AMERICAN BANKRUPTCY INSTITUTE

2021 Rocky Mountain Bankruptcy Virtual Conference

Litigating Common Causes of Action in Bankruptcy

CONCURRENT SESSION

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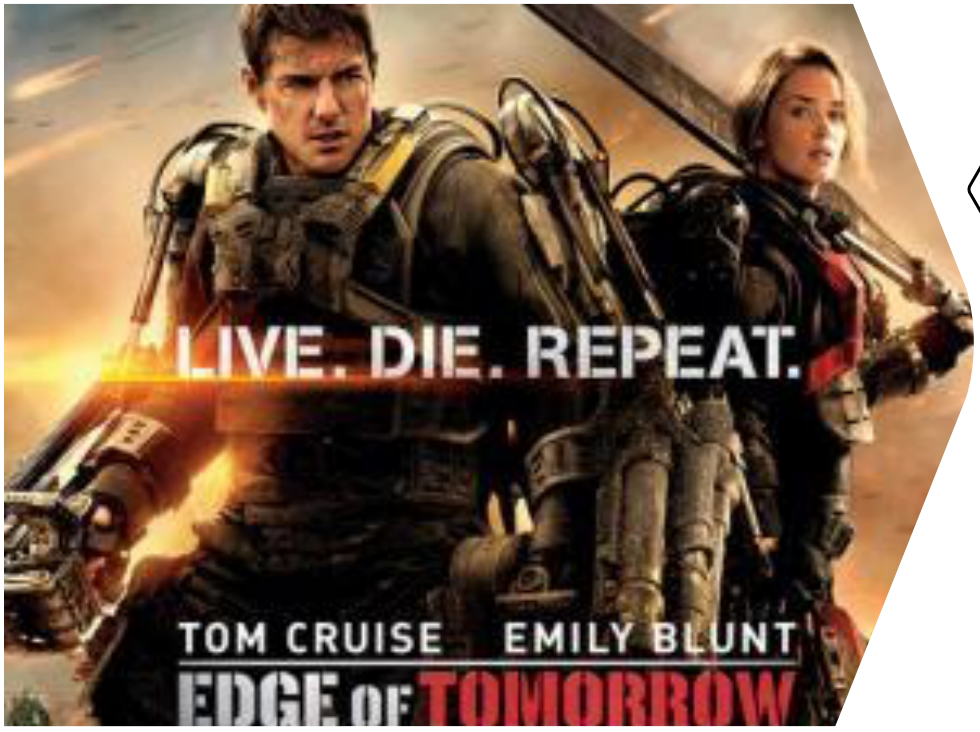
2021

Discharge Litigation

*Issues to think about when prosecuting

*Issues to think about when defending



LIVE

- Be on the Front Lines if you can. Be involved in the underlying State or Federal Court cause of action.
- You want that first bite at the apple. You want the opportunity to see what works and what doesn't whether you are prosecuting or defending.
- Not an Ideal World
  - Bankruptcy Attorneys often are left to clean up someone else's mess.
  - Educate your partners - remind them to include you in litigation strategy sessions if bankruptcy may be on the horizon.

DIE

- The point of Tom Cruise dying everyday in Edge of Tomorrow is to gain knowledge.
- If you weren't lucky enough to be involved in the underlying State or Federal Court cause of action . . .
- Pull the Pleadings (Complaint, Answer, Any Amendments)
- Pull any interlocutory rulings (grants or denial of summary judgment)
- Get a copy of the transcripts if possible (trial and depositions)
- Get a copy of the ruling (understand it)
- In order for the Bankruptcy Attorney to gain knowledge, you need to dig into the first case
- Was it simply a default judgment? (important when it comes to res judicata)

What Are We Looking For

- Causes of Action
  - Does the underlying cause of action fit on all fours with any subsection of Section 523
  - Do you want it to be on all fours
  - Are you prosecuting or defending
  - Was it a jury trial
  - What were the instructions to the jury

Example: Punitive Damages

* Jury Instructions: "Were the defendant's action willful or malicious or made with reckless disregards for the rights of . ."

* Bankruptcy: Section 523(a)(6) of the Bankruptcy Code excludes from a debtor's discharge debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). "Because 'willful' and 'malicious' are joined in the conjunctive, a plaintiff must prove both to render a debt non-dischargeable under this provision." *In re May*, 579 B.R. 568, 593 (Bankr. D. Utah 2017) (citing *Panalis v. Moore* (*In re Moore*), 357 F.3d 1125, 1129 (10th Cir. 2004)); *see also Mitsubishi Motors Credit of Am., Inc. v. Longley* (*In re Longley)*, 235 B.R. 651, 655 (B.A.P. 10th Cir. 1999) ("Failure of a creditor to establish either willfulness or malice renders the debt dischargeable.").

* If you are prosecuting in this case – you have a res judicata problem because the jury' conclusion

REPEAT

- TIMING: 11 U.S.C. 523(c) – within 60 days after the 341 meeting.
- Some Nondischargeble Debts under 11 U.S.C. § 523(a) & Starting Points
- (2)(A) false pretenses, a false representation, or actual fraud
  - *In re Griffith*, 568 B.R. 444 (Bankr. D. Utah 2017).
- (2)(B) Use of a fraudulent statement in writing
  - *In re May*, 579 B.R. 568 (Bankr. D. Utah 2017).
- (2)(C) certain consumer debts aggregating more than specific dollar amounts for luxury goods and cash advances
- (3) unlisted or unscheduled debts
- (4) fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny
  - *In re Bringhurst*, 569 B.R. 814 (Bankr. D. Utah 2017).
- (5) domestic support obligation
- (6) for willful and malicious injury by the debtor to another entity or to the property of another entity
  - *In re Bringhurst*, 569 B.R. 814 (Bankr. D. Utah 2017).
  - *In re Call*, 560 B.R. 814 (Bankr. D. Utah 2016).
- (8) student loans
  - *In re McDaniel*, 590 B.R. 537 (Bankr. D. Colo 2018).
  - *In re Engen*, 561 B.R. 523 (Bankr. D. Kan. 2016).
- (9) death or personal injury caused by the debtor while in 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
- (13) restitution issued under title 18, United States Code
- (15) debt incurred 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 that is not a domestic support obligation (e.g., property settlement)
  - *In re: Kelly*, 549 B.R. 275 (Bankr. D. N.M. 2016).
  - *In re Simons*, 193 B.R. 48 (Bankr. W.D. Okla. 1996).
- (16) membership association fee or assessment
  - *In re Colon*, 465 B.R. 657 (2011).
- (19) violations of federal or state securities laws
  - *In re Robben*, 562 B.R. 469 (Bankr. D. Kan. 2017)

RULES

- Adversary Proceedings governed by Part VII of Federal Rules of Bankruptcy Procedures.
- Remember to review local rules. https://www.utb.uscourts.gov/
- Requesting a Jury Trial
  - Timing – FRCP Rule 38(b) – "no later than 14 days after the last pleading"
  - Special Designation of Bankruptcy Judge to conduct the jury trial (Local rule 9015-1)
  - Consent of adverse party
  - Withholding consent is deemed an objection (cure by Requesting withdrawal of the reference back to the district court)

Collateral Estoppel

- Collateral Estoppel (sword? shield?)
- *FATCO v. Smith*(*In re Smith*), 2019 WL 3026851 (July 10, 2019)

  "Indeed, the disjunctive "or" in the finding thwarts a collateral estoppel finding of willful and malicious injury under § 523(a)(6) because if the jury based its finding on reckless indifference, this is insufficient for purposes of a § 523(a)(6) action."

  "Nonetheless, because First American's claims against the Debtor in this bankruptcy case arise from the same conduct that was tried in the District Court, this Court can consider the factual underpinnings for each damage award in determining if First American has met its burden of proof under § 523(a)(6)."

ADVICE OF COUNSEL DEFENSE

- At its heart, the advice of counsel defense is not so much an affirmative defense as it is a way for a debtor to negate the element of intent. To meet his burden on the advice of counsel defense, [the debtor] must show (1) that all facts were fully and fairly communicated to counsel; (2) that counsel gave legal advice; (3) that [the debtor relied on the legal advice; and (4) that [the debtor's] reliance was in good faith. *Rupp v. Biorge* (*In re Biorge*), 536 B.R. 24, 30 (Bankr. D. Utah 2015).

- In the case of *United Orient Bank v. Green*, that likewise involved a § 523(a)(6) action, the court rejected the debtor's attempt to defend a very aggressive business strategy based on the advice of counsel: "[the debtor] knew that there was, at a minimum, a substantial risk that his actions were improper and elected to run that risk . . . [and the debtor] knew that his actions were 'contrary to commonly accepted duties in the ordinary relationships among people, and injurious to' plaintiffs."

JUSTIFICATION/EXCUSE

- *State Farm Fire & Cas. Co. v. Edie (In re Edie)*, 314 B.R. 6, 15 (Bankr. D. Utah 2004) (citation omitted)("in order for an act to be willful and malicious it must be a deliberate or intentional injury (willful) that is performed without justification or excuse (malicious).") (quoting *Am. First Credit Union v. Gagle (In re Gagle)*, 230 B.R. 174, 181 (Bankr. D. Utah 1999)). *See also Tinker v. Colwell*, 193 U.S. 473, 485–86 (1904) ("Malice, in common will against a person, but in its legal sense it means a wrongful act, done intentionally, withoutjust cause or excuse.") (citation omitted).

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ABI – January 2021 – Discharge Issues

It goes without saying, but the discharge injunction is serious. Violations can subject creditors to damages. If a creditor finds itself accused of violating the discharge injunction, a recent SCOTUS decision suggests damages rest on its chances of passing or failing the "no fair ground of doubt" test.

