkrtcy.E.D.Pa.1981); *In re Soltoff,* 1 B.R. 180, 182 (Bkrtcy.E.D.Pa.1979); *In re Oakdale Associates,* 5 B.C.D. 1136, 1139 (Bkrtcy.E.D.N.Y.1979); *Matter of Nevada Towers Associates,* 3 B.C.D. 583, 584-85 (Bkrtcy.S.D.N.Y.1977). A creditor's mere unsupported allegation that continuance of the stay will cause it irreparable harm will not suffice.

APPLICATION TO THIS PROCEEDING

In applying the foregoing considerations to the facts of this case, the Court finds that movants have failed to make out a prima facie case for granting relief from the automatic stay "for cause."[11] The determination of "cause" is one that necessarily requires exercise of judicial judgment and involves mixed questions of fact and law. Kennedy, "Automatic Stays Under the New Bankruptcy Law," 12 U.Mich. J.L.Ref. 1, 42-43 (1978). The Court holds that the existence of pending litigation in another forum filed after the commencement of the bankruptcy case, without more, does not constitute "cause." *Cf.* H.R.Rep. No. 95-595, *supra,* at 343.

However, even if it were to be assumed that movants have presented a prima facie showing of "cause," the Court concludes that the stay should not be vacated. This conclusion follows from a weighing of the appropriate factors set forth above. These factors will be discussed seriatim as they relate to the motion under consideration.

1. *Resolution of the Issues.* The contrary conclusion of the movants notwithstanding, a determination of the dischargeability of the claim by the Bankruptcy Court is unavoidable. The question of dischargeability of debts is, of course, a federal question. *In re Barrett,* 2 B.R. 296, 298 (Bkrtcy.E.D.Pa.1980). The bankruptcy court has exclusive jurisdiction to determine dischargeability of all claims relating to fraud under Section 523(c). *See* 3 COLLIER ON BANKRUPTCY ¶ 523.05 (15th ed. 1984); 1 W. Norton BANKRUPTCY LAW AND PRACTICE § 27.72 (1981). Nonbankruptcy courts have concurrent jurisdiction to determine dischargeability of certain other claims. Norton, *supra,* at § 27.73. If the state court finds fraud on the part of the debtors, the bankruptcy court must then apply the standards of 11 U.S.C. § 523 to decide the dischargeability issues. *In re Ozai, supra,* 34 B.R. at 766.

State Court judgments are not res judicata in a subsequent nondischargeability action in the bankruptcy court. *Commonwealth of Massachusetts v. Hale,* 618 F.2d 143 (1st Cir.1980); *In re Franklin,* 615 F.2d 909 (10th Cir.1980); *Carey Lumber Co. v. Bell,* 615 F.2d 370 (5th Cir.1980); *Matter of Kasler,* 611 F.2d 308 (9th Cir. 1979); *Lawrence T. Lasagna, Inc. v. Foster,* 609 F.2d 392 (9th Cir.1979); *In re Houtman,* 568 F.2d 651 (9th Cir.1978). *See Brown v. Felsen,* 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979) (Court unanimously held that a bankruptcy court may consider evidence extrinsic to the judgment

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and record of a prior state court suit when determining whether such a debt is dischargeable); *In re Lockwood,* 14 B.R. 374, 377-78, B.C.D. 128 (Bkrtcy.E.D.N.Y.1981); *In re Bus Stop, Inc.,* 3 B.R. 26, 27, 6 B.C.D. 138 (Bkrtcy.S.D.Fla.1980). Significant differences exist between fraud under state law and nondischargeable fraud under Section 523(a)(2). *Compare Dugan v. Jones,* 615 P.2d 1239, 1246 (Utah 1980) (a misrepresentation is fraudulent where the circumstances impose upon vendor of real property a special duty to know the truth of his representations, or nature of the situation is such that vendor is presumed to know the facts to which his representation relates); *Sugarhouse Finance Company v. Anderson,* 610 P.2d 1369, 1373 (Utah 1980) (a finding of fraud requires a showing of a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon upon which the plaintiff reasonably relies to his detriment); *Blodgett v. Martsch,* 590 P.2d 298, 302 (Utah 1978) (plaintiff need not show an

intent to defraud where a confidential relationship exists between the parties and breach of duty is alleged); *Cheever v. Schramm,* 577 P.2d 951, 954 (Utah 1978) (one claiming fraud must show that he acted reasonably under the circumstances); *Pace v. Parrish,* 247 P.2d 273, 274-75, 122 Utah 141 (1952) (a party claiming fraud must prove (1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage); *Elder v. Clawson,* 384 P.2d 802, 804, 14 Utah 379 (1963) (silence may constitute actionable fraud where a duty to disclose arises from a relation of trust, confidence, inequality of condition and knowledge, or other attendant circumstances); *Johnson v. Allen,* 158 P.2d 134, 137, 108 Utah 148 (1945) (before one can obtain relief from a claimed fraud, he must show not only that he relied on the misrepresentation but also that he had the right to rely on it), *with In re Firestone,* 26 B.R. 706, 713 (Bkrtcy.S.D.Fla.1982) (the five elements of nondischargeable fraud under Section 523(a)(2)(A) are that (1) the debtor made the representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made); *Matter of Schnore,* 13 B.R. 249 (Bkrtcy.W.D.Wis.1981) (in order for fraudulent misrepresentation to constitute exception to discharge, there must be actual, subjective intent on the part of the debtor to deceive the creditor at the time of the transaction); *In re West,* 21 B.R. 872, 875 (Bkrtcy.M.D.Tenn.1982) (a creditor must establish intentional or positive fraud; it is insufficient for a creditor to prove "implied fraud"); *Matter of Lawrence,* 1 B.R. 402, 405, B.C.D. 1185 (Bkrtcy.S.D.N.Y.1979) (an objecting creditor must prove representation, falsity, scienter, deception and injury by clear and convincing evidence and the inference of fraud must be unequivocal).

It is clear that in a nondischargeability action the bankruptcy court may look behind the state court judgment and examine the facts in light of the Bankruptcy Code. A state court judgment would be subject to collateral attack by the bankruptcy court and would not determine the issue of nondischargeability. Therefore, an order granting relief from the stay to permit movants to liquidate their claims against the debtors in the state court proceeding will only result, at best, in a partial resolution of the issues and at worst will result in additional expense to the parties and needless relitigation in the bankruptcy court. *See In re Cloud-Nine, Ltd., supra,* 3 B.R. at 204.

2. *Lack of Connection with the Bankruptcy Case*. Congress contemplated that

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relief from the stay may be appropriate to permit state court adjudication of such matters as divorce, child custody and probate proceedings where such matters bear no relation to the bankruptcy case. H.R. Rep. No. 95-595, *supra,* at 343. However, unlike those issues, the allowance of claims and determination of nondischargeability are fundamental bankruptcy issues. See discussion, *supra*.

3. *Debtor as a Fiduciary*. This factor is apparently not applicable to this proceeding.

4. *Another Forum Better Suited to Determination of the Issue*. Movants' complaint alleges causes of action for fraud, negligent misrepresentation and breach of contract. These matters do not involve unsettled questions of state law, nor do they require adjudication before a specialized tribunal. Rather, they are matters routinely heard in the bankruptcy court.

5. *Costs Borne by Insurance Carrier*. With regard to the question of costs, there is no

insurance carrier involved in this case and all costs and expenses of litigation must be borne by the respective parties.

6. *Third Party Liability*. Movants seek more than an adjudication of the liability of third parties. They want to obtain a nondischargeable claim against the debtors in the state court action.

7. *Interests of Other Creditors*. No evidence is before the Court concerning the interests of other parties in this Chapter 11 case.

8. *Equitable Subordination*. There is no basis upon which the Court can presently determine whether movants' claim is subject to equitable subordination under Section 510(c).

9. *Avoidable Lien*. The Court cannot presently determine whether a judgment against the debtors in the state court action would result in a voidable judicial lien under Section 522(f).

10. *Progress of State Court Action*. The state court action was filed *after* the debtors filed their bankruptcy petition. In the Court's view, "a desire to permit an action to proceed to completion in another tribunal," *see* H.R.Rep. No. 95-595, *supra,* at 343, U.S.Code Cong. & Admin.News 1978, p. 6300, contemplates the situation in which the debtor is a party to a prepetition action that has progressed to the point where it would be a waste of the parties' and the court's resources to begin anew in the bankruptcy court. It appears that significant pretrial discovery and other proceedings would be required if the debtors were joined as defendants.

11. *Judicial Economy and Expeditious Determination of the Issues*. It is argued by the movants that substantial discovery has already been accomplished in the state court action, which would be for naught if relief was denied. This contention is without merit. The debtors are not parties to the proceeding. It must be presumed that such discovery as has occurred was directed at obtaining relevant evidence against the existing defendants in the action. *See* Rule 26(b)(1), Utah R.Civ.P. Movants also contend that prejudicial delay would result from an adjudication of the issues in the bankruptcy court because a jury trial would have to be conducted in the district court.[12] Two facets of this argument warrant comment. First, a jury trial generally is not available in proceedings to estimate claims under Section 502(c). *See Bittner v. Borne Chemical Co., Inc.,* 691 F.2d 134, 135 (3d Cir.1982) ("It is conceivable that in rare and unusual cases . . . a jury trial may be necessary to obtain a reasonably accurate valuation of the claims."); 3 COLLIER ON BANKRUPTCY § 502.03, at 502-65 through 502-66 (15th ed. 1984). *Compare Pepper v. Litton,* 308 U.S. 295, 307, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939) (In passing on the allowance of claims the bankruptcy court sits as a court of equity), *with Katchen v. Landy,* 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) (There is no Seventh Amendment right to a jury trial in equitable proceedings in the bankruptcy court).

[40 BR 806]

Second, although I refrain from deciding an issue not properly before me, it must be noted that the question of whether bankruptcy courts may conduct jury trials remains unresolved in the aftermath of the new Bankruptcy Rules. Several courts have held that insofar as subdivision (d)(1)(D)[13] of the Emergency Rule conflicts with Bankruptcy Rule 9015, which was promulgated by the Supreme Court under statutory authority conferred by 28 U.S.C. § 2075, the latter must prevail. *Matter of Paula Saker & Co.,* 37 B.R. 802, 809 (Bkrtcy.S.D.N.Y.1984); *In re Martin Baker Well Drilling, Inc.,* 36 B.R. 154, 158 (Bkrtcy.D.Maine 1984); *In re River Transportation Co.,* 35 B.R. 556, 559-60, 11 B.C.D. 300 (Bkrtcy.M.D.Tenn.1983). *Contra In re Proehl,* 36 B.R. 86, 87-88 (W.D. Va.1984). *Cf. In re Morrissey,* 717 F.2d 100 (3d Cir.1983) ("clearly erroneous" standard of review under Bankruptcy Rule 8013 prevails over the de novo review standard of Emergency Rule § (e)(2)(B)).[14]

The ultimate question in this case is the allowance of movant's claims against the debtor's estate and the dischargeability thereof. A

determination of liability in the state court action would be followed by the filing of a proof of claim in this court and continuation of the nondischargeability suit. Serious questions exist with respect to the right to a jury trial in the bankruptcy court. However, the Court believes that the most expeditious course would be to adjudicate movants' claim here and, if necessary, estimate their claim under the procedure afforded by Section 502(c).

12. *The Balance of Hurt.* Financial hardship to the movants must, of course, be balanced against financial hardship to the debtors. *See Matter of McGraw, supra,* 18 B.R. at 142. In the absence of some other justification, the court will not shift the financial burden from another party to the debtors. To do so would contravene the fundamental policy in favor of economic administration of debtors' estates.

The most important factor in determining whether to grant relief from the automatic stay to permit litigation against the debtor in another forum is the effect of such litigation on the administration of the estate. Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit. In *In re Penn-Dixie Industries, Inc., supra,* 6 B.R. 832, the debtor had been named as a party defendant in several civil antitrust lawsuits prior to the filing of its Chapter 11 petition. Thereafter, plaintiffs in the antitrust litigation sought relief from the automatic stay in order to obtain the debtor's customer lists. Relying upon the legislative history of Section 362, the court observed that "an important key to determining whether to permit an action to proceed in another tribunal turns upon the issue of `connection with or interference with the pending bankruptcy cases.'" *Id.* at 835. Emphasizing that furnishing the lists would involve an expenditure of energy and money and detract from the reorganization effort, the bankruptcy court denied the requested relief:

[40 BR 807]

> The granting of Plaintiff\'s requested relief would also interfere with the pending bankruptcy case. As pointed out earlier, Plaintiffs\' requested relief from the automatic stay does not ask for permission to proceed in full with their antitrust suit. What they seek is specific production of lists to aid discovery in litigation outside this Court that is already stayed. Nowhere does the Bankruptcy Code or Rules of Bankruptcy Procedure provide for this, and to require the Debtor to comply with the request will necessitate a deviation from the Debtor\'s duties and responsibilities in this reorganization, (not to mention the costs of compliance). That consideration cannot be shrugged off as de minimis. Interference by creditors in the administration of the estate, no matter how small, through the continuance of a preliminary skirmish in a suit outside the Bankruptcy Court is prohibited. In short, the Debtor should not be required to devote energy to this collateral matter at this juncture.

Id. at 836. *Cf. In re Dakotas' Farm, Mfg. Co.* 31 B.R. 92 (Bkrtcy.D.S.D.1983) (documents ordered produced provided plaintiff bear all copying expenses and the salary of any clerical assistance employed in providing the copies).

On the record before the Court, it is not possible to determine that the hardship to movants would outweigh the hardship to the debtors.

CONCLUSION

Undoubtedly, there are instances in which it is both reasonable and appropriate to grant relief from the automatic stay to permit another forum to determine whether a creditor has a valid claim against the estate. The Court finds, however, that

this case would be more conveniently administered if the stay remained in effect, since this court is in the best position to afford complete relief to the parties. Movants have failed to show that their claim could be liquidated more expeditiously or economically in the state court action. Relief from the stay would frustrate, rather than advance, the economical administration of this case. The potential disruption and expense to the debtors' estate in defending the state court action would cause great prejudice to the administration of this case. The collateral benefits that movants hope to achieve in the state court proceeding are nonexistent. The mechanism for a speedy adjudication of the merits of movants' claim and the determination of nondischargeability of any debt arising thereunder is an integral part of the Bankruptcy Code and Rules. Considerations of overall judicial economy and the interests of the parties, therefore, favor resolution in this Court.

Based on the foregoing analysis, the motion for modification of the automatic stay is denied.

Notes:

1 Pursuant to its rule-making authority under 28 U.S.C. § 2075, the Supreme Court prescribed new Bankruptcy Rules to govern the practice and procedure in cases under the Bankruptcy Code, which became effective on August 1, 1983. Rule 4001, which permits a party requesting relief from the automatic stay pursuant to Section 362(d) to proceed by motion rather than by the filing of a complaint, represents a significant change from the former practice. A motion for relief from the stay is a contested matter under Bankruptcy Rule 9014 and the rules governing discovery and presentation of evidence apply.

2 Appeals from interlocutory orders in bankruptcy cases are governed by 28 U.S.C. § 1334(b) and Bankruptcy Rule 8003. *See generally* 1 COLLIER ON BANKRUPTCY ¶ 3.03 (15th ed. 1984).

3 *Burton, et al. v. Curtis,* Civil No. C-83-1325W, slip op. (April 3, 1984) (Winder, J.).

4 *Id.* at 3.

5 The Emergency Rule enacted in this District in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), provides in subsection (d) as follows:

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt —

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) An appeal from a judgment, order, decree or decision of a United States bankruptcy judge.

(D) A trial by jury.

See In re Color Craft Press, Ltd., 27 B.R. 962, 967, 10 B.C.D. 182 (D. Utah 1983). *Cf.* Countryman, "Emergency Rule Compounds Emergency," 57 Am.Bankr.L.J. 1-22 (1983).

6 The single example of "cause" identified in Section 362(d)(1), *viz.,* "lack of adequate protection," is not applicable in this case. The adequate protection concept was examined by this court in *In re Alyucan Interstate Corp.,* 12 B.R. 803, 7 B.C.D. 1123, 4 C.B.C.2d 1066 (Bkrtcy.D. Utah 1981), *In re South Village, Inc.,* 25 B.R. 987, 9 B.C.D. 1332 (Bkrtcy.D.Utah 1982);

and *In re Sweetwater,* 40 B.R. 733 (Bkrtcy.D.Utah 1984.).

7 Unlike the treatment afforded contingent and unliquidated claims under the 1898 Bankruptcy Act, the Code provides for an estimate of the amount of such claims for purpose of allowance where the actual liquidation of the claim would unduly delay the closing of the case. Section 502(c) provides: "(c) There shall be estimated for purpose of allowance under this section—(1) any contingent or unliquidated claim, fixing or liquidation of which, as the case may be, would unduly delay the closing of the case; or (2) any right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." *See generally* 3 COLLIER ON BANKRUPTCY ¶ 502.03 (15th ed. 1984); Note, "Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy," 35 Stan.L.Rev. 153 (1982). In *Katchen v. Landy,* 382 U.S. 323, 328-29 86 S.Ct. 467, 471-72, 15 L.Ed.2d 39 (1966), the Supreme Court noted that it had "long recognized that a chief purpose of the bankruptcy laws is `to secure a prompt and effectual administration of all bankrupts within a limited period,'" and that provision for summary determination of claims "`without regard to usual modes of trial attended by some necessary delay,' is one of the means chosen by Congress to effectuate that purpose." Section 502(c) of the Code requires that all claims be converted into dollar amounts. H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 354 (1977), 1978 U.S.Code Cong. & Admin.News, p. 6310; S.Rep. No. 95-989, 95th Cong., 2d Sess. 65 (1978), 1978 U.S.Code Cong. & Admin.News, p. 5851. Congress intended that contingent or unliquidated claims be estimated by the bankruptcy judges under Section 502(c), using whatever method is best suited to the particular contingencies at issue. *Bittner v. Borne Chemical Co., Inc.,* 691 F.2d 134, 135 (3d Cir.1982). The language of Section 502(c) is mandatory, not permissive, and imposes upon the court an affirmative duty to estimate any unliquidated claim where the actual liquidation of the claim would unduly delay closing of the case. *In re Nova Real Estate Investment Trust,* 23 B.R. 62, 65, 7 C.B.C.2d 87 (Bkrtcy.E.D.Va.1982).

8 Supra note 3, at 5.

9 Under the former Rules of Bankruptcy Procedure, automatic stays were prescribed by Rules 401, 601, 8-501, 9-4, 10-601, 11-44, 12-43 and 13-401. *See* Kennedy, *supra,* at 177 n. 1. Rule 11-44(a) provides: "(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act of the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

10 Certainly movants are best able to present evidence of "cause." *Cf. Adams v. United States,* 317 U.S. 269, 281, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942) ("It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such an injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.").

11 Movant's proffer that financial hardship would result if they had to litigate in two courts is at best inconclusive. No showing was made that they could not bear the expense or that the debtors were any better situated. More importantly, movants misunderstand the extent to which full relief could be accorded in the state court. See discussion, *infra.*

12 *Supra* note 5.

13 *Id.*

14 Movants have not argued that they are entitled to a jury trial in their nondischargeability action. Under the 1898 Bankruptcy Act, Judge Herzog of the Bankruptcy Court for the Southern District of New York presented a strong argument for the right to a jury trial in nondischargeability cases. *See In re Law Research Service, Inc.,* Bankr.Law Rep. ¶ 64,528 (Bkrtcy. S.D.N.Y.1971).

Compare Herzog, "The Case for Jury Trials on the Issue of Dischargeability," 46 Am.Bankr.L.J. 235 (1972), *with* Countryman, "Jury Trials on Dischargeability—A Reply to Referee Herzog," 46 Am.Bankr.L.J. 311 (1972). However, the weight of authority under the Act was decisively contrary to Herzog. *See e.g., In re Swope,* 466 F.2d 936 (7th Cir.1972), *cert. denied* 409 U.S. 114, 93 S.Ct. 929, 34 L.Ed.2d 697 (1973); *Matter of Copeland,* 412 F.Supp. 949 (D.Del.1976); *Transport Idemnity Company v. Hofer Truck Sales,* 339 F.Supp. 247 (D.Kan. 1971); *Matter of Palfy,* 336 F.Supp. 1268 (D.Ohio 1972).

The right to a trial by jury in bankruptcy matters is unaffected by the Code. 28 U.S.C. § 1480(a). *See* H.R.Rep. No. 95-595, *supra,* at 448; S.Rep. No. 95-989, *supra,* at 157. *Cf.* Levy, "Trial by Jury Under the Bankruptcy Reform Act of 1978," 12 Conn.L.Rev. 1-13 (1979).

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IN RE: Shawne MERRIMAN, Debtor.

Shawne Merriman, Appellant,
v.
Ferdinand Fattorini; Deann Fattorini, Appellees.

BAP No. CC-19-1245-LTaF
Bk. No. 2:18-bk-23173-VZ

United States Bankruptcy Appellate Panel of the Ninth Circuit.

FILED JULY 13, 2020

Raymond H. Aver of Law Offices of Raymond H. Aver argued for appellant;

Torsten M. Bassell of LARI-JONI & BASSELL, LLP, Los Angeles, CA, argued for appellees.

Before: LAFFERTY, TAYLOR, and FARIS, Bankruptcy Judges.

LAFFERTY, Bankruptcy Judge:

INTRODUCTION

Chapter 13[1] debtor Shawne Merriman appeals the bankruptcy court's order retroactively annulling the automatic stay to permit appellees Ferdinand and Deann Fattorini to proceed with a state court wrongful death action against him and others. Post-petition, and shortly before the statute of limitations was set to run on the wrongful death claim, the Fattorinis filed

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their state court complaint without knowledge of the bankruptcy case. Upon being notified of the case, they promptly moved to annul the stay to validate the filing of the state court complaint and to liquidate their claim against Mr. Merriman. The bankruptcy court found cause retroactively to lift the stay and granted the motion.

We AFFIRM. We publish to address the impact, if any, of *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano* , ––– U.S. ––– –, 140 S. Ct. 696, 206 L.Ed.2d 1 (2020) (per curiam), which was decided during the pendency of this appeal, on the issues raised therein.

FACTUAL BACKGROUND

Mr. Merriman filed a chapter 13 petition in November 2018. Notice of the case was not served on the Fattorinis.

In July 2019, several months after Mr. Merriman's bankruptcy filing, the Fattorinis filed a lawsuit against Mr. Merriman and others in Los Angeles County Superior Court seeking damages under state law in connection with the July 2017 death of their daughter Kimberly ("State Court Action"). A few days later, after learning of Mr. Merriman's bankruptcy through his counsel, they filed a motion for relief from stay (the "Stay Motion").[2] They asked the court to annul the stay to permit them to continue litigating the State Court Action, which was set for trial in January 2021. The motion was supported by the form declaration prescribed by the Local Rules for the Central District of California and a supplemental declaration of the Fattorinis' counsel, to which was attached a copy of the state court complaint and other documents. In the supplemental declaration, counsel testified that he had researched Mr. Merriman but did not discover that he had filed a bankruptcy petition. Counsel also testified that the State Court Action was filed in July 2019 because the applicable limitations period was about to expire.

Mr. Merriman filed an opposition, arguing that the Stay Motion was not supported by sufficient evidence and did not demonstrate that "cause" existed to lift the stay pursuant to § 362(d)(1) in light of the relevant factors. He also argued that the request for retroactive annulment lacked factual or legal grounds other than "suspicious and objectionable statements" in counsel's declaration regarding lack of notice of the bankruptcy filing.

In addition, Mr. Merriman objected to statements contained in counsel's supplemental declaration in support of the Stay Motion. Those statements pertained to the circumstances of Kimberly's death and included information obtained through the Los Angeles County Sheriff's investigation and information about Mr. Merriman discovered through internet searches. He argued that the declaration testimony lacked foundation, was not based on personal knowledge, was hearsay, and constituted improper opinion testimony.

At the hearing on the Stay Motion, the court sustained several of Mr. Merriman's evidentiary objections, but it nevertheless found that cause existed to annul the stay. The court found that the Fattorinis did not have notice of the bankruptcy case before they filed the State Court Action. Additionally, it found that the issues in the State Court Action needed to be litigated and that it made sense to have those issues tried in one place. Accordingly, the court ruled that it would lift the stay retroactively to permit the Fattorinis to liquidate their damages in state court and potentially obtain findings and conclusions from the state court that could be applied preclusively in a nondischargeability proceeding.

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The bankruptcy court's order granted retroactive relief from stay and provided that if the Fattorinis were to obtain a final judgment against Mr. Merriman in the State Court Action, they would be stayed from enforcing the judgment without a further order of the bankruptcy court. The court also ordered that if a final judgment were obtained in the State Court Action, the Fattorinis could file it "as a liquidated claim in Debtor's bankruptcy action and commence an adversary proceeding to determine whether any such judgment is enforceable or dischargeable."

Mr. Merriman timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Whether the bankruptcy court abused its discretion in retroactively annulling the automatic stay.

STANDARD OF REVIEW

A bankruptcy court's decision retroactively to annul the automatic stay is reviewed for an abuse of discretion. *Gasprom, Inc. v. Fateh (In re Gasprom, Inc.)* , 500 B.R. 598, 604 (9th Cir. BAP 2013) (citing *Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.)* , 129 F.3d 1052, 1054 (9th Cir. 1997) ; additional citation omitted). A bankruptcy court abuses its discretion if its decision is based on the wrong legal standard or its findings of fact were illogical, implausible, or without support in the record. *TrafficSchool.com, Inc. v. Edriver Inc.* , 653 F.3d 820, 832 (9th Cir. 2011) (citing *United States v. Hinkson* , 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

We may affirm on any basis supported by the record. *Caviata Attached Homes, LLC v. U.S. Bank, Nat'l Ass'n (In re Caviata Attached Homes, LLC)* , 481 B.R. 34, 44 (9th Cir. BAP 2012).