11 USC 524(a) – THE 3 MOST USED/REFERENCED PARTS OF THE STATUTE

(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, 1192, 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, 1192, 1228(a)(1), or 1328(a)(1), 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.

WHAT DEBTS ARE DISCHARGED?

Not all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. Section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, the debtor must still repay those debts after bankruptcy. Congress has determined that these types of debts are not dischargeable for public policy reasons (based either on the nature of the debt or

the fact that the debts were incurred due to improper behavior of the debtor, such as the debtor's drunken driving).

Per 11 U.S.C. § 523, there are 19 categories of debt excepted from discharge under chapters 7, 11, and 12. A more limited list of exceptions applies to cases under chapter 13 (see 11 U.S.C. § 1328).

Generally speaking, the exceptions to discharge apply automatically if the language prescribed by section 523(a) applies. The most common types of nondischargeable debts are certain types of tax claims, debts not set forth by the debtor on the lists and schedules the debtor must file with the court, debts for spousal or child support or alimony, debts for willful and malicious injuries to person or property, debts to governmental units for fines and penalties, debts for most government funded or guaranteed educational loans or benefit overpayments, debts for personal injury caused by the debtor's operation of a motor vehicle while intoxicated, debts owed to certain tax-advantaged retirement plans, and debts for certain condominium or cooperative housing fees.

The types of debts described in sections 523(a)(2), (4), and (6) (obligations affected by fraud or maliciousness) are not automatically excepted from discharge. Creditors must ask the court to determine that these debts are excepted from discharge. In the absence of an affirmative request by the creditor and the granting of the request by the court, the types of debts set out in sections 523(a)(2), (4), and (6) will be discharged.

A slightly broader discharge of debts is available to a debtor in a chapter 13 case than in a chapter 7 case. Debts dischargeable in a chapter 13, but not in chapter 7, include debts for willful and malicious injury to property, debts incurred to pay non-dischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. Although a chapter 13 debtor generally receives a discharge only after completing all payments required by the court-approved (i.e., "confirmed") repayment plan, there are some limited circumstances under which the debtor may request the court to grant a "hardship discharge" even though the debtor has failed to complete plan payments. Such a discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor's control. The scope of a chapter 13 "hardship discharge" is similar to that in a chapter 7 case with regard to the types of debts that are excepted from the discharge. A hardship discharge also is available in chapter 12 if the failure to complete plan payments is due to "circumstances for which the debtor should not justly be held accountable."

THE STANDARD FOR DETERMINING WHETHER CONDUCT VIOLATES THE DISCHARGE INJUNCTION - THE SUPREME COURT HAS SPOKEN

Hardy, Taggart & Roth – Taggart gives us a standard

Way back in 1986, the 11th Circuit in a case called *In re Hardy*, 97 F. 3d 1384 (11th Cir. 1996) adopted a strict standard as it pertains to damages for discharge violations. Per *Hardy*, discharge violations are willful where a creditor (1) is aware of the automatic stay or discharge injunction and (2) intends the actions that violate the stay or injunction. That test has been used for decades.

In *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), the Supreme Court set a new standard for holding a creditor in civil contempt for violating a discharge order: Henceforth, "[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."

The issue in *Taggart* was the legal standard required in order to hold a creditor in civil contempt when that creditor violates a bankruptcy discharge order. In a unanimous decision, Justice Breyer delivered the Opinion with the noted standard, i.e., 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.

In reaching its decision, the Supreme Court rejected both a subjective standard and a standard "akin to strict liability," but rather set forth an objectively based standard[1]. The Supreme Court noted the difficulty with the proof regarding a state of mind standard as set forth by the circuit court, while also rejecting a strict liability approach because it disregards the reasonable beliefs of creditors.

Back to the 11th Circuit – post-*Taggart*, we have a case called *In re Roth*, 935 F. 3d 1270 (11th Cir. 2019), where a debtor indicated on her bankruptcy schedules that she planned to surrender her non-homestead property to the bank in her chapter 13 plan. The debtor obtained a discharge; however, rather than foreclose on the property, the bank started mailing monthly "informational" statements to the debtor indicating the amount due, due dates, and instructions for how to make payment with a disclaimer that the statements were "not intended as an attempt to collect" her discharged debt.

[1] The Bankruptcy Court used the standard from the *Hardy* opinion - that civil contempt sanctions are appropriate where a creditor (1) is aware of the discharge and (2) intended the actions which violated the discharge injunction. The Bankruptcy Appellate Panel disagreed and vacated the sanctions. When the Ninth Circuit affirmed the BAP's decision, it applied a subjective standard, holding that a creditor's "good faith belief" that the discharge order does not apply precludes an award of sanctions for discharge injunction violations – even if the creditor's belief is unreasonable.

When the debtor filed for sanctions under § 524, the bankruptcy court dismissed the case, finding that the bank statements were not intended to collect a debt and, therefore, did not violate the discharge injunction. The Eleventh Circuit affirmed this decision. While the bankruptcy court's decision was limited to whether a discharge violation had occurred, the Eleventh Circuit went a step further. "The Taggart standard is a rigorous one," wrote Judge Branch, and there must be "daylight" between an unlawful attempt to collect a debt and a legitimate attempt to inform a debtor how they can regain property. Thus, "even if we reached a different conclusion . . . and found that the issue of the § 524 violation presented a close call, we would nonetheless find that sanctions under § 105 are unavailable under the Supreme Court's recent decision in Taggart."[2]

Another post-*Taggart* case, this coming from the Middle District of Florida - *In re Musto*, Case No. 8:19-bk-03452-RCT, wherein a creditor law firm got socked with significant damages for a discharge violation.

In *Musto*, a Debtor with legal fees owed to her family law counsel filed for Chapter 7. The law firm received notice of the bankruptcy and the entry of discharge. After discharge, the law firm wrote the debtor and called her, requesting payment of the unpaid fees. The Debtor told the firm about her discharge in the first call and followed up with a certified letter enclosing the discharge order. The law firm continued collection activity (made/sent eight other calls and letters to collect the fees). The Debtor's bankruptcy lawyer wrote the law firm, which resulted in a cease of collection efforts. The Debtor's attorney also wrote the law firm seeking reparations, which the law firm ignored, so Debtor's counsel sought to impose sanctions and reopened the case to initiate a § 524 Violation of Discharge action.

The Court found the inappropriate actions resulted from "administrative errors" that the law firm's partner corrected once becoming aware of the collection efforts, but the Judge found the conduct sanctionable nonetheless.

With regard to the grounds for damages, the Bankruptcy Judge said that emotional distress damages are available under Section 105, but the debtor "did not evidence the type of significant emotional distress required to support an award of emotional distress sanctions, nor did she show that the distress alleged was causally connected to the Law Firm's violation of the discharge injunction." And entered judgment in favor of the debtor for $450 in actual damages and about $10,000 for attorney's fees.

Summary - when there's 'no fair ground of doubt' about a discharge violation, the creditor should settle or make an offer of settlement to avoid larger damages after trial.

[2] This difficulty Debtor practitioners face getting mortgage lenders to send statements to Debtors is discussed below.

PERMISSIBLE COMMUNICATIONS W/DEBTORS? CAN LENDERS SEND STATEMENTS TO CLIENTS?

Generally speaking, creditors do not have the right to contact a debtor after they have filed for bankruptcy. Once the creditor has received notice of a debtor's bankruptcy filing they are barred from contacting the debtor or attempting to collect on any debt owed. However, there is a gray area where certain types of communication may be allowed.

District of Colorado – we have L.B.R. 4001-6. Communication Not in Violation of the Automatic Stay

(a) Forms of Communication; Issuance of Monthly Statements is not a Stay Violation. The following communication and issuance of monthly statements are declared appropriate and not a violation of the automatic stay:
(1) Permissible Contact with the Debtor. Secured creditors may contact the debtor about the status of insurance coverage on property that is collateral for the creditor's claim, may respond to inquiries and requests for information about the account from the debtor, and may send the debtor statements, payment coupons, information on loss mitigation or loan modifications, or other correspondence that the creditor sends to its non-debtor customers, without violating the automatic stay, provided none of these communications includes an attempt to collect the debt. Permissible forms of communication are those that are sent to the debtor by creditors in the ordinary course of business, to the address that the debtor last provided to the creditor by agreement between the debtor and the creditor. In order for communication to be protected under this Rule, the communication must indicate it is provided for information purposes and does not constitute a demand for payment.
(2) Manner of Contacting Debtor. Permissible communications may be transmitted via email, facsimile, mail, commercial communications carrier, or such other mode as is mutually acceptable to the parties.

I have found lenders aren't terribly moved by our local rule allowing statements. I don't hear much in terms of insurance coverage, except when a lender is barking about proof of insurance or an insurance lapse – then I find that they tend to reach out.

Repeating a bit from the 11th Circuit *Roth* case above, regarding sending of mortgage statements post-discharge:
"Accordingly, we first determine whether a communication is a prohibited debt collection under section 524 by looking to 'whether the objective effect of the creditor's action is to pressure a debtor to repay a discharged debt.' *In re McLean*, 794 F.3d 1313, 1322 (11th Cir. 2015). If so, we then evaluate whether that violation of the discharge injunction is sanctionable under section 105, by determining if 'there is no fair ground of doubt as to whether the order barred the creditor's conduct.' "*Taggart*, 139 S. Ct. at 1799.

The Court ruled that sending of statements was ok. From a practice and practical standpoint, I'm ok with this opinion. It's hard enough getting lenders to send statements, accept payments, speak with clients directly regarding workouts, etc., I want as few barriers as possible when it comes to clients communicating with mortgage lenders. We also send out authorization letters frequently (before and after discharge) authorizing lenders to speak directly with clients. On average, 50% of the letters never make it into the lenders' systems because we typically send out the authorization twice. Sometimes a lender gets it, then we get another request a year later.

USING RESPA - If attempts are made to get statements sent to a Debtor and the servicer refuses to send monthly statements, a way to get information about the account (payment amount, interest rate adjustments, payment application), Debtors can make a request for information under the Real Estate Settlement Procedures Act (RESPA) (12 CFR § 1024.36).

I believe the regulation requires that the request be made (in writing) within one year of the discharge, but my reading is that this means when both the debt and the corresponding lien have been extinguished.

To do a RESPA request – must include borrower's name, information that enables the servicer to identify the account and the information requested with respect to the loan.

ATTORNEY'S FEES IN §362 BUT NOT §524?

There is no provision in §524, or any other part of the Bankruptcy Code for that matter, that prescribes a unique remedy if a creditor violates the discharge injunction. By comparison, and by way of example, the Code expressly creates a cause of action for a willful violation of the automatic stay.

11 U.S.C. §362 (k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section *shall* recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. (emphasis added)

To get fees under 524, need to bootstrap to 105 – violation of a court order so going to maintain integrity of the system. At one time I saw a lot of pushback and the question as to whether a violation of the discharge injunction created a private right of action (and many time that was in the form of denial of class creation) – pretty overwhelmingly seems like Courts will entertain a cause of action.

It's been several years since I've seen it contested that there's a private right of action and I feel comfortable bringing an action for a discharge violation if I like the facts of the case.

CAN THE DISCHARGE BE REVOKED?

The court may revoke a discharge under certain circumstances. For example, a trustee, creditor, or the U.S. trustee may request that the court revoke the debtor's discharge in a chapter 7 case based on allegations that the debtor: obtained the discharge fraudulently; failed to disclose the fact that he or she acquired or became entitled to acquire property that would constitute property of the bankruptcy estate; committed one of several acts of impropriety described in section 727(a)(6) of the Bankruptcy Code; or failed to explain any misstatements discovered in an audit of the case or fails to provide documents or information requested in an audit of the case. Typically, a request to revoke the debtor's discharge must be filed within one year of the discharge or, in some cases, before the date that the case is closed. The court will decide whether such allegations are true and, if so, whether to revoke the discharge.

11 U.S.C. § 727(d)(1) – one trick – have to show the discharge was obtained through fraud AND the requesting party did not know of such fraud until after the granting of the discharge. I have only had this come up once in 20 years – and in that case creditor failed to put on any evidence as to when the creditor learned of the fraud. Revocation under 727(d)(2), (d)(3) or (d)(4) there is no “did not know of such fraud until after the granting of the discharge” requirement.

11 U.S. Code § 1144

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall—

(1)contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2)revoke the discharge of the debtor.

Chapter 12’s discharge revocation provisions (11 U.S.C. § 1228) and Chapter 13 discharge revocation provisions (11 U.S.C. § 1328) are similar to Chapter 7’s as it pertains to discharges obtained via fraud.

The common element in all the Chapters, if confirmation of a plan or the discharge is obtained through fraud, the court can revoke the order of confirmation or discharge. Chapter 7 has some expanded provisions as it pertains to

*The bankruptcy court initially awarded Taggart over $100,000 for attorneys' fees, emotional distress, and punitive damages.

MORE THOUGHTS ON PERMISSIBLE COMMUNICATION WITH DEBTORS/GETTING MORTAGE COMPANIES TO SEND STATEMENT - WHAT DO WE DO WITH MORTGAGE STATEMENTS THAT ARE SENT TO US AFTER CLOSING OF FILE?

The federal periodic statement rule requires mortgage lenders and servicers to provide homeowners with prompt, regular, and accurate information about their mortgage loans. So this is a possible avenue in addition to RESPA. There are some loans that are exempt from the rule (open-end lines of credit or HELOC's, fixed rate loans that have coupon books, reverse mortgages).

Case called *In re Sperry*, 562 BR 1 (Bankr. D.Mass 2016), Debtors wrote into the plan a requirement that the lender continue to send monthly periodic statements. The bankruptcy court confirmed the plan over the mortgage lender's objection.

The court stated, "Based on the weight of the extant legal authority, I conclude that a chapter 13 plan's requirement that a lender send periodic mortgage loan statements to the debtor does not render the plan unconfirmable. The Bankruptcy Code certainly doesn't prohibit it and arguably permits it under § 1322(b)(11). HSBC's argument that a monthly statement requirement is an impermissible modification in violation of § 1322(b)(2), is unpersuasive, particularly when examined against the backdrop of Rule 3002.1 which imposes a host of reporting requirements on mortgage lenders."

The lender rejected the borrowers' request to receive monthly periodic statements under their "cure and maintain" plan. First, the lender claimed it could not send statements "[d]ue to logistical limitations" and that the statements would be "confusing." The lender also argued that the Servicing Rules exempt it from sending such statements to borrowers during the pendency of their bankruptcy cases, that sending such statements would likely violate the automatic stay, and that the requirement to send monthly statements is an impermissible modification of its claim.

This feels sort of like an *Espinosa* type deal to me (recall Espinosa had the discharge of student loans in the plan). Fool me once, shame on you.....
With the form plans that a lot of districts have (including ours in Colorado) I wouldn't be real confident that I'd get that plan through. I feel like if the lender didn't object, our Chapter 13 Trustees would. There are a several opinions that "non-standard" or additional plan terms outside of the form plans should be kept to a minimum.

Back to the code & getting mortgage statements sent after entry of discharge –
11 U.S.C. § 524(j):
(j)Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

(1)such creditor retains a security interest in real property that is the principal residence of the debtor;
(2)such act is in the ordinary course of business between the creditor and the debtor; and
(3)such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

Try explaining that to the hourly phone rep reading the script. But it's a possible out.

DAMAGES? NEED AN EXPERT? WHAT'S NEEDED TO PROVE DAMAGES? HOW TO GET IN FRONT OF THE COURT? ADVERSARY COMPLAINT? REOPEN UNDERLYING CASE & FILE A MOTION TO SHOW CAUSE? PRIVATE RIGHT OF DAMAGE? (why am I yelling?)

With regard to the grounds for damages, the *Musto* opinion awarded damages for each instance of a collection attempt as well as attorney's fees. The Court held that emotional distress damages are available under Section 105, but the debtor "did not evidence the type of significant emotional distress required to support an award of emotional distress sanctions, nor did she show that the distress alleged was causally connected to the Law Firm's violation of the discharge injunction."

A case called *In re Moon*, 613 BR 317 (Bankr.D.Nevada 2020) offers some thoughts on emotional stress damages in the context of auto stay violation. The Court stated that emotional distress damages from an automatic stay violation requires proof by a preponderance of the evidence that the individual (1) suffered significant harm, (2) that the significant harm has been clearly established, and (3) there is a causal connection between the significant harm and the automatic stay violation. Such harm may be clearly established through corroborating medical evidence or testimony from percipient parties who witness the mental anguish of the injured party, or, through proof of circumstances that make it obvious a reasonable person would suffer significant emotional harm.

In re Snowden, 769 F.3d 651 (9th Cir. 2014).

Emotional distress: The court held that the debtor suffered "significant harm," produced sufficient evidence of the harm, and showed that the harm resulted from the automatic stay violation rather than the "anxiety and pressures inherent in the bankruptcy process." Id. at 657, quoting *In re Dawson*, 390 F.3d 1139, 1149 (9th Cir. 2004). That's a stay violation, but you could see an analogous situation.

Punitive damages: The court held that the debtor established the lender's "reckless or callous disregard for the law," which supported a punitive damages award. *Snowden*, 769 F.3d at 657, quoting *In re Bloom*, 875 F.2d 224, 228 (9th Cir. 1989).

Attorney's fees: A debtor may only recover attorney's fees under § 362(k) that are directly related to enforcing the automatic stay or remedying a violation. *Sternberg v. Johnston*, 595 F.3d 937, 940 (9th Cir. 2010). The question for this court was whether the lender's $1,445 settlement offer ended the violation by giving the debtor an opportunity to be made whole. The court rejected this argument, which would limit the debtor's attorney fee award to fees incurred before the settlement offer. The court held that the violation did not end until the date the bankruptcy court ruled that a violation had occurred.

An Illinois District Court case, *Romanucci & Blandin, LLC et al. v. Lempesis*, 2017 WL 4401643 (N.D. Ill. May 4, 2017) affirmed a judgment by the Bankruptcy Court awarding $90,000 for a violation of the discharge injunction, including damages for emotional distress and punitive damages. Here, after the bankruptcy was filed, notice was sent to the law firm, but the mail was returned because the law firm had moved. So Lempesis's bankruptcy lawyer faxed it to the law firm, where an associate put it in the file, but apparently didn't tell anyone else at the law firm about it. Lempesis received a discharge. The lawsuit was voluntarily nonsuited and later refiled (a common strategy in Illinois courts, used by plaintiffs to buy time when the statute of limitations is looming). Even after Lempesis moved to enforce the discharge and for sanctions, the law firm continued to pursue Lempesis in the state court lawsuit, and even went on TV to repeat the allegations. The bankruptcy court eventually awarded $90,000 in damages: $11,000 in attorneys' fees and costs, $12,000 in emotional distress damages, $50,000 in punitive damages, and $17,000 of additional attorney's fees based on a supplemental statement of fees, presumably required to bring the discharge injunction litigation to trial.