DISCUSSION

Section 362(d)(1) provides that the bankruptcy court, on request of a party in interest and after notice and a hearing, must grant relief from the automatic stay, "such as by terminating, annulling, modifying, or conditioning" the stay, upon a showing of "cause."

"What constitutes ‘cause’ for granting relief from the automatic stay is decided on a case-by-case basis." *Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer)* , 405 B.R. 915, 921 (9th Cir. BAP 2009) (citing *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)* , 912 F.2d 1162, 1166 (9th Cir. 1990) ; additional citation omitted).

In assessing whether relief from stay should be granted to allow state court proceedings to continue in that forum, the bankruptcy court should consider judicial economy, the expertise of the state court, prejudice to the parties, and whether exclusively bankruptcy issues are involved. *Id.*

In determining whether retroactive annulment of the stay is appropriate, courts have focused on two main factors: "(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." *In re Nat'l Envtl. Waste Corp.* , 129 F.3d at 1055.

The bankruptcy court's findings are sparse, but the record supports its ruling. The State Court Action involves exclusively state law claims, and Mr. Merriman has pointed to no prejudice to him resulting from permitting the State Court

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Action to proceed, other than that he lacks insurance that could fund his defense, and Mr. Merriman would face the same problem if the case were litigated in bankruptcy court. Mr. Merriman is one of six defendants in the State Court Action so the case would have to be tried in state court, with or without Mr. Merriman; judicial economy dictates that the matter be tried in one forum.[3] Of course, if the Fattorinis prevail in the State Court Action, they will need to return to the bankruptcy court to litigate nondischargeability, but such a proceeding would likely be relatively simple if the state court makes findings that may be applied preclusively.

As for retroactive relief, the bankruptcy court found that the Fattorinis lacked notice of the bankruptcy filing, and the record shows that if they were not granted such relief, their wrongful death claim may be time-barred.[4]

Mr. Merriman contends that the bankruptcy court abused its discretion in annulling the stay because: (1) the Stay Motion was not supported by sufficient evidence; (2) the court did not apply correct standards in determining that cause existed to lift the stay and that retroactive annulment was appropriate; and (3) the facts weighed against granting the requested relief. We disagree.

A. The Stay Motion was supported by sufficient evidence.

As noted, the bankruptcy court sustained many of Mr. Merriman's evidentiary objections to the supplemental declaration filed with the Stay Motion. He contends that the remaining evidence was insufficient to support a finding of cause under § 362(d)(1). He argues that the "unverified complaint" attached to the declaration should be deemed without evidentiary effect, citing *Esteem v. City of Pasadena* , No. CV 04-662-GHK, 2007 WL 4270360, at *3 (C.D. Cal. Sept. 11, 2007) (citing *Moran v. Selig* , 447 F.3d 748, 759 & n.16 (9th Cir. 2006)). Those cases involved litigants attempting to use unverified complaints in summary judgment proceedings to prove the matters asserted therein. Here, the complaint was submitted only to describe the nature of the state court litigation, not to prove the truth of its allegations. It was thus properly considered by the court.

Mr. Merriman also asserts that many of counsel's statements in the supplemental declaration were not based on personal knowledge. But the bankruptcy court excluded much of the supplemental declaration, and Mr. Merriman does not indicate which portions of the remainder he finds objectionable. Thus he has not shown that the bankruptcy court relied on any inadmissible evidence, and the non-excluded evidence attached to the Stay Motion supports its findings (i.e., the fact that counsel did not learn of the bankruptcy until after filing the State Court Action, and the procedural posture and nature of the claims being asserted in that action).

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B. The bankruptcy court applied the correct legal standards.

Mr. Merriman argues that the bankruptcy court erred in finding cause for granting relief from stay by failing to make findings as to the " *Curtis* factors," which were cited by this Panel in *Kronemyer* . Those factors were initially articulated in *In re Curtis* , 40 B.R. 795, 799-800 (Bankr. D. Utah 1984), and were adopted by the bankruptcy court in *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)* , 311 B.R. 551, 559–60 (Bankr. C.D. Cal. 2004).[5]

In *Kronemyer* , the Panel articulated the factors to be considered in lifting the stay to permit state court litigation to proceed as set forth above– judicial economy, the expertise of the state court, prejudice to the parties, and whether exclusively bankruptcy issues are involved. 405 B.R. at 921. The Panel noted that the bankruptcy court had appropriately considered the *Curtis* factors in deciding to grant relief from stay to allow pending litigation to continue in another forum. *Id.* But the Panel did not hold that express consideration of each of the *Curtis* factors was required. In fact, it based its affirmance of the bankruptcy court's order primarily on grounds that judicial economy weighed in favor of stay relief. *See id.* at 921-22.

In a similar vein, Mr. Merriman contends that the bankruptcy court erred in not properly applying the factors in the balancing of the equities test for retroactive annulment of the stay set forth in *Fjeldsted v. Lien (In re Fjeldsted)* , 293 B.R. 12, 24-25 (9th Cir. BAP 2003).[6] In

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Fjeldsted , although the Panel held that the bankruptcy court must consider the equities in determining whether retroactive relief is appropriate and articulated factors that may be considered in that determination, it also noted that "a mechanistic application of factors is inappropriate in making this determination, [but] such factors may be considered as an aid to the court in weighing the equities." 293 B.R. at 24.

In summary, the bankruptcy court was not **required** to make findings as to each suggested factor when determining whether cause existed for granting relief from stay or whether the equities weighed in favor of retroactive annulment. Mr. Merriman has not shown that the bankruptcy court failed to apply the correct legal standards for both findings as set forth in *Kronemyer* and *National Environmental Waste* .

C. The bankruptcy court did not err in finding cause for relief from stay.

Mr. Merriman contends that the Fattorinis failed to demonstrate cause to grant relief from stay. He reaches this conclusion based on his analysis of the *Curtis* factors, which he submits weigh against a finding of cause. Specifically, he argues that (1) the State Court Action had only recently been filed, (2) he has no insurance policy that could fund his defense of the State Court Action and he is financially unable to defend it, (3) the Fattorinis presented no evidence regarding their chances of success in the State Court Action, (4) he would be prejudiced by the continuance of the State Court Action, and (5) the deadline for filing a complaint to determine nondischargeability has expired.

As discussed, the bankruptcy court was not required expressly to analyze each of the *Curtis* factors in reaching its conclusions. In any event, there is no requirement that the moving party show it would be likely to prevail in the state court litigation. And Mr. Merriman is wrong that the Fattorinis are time-barred from filing a nondischargeability complaint. The deadline for filing a nondischargeability complaint under § 523(a)(2), (4), or (6) expired on February 11, 2019, but that deadline does not apply to the Fattorinis because they lacked notice of the bankruptcy filing in time to file a timely complaint. *See* 11 U.S.C. § 523(a)(3)(B) (a debt is not discharged if it is not listed or scheduled in time for the creditor to file a timely proof of claim and request for determination of nondischargeability under § 523(a)(2), (4), or (6), unless the creditor had notice or actual knowledge); Rule 4007(b) ("A complaint other than under § 523(c) may be filed at any time."). And the bankruptcy court's order explicitly

provides that if the Fattorinis prevail in state court, they may return to the bankruptcy court for a determination of nondischargeability.[7]

As discussed, the relevant factors–judicial economy, expertise of the state court, prejudice to the parties, and whether exclusively bankruptcy issues are involved–weighed in favor of finding cause to grant

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relief from the stay. The first, second, and fourth considerations weigh in favor of relief because the State Court Action involves exclusively state law claims against multiple defendants. And the only evidence of prejudice before the bankruptcy court was Mr. Merriman's declaration testimony that he has no insurance coverage to defend against the State Court Action. Although one of the *Curtis* factors is "[w]hether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation," 40 B.R. at 800, Mr. Merriman has not cited any authority that this factor alone would have warranted denial of the Stay Motion in light of all the relevant circumstances, particularly where he would probably face the same problem no matter which court adjudicated the claims.

D. The bankruptcy court did not err in finding that retroactive relief was appropriate.

Finally, Mr. Merriman argues that the bankruptcy court abused its discretion in annulling the stay retroactively because it made no finding of cause for retroactive relief. He notes that when he objected to the form of order submitted by the Fattorinis, the bankruptcy court added language to the order that retroactive relief was appropriate because the Fattorinis did not have notice of the bankruptcy filing, but he still contends that the bankruptcy court abused its discretion by not applying the *Fjeldsted* "balancing of the equities" factors.

As noted, the bankruptcy court was not required to analyze each and every factor articulated in *Fjeldsted* , but it was required to balance the equities by considering whether the Fattorinis were aware of the bankruptcy petition and whether prejudice would result to them by not granting retroactive relief. *See In re Nat'l Envtl. Waste Corp.* , 129 F.3d at 1055. Here, the court found that the Fattorinis did not have notice of the bankruptcy case; Mr. Merriman does not dispute that finding. Moreover, the record supports retroactive relief: the Fattorinis moved for relief from stay only a few days after learning of the bankruptcy case, and if retroactive relief were not granted so as to validate the filing of the state court complaint, they might be time-barred from pursuing their wrongful death claim.[8]

E. The Supreme Court's *Acevedo* opinion does not preclude retroactive relief from stay.

During the pendency of this appeal, the Supreme Court decided *Acevedo* , 140 S. Ct. 696, in which it held that a United States District Court's nunc pro tunc order remanding a removed lawsuit to state court was not effective to retroactively confer jurisdiction so as to validate the state court's orders entered before remand. *See id.* at 699-701.[9] At least one bankruptcy court has interpreted *Acevedo* as prohibiting a grant of retroactive or nunc pro tunc relief from stay. *In re Telles* , No. 8-20-70325-reg, 2020 WL 2121254 (Bankr. E.D.N.Y. Apr. 30, 2020).

We do not believe that the ruling in *Acevedo* prohibits a bankruptcy court's exercise of the power to grant retroactive relief from stay. But this court should always carefully consider the scope and reach of Supreme Court opinions; and in light of our disagreement with *Telles* –that

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Acevedo is directly relevant to requests to terminate or annul the stay retroactively–we consider the issue here and at some length.

In *Acevedo* , employees of Roman Catholic academies in the Archdiocese of San Juan, Puerto Rico, sued the Archdiocese and other entities in

the Puerto Rico Court of First Instance for alleged termination of pension benefits. *Id.* at 697. During the litigation, the Archdiocese filed a chapter 11 case and removed the lawsuit to the United States District Court for the District of Puerto Rico. *Id.* at 699-700. Roughly a month later, the bankruptcy court dismissed the chapter 11 case, but the lawsuit was not immediately remanded to the Court of First Instance. *Id.* at 700. Nevertheless, shortly after the bankruptcy case was dismissed, the Court of First Instance issued orders against various defendants requiring payments and ordering seizure of assets. *Id.* Approximately five months later, the District Court entered an order remanding the lawsuit to the Court of First Instance; the order provided that the remand was effective as of the date of dismissal of the bankruptcy case. *Id.*

The defendants appealed the payment and seizure orders to the Puerto Rico Court of Appeals, which reversed. *Id.* at 698. The Puerto Rico Supreme Court reversed the court of appeals. *Id.* The Supreme Court then granted the Archdiocese's writ of certiorari. *Id.* at 701. But the Supreme Court did not reach the merits of the appeal. The Court held that the Court of First Instance lacked jurisdiction to issue the payment and seizure orders at the time it did so because the District Court still had jurisdiction over the lawsuit, despite the fact that its remand order purported to be effective retroactively:

> Once a notice of removal is filed, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). The state court loses all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment are not ... simply erroneous, but absolutely void ....
>
> The Court of First Instance issued its payment and seizure orders after the proceeding was removed to federal district court, but before the federal court remanded the proceeding back to the Puerto Rico court. At that time, the Court of First Instance had no jurisdiction over the proceeding. The orders are therefore void.

Id. at 700 (citations, quotation marks, and alterations omitted).

The Court held that nunc pro tunc orders could not be used retroactively to confer jurisdiction where none existed:

> Federal courts may issue nunc pro tunc orders ... to reflect the reality of what has already occurred. Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court.
>
> Put colorfully, nunc pro tunc orders are not some Orwellian vehicle for revisionist history—creating facts that never occurred in fact. Put plainly, the court cannot make the record what it is not.

Id. at 700–01 (citations, quotations, and alterations omitted).

This holding–that nunc pro tunc orders may not create jurisdiction where none exists–is consistent with other Supreme Court opinions holding that jurisdiction in the federal courts must emanate from the United States Constitution or a statute and cannot be created by the actions of a court. *See, e.g., Hamer v. Neighborhood Hous. Servs. of Chicago* , ––– U.S. ––––, 138 S. Ct. 13, 17, 199 L.Ed.2d 249 (2017) (only Congress may determine a lower federal court's jurisdiction; court-made rules

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may not create or withdraw federal jurisdiction).