[C]ourts that have awarded punitive sanctions for violations of the discharge injunction require actions taken with either a malevolent intent or a clear disregard and disrespect of the bankruptcy laws[,] and . . . it is not sufficient to merely show that the actions were deliberate. *In re Vazquez*, 221 B.R. 222, 231 (Bankr. N.D. Ill. 1998).

In re Walker, 180 B.R. 834, 847-48 (Bankr. W.D. La. 1995) ("The majority of courts also allow punitive damages [for violations of discharge injunctions] but differ as to their reasoning."). Yet even assuming that the standard for punitive damages is indeed more onerous for violations of discharge injunctions, the court concludes that there is sufficient evidence in the record from which a jury could conclude that the standard has been met here.

Obviously, if you can get a professional to weigh in on the distress, it gives the Court something to hang its hat on. Equally as obvious, cost is going to play a role for Debtors. So I suspect in many/most of these cases, Debtors are going to be stuck with their own

testimony or that of their family members, which makes coming up with a number difficult.

As for the method of getting in front of the Court, Motion for Order to Show Cause seems like the most inexpensive remedy if the case is still open. If the case is closed, an adversary proceeding is certainly appropriate, but a Court would likely entertain a Motion to Reopen the Case. I've always found that getting in front of the Court via motion to reopen the case. I have found motions to be is easier than opening a new adversary case (Summons, Complaint, serving registered company officers/registered agents, etc). On the other hand, with an adversary, you get discovery.

REAFFIRMATION AGREEMENTS – 524(c) AND 524(k)

In my little single spaced, 10 pitch code book, these two little subsections on reaffirmation agreements takes up 4 ½ pages. The entire speech you see in a reaffirmation agreement appear to be in there.

That's it. That's the comprehensive thought about that.

DISCHARGE IMPACT ON OTHER PARTIES – 524(e)

(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.

Seems obvious, but worth noting where it's specifically pointed out in the code.

"RETURN TO THE FRAY" AFTER DISCHARGE – BE CAREFUL OF POKING THE BEAR

Back to *Taggart*, the Ninth Circuit (*In re Taggart*, 888 F.3d 438 (9th Cir. 2018) spoke of a "return to the fray." The Circuit Court referenced *In re Castellino Villas*, another opinion from the 9th Circuit - the Court reviewed whether the Debtor, Taggart had "returned to the fray" post discharge was significant because if a debtor "returns to the fray" by engaging in post-bankruptcy petition litigation, a creditor may seek an attorneys' fee award if the new litigation was not within the "fair contemplation of the parties" prior to the bankruptcy petition. See *In re Castellino Villas*, A. K. F. LLC, 836 F.3d 1028, 1034-37 (9th Cir. 2016).

Defendant's defense to the violation of discharge may be characterized as "returning to the fray." Cases finding a debtor has "returned to the fray" generally deal with post-petition litigation commenced by the debtor associated with a pre-petition claim. In the case of *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), the court found that a prepetition claim for attorney's fees was discharged in the bankruptcy proceeding, however, when the debtor commenced post-petition litigation involving the prepetition contract, he

"returned to the fray," and the bankruptcy filing did not give him "carte blanche to go out and commence new litigation about the contract without consequences." Id., 1024. See also *In re Gillespie*, 516 B.R. 586 (B.A.P. 9th Cir. 2014). (Where the underlying claim arose prepetition, the debtor "returned to the fray" post-petition by voluntarily and affirmatively acting to commence or resume the litigation with the creditor). Id., at 591.

BUYING A HOUSE AFTER DISCHARGE

As noted above - 11 USC 524

(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, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

Get lots of angry phone calls when client that didn't own a house at the time of filing (hence no § 522 motion to avoid lien because there's nothing for a judgment/lien to "impair") and now is trying to buy a house. Title company concerned lien will attach to the after acquired property. Letter to title company pointing out this provision has been successful in 99% of the cases where this has come up. In the 1% where this doesn't work, find a new title company.

At the expense of giving a free plug, call my office & we can point you in the direction of a title guy that used to do BK work who knows how this stuff plays out.

ABI – January 2021 – Discharge Issues:

The discharge injunction is serious. Violations can subject creditors to damages. Creditors with customers in bankruptcy, or who have filed bankruptcy in the past, should consult counsel who can advise them on what debts they can pursue. If a creditor finds itself accused of violating the discharge injunction, it should contact counsel to assess its chances of passing or failing the "no fair ground of doubt" test.

11 USC 524

(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, 1192, 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, 1192, 1228(a)(1), or 1328(a)(1), 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.

-ANECDOTES/CASE LAW

Hardy v. United States (*In re Hardy*) & *Taggart*

In *Taggart v. Lorenzen*, the issue was the legal standard for holding a creditor in civil contempt when the creditor violates the bankruptcy discharge order. In a unanimous decision, the Supreme Court held that 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.

-PERMISSIBLE COMMUNICATIONS W/DEBTORS? CAN LENDERS SEND STATEMENTS TO CLIENTS?

Generally speaking, creditors do not have the right to contact a debtor after they have filed for bankruptcy. Once the creditor has received notice of a debtor's bankruptcy filing they are barred from contacting the debtor or attempting to collect on any debt owed. However, there is a gray area where certain types of communication may be allowed.

From the 11th Circuit in *In re Roth*, regarding sending of mortgage statements post-discharge:

Accordingly, we first determine whether a communication is a prohibited debt collection under section 524 by looking to "whether the objective effect of the creditor's action is to pressure a debtor to repay a discharged debt." *In re McLean*, 794 F.3d 1313, 1322 (11th Cir. 2015). If so, we then evaluate whether that violation of the discharge injunction is sanctionable under section 105, by determining if "there is no fair ground of doubt as to whether the order barred the creditor's conduct." *Taggart*, 139 S. Ct. at 1799.

USING RESPA - If the servicer still refuses to send monthly statements and you want to get information about your account (such as the payment amount or when the interest rate is scheduled to adjust, for example), you can make a request for information under the Real Estate Settlement Procedures Act (RESPA) (12 CFR § 1024.36). (The regulation states that you must make the request within one year of the discharge, but this has been interpreted to mean when both the debt and the corresponding lien have been extinguished.)

The request must be in writing and include:

your name

information that enables the servicer to identify your mortgage loan account, and

the information that you are requesting with respect to your mortgage loan.

-ATTORNEY'S FEES IN 362 BUT NOT IN 524?

There is no provision in §524, or any other part of the Bankruptcy Code for that matter, that prescribes a unique remedy if a creditor violates the discharge injunction. By comparison, and by way of example, the Code expressly creates a cause of action for a willful violation of the automatic stay. 11 U.S.C. §362(k).

(k) (1)Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2)If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

To get fees under 524, need to bootstrap to 105 – violation of a court order so going it to maintain integrity of the system

-WHAT DO WE DO WITH MORTGAGE STATEMENTS THAT ARE SENT TO US AFTER CLOSING OF FILE?

-Damages? Need an expert? What needed to prove damages? How to get in front of the Court? Adversary Complaint? Reopen underlying case & file a Motion? Motion to Show Cause? Private Right of damage?

-CREDITOR & DEBTOR PERSPECTIVE (524(D)?)

-DISCHARGE IMPACT ON OTHER PARTIES – 524(E)

(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.

ABI, Rocky Mountain Conference, 2021

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STAY RELIEF ISSUES

I. THE AUTOMATIC STAY: A FUNDAMENTAL DEBTOR PROTECTION

11 U.S.C. § 362(a)(1)[1] establishes an automatic stay in bankruptcy cases. Specifically, Section 362(a)(1) provides that the filing of a bankruptcy petition operates as a stay "applicable to all entities" of certain actions, including but not limited to:

- the commencement or continuation of a judicial action against the debtor that was or could have been commenced before the bankruptcy case was filed;
- the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- 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; and
- any act to create, perfect, or enforce any lien against property of the estate.

The filing of a bankruptcy petition does not operate as a stay, of, among other things, the commencement or continuation of criminal actions or proceedings against the debtor; the commencement or continuation of a civil action or proceeding against the debtor to establish paternity, establish or modify an order for domestic support obligations, concerning child custody or visitation, for dissolution of the marriage—except to the extent that such proceeding seeks to determine the division of property that is property of the estate, regarding domestic violence, or for the collection of domestic support obligations from property that is not property of the estate. 11 U.S.C. § 362(b).

As Congress pronounced:

[1] All further references to § or "section" are to the Bankruptcy Code, Title 11, United States Code, unless specifically identified otherwise.

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclose actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

S.Rep. No. 989 Cong. 2d Sess. 54-55 (1978) reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5840-41; *see also Pursifull v. Eakin*, 814 F.2d 1501, 1501 (10th Cir. 1987) ("The purpose of the automatic stay . . . is to protect the debtor and his creditors by allowing the debtor to organize his affairs, and by ensuring that the bankruptcy procedure may operate to provide an orderly resolution of all claims."); *In re Touchstone Home Health LLC*, 572 B.R. 255, 271 (Bankr. D. Colo. 2017). "The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of others. *City of Chicago, Illinois v. Fulton,* No. 19-357, 2021 WL 125106, at *1 (U.S. Jan. 14, 2021).

"Any action taken in violation of the automatic stay, including a judgment or order entered by another court, is void and without effect." *In re Cannady*, 621 B.R. 16, 33 (Bankr. D. Colo. 2020) (citing *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990)). An individual injured by any willful violation of the 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).