We do not interpret *Acevedo* as pertaining to the bankruptcy court's power to annul the automatic

stay under § 362(d). The language of the removal statute explicitly prohibits the state court from exercising jurisdiction over the removed action. *Acevedo* , 140 S.Ct. at 700 ; *see also Resolution Tr. Corp. v. Bayside Developers* , 43 F.3d 1230, 1238 (9th Cir. 1994) ("the clear language of the general removal statute provides that the state court loses jurisdiction upon the filing of the petition for removal." (Citations omitted)).

In contrast, § 362(d) does not purport to deprive the bankruptcy court of jurisdiction; rather, it explicitly grants the court the power to modify the stay to permit another court or entity to exercise control over an asset or claim. To the extent that jurisdiction describes a statutory grant of authority to adjudicate a matter or exercise a power, it is absolutely clear that Congress expressly gave such power, including the power retroactively to grant relief, to bankruptcy courts. "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by **terminating, annulling, modifying, or conditioning** such stay ...." 11 U.S.C. § 362(d) (emphasis added). Congress' decision to deploy four verbs to describe the various ways in which a bankruptcy court might grant relief from stay indicates an express decision to grant bankruptcy courts the broadest possible range of options in respect of the stay, including annulling it, which has the effect of treating it as if it had never existed.

In *Telles* , the bankruptcy court ruled that, under *Acevedo* , it lacked authority to grant retroactive relief from stay to validate a post-petition foreclosure sale because after the bankruptcy case was filed, the state court lost jurisdiction over estate property, and jurisdiction could not be retroactively restored. 2020 WL 2121254 at *4-5. The bankruptcy court's holding in *Telles* rests on the premise that *Acevedo'* s prohibition of using nunc pro tunc orders to create jurisdiction in a state court pertained to the bankruptcy court's ability to annul the stay. As a result, despite the fact that Congress, in enacting § 362(d), explicitly empowered bankruptcy courts to annul the stay, the *Telles* court concluded that it lacked an effective method to do so.

The bankruptcy court's reasoning in *Telles* implicitly depends on the fact that when a bankruptcy case is filed, two things happen: (1) an estate is created, comprised of all property interests of the debtor, "wherever located and by whomever held," § 541(a), and the district court obtains exclusive jurisdiction over those property interests, 28 U.S.C. § 1334(e) ; and (2) the automatic stay under § 362(a) goes into effect, which prohibits most acts to exercise control over property of the estate or to pursue pre-petition claims against the estate.

But the conclusion that *Acevedo* prohibits the annulment of the stay based on jurisdiction and property of the estate concerns reads too much into the Supreme Court's opinion. As previously demonstrated, Congress drafted the language of § 362(d) to give bankruptcy courts broad authority to modify the stay to maximize its value as a flexible and useful tool in the bankruptcy process and to preserve and balance the rights of the parties.

Although the bankruptcy court obtains jurisdiction over estate **assets** once a bankruptcy petition is filed, *see* § 541(a), the stay does not transfer jurisdiction from one court to another, and granting relief from stay does not remove an asset from

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the bankruptcy estate. *See Catalano v. Comm'r of Internal Revenue* , 279 F.3d 682, 686-87 (9th Cir. 2002). It merely eliminates, to a greater or lesser degree, an impediment to the pursuit or enforcement of claims or the pursuit of assets.

Relief from stay usually permits another (frequently state law based) process to go forward, and notions of bankruptcy court jurisdiction are no impediment to that result. Viewed another way, stay relief is premised upon the pursuit of the correct economic or equitable result, in light of the purposes of a bankruptcy

filing. For example, stay relief is appropriate when an asset to be pursued in state court is of no economic use to the estate, i.e., the asset has no equity, or when a debtor has acted in bad faith, i.e., by filing multiple bankruptcy cases affecting the property. Such concerns are baked into every stay relief determination that involves a request to pursue an asset, whether prospective (terminating the stay), or retroactive (annulling it). The *Telles* decision, taken to its logical end, would essentially prohibit relief from stay in all circumstances, including granting prospective relief, where the movant seeks to exercise control over an estate asset. Such a conclusion would render § 362(d) meaningless.

Where the stay enjoins pursuit of litigation of a claim, such as the case before us, granting relief from stay raises even fewer jurisdictional concerns. Although district courts have original and exclusive jurisdiction over bankruptcy cases, 28 U.S.C. § 1334(a), they have original but not exclusive jurisdiction over all civil proceedings airing in or arising under or related to a bankruptcy case, 28 U.S.C. § 1334(b). Further, Congress clearly contemplated that in certain circumstances, other courts would hear and determine proceedings arising in or related to a bankruptcy case (subject to limits on enforcement), i.e., abstention, 28 U.S.C. § 1334(c), and removal and remand, 28 U.S.C. § 1452.

Congress left to the judgment of bankruptcy courts (via the reference) the decision about where a claim or action should be litigated by leaving the concept of "cause" to terminate, annul, modify, or condition the stay purposefully undefined and flexible. It has long been acknowledged that the decision to grant relief from stay to permit litigation to continue in another forum is related to decisions regarding abstention and is one best determined via reference to a multi-part test that seeks to balance concerns re judicial economy, harm to the estate, and prejudice to third parties. *See In re Tucson Estates, Inc.* , 912 F.2d at 1167 (reciting factors to be considered in determining whether permissive abstention is appropriate); *In re Curtis* , 40 B.R. at 799-800 (reciting factors to be considered when determining to grant stay relief to litigate claims in another court). These concerns are part of every competent determination to grant or deny relief from stay to pursue a claim in another forum, whether prospective or retroactive. Additional considerations are appropriate when determining whether retroactive relief is warranted. *See In re Nat'l Envtl. Waste Corp.* , 129 F.3d at 1055 ; *In re Fjeldsted* , 293 B.R. at 24-25.

This result is perfectly consistent with the requirement that, in the performance of its "traffic cop" role, bankruptcy courts must have broad authority to determine the appropriate forum for dispute resolution, taking into account and giving full respect to the panoply of interests to be weighed and protected in these matters, as well as to the dignity and power of other judicial processes. The statutory language, and longstanding and sound experience,

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make clear that the effective use of these remedies must occasionally include the option of granting retroactive relief.

CONCLUSION

Mr. Merriman has not shown that the bankruptcy court abused its discretion in granting retroactive annulment of the stay to permit the State Court Action to be litigated.[10] *Acevedo* does not dictate otherwise.

Accordingly, we AFFIRM.

Notes:

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 -1532, and "Rule" references are to the Federal Rules of Bankruptcy Procedure.

[2] The Fattorinis also filed a proof of claim on July 30, 2019.

[3] Although not raised by any party, personal injury tort and wrongful death claims are non-core proceedings, *see* 28 U.S.C. §§ 157(b)(2)(B) and (O), and such claims are to be tried in the district court in which the bankruptcy case is pending, *see* 28 U.S.C. § 157(b)(5).

[4] We note, however, that California Code of Civil Procedure § 356 provides that "[w]hen the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." No party cited this statute or its potential impact on the analysis of whether retroactive relief was warranted.

[5] Those factors are:

> (1) Whether the relief will result in a partial or complete resolution of the issues[;]
>
> (2) The lack of any connection with or interference with the bankruptcy case[;]
>
> (3) Whether the foreign proceeding involves the debtor as a fiduciary[;]
>
> (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases[;]
>
> (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation[;]
>
> (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question[;]
>
> (7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties[;]
>
> (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c)[;]
>
> (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f)[;]
>
> (10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties[;]
>
> (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial[; and]
>
> (12) The impact of the stay on the parties and the "balance of hurt."

In re Curtis , 40 B.R. at 799–800 (citations omitted).

[6] Application of that test involves consideration of the following factors:

> 1. Number of filings;
>
> 2. Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors;
>
> 3. A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser;
>
> 4. The Debtor's overall good faith (totality of circumstances test);

> 5. Whether creditors knew of stay but nonetheless took action, thus compounding the problem;
>
> 6. Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules;
>
> 7. The relative ease of restoring parties to the *status quo ante* ;
>
> 8. The costs of annulment to debtors and creditors;
>
> 9. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct;
>
> 10. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;
>
> 11. Whether annulment of the stay will cause irreparable injury to the debtor;
>
> 12. Whether stay relief will promote judicial economy or other efficiencies.

In re Fjeldsted , 293 B.R. at 25 (citation omitted).

[7] Although laches may be asserted as a defense to a complaint under § 523(a)(3)(B), *see Beaty v. Selinger (In re Beaty)* , 306 F.3d 914, 926 (9th Cir. 2002), the language of the court's order permitting the Fattorinis to return to the bankruptcy court for a determination of nondischargeability would foreclose this defense.

[8] See footnote 4, *supra*.

[9] *Acevedo* was published during briefing for this appeal, albeit after the parties had already submitted their opening briefs. Neither party filed a notice of supplemental authority and, when asked at oral argument whether they intended to discuss it, they declined.

[10] In both their Stay Motion and their responsive brief in this appeal, the Fattorinis argued that the allegations of the state court complaint constitute domestic violence and thus the State Court Action falls into the exception to the automatic stay for civil proceedings regarding domestic violence under § 362(b)(2)(A)(v). The bankruptcy court did not make any findings on this issue, and Mr. Merriman did not raise it in his opening brief. Because this issue is not necessary to our disposition of this appeal, we express no opinion on it.

POST-FILING ISSUE SPOTTING

CONSUMER PRACTICE EXTRAVAGANZA (CPEX)
AMERICAN BANKRUPTCY INSTITUTE

By Neil C. Gordon
Arnall Golden Gregory LLP
November 12, 2021

17232358v1

1. SELECTED RULES AND STATUTES

Rule 1016

Section 541(a)(5)

Sections 549(a) and (c)

Section 348(f)(1)(B)

Section 362(a)(3)

2. POST-PETITION TRANSFERS: SELECTED PROBLEMS

3. SELECT POST-PETITION CASES

1. SELECTED RULES AND STATUTES

Rule 1016. Death or Incompetency of Debtor

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

§ 541(a)(5). Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: . . .

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.
. . .

§§ 549(a) and (c). Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

. . .

(c) The trustee may not avoid under subsection (a) of this section a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such real property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to such interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected. . . .

§ 348(f)(1)(B). Effect of conversion

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title--

. . .

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan; and . . .

§ 362(a)(3). Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

. . .

(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;

2. POST-PETITION TRANSFERS: SELECTED PROBLEMS

17232358v1

I. INTRODUCTION.

The Bankruptcy Code has been in effect for more than forty-two years. Although many Code provisions have been amended, 11 U.S.C. §549, dealing with avoidance of post-petition transfers, has remained constant. Compared to preferential transfer and fraudulent conveyance actions, there are relatively few reported decisions which address avoidance and recovery of post-petition transfers.

Litigating §549 post-petition transfer issues is somewhat infrequent because §549 appears so straightforward; the author believes that nearly all disputes are settled. When litigated, the author suspects that bench decisions regularly occur--there are few written opinions. These materials contain selected written opinions by the trial and appellate courts. Many of the issues raised by the opinions are addressed in a problem solving context.

The problems in these materials are intended to review the basic §549 avoidance and recovery principles with emphasis on issues encountered by chapter 7 trustees. Statutory defenses and some uncommon nonstatutory defenses are also addressed by the problems.

The reader should note that there seems to be a growing trend of attempting to use available §547 defenses in the §549 context. The panelists intend to give practical advice. Participants at the presentation are encouraged to share their knowledge about this area of the law.

II. AVOIDANCE OF POST-PETITION TRANSFERS.

A. <u>The Operative Statutory Subsection</u>.

11 U.S.C. §549(a) states:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this

title; or

(B) that is not authorized under this title or by the court.

B. Elements and Burden of Proof.

For a plaintiff-trustee to prevail, it must be shown that:

1. a transfer occurred;

2. the transfer was of property of the estate;

3. the transfer was after commencement of the case; and

4. the transfer was not authorized by the Bankruptcy Code or the bankruptcy court.

> *See, e.g., Gibson v. United States (In re Russell)*, 927 F.2d 413, 417-18 (8th Cir. 1991); *Nelson v. Kingsley (In re Kingsley)*, 208 B.R. 918, 920 (Bankr. 8th Cir. 1997); *Krol v. Wilcek (In re H. King & Associates)*, 295 B.R. 246, 291 (Bankr. N.D. III. 2003); *Litzler v. American Elk Conservatory, Inc. (In re Kelso)*, 196 B.R. 363, 368 (Bankr. N.D. Tex. 1996).

FED. R. BANKR. P. 6001 states:

> "Any entity asserting the validity of a transfer under §549 of the Code shall have the burden of proof."

See *Manuel v. Allen (In re Allen)*, 217 B.R. 952, 955 (Bankr. M.D. Fla. 1998) ("If a transfer is established, the burden of proving the validity of the transfer rests with the defendants in this proceeding.").

Query: Who has the burden of proving "property of the estate" and the timing of the transfer, i.e., "after the commencement of the case"?

1. *"Trustee."*

It is probable that a bankruptcy court will only permit §549 avoidance powers to be exercised by a trustee or a chapter 11 debtor-in-possession. *See In re Shah,* 2001 WL 423024 (Bankr. E.D. Pa. 2001) (only trustees and debtors-in-possession, through §1107, can exercise avoidance powers under §549(a)); *cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1,120 S.Ct. 1942 (2000) (concluding only a trustee or D-I-P may use the §506(c) surcharge power).

A creditor may not exercise the trustee's (or D-I-P's) avoidance powers, absent a court granting derivative standing. See, e.g., In re The Gibson Group, Inc., 66 F.3d

1436 (6th Cir. 1995) (a creditor or creditors' committee may obtain derivative standing when a demand is made upon the D-I-P to take action, the demand is declined, a colorable claim exists, and the failure to act is unjustified in light of the D-I-P's duties).

The Sixth Circuit has extended derivative standing to certain circumstances in chapter 7 cases. *In re Trailer Source, Inc.,* 555 F.3d 231 (6th Cir. 2009) (permission granted for creditor to seek to avoid fraudulent transfer on behalf of estate; relief from stay not necessary to proceed in district court action). *Cf. In re LTV Steel, Inc.,* 560 F.3d 449 (6th Cir. 2009) (in a chapter 11 case, debtor's former CEO did not have standing to challenge bankruptcy court's derivative standing order).

In Glinka v. Murad (In re Housecraft Indus. U.S.A., Inc.), 310 F.3d 64, 68 (2d Cir. 2002), the Second Circuit, after challenge by the defendant to a secured creditor=s standing, affirmed that standing may be conferred to bring suit on behalf of a bankruptcy estate when the trustee unjustifiably refused to do so. In *Glinka*, it was determined the secured creditor could seek recovery of fraudulent conveyance and post-petition transfer claims, when the bankruptcy court ratified *a joint prosecution agreement* by the creditor and trustee.

2. *"Transfer."*

11 U.S.C. §101(54) defines “transfer” as follows:

> [T]ransfer means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption[.]

The Bankruptcy Code mandates "an expansive definition of transfer." *Barnhill v. Johnson*, 503 U.S. 393, 400,112 S.Ct. 1386, 1390 (1992). "A transfer is a disposition of an interest in property. The definition of transfer is as broad as possible." H.R. Rep. No. 595, 95th Cong. at 314 (1977). "'What constitutes a transfer and when it is complete' is a matter of federal law." *Barnhill v. Johnson*, 503 U.S. 393, 397-98, 112 S.Ct. 1386, 1389 (1992) (quoting *McKenzie v. Irving Trust Co.,* 323 U.S. 365, 369-70, 65 S.Ct. 405, 407-08 (1945)).

Problem 1: What constitutes a "transfer"?

(a) payment of funds? *In re M & L Business Machine Co.,* 59 F.3d 1078 (10th Cir. 1995).

(b) payment of life insurance proceeds? *Matter of Hargis*, 887 F.2d 77 (5th Cir. 1989).

(c) a judicial tax sale? Compare *In re Shah*, 2001 WL 423024 (Bankr. E.D. Pa. 2001) with *In re Shamblin*, 890 F.2d 123 (9th Cir. 1989).

(d) execution of an employment contract? *In re Allen*, 217 B.R. 952 (Bankr. M.D. Fla. 1998).

(e) notation of a lien on a vehicle title? *In re Weaver*, 131 B.R. 804 (S.D. Ohio 1991).

(f) granting a deed of trust or mortgage? Compare *In re McConville*, 110 F.3d 47, 49 (9th Cir. 1997) (stating that "creation of a lien does not transfer property for purposes of §549"; as a result of disregarding 364, the court rescinds the unauthorized post-petition lending arrangement) with *In re Auxano, Inc.*, 96 B.R. 957, 960 (Bankr. W.D. Mo. 1989) ("taking a security interest in real estate is a 'transfer' as that term is defined in 11 U.S.C. Section 101(50)." [now §101(54)]).

Note: *McConville* has been statutorily overruled by a BAPCPA definition clarification in 101(54)(A) ("transfer" includes "creation of lien"); *In re Earls*, 2006 WL 3150923 (Bankr. M.D.N.C. 2006) (post-petition recording of deed of trust is a "transfer" that may be avoided under § 549(a)); *In re Pegram*, 395 B.R. 692 (Bankr. Idaho 2008) (prepetition purchaser of AN obtained title post-petition when lien on ATV was also created; transfer of title and creation of lien could be avoided as unauthorized post-petition transfer).

(g) the ownership designation of an annuity contract? *In re Pepmeyer*, 275 B.R. 539 (Bankr. N.D. Iowa 2002) (under Iowa law, an annuity contract is property; transfer occurred when the debtor signed the ownership designation).

(h) a debtor-in-possession's refusal to accept a settlement offer? *In re Kelso*, 196 B.R. 363 (Bankr. N.D. Tex. 1996) ("[T]he court must first determine that a settlement offer may be considered property of the estate, before it can determine that it has been transferred.")

(i) withdrawal of an individual debtor's wholly owned corporation as a general partner in a limited partnership? *In re Hill*, 265 B.R. 296 (Bankr. M.D. Fla. 2001) (a transfer occurred when debtor withdrew his corporation as general partner and substituted his daughter).

(j) a payment to a creditor who drew on a letter of credit? *In re Farm Fresh Supermarkets of Maryland, Inc.,* 257 B.R. 770 (Bankr. D. Md. 2001) (drawing on a standby letter of credit, which is similar to a guarantee, did not transfer property of the estate).

(k) the shareholders in a subchapter S corporation refusing to waive loss carrybacks and utilizing net operating losses to obtain individual rights to refunds? *In re Forman Enterprises, Inc.,* 281 B.R. 600 (Bankr. W.D. Pa. 2002) (Refusing to transfer an asset not owned by the estate to the estate can hardly be termed a transfer.).

(l) the post-petition disclaimer of an inheritance? *In re Wood*, 291 B.R. 829 (Bankr. C.D. III. 2003) (under Illinois law, a disclaimer relates back to date of death of testator).

(m) post-petition policy loans against life insurance policies owned by the debtor? *Phoenix Amer. Life Ins. Co. v. Devan,* 308 B.R. 237 (D. Md. 2004) (so-called policy loans entail mere withdrawal and retention by the debtor of its own property and are not transfers of property of the estate; by contrast, post-petition interest payments on policy loans are transfers of property of the estate and may be avoided under §549; interest payments are not in the ordinary course of business of operating retail clothing stores).

3. *"Property of the Estate."*

11 U.S.C. §541(a) defines property of the estate. Such property includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). Property of the estate is broadly defined. 11 U.S.C. §541(a)(1)-(7); 1306(a) (chapter 13 cases); United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05, 103 S.Ct. 2309, 2313-14 (1983). Property interests are generally determined by state law unless a federal purpose requires a different result. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918 (1979).

Certain types of property are explicitly excluded from property of the estate. 11 U.S.C. §541(b)(1)-(5). Also, restrictions on transfers of spendthrift trusts, including ERISA-qualified trusts, are enforceable and excluded from property of the estate. 11 U.S.C. §541(c)(2); *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242 (1992).

The payment of funds subject of a statutory trust is not avoidable because the funds are not property of the estate. *Begier v. Internal Revenue Service*, 496 U.S. 53, 110 S.Ct. 2258 (1990) (trust fund taxes paid by debtor); *In re Suwannee Swifts Stores, Inc.*, 266 B.R. 544 (Bankr. M.D. Ga. 2001), *aff'd*, 67 Fed. Appx. 583, 2003 WL 21067111 (11th Cir. 2003) (lottery ticket funds subject to state statutory trust are not property of the estate even though the funds were comingled).

Problem 2: The debtors file a chapter 11 bankruptcy case. After one debtor dies and the other obtains the life insurance proceeds, a payment is made to the debtors' attorney on a prepetition obligation. *Matter of Hargis*, 887 F.2d 77 (5th Cir. 1989) (the insurance proceeds were received more than 180 days after the petition was filed; the transfer was made out of non-estate assets and cannot be avoided; a fiduciary duty exists only with respect to estate funds).

Comment: The result should be the same in a chapter 7 case.

Problem 3: A debtor corporation engages in a Ponzi scheme and defrauds many creditor-investors. A creditor receives payment from the debtor after filing of the case. *In re M & L Business Mach. Co.*, 59 F.3d 1078 (10th Cir. 1995) (although property acquired fraudulently does not pass title to the debtor, the defrauded claimant must be able to identify or trace the property). What if the debtor only defrauded one person to obtain funds? *Cf. In re Newpower*, 233 F.3d 922 (6th Cir. 2000) (embezzled funds are not property of estate; creditor can take action to recover funds and traceable property).

Problem 4: A debtor buys a vehicle one week before filing a chapter 7 bankruptcy. Twelve days after the filing, the vehicle title was issued and the creditor's lien was noted on the title. *In re Weaver*, 131 B.R. 804 (S.D. Ohio 1991) (under Ohio law, neither debtor nor estate acquired any rights in the vehicle until the title was issued; the debtor could not transfer any interest in the vehicle until the title was issued).

Problem 5: A chapter 11 debtor has its plan confirmed. Later, the case is converted to chapter 7 because the reorganized debtor defaults on its plan payments. The chapter 7 trustee files a §549 action against a bank to recover post-petition plan

payments. *In re Chattanooga Wholesale Antiques, Inc.,* 930 F.2d 458 (6th Cir. 1991); see also 11 U.S.C. §1141.

Problem 6: Before filing of the bankruptcy petition, a supplier-creditor and the debtor enter into an agreement that the debtor's customers will remit joint checks to the supplier-creditor and the debtor for furnishings and equipment purchased from the supplier-creditor. The debtor files for chapter 11 relief. After filing, in accordance with the agreement, the creditor cashes a joint check from a customer and applies the funds to pay the debtor's prepetition indebtedness. *In re Network 90 Degrees, Inc*., 98 B.R. 821 (Bankr. N.D. III. 1989), *affd*, 126 B.R. 990 (N.D. III. 1991) (in a §549 action, the court states the debtor gave up control of the property prepetition and therefore did not transfer property of the estate). *But see In re Libby Intl, Inc*., 247 B.R. 463, 467, 469 (Bankr. 8th Cir. 2000) (in a §547 action, the court criticizes *Network 90 Degrees* as misapplying the earmarking doctrine; [t]he doctrine was originally based upon the rationale that since the funds were provided by a third party for a specific purpose of paying a selected creditor, the debtor had no actual control over the disbursement [and] [t]hus, because the estate was not diminished by the payment, the payee should not required to return the funds"; "In this instance a creditor was not substituted, there was merely a diversion of an income source. The fact that a debtor did not handle the checks does not compel the conclusion that it has no interest in them.").

Problem 7: The debtor owed its landlord over $300,000 in rent. Facing eviction, the debtor filed a chapter 11 case. One week after filing, the landlord was granted relief from stay to obtain possession of the leased premises. The debtor then negotiated an agreement with the landlord whereby a related nondebtor corporation would pay $100,000 and the debtor would pay $13,000 per month to be applied to the prepetition lease arrearages. After the case converted, the chapter 7 trustee sued to recover the payments as avoidable post-petition transfers. *In re Westchester Tank Fabricators, Ltd.,* 207 B.R. 391 (Bankr. E.D.N.Y. 1997) (earmarking doctrine may apply in §549 avoidance actions; $100,000 payment from a nondebtor corporation is not property of the estate; the other monthly payments made by the D-I-P are avoidable).

3. SELECT POST-PETITION CASES

17232358v1

IRA inherited within 180 days post-petition not property of the estate

In *In re Neubert*, 2020 WL 6950396 (Bankr. E.D.Mich. 2020) (Applebaum, J.), debtor's mother died approximately 3-1/2 months after debtor had filed her chapter 7 petition. Debtor and her three siblings were equal beneficiaries of her IRA account, with each to receive approximately $100,000. Debtor's counsel notified the trustee of the Fidelity IRA. The UST filed a motion to reopen the case that was granted. The trustee then filed a motion to compel turnover of the funds debtor received from Fidelity for her share of the IRA. The court was called upon to determine whether the IRA proceeds constituted property of the estate under §541(a)(5)(A) and (C), which provides that "any interest in property that … the debtor acquires or becomes entitled to acquire within 180 days after the [petition] date – (A) by bequest, devise or inheritance; … (C) as a beneficiary of a … death benefit plan." The court determined that a "devise" was a testamentary disposition of real or personal property by will. Thus, this did not qualify as a "devise." Next, the court determined that this was not a "bequest," because a "bequest" was the act of giving property or money by will. Next, the court determined that an "inheritance" was defined as property received from an ancestor under the laws of intestacy. That did not happen here either. Instead, what did occur was a transfer "by reason of contract" that was "not testamentary." The court's reasoning was in line with *In re Rogove,* 443 B.R. 182, 187 (S.D.Fla. 2010), and *In re Hall,* 394 B.R. 582, 594 (Bankr. D.Kan. 2008) *aff'd*, 441 B.R. 680 (10th Cir. BAP 2009).