Section 362(c) establishes the duration of the automatic stay. Generally, the stay of an act against property of the estate continues until such property is no longer property of the estate, and the stay of any other act continues until the earliest of the time the case is closed, the time the case is dismissed, or the until such time as a discharge is granted or denied. 11. U.S.C. § 362(c)(1)-(2). If a party in interest requests relief from the stay, as discussed in more detail below, the automatic stay terminates with respect to that party in interest 30 days after it requests relief from the stay unless the court, after notice and a hearing, orders that the stay is continued. 11 U.S.C. § 362(e).

The duration of the stay is quite different, however, where a case is filed by or against an individual debtor within one year after a prior case of debtor has been dismissed. If a second case is filed by or against the debtor within one year after a prior case of debtor has been dismissed, the automatic stay with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease terminates with respect to the debtor on the thirtieth day after the

second case by or against the debtor is filed. § 362(c)(3)(A).[2] Courts within the Tenth Circuit have interpreted the language of Section 362(c)(3)(A) to mean that "the automatic stay terminates after thirty days with respect to the debtor and the debtor's property, but not as to property of the estate." *See In re Cannady*, 621 B.R. at 33 (citing *Holcomb v. Hardeman* (*In re Holcomb*), 380 B.R. 813, 816 (10th Cir. BAP 2008)). Before the expiration of the 30-day period, upon motion of a party in interest and after notice and a hearing on the same, the court may extend the automatic stay as to any or all creditors if the party in interest establishes that the latter case was filed in good faith as to the creditor(s) to be stayed. § 362(c)(3)(B). If two or more is filed by or against the debtor within one year after a prior case of debtor has been dismissed, the stay shall not go into effect upon the filing of the later case unless within 30 days of the filing of the new case, after notice and a hearing, a party in interest demonstrates that the later case was filed in good faith as to the creditors to be stayed.[3] § 362(c)(4)(A)(i).

To obtain an extension of the automatic stay under 11 U.S.C. § 362(c)(3)(B) or § 362(c)(4)(A)(i), the party in interest must demonstrate by clear and convincing evidence "that the most recent bankruptcy case was filed by the debtor in good faith." *See In re Thompson*, Case No. 10-37075-HRT, 2010 WL 4928897 at 2 (Bankr. D. Colo. Nov. 24, 2010). In evaluating whether the later-filed case was filed in good faith, the court will consider the totality of the circumstances. *Id.* (citing *In re Galanis*, 334 B.R. 685, 691-92 (Bankr. D. Utah 2005); *In re Montoya*, 333 B.R. 449, 458 (Bankr. D. Utah 2005)). In determining whether a case was filed in good faith under the totality of the circumstances standard, courts in the Tenth Circuit consider the following factors:

> 1) the timing of the petition; 2) how the debt(s) arose; 3) the debtor's motive in filing the petition; 4) how the debtor's actions affected creditors; 5) why the debtor's prior case was dismissed; 6) the likelihood that the debtor will have a steady income throughout the bankruptcy case and will be able to properly fund a plan; and 7) whether the Trustee or creditors object to the debtor's motion.

Id. at *2 (citing *In re Galanis*, 334 B.R. at 693).

II. *CITY OF CHICAGO, ILLINOIS V. FULTON ET AL.* RESOLVES THE CIRCUIT SPLIT REGARDING WHAT CONSTITUTES A VIOLATION OF SECTION 326(a)(3)

[2] Section 362(c)(3)(A) does not apply in a case refiled under a chapter other than chapter 7 after dismissal under Section 707(b).
[3] Section 362(c)(4)(A)(i) does not apply in a case refiled under a chapter other than chapter 7 after dismissal under Section 707(b).

On January 14, 2021, the Supreme Court of the United States entered its unanimous opinion in *City of Chicago, Illinois v. Fulton*, resolving a split among the circuits as to the question of whether retaining possession of a debtor's property after a bankruptcy petition is filed violates the Section 326(a)(3), which stays 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. *Fulton*, No. 19-357, 2021 WL 125106.

Prior to the *Fulton* opinion, the majority of circuits, including the Second, Seventh, Eighth, and Ninth Circuit Courts of Appeals, held that the act of passively holding on to an asset constitutes "exercising control" over it and such action violates Section 362(a)(3). *Weber v. SEFCU* (*In re Weber*), 719 F.3d 72 (2d Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009); *Cal. Emp't Dev. Dep't. v. Taxel* (*In re Del Mission*), 98 F.3d 1147 (9th Cir. 1996); *Knaus v. Concordia Lumber Co.* (*In re Knaus*), 889 F.2d 773 (8th Cir. 1989). These courts concluded that a creditor's failure to affirmatively and immediately return qualifying property of the debtor that was seized pre-petition constituted a violation of the automatic stay.

The minority of circuits, including the Third, Tenth, and D.C. Circuit Courts of Appeals held that Section 362(a)(3) stays entities from doing something to obtain possession of or to exercise control over the estate property and is not violated by the act of passively holding on to an asset. *In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019); *WD Equip., LLC v. Cowen* (*In re Cowen*), 849 F.3d 943 (10th Cir. 2017); *U.S. v. Inslaw*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). The courts concluded that a creditor does not violate the automatic stay when it "merely maintains the status quo" in effect on the petition date.

In *WD Equip., LLC v. Cowen* (*In re Cowen*), 849 F.3d 943 (10th Cir. 2017), the debtor asserted that a creditor's refusal to return vehicles to him post-petition constituted a continuing violation of the automatic stay. The Tenth Circuit considered whether to follow the "majority rule" that "the act of passively holding on to an asset constitutes 'exercising control' over it, and such action violates Section 362(a)(3). *Id.* at 948 (quoting *Thompson v. Gen Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009). The Tenth Circuit explained that the majority rule seems to be more driven by practical and policy considerations than by the text of the statute, and reads too much in to the section's legislative history. *Id* at 948-49. Relying on the plain language of the statute, the Tenth Circuit determined that Section 362(a)(3) "stays entities from *doing* something to obtain possession of or to exercise control over the estate property," not from the "the act of

passively holding onto an asset." *Id.* at 949; *see In re Denby-Peterson*, 941 F.3d at 125-26 (3d Cir. 2019) ("[T]he statutory language is prospective in nature . . . the *exercise* of control is not stayed, but the *act to* exercise control is stayed." (internal quotations omitted)). The court went on to find that Section 362(a)(3) does not it impose an affirmative obligation to turnover property to the estate. 'The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control of property of the estate.' Stay mean stay, not go." 849 F.3d at 949 (quoting *U.S. v. Inslaw*, 932 F.2d 1467, 1474 (D.C. Cir. 1991)). Adopting the minority rule, the Tenth Circuit held that the meaning "act" for the purposes of Section 362(a)(3) is limited to affirmative conduct. *Id.* at 950.

The Tenth Circuit applied the same reasoning in *In re Garcia*, 740 F. App,x 163, 164 (10th Cir. 2018), finding that Section 362(a)(4) also encompasses only affirmative conduct on the part of the lienholder.

In *In re Fulton,* 926 F.3d 916, 925 (7th Cir.), the Seventh Circuit acknowledged the Tenth Circuit's holding in *In re Cowen*, but decided to continue to follow the majority rule. *In re Fulton,* 926 F.3d 916, 925 (7th Cir.), cert. granted sub nom. *City of Chicago, Illinois v. Fulton*, 140 S. Ct. 680, 205 L. Ed. 2d 449 (2019), and vacated and remanded sub nom. *City of Chicago, Illinois v. Fulton*, No. 19-357, 2021 WL 125106 (U.S. Jan. 14, 2021) ("Although the Tenth Circuit recently adopted the City's view*, see In re Cowen*, 849 F.3d 943 (10th Cir. 2017), that position is still the minority rule. Our reasoning in Thompson continues to reflect the majority position and we believe it is the appropriate reading of the bankruptcy statutes."). There, prior to the debtors' bankruptcy filing, the City of Chicago (the "City") impounded the debtors' vehicles for failure to pay multiple traffic fines and refused to return the vehicles after the debtors filed their bankruptcy petitions. *Id.* at 920. The bankruptcy courts held that "the City violated the automatic stay by 'exercising control' over property of the bankruptcy estate and that none of the exceptions to the stay applied," ordered the City to return debtors' vehicles, and sanctioned the City for violating the automatic stay. *Id.* The Seventh Circuit upheld this bankruptcy courts' decisions, concluding that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City had acted "to exercise control over" respondents' property in violation of Section 362(a)(3). *Id.* at 924–25.

The United States Supreme Court "granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a bankruptcy estate violates § 362(a)(3)." In a unanimous opinion issued on January 14, 2021, the Court determined

that the plain language of Section 362(a)(3), the existence of Section 542, and the history of the Bankruptcy Code dictate that mere retention of estate property after the filing of a bankruptcy petition does not violate Section 362(a)—effectively adopting the minority rule.

Considering the plain language of Section 362(a)(3), the Court found that "[t]he suggestion conveyed by the combination of these terms is that § 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition." *Id.* at *3. The Court went on to explain:

> We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents. As respondents point out, omissions can qualify as "acts" in certain contexts, and the term "'control'" can mean "'to have power over.'" *Thompson v. General Motors Acceptance Corp.*, 566 F. 3d 699, 702 (CA7 2009) (quoting Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2003)). But saying that a person engages in an "act" to "exercise" his or her power over a thing communicates more than merely "having" that power. Thus the language of § 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision.

Id.

In addition to the plain language of the statute, the Court determined that Section 542, which governs the turnover of estate property, further supported the requirement of affirmative action and resolves any ambiguity in the text of Section 362(a)(3). Section 542, titled "Turnover of property of the estate," provides, with two exceptions, as follows:

> [A]n 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.