The court also considered in its analysis the trustee's argument that the IRA at issue here was a "Totten Trust." Some courts have held that a Totten Trust was a testamentary instrument and others have held it was not. The court here determined that it was not a Totten Trust at all because the debtor received the funds by contract between the debtor's mother and Fidelity, and not by bequest, devise, or inheritance. The court also determined that it was not received under a "death benefit plan," since it had nothing to do with debtor's employment. In fact, an IRA could be established by anyone without respect to employment, and, indeed, debtor's mother's IRA was unrelated to employment. Thus, the funds were not received by the debtor pursuant to a death benefit plan nor by bequest, devise, or inheritance. Accordingly, the trustee's motion to compel turnover was denied. [*Author's comment*: Whatever the intent of Congress may have been, the language of the statute is clear and the IRA

does not become property of the estate. It is hard to argue with the analysis and conclusion of the court here.]

17232358v1

Debtor's death removed from the estate property owned jointly with right of survivorship

In *Cohen v. Cherushian, et al. (In re Cherushian),* 2018 WL 6729716 (10th Cir. 12/21/18), the debtor and his non-debtor spouse had owned both their homestead and a second property jointly with right of survivorship. Debtor filed chapter 7 claiming an exemption for the primary residence but not for the second home. Debtor died 10 months later. The trustee initiated an adversary proceeding against the co-owner seeking authorization to sell the second home. The spouse argued that the second home was no longer property of the estate due to the death of the debtor. The bankruptcy court granted summary judgment to the spouse, which was affirmed by the district court. The trustee further appealed, but the circuit court likewise affirmed, holding that the joint tenancy was not severed by the filing of the bankruptcy petition nor at any time prior to the debtor's death. The court determined that under Colorado law, the interest in the subject property continued free of the deceased joint tenant's interest. In other words, title to the entire property was vested in the surviving co-owner at the moment of the death of the other surviving joint tenant. The trustee had made three arguments, all of which were rejected. First, the trustee relied on Rule 1016 which provides: "Death or incompetence of the debtor shall not abate a liquidation case under Chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." The circuit court held that this was a procedural rule that said nothing about the substance of the bankruptcy estate. Further, unlike property that must pass through probate, as a joint tenancy, title to the property here was instantly vested in the co-tenant upon the debtor's death. Second, the trustee argued that §363(h) and Rule 6007 would be vitiated if he was not allowed to sell the property. Although that statute clearly authorized the trustee to sell both the estate's interest and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a joint tenant, the court reiterated that the home was not property of the estate. The court noted that the estate's rights were no stronger than they were when actually held by the debtor so that the trustee took only what the debtor himself had, which was a joint tenancy subject to extinguishment in favor of the surviving joint tenant upon his death. The court held that while the trustee had the right to sell jointly owned property under §363(h), he had to do so while the estate still had an interest in the property. By the time the trustee here had attempted to sell the second home, the estate no longer had any interest in it according to the court. The final argument was that the trustee's strong-arm powers entitled the trustee to prevail. The court disagreed and found them inapplicable because the co-owner was not a creditor, no transfer had occurred, and the co-owner held and

continued to hold an interest in the entire property that was no longer subject to the debtor's joint tenancy upon his death. The trustee was unable to identify any prior conveyance that he could avoid whether as a *bona fide* purchaser or otherwise. [*Author's comment:* This is a troublesome case. §541(a)(1) clearly provides that property of the estate includes "all legal or equitable interest of the debtor in property as of the commencement of the case." There is no provision in §541 divesting the estate from ownership of property of the estate. Contrarywise, there are provisions that allow for later acquired interests to become property of the estate. Moreover, under §363(h) the terms of the trustee's ability to sell co-owned property is specifically tied to "the time of the commencement of the case." Thus, it appears that there is a "snapshot" rule in effect on the petition date that should determine the rights of the trustee, and not these later events. Further, upon the chapter 7 filing, all of debtor's property interests by operation of law pass to the trustee until abandoned. So the co-owner and trustee were the owners of the subject property – not the debtor and co-owner]

17232358v1

Post-petition appreciation belongs to chapter 7 estate after conversion from chapter 13

In *In re Castleman,* 2021 WL 2309994 (Bankr. W.D.Wash., June 4, 2021) (Barreca, J.), debtors filed their chapter 13 petition on June 13, 2019, obtained plan confirmation, and then the case was converted to chapter 7 on February 5, 2021. Debtors' original schedules had valued their home at $500,000, and they scheduled a mortgage of $375,077 and claimed a homestead exemption of $124,923. Upon conversion to chapter 7, the trustee asserted the home was worth at least $700,000 and that any increase in value should inure to the benefit of the chapter 7 bankruptcy estate. Debtors contended just the opposite. The court focused on §348(f)(1) and noted that there were two (2) primary approaches to analyzing the issue. One group of cases found the statute to be ambiguous and looked to the intent of Congress to determine its meaning. They believed that the legislative history supported an interpretation that the post-petition appreciation would upon conversion to chapter 7 belong to the debtors. The other approach found that the statute did not limit the subsequent chapter 7 estate to equity in the property at the petition date.

Judge Barreca determined that the latter approach was the correct one. He recognized that the House Report could be used to support the argument that depriving the debtors of the appreciation would be a disincentive to chapter 13 debtors, contrary to the intent of Congress. But, the court found the House Report itself confusing, particularly because the statute itself did not address at all the effect of conversion on pay down of secured debt during the chapter 13 case or natural changes in the value of pre-petition assets. The statute itself, observed the court, was not ambiguous. It simply did not address the scenario referred to in the House Report where the pay down of liens in chapter 13 should not inure to the chapter 7 estate. The court here did not find it appropriate to read into the statute an unstated provision regarding treatment of post-petition, pre-conversion changes in property value. The court agreed with those other courts that had held that post-petition appreciation was not treated as a separate asset from pre-petition property and, thus, inured to the bankruptcy estate and not the debtors. They found that equity attributable to the post-petition appreciation of the property is not separate, after acquired property. The court held that the equity is inseparable from the real estate, which was always property of the estate under §541(a)(6). In conclusion, the court held as follows:

> The meaning of Section 348(f)(1)(A) is clear. The failure of the provision to address the example of a risk of conversion from Chapter 13 to Chapter 7 discussed in the House Report does not create

> ambiguity that would put the provision at odds with overall legislative intent. There is no reason to read into the statute words which are not there. Therefore, I conclude that the full value of the [home] is property of the Chapter 7 estate including any post-petition **appreciation.** Accordingly, I grant the Trustee's Motion.

[*Author's comment:* I agree with the analysis of the court here. The House Report does give an example of debtors paying down their mortgage or other liens, which should not benefit the chapter 7 estate per the House Report. However, the court here is correct that the statute does not address it nor does the House Report address the natural appreciation that might occur. Courts use a very broad brush when they find that a debtor gets to keep the appreciation upon conversion to chapter 7 using a policy argument that individuals should be incentivized to file chapter 13. Policy arguments and equitable considerations do not trump the express wording of the statute under *Law v. Siegel*. Moreover, a debtor has no expectation of receiving more than the allowed exemption in property. As the Supreme Court held in *Schwab v. Reilly* 560 U.S. 770 (2010), debtors do not exempt the asset itself, debtors exempt their interest in the asset stated in dollar terms. This ruling is in keeping with that mandate.]

17232358v1

Court rules debtor retains home appreciation on conversion to chapter 7

In *In re Barrera, et al.,* 2020 WL 5869458 (10th Cir. BAP Oct. 2, 2020), debtors had filed a chapter 13 petition in April 2016 scheduling the value of their home at $396,606. The combination of consensual liens and homestead exemption exceeded that value, resulting in no non-exempt equity on the petition date. Their confirmed chapter 13 plan had provided for a cure of mortgage arrearages in the amount of $4,400 and for future mortgage payments to be made directly to CitiMortgage and vested all property of the estate in the debtors upon confirmation. Debtors sold their home for $520,000 in April 2018 and netted $140,250.63. Shortly thereafter, they voluntarily converted their case to chapter 7, with approximately $100,000 of the net proceeds remaining in a savings account. Chapter 7 trustee filed a motion for turnover of the net proceeds in excess of the $75,000 homestead exemption while stipulating that the scheduled value was indeed the fair market value of the home on the petition date. The bankruptcy court denied the motion for turnover, concluding that the term "property" in §348(f)(1)(A) was ambiguous, allowing for an examination of the legislative history. The court found the legislative history did not support the trustee's position, finding debtor retained the appreciation in the home after the petition date. Thus, the bankruptcy court held that the chapter 7 trustee was not entitled to any of the sale proceeds. The trustee appealed, but the 10th Circuit Bankruptcy Appellate Panel affirmed in an opinion that was to remain unpublished and was specifically stated to be for "persuasive value only and not precedential."

Although, the trustee argued that the term "property" was not an ambiguous term at all, both the bankruptcy court and the BAP disagreed. The BAP stated that if two bankruptcy judges did not agree on whether the post-petition appreciation belonged to the chapter 7 estate upon conversion, then the statute was open to two or more interpretations and therefore ambiguous. Here, there were a multitude of cases going in opposite directions. That supported the view of the court that the phrasing was ambiguous. Therefore, based on its interpretation of congressional intent, the appellate court held that any post-petition appreciation in the value of the debtor's homestead belonged to the debtor and did not become property of the estate upon conversion to chapter 7.

17232358v1

[*Author's comment:* The author agrees with the trustee here. The term "property" is not ambiguous. The BAP states: "The Trustee cites several cases with the proposition that in a case initially filed under chapter 7, post-petition appreciation in value belongs to the estate. However, the Trustee cites no binding authority and this Court is unable to locate any such precedent." The author has not read the trustee's brief, but has read *Schwab v. Reilly,* 560 U.S. 770 (2010). That opinion of the Supreme Court is binding authority and has been universally interpreted as meaning that debtors can only exempt their interest in an asset stated in dollar terms and cannot exempt the asset itself. Thus, the asset remains in the bankruptcy estate until abandoned and its worth at the time of sale less the dollar exemption claimed is estate property. All courts have interpreted this as meaning that the asset itself remains in the estate regardless of its value at the petition date, with the chapter 7 estate benefitting from any appreciation. The Supreme Court was not addressing what would happen if the case began in chapter 13, however, this court mistakenly believed that there was no precedent for appreciation belonging to the estate even in a chapter 7 case. Hopefully, the trustee will file a timely appeal.]

17232358v1

Value of property subject to a motion to compel abandonment determined at the time the motion is filed and not the petition date

In *Coslow v. Reisz (In re Coslow),* 2020 WL 2317493 (6th Cir. 2020), the factual history was complicated. Debtor had successfully run his own company, Republic Industries International, Inc. By June 2014, he was in serious financial trouble. After a business downturn, Republic was struggling to pay off $4.5 million in loans it had taken out from its bank that debtor had personally guaranteed. Ultimately, debtor decided to liquidate Republic. Its mining division was sold to JBL pursuant to an asset purchase agreement under which JBL was obligated to payoff the price in installments over several years. Republic assigned its right to JBL's future payments directly to the bank. By December 2015, Republic had liquidated all of its assets, but it still owed the bank over $1 million. At that point, a further agreement was reached whereby the bank decreased the amount of debtor's personal liabilities on his guaranties to $425,000, and debtor granted the bank a mortgage on his residence in the amount of $275,000 to secure the continued payments of JBL. Debtor filed chapter 7 on July 26, 2016 with a first mortgage on the home of $62,500 and the second mortgage with the bank of $275,000. Although JBL had been paying the bank, it had not paid down its obligation below that amount of $275,000, but it was on track to pay off its obligations entirely, and thus the second mortgage, by May 2017. Debtor filed an action on December 30, 2016, to compel abandonment of the home pursuant to Section 554(b). The bankruptcy court granted debtor summary judgment on the issue and entered an order compelling the trustee to abandon the residence, finding that as of the petition date there was no equity to benefit the estate. The bankruptcy court also found that any equity in the home would have accrued as a result of JBL's payments representing debtor's post-petition labor. The trustee appealed, but the district court affirmed. The trustee then appealed to the 6th Circuit Court of Appeals, which reversed.

The question the circuit court confronted was whether the equity that had accrued in the residence post-petition became property of the estate given that the increase was due to the payments made by JBL post-petition. The court observed that generally, post-petition increases in equity became part of the bankruptcy estate as long as the equity was not payment for post-petition services. The bankruptcy court had found that JBL's payments were compensation for the debtor's post-petition services, but the circuit court determined that that factual finding of the bankruptcy court was mistaken. The debtor had not even claimed that he performed post-petition labor in order to earn JBL's payments, and there was no evidence

presented to support the bankruptcy court's factual finding, even though it was debtor's burden to make the initial showing that he had performed such post-petition services, citing *In re Thomas* 516 F.Appx. 875, 878 (11th Cir. 2013); *In re Walhof Props.,* LLC, 613 B.R. 479, 482-83 (Bankr. M.D.Fla. 2020). Here, debtor made no such showing. Because the post-petition equity increase in the residence was not compensation for post-petition services, the circuit court concluded that the equity was property of the bankruptcy estate. Next, the circuit court addressed whether the bankruptcy court should have ordered the trustee to abandon the property under §554(b). According to the debtor, the snapshot rule applied and the court had to assess the equity in the home as of the petition date. The circuit court disagreed, finding that such an approach made no sense either legally or from a common sense standpoint. It determined that §554(b) said nothing about looking to the "commencement of the case" to determine value. The statute used the present tense when discussing abandonment of valueless property by stating that abandonment could be ordered for "any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." (emphasis added). The circuit court observed that every other court that had been confronted with an analogous abandonment dispute had looked to the equity contained in the debtor's property at the time the abandonment motion came before it, rather than at some static moment in the past. Courts are only required to look at whether the present value of the property would benefit the estate in some way. The court observed in its conclusion that the debtor could always protect itself by moving earlier for an abandonment of property. Where the debtor waits, the debtor is at risk that the property will appreciate and abandonment will not be appropriate. Acccordingly, the lower court orders were reversed. [*Author's comment*: In many cases, a trustee can be involved in multi-year litigation unrelated to a debtor's real property. When that litigation ends, the trustee should re-check all existing assets for any change in value, so long as the property has not previously been abandoned, either voluntarily by the trustee or by an order compelling abandonment. It is incumbent upon the debtor to move to compel abandonment if it wants to prevent the risk of subsequent appreciation or equity remaining as property of the estate to be administered by the trustee.]

17232358v1

Bankruptcy court lacks authority to grant debtor's motion to reconvert to chapter 13

In *In re Andrews*, 613 B.R. 896 (Bankr. E.D.Mich. 2020) (Tucker, J.), the debtor had initially filed his petition under chapter 13. Only two weeks later, debtor voluntarily converted the case to chapter 7. Thereafter, debtor sought to reconvert the case back to chapter 13. The court here followed the majority view that it lacked discretion to allow the reconversion and denied the motion. The court determined that the clear majority rule was that the court did not have the authority under any provision of the Code to reconvert the case to chapter 13 on the debtor's request. The court observed that there was a minority position holding otherwise, but the court found the majority view to be more persuasive and agreed with that view, citing *In re Muth*, 378 B.R. 302, 303-304 (Bankr. D.Colo. 2007); *In re Baker*, 289 B.R. 764, 769-70 (Bankr. M.D.Ala. 2003); *In re Hardin*, 301 B.R. 298, 299-300) (Bankr. C.D.Ill. 2003); and *In re McLawhorn*, 2014 WL 4948120 (Bankr. E.D.N.C. 2014). [*Author's comment:* The minority view of cases seems intent on expanding the authority of the bankruptcy court. In every case in which the author is familiar, the effort to reconvert was precipitated by the chapter 7 trustee's discovery of unscheduled assets or transfers or undervaluation of assets. The minority view protects these bad faith debtors from any repercussions for their bad faith. Even worse, from the standpoint of the chapter 7 trustee, the trustee often is denied any compensation in the chapter 13 case because no distributions have yet been made in the chapter 7 case. So, these courts decline to punish the debtor and, instead, punish the trustee.]

Debtor barred from simultaneously maintaining both a chapter 7 and chapter 13 case

In *In re Bremer,* 562 B.R. 903 (Bankr. W.D.Mich. 2017) (Dales, C.J.), the court issued an order to show cause to the debtor after discovering the debtor had filed a chapter 13 petition while her current chapter 7 case remained pending. The order directed the debtor to explain why the court should not dismiss the chapter 13 case as prohibited *per se* or as a bad faith filing. The court did not perceive any bad faith but nevertheless dismissed the chapter 13 case. The court observed that some courts had regarded the pendency of simultaneous bankruptcy cases as *per se* prohibited, while others disagreed but nevertheless carefully scrutinized the two filings for signs of bad faith. In this case, the court determined that maintaining two petitions presented both practical and theoretical problems that the debtor was unable to address to the court's satisfaction during the hearing. Part of the focus was that debtor's counsel had recently learned that the SSA had garnished or otherwise taken from the debtor's bank account an unspecified amount it regarded as an overpayment previously made (before the filing of either petition) to support the debtor's mother who it learned was already deceased. The court noted that the chapter 7 trustee, the debtor and the chapter 13 trustee could all be taking action against the SSA to recover the funds using for example §§ 362(k), 549, 522(h) and 105. Although the chapter 7 trustee had filed a "no asset report", the court noted that such a filing was not equivalent to an abandonment, which would not occur until the case was closed under §554(c). "In an *in rem* proceeding such as bankruptcy, overlapping bankruptcy estates could easily lead to conflicting decisions, competing claims for authority, unnecessary litigation, uncertainty, strife, delay, and waste." 562 B.R. at 906. Although the court recognized that it had the authority to consolidate the two cases under Rule 1015(a), it determined that doing so would not ameliorate the concerns it had expressed with having two trustees and two estates in place. Instead, the court found cause to dismiss the chapter 13 case both from the structure of the Bankruptcy Code and based on the practical problems involving the SSA's post-petition garnishment. [*Author's comment:* The author has had this exact fact pattern occur and it does, indeed, create confusion, conflict, and run up the costs of the chapter 7 estate unnecessarily and, in theory, would impose an automatic stay against the chapter 7 trustee by virtue of the later chapter 13 petition, creating even more confusion and cost to the estate.]

17232358v1

Debtor violates the automatic stay in his pending chapter 7 case by filing a chapter 13 petition

In *In re Benitez*, 611 B.R. 106 (8th Cir. BAP 2020) (Shermer, J.), Debtor had filed a chapter 7 petition in 2017. The bankruptcy court granted stay relief with respect to certain real property of the debtor. The bankruptcy court also denied debtor's motion for reconsideration of that order. Less than two weeks later, debtor filed his chapter 13 petition even though he had not yet obtained a chapter 7 discharge nor had the chapter 7 trustee abandoned the property at issue. The bankruptcy court promptly issued an order to show cause why the chapter 13 case should not be dismissed. At the hearing, the court dismissed the chapter 13 case as a violation of the automatic stay in the pending chapter 7 case. Debtor appealed. The 8th Circuit BAP affirmed on the basis that the filing of the chapter 13 petition was clearly an attempt by the debtor to exercise control over his interest in the subject property, which was indisputably property of his chapter 7 bankruptcy estate. The record further supported the bankruptcy court's findings that the debtor had filed the chapter 13 case to stop the foreclosure of the subject property. Because it violated the stay of the chapter 7 case, the chapter 13 filing was void *ab initio*. [*Author's comment*: Filing multiple cases like this happens more often than many trustees realize. The author as trustee has had it happen shortly after an order approving a settlement was reached with the debtor in the chapter 7 case that required the debtor to repay the estate for misappropriated funds over a 12-month period. No sooner was the order final than debtor, through her same counsel, filed a separate chapter 13 case to have the payments spread out over five years. It cost the estate approximately $15,000 successfully fighting for dismissal of the chapter 13 case. The trustee then sued the debtor's law firm under 28 U.S.C. §1927 to recover his legal fees. That action was mediated to a successful resolution. This trustee no longer will allow clients of that law firm the flexibility of paying any portion of a settlement or sale in installments.]

Filing of separate chapter 13 case during pendency of chapter 7 case constituted a stay violation

In *In re Munroe*, 568 B.R. 631 (Bankr. E.D. Mich. 2017) (Tucker, J.), debtors filed their chapter 7 petition on May 29, 2015, and received their discharge in that year, but the case remained pending and the trustee did not abandon any property of the bankruptcy estate. Although stay relief had been granted to the mortgagee of the debtors' home, the trustee was waiting to see whether the sale price was low enough that the trustee would be able to market and sell the home for the benefit of the bankruptcy estate (and redeem the property from the foreclosure sale as part of selling it to a third party). Nevertheless, on May 31, 2017, debtors filed a chapter 13 case to try and obtain an automatic stay against the foreclosure sale, confirm a plan that cured the mortgage arrearage, maintain monthly payments on the mortgage debt, and thereby effectively reinstate the mortgage. There appeared to be no other purpose for the chapter 13 case, since they had obtained a discharge in the chapter 7 case and had no other debts to pay. Debtors also failed to list the chapter 7 trustee on the mailing matrix or otherwise take any steps to give the chapter 7 trustee notice of the chapter 13 filing. The court found that the chapter 13 filing was a patent violation of §362(a)(3) that bars "any act . . . to exercise control over a property of the estate." Because there had been no abandonment of any assets during the chapter 7 case, all assets remained property of the bankruptcy estate subject to that automatic stay. In addition, the court noted that the majority rule, with which the court agreed, was that a debtor could not have two bankruptcy cases pending at the same time. For this additional reason, the court held that the chapter 13 case had to be dismissed. The court dismissed the chapter 13 case without prejudice to the debtor doing one of the following: (1) filing a motion in the chapter 7 case seeking relief from stay to permit the refiling of the chapter 13 case; (2) filing a motion in the chapter 7 case seeking an order to compel abandonment under §554(b) of the debtors' home, or (3) refiling the chapter 13 bankruptcy case after the pending chapter 7 case was closed. [*Author's comment*: This is the second reported decision in a short period of time where debtors have filed chapter 13 cases during the pendency of the chapter 7 case, and in each case, the court dismissed the chapter 13 case. Trustees should consider suing debtors' counsel for filing the simultaneous cases pursuant to 28 U.S.C. §1927 for unreasonably and vexatiously multiplying the proceedings at a cost to the trustee and the bankruptcy estate.]

17232358v1

Refinancing of debtor's mortgage with same lender post-petition avoided by trustee and trustee allowed to recover the value of the lien rather than the property itself.

In *In re Lemmons*, 604 B.R. 888 (Bankr. D. Idaho 2019) (Meier, C.J.), the debtor and his late wife had owned a parcel of real estate in Pocatalla, Idaho. On July 6, 2016, the property was refinanced with a promissory note in the original principal amount of $84,084 secured by a deed of trust in favor of Freedom Mortgage and naming Chicago Title as trustee and MERS as the nominee beneficiary. It was promptly recorded. On August 22, 2016, debtor filed a chapter 7 petition. Freedom Mortgage was listed on Schedule D and on the mailing matrix. It received notice of the filing and 341 meeting date. Nevertheless, on December 6, 2016, debtor refinanced the July note by obtaining a new loan from Freedom Mortgage in the amount of $84,389, again naming Chicago Title as trustee and MERS as nominee beneficiary. This was promptly recorded. In connection with this refinancing, debtor indicated that "no bankruptcy proceeding has been filed or currently exists involving any owner . . . nor does any owner intend to file for bankruptcy." A deed of reconveyance was recorded later that month satisfying the DOT from July. On May 8, 2019, the trustee filed an adversary proceeding to avoid the unauthorized post-petition transfer. Less than two weeks later, on May 20, 2019, debtor refinanced the property yet again, this time through Wintrust Mortgage, with Fidelity National as the trustee and MERS again as nominee beneficiary. A deed of reconveyance was recorded on June 18, 2019, indicating that the December DOT had been paid in full. Thus, there were two post-petition refinances and reconveyances.

It was undisputed that these refinances had occurred post-petition and without court authority. Despite the protestations to the contrary of Freedom Mortgage, the court found that it clearly had actual knowledge of the bankruptcy filing so that it could not take advantage of the good faith defense under §549(c). Accordingly, the court granted summary judgment in favor of the trustee on the lien avoidance issue. The trustee also sought recovery under §550. Freedom Mortgage argued that §550 only required that the bankruptcy estate be placed back into the financial condition that it would have been had the avoided transfer not occurred. The court disagreed that the original liens had to be reinstated finding that it would not exercise its discretion to favor the interest of a wrongdoing transferee over the interest of other creditors of the bankruptcy estate. Freedom Mortgage also contended that due to the second refinance, the trustee was required to have sued the subsequent transferee in the same adversary proceeding in order to apportion full relief. The court disagreed, holding that once the trustee has obtained avoidance under §549, it is

free to recover the property transferred or the value of such property from the initial transferee or any subsequent transferee under §550(a). Moreover, the trustee need not avoid a transfer from the initial transferee under §549 before seeking to recover from a subsequent transferee under §550. Upon avoidance here, the trustee was free to seek recovery from Freedom Mortgage of either the property or the value of the property transferred.

The court observed that the statute did not explain when a court should award the trustee recovery of the actual property and when it should, in the alternative, award the trustee recovery of the value of the property. However, the court determined that the value of the property should be as of the date of the transfer, and that this was an appropriate case to award the value. The court rejected the defendant's assertions that because the debtors weren't truthful in their documents, indicating no bankruptcy had been filed, they should somehow be immunized from the trustee's action. The court rejected this because of the actual notice of the bankruptcy that Freedom Mortgage had received. It was also noted that defendants could have easily protected their interests by a PACER search. Finally, the court rejected defendants' argument that the probate estate of debtor's late wife had to be joined into the proceeding, finding that the probate estate was not a necessary party nor were others affected by the unauthorized post-petition transfers. Such parties were irrelevant to whether the transfer could be avoided. Accordingly, the transfer was avoided and the trustee awarded the value of the lien, in the amount of $84,389 as opposed to the property itself. [*Author's comment:* The author routinely files on the real estate records for the county where the property is located a notice of the bankruptcy filing and the claim of interest of the trustee whenever there is a possibility that there is sufficient value to administer or there is an avoidable lien or transfer. It is surprising to the author how many times unauthorized financings occur post-petition despite these recorded trustee notices. Either the lenders are not adequately searching the title or do not understand what they are seeing. These cases turn into very substantial recoveries for the bankruptcy estate.]