The Court explained that to interpret "any act . . . to exercise control" in Section 362(a)(3) to include the mere retention of a debtor's property would transform Section 362(a)(3) into a blanket provision, rendering "the central command of § 542 largely superfluous":

> [Section] 542 expressly governs "[t]urnover of property to the estate," and subsection (a) describes the broad range of property that an entity "shall deliver to the trustee." That mandate would be surplusage if § 362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.
>
> . . .
>
> The better account of the two provisions is that § 362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while

> § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.

In addition, the interpretation advanced by the respondents would render Sections 362(a)(3) and 542 contradictory:

> Section 542 carves out exceptions to the turnover command, and § 542(a) by its terms does not mandate turnover of property that is "of inconsequential value or benefit to the estate." Under respondents' reading, in cases where those exceptions to turnover under § 542 would apply, § 362(a)(3) would command turnover all the same. But it would be "an odd construction" of § 362(a)(3) to require a creditor to do immediately what § 542 specifically excuses. Respondents would have us resolve the conflicting commands by engrafting § 542's exceptions onto § 362(a)(3), but there is no textual basis for doing so.

Id. at *4 (internal citation omitted).

Finally, the Court reasoned that "[t]he history of the Bankruptcy Code confirm what its text and structure convey":

> Both § 362(a)(3) and § 542(a) were included in the original Bankruptcy Code in 1978. At the time, § 362(a)(3) applied the stay only to "any act to obtain possession of property of the estate or of property from the estate." The phrase "or to exercise control over property of the estate" was not added until 1984.
>
> Respondents do not seriously dispute that § 362(a)(3) imposed no turnover obligation prior to the 1984 amendment. But transforming the stay in § 362 into an affirmative turnover obligation would have constituted an important change. And it would have been odd for Congress to accomplish that change by simply adding the phrase "exercise control," a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in § 542. Had Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a crossreference or provide any other indication that it was transforming § 362(a)(3). The better account of the statutory history is that the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property.

Id. at *4 (internal citations omitted).

Adopting the minority view, the Court held that mere retention of estate property after the filing of a bankruptcy petition does not violate Section 362(a). Though the Court expressly states that it does not decide how the turnover obligation in Section 542 operates nor does it settle the meaning of other subsections of Section 362(a), *Id.* at *4 (and emphasized in Justice Sotomayor's concurring opinion), as noted above, the Tenth Circuit has applied the same reasoning to Section

362(a)(4) to require affirmative conduct on the part of the lienholder. *See In re Garcia*, 740 F. App,x at 164. As for Section 542, it will be interesting to see whether Congress or the Advisory Committee on Rules of Bankruptcy Procedure accepts Justice Sotomayor's implicit invitation to consider amendments or legislation to address the issues her concurring opinion raises regarding the slowness of the turnover process and its impact on the debtor, especially where debtors' vehicles are concerned.

III. RELIEF FROM THE AUTOMATIC STAY

"[M]otions for relief from the automatic stay are ubiquitous in bankruptcy cases." *In re Touchstone Home Health LLC*, 572 B.R. 255, 259 (Bankr. D. Colo. 2017). Secured creditors routinely request relief from the automatic stay in order to foreclose on collateral, and creditors, secured and unsecured, frequently seek relief from the stay to in order to liquidate their claims against debtors through the continuation of pre-petition lawsuits. *Id.* Debtors may also seek relief from the stay to proceed with appeals in proceedings that were originally brought against them, regardless of whether they are the appellant or appellee. *See TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 497 (10th Cir. 2011).

A. Section 362(d)(1) – For Cause, Including Lack of Adequate Protection

Under Section 362(d)(1), the bankruptcy court may terminate, annul, modify, or condition the automatic stay for "cause." Section 362(d)(1) states that "cause" includes the lack of adequate protection of an interest in property of a party in interest, but does not otherwise define "cause," so the bankruptcy court must determine cause based on the totality of the circumstances. *See In re Busch*, 294 B.R. 137, 140 (10th Cir. BAP 2003).

"[B]efore the debtor is put to its proof on the issue of adequate protection, the creditor must carry its initial burden of going forward with evidence of 'cause,' including a lack of adequate protection and then the burden will shift to the debtor to persuade the court that the creditor is adequately protected." *In re Anthem Communities/RBG, LLC*, 267 B.R. 867, 871 (Bankr. D. Colo. 2001). The secured creditor's right to adequate protection includes "the right . . . to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988). "Evidence of the erosion of the creditor's position or of a threatened erosion satisfies this initial burden." *In re*

Anthem Communities/RBG, LLC, 267 B.R. at 871. As the Colorado Bankruptcy Court explained in *In re Anthem Communities/RBG, LLC*:

> The erosion may be shown through evidence of declining property values, the increasing amount of the secured debt through interest accruals or otherwise, the non-payment of taxes or other senior liens, failure to insure the property, failure to maintain the property, or other factors that may jeopardize the creditor's present position. It may be necessary to show a combination of these factors and/or to show that the circumstances as a whole are sufficient to jeopardize the creditor' interest in the property.

Id.

In addition to showing an erosion or threatened erosion of its position, the secured creditor must also demonstrate that the threatened harm is attributable to the stay. *Id.* at 875 ("[The Bank] did not, however, show how these factors have caused or will cause an erosion of its secured position that is attributable to the automatic stay. Taken as a whole, the Bank's evidence failed to satisfy its initial burden of establishing 'cause.'").

The purpose of adequate protection is to "insure that a creditor receives the value for which it bargained pre-bankruptcy. *In re DB Capital Holdings, LLC*, 454 B.R. 804, 816–17 (Bankr. D. Colo. 2011). Adequate protection assures the creditor that its collateral is not depreciating or diminishing in value. *Id.* at 817. Whether adequate protection exists is evaluated on a case-by-case basis and may be shown, by among other things, proof of an equity cushion in the property. *See id.*; *In re Steffens*, 275 B.R. 570, 577 (Bankr. D. Colo. 2002).

B. Section 362(d)(2) – Lack of Equity and Necessity for an Effective Reorganization

Under Section 362(d)(2), the bankruptcy court may grant relief from the stay with respect to a stay of an act against property if (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). The movant bears the burden of proving the debtor's lack of equity, and the party opposing the relief bears the burden of proof as to all other issues. *Id.* at § 362(g).

As to the first element, valuation evidence is typically offered in the form of appraisal reports and appraisal testimony. *See In re Anthem Communities/RBG, LLC*, 267 B.R. at 872-75 (evaluating a creditor's valuation evidence in the form of written appraisal and appraiser testimony); *In re YL West 87th Holdings I, LLC,* 423 B.R. 421, 428 (Bankr.S.D.N.Y.2010) ("In

making its determination with respect to valuation, a court should sift through the appraisal and testimony and make a judgment as to the 'accuracy and credibility' of the appraisers.").

Section 363(d)(2)(B) is a two-step inquiry. For example, in a single asset real estate case, "the property will almost always be necessary for reorganization for the very reason that it is the debtor's sole asset, and relief under 362(d)(2)(B) will be available only if the bankruptcy court concludes that reorganization within a reasonable time is not feasible." *Nantucket Investors II v. California Fed'l Bank; Indian Palms Assoc., Ltd (In re Indian Palms Assoc., Ltd)*, 61 F.2d 197, 209 (3rd Cir. 1995); *In re DB Capital Holdings, LLC*, 454 B.R. 804, 819 (Bankr. D. Colo. 2011) ("Obviously, in single asset real property cases, as these, without the real property, reorganization is impossible."). However, this necessity alone is not enough. *Id.* The debtor must also demonstrate that the property is necessary to a successful reorganization that is in prospect. The debtor must show not merely "that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375–76 (1988). "This means . . . there must be a reasonable possibility of a successful reorganization within a reasonable time." *Id.* (internal quotation and citation omitted). "Necessity and the prospect of an effective reorganization are intertwined concepts. Obviously, the real property upon which a real estate development sits is necessary to the success of that venture. Yet it is only 'necessary' in the context of § 362(d)(2) if the debtor can show the reasonable possibility of an effective reorganization." *In re DB Capital Holdings, LLC*, 454 B.R. 804, 819–20 (Bankr. D. Colo. 2011).

When a creditor requests relief from the stay promptly after the bankruptcy filing, the bankruptcy court will ordinarily apply a lesser standard—referred to as the "sliding scale" burden proof—in determining whether a debtor has satisfied its burden to demonstrate a "reasonable possibility of a successful reorganization within a reasonable time." *See In re Gunnison Center Apts., LP*, 320 B.R. 391 (Bankr. D. Colo. 2005). This "sliding scale" burden of proof "is intended to benefit debtors who have a realistic chance of reorganization but who have not had sufficient time to formulate a confirmable plan." *In re Apex Pharmaceuticals, Inc.*, 203 B.R. 432, 442 (N.D.Ind. 1996). The burden is at its lowest when the order for relief enters and gradually increases as the debtor approaches the termination of the exclusivity period. *Matter of Holly's, Inc.*, 140 B.R. 643, 701 (Bankr. W.D. Mich. 1992). "[W]hen a creditor requests relief from the stay fast on

the heels of the bankruptcy filing . . . the burden of proof under § 362(d)(2)(B) is satisfied if the debtor offers sufficient evidence to indicate that a successful reorganization within a reasonable time is 'plausible.'" *Id.* at 701. When a creditor requests relief from the stay near the expiration of the exclusivity period, "a debtor must demonstrate that a successful reorganization within a reasonable time is 'probable.'" *Id.* at 702. "'Probable' has been defined as having more evidence for than against or supported by evidence which inclines the mind to believe, but leaves some room for doubt or 'likely.'" *In re Gunnison Center Apts., LP*, 320 B.R. at 402 (citing Black's Law Dictionary 1201 (6th ed.1990)).