17232358v1

When is the transfer date under §549?

In *Lewis v. Kaelin (In re Cresta Technology Corp.)* 583 B.R. 224 (9th Cir. B.A.P. 2018), Lewis was the CFO of Cresta Technology Corp. He had issued a pre-petition check from the company account to the company bankruptcy attorney on March 16, 2016, as payment for representing the company in its upcoming bankruptcy case. The attorney refused the check, requiring a cashier's check instead. The next day, Lewis delivered a cashier's check to the attorney in the amount of $10,000 drawn on his personal account, with the understanding that the company would reimburse him. On March 18, Lewis's CFO caused the company to issue a check to him from its bank account. Later that same day, the company filed its chapter 7 petition. The reimbursement check to Lewis cleared the company bank account on March 22, four days post-petition. The chapter 7 trustee sued Lewis to avoid the $10,000 payment as an unauthorized post-petition transfer under §549(a). The trustee was granted summary judgment because the court agreed that the "transfer" by ordinary check occurred when the check cleared the debtor's bank account and not when it was delivered to the creditor. The court rejected Lewis' arguments that §549 was not the applicable statute, but rather, §547 applied and the defenses such as contemporaneous exchange of new value protected the transfer. On appeal, the bankruptcy appellate panel affirmed, noting that in *Barnhill v. Johnson,* 503 U.S. 393 (1992), the Supreme Court held that under §547(b) the transfer of an ordinary check did not occur until it was honored by the debtor's bank. Although not expressly decided in *Barnhill*, the BAP here noted that all circuit courts had determined that with respect to the affirmative defenses under §547(c), a "date of delivery" rule would apply to ordinary check payments. However, here Lewis had improperly conflated the affirmative defenses available under §547(c) with §549(a) which had its own exceptions for post-petition transfers. The BAP noted that in preference cases, both the delivery and honoring of the check occurred pre-petition, leaving us with the only question whether the ordinary check was honored within the reach-back period. Here, the transaction straddled the date of the chapter 7 filing so that neither §547(b) nor (c) even applied. The BAP agreed that the *Barnhill* holding was not limited to §547, because it was based on an application of the definition of "transfer" contained in §101(54) that it occurred "on the date of honor and not before." The BAP saw no logical reason for not using the same tests to determine the transfer date for purposes of §549. In both instances, the recipient had no right in the funds held by the bank when it was a personal check because myriad events could intervene between delivery and presentment that would result in the check being dishonored. Moreover, it noted that Congress could not have intended to make such payments neither recoverable as a preference nor as a post-petition transfer. [*Author's comment:* This question gets raised on the listserve regularly,

but it is hard to argue with the analysis and conclusion here. There is no reason to apply a different analysis in §549 situations based on the *Barnhill* analysis, which should control.]

17232358v1

No post-discharge conversion of chapter 7 case

After debtors received a standard discharge in their chapter 7 case, trustee filed for and was granted employment of counsel, a realtor, and turnover, all related to certain real property of the debtors located in Chino Hills, California. After debtors' appeal of the turnover order was dismissed, trustee filed another motion for turnover. Before that hearing, debtors filed a motion to convert to chapter 13. Trustee had determined that the real property had non-exempt equity of approximately $120,000. "Faced with Trustee's second motion for turnover, and settlement discussions having fallen through, in an effort to shield their real property from Trustee's sale efforts, Debtors filed their motion seeking to convert to Chapter 13." The court denied the motion. *In re Santos,* 561 B.R. 825 (Bankr. C.D.Cal. 2017) (Houle, J.). First, the court determined that the majority of courts had not afforded a debtor the absolute right to convert a case to chapter 13 after a discharge had been obtained, citing *In re Starling,* 359, B.R. 901, 907-09 (Bankr. N.D.Ill. 2007); *In re Hauswirth,* 242 B.R. 95, 96 (Bankr. N.D.Ga. 1999); and *In re Lesniak,* 208 B.R. 902, 907 (Bankr. N.D.Ill. 1997). The court also analyzed the opinion in *Marrama v. Citizens Bank of Mass.* 549 U.S. 365 (2007) and noted that in that decision, the Supreme Court had held that where there was sufficient cause under §1307(c) to convert or dismiss the chapter 13 case, those same grounds would be sufficient to prevent conversion in the first instance to chapter 13. The court also noted as follows: "The issue with §109(e) is whether it requires that a debtor owe any debt. Because a debtor's personal liability is extinguished by a Chapter 7 discharge, it is possible that there would not be any claims that would be subject to a Chapter 13 reorganization plan." 561 B.R. at 828. The court observed that in a Chapter 20, the Chapter 7 estate is fully administered prior to the filing of the Chapter 13 petition; whereas, allowing conversion after discharge but before administration of the Chapter 7 estate is unfair to creditors and a manipulation and abuse of the Bankruptcy Code. Therefore, cause would exist to convert the case under §1307(c). "Cause does not require 'fraudulent intent' or any bad conduct by Debtors." *Id.* at 831. [*Author's comment:* This is a recurring issue for trustees. Many of the cases in which debtors seek to convert to chapter 13 are just like this one: an effort to protect the home from being sold by the trustee. In the author's own district, the judges are split on whether to require that the chapter 7 discharge be vacated before allowing conversion.]

17232358v1

Non-dischargeability complaint filed two minutes and 44 seconds late not permitted

Plaintiff and debtor had entered into two consent orders extending the deadline for plaintiff to file a complaint relating to discharge objection. As the deadline approached, debtor refused to extend the deadline a third time. The plaintiff had already deposed the debtor and his wife and had pursued settlement negotiations. Those agreements terminated 25 days before the deadline. No further motion was filed. At 11:45 p.m. on the night of the deadline, plaintiff attempted to file its complaint electronically but had computer difficulties, delaying the filing. Only after three attempts did the complaint get filed. Unfortunately for the plaintiff, the time stamp for the filing was 12:02:44, just two minutes and 44 seconds beyond the extended deadline. The debtor promptly filed a motion to dismiss. The plaintiff sought allowance of the complaint under principles of equitable tolling. The court denied that request finding it "hard to accommodate a creditor's request for equitable tolling of a hard and fast deadline when that creditor sat on its hands and waited until the last moment to meet said deadline." Further, equitable tolling usually is based on misconduct of some kind by the debtor which did not exist here. There was very little discussion of Rule 9006(b) and the grounds for excusable neglect. Instead, the court held that it had no discretion to consider the merits of the complaint under the prior 11th Circuit precedent of *Byrd v. Alton (In re Alton)*, 837 F.2d 457 (11th Cir. 1988). Accordingly, the motion to dismiss the complaint was granted. *In re Harper*, 489 B.R. 251 (Bankr. N.D. Ga. 2013)(Drake, J.). (Accord, *Anwar v. Johnson*, 510 Fed. Appx. 499 (9th Cir. 2013)(18 minutes late was still too late).

17232358v1

Faculty

Hon. Martin R. Barash is a U.S. Bankruptcy Judge for the Central District of California in Woodland Hills and Santa Barbara, sworn in on March 26, 2015. He brings more than 20 years of legal experience to the bench. Prior to his appointment, Judge Barash had been a partner at Klee, Tuchin, Bogdanoff & Stern LLP in Los Angeles since 2001, where he counseled parties in chapter 11 cases and litigated chapter 7 and chapter 11 bankruptcy cases. He first joined the firm as an associate in 1999. Earlier in his career, Judge Barash worked as an associate of Stutman, Treister & Glatt P.C. in Los Angeles. He also has served as an adjunct professor of law at California State University, Northridge. Following law school, Judge Barash clerked for Hon. Procter R. Hug, Jr. of the U.S. Court of Appeals for the Ninth Circuit from 1992-93. He is a former ABI Board member, for which he served on its Education Committee, and he is a former member of the Board of Governors of the Financial Lawyers Conference. In addition, he is a judicial director of the Los Angeles Bankruptcy Forum and a frequent panelist and lecturer on bankruptcy law. Judge Barash received his A.B. *magna cum laude* in 1989 from Princeton University and his J.D. in 1992 from the UCLA School of Law, where he served as member, editor, business manager and symposium editor of the *UCLA Law Review*.

Rachel L. Foley is the founder of Foley Law, PC in Independence, Mo., and handles consumer chapter 7s and 13s in both Kansas and Missouri. She began her bankruptcy career with the United Auto Workers, representing GM and Ford employees in chapter 13 and 7 cases. She was the only bankruptcy attorney for the Missouri auto workers, and it was not unusual for her to manage three to four times the regular attorney caseload at any given time. Ms. Foley previously was a risk manager for Clarkson Regional Health Center and has 20 years of experience in the emergency room as a Registered Respiratory Therapist. She is the inaugural winner of the K. Colleen Nunnelly Award by the National Association of Consumer Bankruptcy Attorneys and is recognized by her peers as being the Best of the Kansas City Bar in the area of bankruptcy. She also has been named to the Pro Bono Wall of Fame by the Missouri Bar Association. Ms. Foley frequently speaks nationally and locally on consumer bankruptcy topics. She is a member of the National Association of Consumer Bankruptcy Attorneys, ABI, the Kansas City Bankruptcy Bar Association, the Kansas City Metro Bar Association and the International Women's Restructuring & Insolvency Confederation. Ms. Foley received her undergraduate degree in the sciences and medicine from Creighton University and her J.D. from Creighton School of Law.

Neil C. Gordon is a partner in the Bankruptcy, Creditors' Rights & Financial Restructuring practice of Arnall Golden Gregory LLP in Atlanta and focuses his practice on bankruptcy, creditors' rights, debt restructuring, distressed assets and fraud. For more than 40 years, he has represented secured and unsecured creditors, creditors' committees, trustees, receivers and debtors-in-possession. He also serves as the bankruptcy trustee in chapter 7 and chapter 11 cases and as an SEC receiver. Mr. Gordon is a prolific author and speaker, having conducted more than 190 seminar presentations nationally and published over 80 scholarly articles on bankruptcy law topics over the course of his career. He is a past president of the National Association of Bankruptcy Trustees and a lifetime member of ABI, and previously co-chaired ABI's Legislation Committee. In addition, he is a Fellow of the American College of Bankruptcy and a Master of the Bench of the Georgia Bankruptcy American Inn of Court, and he served on the small steering committee for Prof. Lois Lupica's Study on

the Costs of BAPCPA and on the Chapter 7 Subcommittee for the ABI Consumer Bankruptcy Commission. Mr. Gordon received his B.B.A. with a focus on real estate and urban land studies in 1976 from the University of Florida and his J.D. in 1979 from the University of Georgia School of Law.

Summer M. Shaw is the founder of Shaw & Hanover PC, a bankruptcy boutique law firm serving Southern California with its main office located in Palm Desert, Calif. She is a Bankruptcy Specialist certified by the State Bar of California and represents creditors and debtors in chapter 7, 11, 12 and 13 bankruptcy proceedings and litigation matters. Ms. Shaw is admitted to practice in all state and federal courts in California, handling appeals in district court and the Ninth Circuit BAP. She also is admitted to practice before the U.S. Ninth Circuit Court of Appeals and the Tenth Circuit Court of Appeals with experience in handling appeals in both circuits. Ms. Shaw is a very active member of the bankruptcy bar, presently serving as a board member of the Inland Empire Bankruptcy Forum and having served as a past president and program chair. She has also served as an education co-chair for the Consumer Education Programs at the Annual California Bankruptcy Forum Conferences for 2016 and 2019, and she has been invited to speak at various education programs covering secured debt litigation, small business bankruptcies, individual chapter 11s, and bankruptcy law and crossover issues with civil litigation, family law, probate law and criminal law. Ms. Shaw is a member of the Board of Trustees for the Desert Bar Association, and she is one of the founders and co-chairs of its Real Estate, Business, and Bankruptcy subsection. In addition, she is a professor of bankruptcy law at the California Desert Trial Academy (CDTA). Ms. Shaw was a selected as a member of the inaugural class of ABI's "40 Under 40" in 2017, and in 2018, she received the National Association of Consumer Bankruptcy Attorney's National Distinguished Service Award. She has also been named one of *Palm Springs Life Magazine*'s Top Bankruptcy Lawyers and was honored to be a part of the 2015 and 2016 Central District of California Bankruptcy Court's *Pro Bono* Honor Roll. Ms. Shaw received her B.S. in political science with a minor in law and society from the University of California, Riverside and her J.D. from Western State College of Law.