C. Section 362(d)(3) – The Single Asset Real Estate Case

Section 362(d)(3) provides that a secured creditor in a single-asset case is entitled to relief from the stay to foreclose on its collateral unless the debtor has filed a reorganization plan that has a reasonable prospect for confirmation or begins paying monthly interest to the secured creditor at a market rate of interest by no later than 90 days after the entry of the order for relief or 30 days after the court determines that the debtor is subject to section 362(d)(3), whichever is later.

"The plain language of section 362(d)(3) gives the Debtor a 90–day breathing space before the foregoing obligations become the basis for a motion for relief. The passage of 90 days is a predicate to relief under this section." *In re Hope Plantation Grp., LLC*, 393 B.R. 98, 102 (Bankr. D.S.C. 2007) (quoting *In re National/Northway Ltd. P'ship*, 279 B.R. 17 (Bankr.D.Mass.2002) (finding that a motion based on section 362(d)(3) was premature when filed two months after the bankruptcy case was filed and prior to the expiration of the 90–day "breathing space)); *see also In re Salem Logistics Distribution Servs., LLC*, No. 09-50504C-11, 2009 WL 1783547, at *1 (Bankr. M.D.N.C. June 22, 2009) ("Accordingly, the motion for relief from stay in each case must be denied, without prejudice, since the time for [the debtor] to comply with Section 362(d)(3) has not expired and will not expire until July 17, 2009.").

IV. APPLICABLE LOCAL RULES

Before you file a Motion for Relief from Stay in the United States Bankruptcy Court for the District of Colorado, make sure to review the applicable local rules:

- L.B.R. 4001-1 – Relief from Automatic Stay
- L.B.R. 4001-4 – Continuance of the Automatic Stay or Imposition of Stay
- L.B.R. 4001-5 – Confirmation of Termination or Absence of Automatic Stay
- L.B.R. 4001-6 – Communication Not in Violation of the Automatic Stay

This section is intended to highlight certain nuances in the local rules and should not be relied upon as an exhaustive description of what is required under the local rules. You are strongly encouraged to read the relevant local rules in detail.

Check the judge's website. If you are filing a motion for relief from stay under Section 362(d), you must select a hearing date from the court's calendar, and that date must be latest hearing date available on the assigned judge's calendar that is not more than 30 days from the date the motion for relief from stay is filed. L.B.R. 4001-1(a)(1). If you fail to comply with this process and set the hearing date more than 30 days out or seek to continue the hearing, you waive your right under Section 362(e) to automatic relief after 30 days. L.B.R. 4001-1(a)(2).

Make sure your motion and notice of hearing satisfy L.B.R. 4001-1 and L.B.R. 9013-1.

- If you assert, as a basis for relief, default as to payment on a business or consumer debt, you must attach to the motion a detailed, understandable payment history regarding the debt and arrearages and a summary. L.B.R. 4001-1(a)(4)(B).
- If you assert, as a basis for relief, default as to payment on a promissory note, your motion must include a statement as to whether the movant has possession of the original promissory note. L.B.R. 4001-1(a)(4)(B).
- If the debtor or co-debtor is an individual, you must file a Servicemembers Civil Relief Act Affidavit pursuant to L.B.R. 4002-3(c).
- The motion and notice of hearing must be served on all parties specified in Fed. R. Bankr. P. 4001 as well as on the debtor and debtor's counsel, the U.S. Trustee, trustee, and any party with an interest. L.B.R. 4001-1(a)(3).
- The notice of hearing must state that "any objection and request for hearing must be filed by a specific date that is at least seven days prior to the hearing date and that, if no objection to the requested relief is timely filed, the relief requested in the motion may enter without a hearing." L.B.R. 4001-1(a)(3).

The court will treat the hearing as a preliminary hearing. Based on the parties' proffers of evidence at the preliminary hearing, if the court determines there is a reasonable likelihood that the party opposing relief will prevail at a final hearing, may set the matter over for a final hearing. "In the alternative, the Court may consider the offers of proof and, absent the need for an evidentiary hearing, grant, or deny the request for relief from stay." L.B.R. 4001-1(c)(4). Exhibits and witness lists must be exchanged with at least 24 hours prior to the scheduled hearing. At the preliminary hearing, L.B.R. Rule 4001-1 contemplates the use of detailed offers of proof and no live witnesses.

Special Service Considerations for a Motion for Relief from Stay. In a chapter 11 case in which a committee of unsecured creditors has not been appointed, service of a motion for relief from stay

must be made upon the creditors listed as the twenty largest unsecured creditors in the case and other entities as directed by the court. Fed. R. Bankr. P. 4001(a)(1); *see* Fed. R. Bankr. P. 1007(d). A motion for relief from stay must additionally be served on, among other parties, the trustee. L.B.R. 4001-1(a)(3).

Pursuant to L.B.R. 9013-1(a)(2)(c), tf a statute requires "notice and a hearing," as is required for a motion for relief from stay, notice is to be given to all creditors and parties in interest. The commentary to L.B.R. 9013-1 provides: "Generally speaking, all creditors should receive a general notice so that they have an opportunity to provide input on the proposed action".

Moving to Continue the Automatic Stay. A motion to continue the automatic stay pursuant to Section 362(c)(3)(B) must be filed with the petition or promptly thereafter such that meaningful due process can be afforded and a hearing completed before the end of the 30-day period set forth in 11 U.S.C. § 362(c)(3)(B). L.B.R. 4001-1. Failure to timely file your motion in accordance with L.B.R. 4001-4(a) to continue may result in the motion being summarily denied.

Moving to Impose a Stay. A motion to impose a stay pursuant to 11 U.S.C. § 362(c)(4)(B) must be filed within 30 days after the filing of the later case.

Comfort Orders. If you seek an order confirming the absence of the automatic stay, you must file a motion demonstrating entitlement under the applicable Bankruptcy Code provision and comply with all additional requirements set forth in L.B.R. 4001-5. The motion must be served on the debtor, the debtor's attorney, the trustee, and the U.S. Trustee and must be accompanied by a proposed order in substantial conformity with L.B.R. 4001-5.1.

Communications That Do Not Violate the Automatic Stay. Without violating the automatic stay, a secured creditor may contact the debtor by the methods specified in L.B.R. 4001-6 regarding the status of insurance coverage on collateral, may respond to the debtor's inquiries and requests regarding the debtor's account, and "may send the debtor statements, payment coupons, information on loss mitigation or loan modifications, or other correspondence that the creditor sends to its non-debtor customers. To receive protection under this Rule, the communication must indicate it is provided for information purposes and does not constitute a demand for payment.

VI. OTHER CONSIDERATIONS

A. Determination of Property in a Divorce Proceeding

The Bankruptcy Code does not exempt from the automatic stay the determination of

property of the estate that may be a part of a divorce proceeding. In fact, the Bankruptcy Code reserves for the Bankruptcy Court the right to adjudicate property of the estate that is subject to a divorce proceeding. *Medrano Diaz v. Vazquez-Botet*, 204 B.R. 842 (D. P.R. 1996), aff'd, 121 F.3d 695 (1st Cir. 1997) (determining that when a divorce action was filed before the bankruptcy and is still pending, the state court no longer has jurisdiction over property of the estate); *In re Teel*, 34 B.R. 762 (B.A.P. 9th Cir. 1983) (same); *In re Raboin*, 135 B.R. 682 (Bankr. D. Kan. 1991) (same); *Matter of Palmer*, 78 B.R. 402 (Bankr. E.D. N.Y. 1987) (same); *In re Sokoloff*, 200 B.R. 300 (Bankr. E.D. Pa. 1996) (The Bankruptcy Court has jurisdiction over all aspects of property of the estate, including the power to adjudicate the rights of the spouses to property).

B. Assets of the Estate

"Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). Bankruptcy Courts therefore have exclusive jurisdiction to determine what interest are part of the estate. *In re Rare, LLC*, 298 B.R. 762, 764 (Bankr. D. Colo. 2003) (citing to *Manges v. Atlas (In re Duval County Rant Co.)*, 167 B.R. 848, 849 (Bankr. S.D. Tex. 1994)). As explained by one court, "A dispute over whether an asset is property of a debtor's estate should and must be resolved in favor of this [Bankruptcy] Court's jurisdiction." *In re First Assured Warranty Corp.*, 383 B.R. 502, 541 (Bankr. D. Colo. 2008); *see also In re Fundamental Long Term Care, Inc.*, 501 B.R. 770, 781 (Bankr. M.D. Flor. 2013) (citing to 28 U.S.C. § 1334(e); 11 U.S.C. § 541; *In re Cox*, 433 B.R. 911, 920 (Bankr. N.D. Ga. 2010)) ("This [Bankruptcy] Court has exclusive jurisdiction over property of the estate and is best suited to determine whether property is, in fact, property of the estate."); *In re Cox*, 433 B.R. 911, 920 (Bankr. N.D. Ga. 2010) (citing to *In re Duval Country Ranch Co.*, 167 B.R. 848, 849 (Bankr. S.D. Tex. 1994)); *In re Slay Warehousing Co. v. Modern Boats, Inc.*, 775 F.2d 619, 620 (5th Cir. 1985) ("Whenever there is a dispute regarding whether property is property of the bankruptcy estate, exclusive jurisdiction is in the bankruptcy court.").

C. Litigation

In determining whether to grant relief from stay to continue federal and state court litigation, the bankruptcy court considers what are commonly referred to as the *Curtis* Factors:

(1) Whether the relief will result in partial or complete resolution of the issues;

(2) The lack of any connection to 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 case 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 will 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 the movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);

(10) The interests 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. 795, 799-800 (Bankr. D. Utah 1984); *See Dampier v. Credit Invs., Inc.* (*In re Dampier*), 2015 WL 6756446, at *2 (10th Cir. BAP Nov. 5, 2016) (unpublished) (noting that "[i]n the absence of a comprehensive Tenth Circuit test, a list of factors identified in *In re Curtis* is often relied on by courts in their determination of whether stay relief should be granted".).

D. COVID-19

Surprisingly, only one case was discovered involving COVID-19 and its impact upon the automatic stay, *In re: The* Cracked *Egg, LLC*, 2021 WL 58147(Bankr., E.D. PA. 2021). In the case, the county health department sought relief from stay to enforce health measures, comprised of enforcement proceedings, put in place as a result of the pandemic. The Court, in ruling in favor of the county, discussed some key policy considerations relevant to the automatic stay:

The mere fact that a debtor has filed for bankruptcy protection does not obviate the requirement that a debtor abide by applicable law. Congress has recognized as much when it passed 28 U.S.C. § 959(b), which states that:

> ... a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

The Court also observes that the automatic stay in bankruptcy is a shield and not a sword designed to afford a party with a litigation advantage. While the automatic stay in bankruptcy is designed to afford the honest but unfortunate debtor with respite from creditor collection activities, the extent or reach of the automatic stay is not absolute. When Congress enacted the Bankruptcy Code it was well aware that:

> the stay provision [of 11 U.S.C. § 362(a)] was particularly vulnerable to abuse by debtors improperly seeking refuge under the stay in an effort to frustrate necessary governmental functions. To combat the risk that the bankruptcy court would become a sanctuary for [wrongdoers] Congress enacted the police and regulatory power exception to the automatic stay.

U.S. v. Nicolet, 857 F.2d 202, 207 (3d Cir. 1988) (*citing Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc*., 700 F.2d 1279, 1283 (9th Cir. 1983).

Accordingly, Congress wrote limitation provisions into the Bankruptcy Code. These limiting provisions reflect Congress's intention that the automatic stay does not provide a debtor in bankruptcy with a *carte blanche* excuse to avoid health and safety regulations.

E. Chapter 13 Co-Debtor Stay

Bankruptcy Code § 1301 provides:

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

With respect to Bankruptcy Code § 1301(c)(2) "[i]t is a settled question of law that relief from the codebtor stay is mandated to the extent that a Chapter 13 plan does not propose to pay a claim in full." *First Franklin Financial Corp. v. Alls (In re: Alls),* 238 B.R. 914 (Bankr. S.D. Ga. 1999) (*citing Citizens and Southern Nat'l Bank v. Rebuelta (In re Rebuelta)*, 27 B.R. 137 (Bankr. N.D. Ga. 1983)) and (*citing Harris v. Fort Oglethorpe State Bank*, 721 F.2d 1052, 1054 (6th Cir. 1983); *In re Schaffrath*, 214 B.R. 153, 155 (6th Cir. B.A.P. 1997); *Household Fin. Corp. v. Jacobsen (In re Jacobsen)*, 20 B.R. 648, 650 (9th Cir. B.A.P. 1982); *In re Campbell*, 242 B.R. 547, 1999 Bankr. LEXIS 1283, slip op. at 2 (Bankr. S.D. Ga. 1999) (Davis, J.); *In re Janssen*, 220 B.R. 639, 645 (Bankr. N.D. Iowa 1998); *In re Pardue*, 143 B.R. 434, 437 (Bankr. E.D. Tex. 1992); *In re Saunders*, 130 B.R. 208, 213 (Bankr. W.D. Va. 1991); *In re Fink*, 115 B.R. 113, 115 (Bankr. S.D. Ohio 1990); *In re Austin*, 110 B.R. 430, 431 (Bankr. E.D. Mo. 1990); *In re Binstock*, 78 B.R. 994, 996 (Bankr. D. N.D. 1987); *In re Bonanno*, 78 B.R. 52, 54 (Bankr. E.D. Pa. 1987); *In re Lamoreaux*, 69 B.R. 301, 303 (Bankr. M.D. Fla. 1987); *First Nat'l Bank v. Garrett*, 36 B.R. 432, 433 (Bankr. M.D. Tenn. 1984); *In re Sandifer*, 34 B.R. 507, 509 (Bankr. W.D. La. 1983); *Wiremen's C.U. v. Laska (In re Laska)*, 20 B.R. 675, 676 (Bankr. N.D. Ohio 1982); *In re Harris*, 16 B.R. 371, 378 (Bankr. E.D. Tenn. 1982); *International Harvester Employee C.U. v. Grigsby (In re Grigsby)*, 13 B.R. 409, 411 (Bankr. S.D. Ohio 1981); *Mid Maine Mut. Sav. Bank v. Johnson (In re Johnson)*, 12 B.R. 894, 895 (Bankr. D. Me. 1981); *Timex F.C.U. v. Di Domizio (In re Di Domizio),* 11 B.R. 357, 359 (Bankr. D. Conn. 1981); *First Pa. Bank N.A. v. Rondeau (In re Rondeau)*, 9 B.R. 403, 404 (Bankr. E.D. Pa. 1981); *Household Fin. Corp. v. Matula (In re Matula)*, 7 B.R. 941, 942 (Bankr. E.D. Va. 1981); *Household Fin. Corp. v. Weaver (In re Weaver)*, 8 B.R. 803, 805 (Bankr. S.D. Ohio 1981); *Commercial Sec. Co. v. Leger (In re Leger)*, 4 B.R. 718, 720 (Bankr. W.D. La. 1980); *American Nickeloid Employee C.U. v. Pyzska*, 162 Ill. App. 3d 84, 515 N.E.2d 328, 329, 113 Ill. Dec. 519 (Ill. App. Ct. 1987); *Manpoe F.C.U. v. Lee*, 1997 Conn. Super. LEXIS 3467, No. CV 920510269, 1997 WL 803859, at *2 (Conn. Super. Ct. Dec. 19, 1997).

As explained by one Court, the rational for this rule is,

> "(T)here is no limitation on the creditor's right to sue the co-debtor for the amount not provided for by the plan. There is no requirement that suit be deferred while the debtor pays under the plan during a period of years." (citations omitted).
>
> It would make little sense to defer such relief when it is known that the creditor will never receive the unprovided-for amount, under the plan, from the debtor. To put it otherwise, the debtor has in effect stated the respective dimensions of his liability and that of the co-maker. Section 1301(a)(2) provides the creditor with freedom to pursue, to the latter extent, its claim against a co-debtor."

In re: Nickles, 2010 Bankr. Lexis 3604 (Bankr. S.D. Cal. 2010) (*quoting In re: Jacobson*, 20 B.R. 648, 650 (9th Cir. BAP 1982)).

Faculty

Sean Cloyes is a partner with Berken Cloyes, PC in Denver, which he co-founded in 2016. He is admitted to practice in federal and state courts and agencies in Colorado. Previously, Mr. Cloyes was a partner with the Colorado Springs law firm of Kinnaird Cloyes & Kinnaird, P.C., and from approximately 2005-14, he chaired the El Paso County Bar Association's Bankruptcy Subsection, during which time he taught semi-monthly CLEs to other attorneys and served as a liaison between the Colorado Bankruptcy Court judges and the El Paso County Bar. He has been voted Best Bankruptcy Attorney by *Colorado Springs Style* magazine. Mr. Cloyes received his B.A. in psychology from the University of Nebraska and his J.D. from the University of Nebraska College of Law.

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Jeremy C. Sink is a shareholder with Kirton McKonkie in Salt Lake City, having joined the firm in 2019 after 16 years with the law firm of McKay, Burton & Thurman. He is a member of Kirton McConkie's Litigation Section with an emphasis in Bankruptcy. Mr. Sink's creditor bankruptcy practice focuses on protecting creditor rights in all bankruptcy proceedings, including secured creditors, landlords, vendors and general unsecured creditors. His debtor bankruptcy practice includes filing bankruptcies under all chapters of the Bankruptcy Code. He is also one of the few Utah attorneys who has filed and completed an assignment for the benefit of creditors. Mr. Sink is recognized as one of Utah's Legal Elite for Bankruptcy Law (2016) and as a *Mountain States Super Lawyer*. He spent 16 years representing three different chapter 7 panel trustees in all aspects of prosecuting chapter 7 bankruptcy cases. Mr. Sink received his B.A. in English from Brigham Young University and his J.D. *summa cum laude* in 2003 from Creighton University School of Law.

Hon. Kimberley H. Tyson is a U.S. Bankruptcy Judge for the District of Colorado in Denver, appointed to the bench in May 2017. Previously she was a director of Ireland Stapleton Pryor & Pascoe, PC, where her practice focused on bankruptcy and related litigation. She represented secured and unsecured creditors, creditors' committees, trustees and purchasers in bankruptcies, as well as clients in contested foreclosure proceedings and lender-liability cases. She also pursued hidden or improperly transferred assets. In March 2011, she was appointed to the panel of chapter 7 trustees by the U.S. Trustee. Ms. Tyson is a former chair of the Colorado Bar Association's Bankruptcy subcommittee and is a frequent lecturer on bankruptcy issues, co-authors the bankruptcy chapter of the *Annual Survey of Colorado Law*, and has been named in *Colorado Super Lawyers*. She is an active member of ABI, having served on its Rocky Mountain Bankruptcy Conference advisory board since 2003. Ms. Tyson clerked for Hon. John K. Pearson of the U.S. Bankruptcy Court for the District of Kansas and Hon. Jerry G. Elliot of the Kansas Court of Appeals. She earned her B.A. at Smith College and her J.D. at the University of Kansas School of Law.