AMERICAN BANKRUPTCY INSTITUTE

2019 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

A Deep Dive on Important Bankruptcy Cases

Hon. Jessica E. Price Smith
U.S. Bankruptcy Court (N.D. Ohio); Cleveland

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CONCURRENT SESSION

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A Deep Dive on Important Bankruptcy Cases

Presented by:

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United States Bankruptcy Court for the Eastern District of Michigan
Flint, Michigan

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Written Materials:

The Supreme Court's Newly-Announced Civil Contempt Standard for Violations of Discharge Injunction: *Taggart v. Lorenzen*, ___ U.S. ___ ; 139 S.Ct. 1795; 204 L.Ed.2d 129 (2019)

Written by:

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I. **Factual Background:** The Debtor, Bradley Taggart, had an interest in Sherwood Park Business Center, an Oregon LLC. The LLC's operating agreement provided members of the LLC the right of first refusal if any member wished to transfer his or her interest in the company. Notwithstanding this provision, Debtor transferred his interest to his attorney allegedly in breach of the right of first refusal. Sherwood Park Business Center and several of its members (collectively, the "Company") sued Debtor and his attorney for breach of the operating agreement. On the eve of trial, Debtor filed a chapter 7 bankruptcy and, ultimately, received a discharge. After Debtor received his discharge, the Oregon state court entered a judgment against him in the still pending lawsuit (and against his attorney as transferee of Debtor's interests).

II. **Procedural History (Part One):** The Company filed a petition in state court seeking attorneys' fees from Debtor and the other defendants that the Company incurred after the Debtor filed his bankruptcy petition. The Ninth Circuit allows non-debtors to sue discharged debtors over discharged debts if the debtors continued the pre-petition litigation after receiving their discharge -- where the debtor "returned to the fray." *In re Ybarra*, 424 F.3d 1018, 1027 (9th Cir. 2005). All parties agreed that the discharge order covered the post-petition attorneys' fees at issue *unless* Taggart "returned to the fray." The Oregon state court found that Debtor had returned to the fray and held Debtor liable for approximately $45,000 of the Company's post-petition attorneys' fees. Debtor filed a motion in the bankruptcy court seeking to enforce the discharge injunction, arguing that he had not returned to the fray. The Bankruptcy Court agreed with the Oregon court that Debtor had indeed returned to the fray and denied the motion. On appeal, the district court reversed, holding that Debtor had not returned to the fray. The district court concluded that the Company had violated the discharge injunction and remanded the case to the bankruptcy court. In light of the district court's conclusions, the bankruptcy court on remand held the Company in civil contempt and awarded Debtor approximately $105,000 in attorneys' fees and costs, $5,000 in emotional distress damages, and $2,000 in punitive damages.

III. **Procedural History (Part Two):** In holding the Company in civil contempt, the bankruptcy court imposed a "strict liability" standard; that the Company knew of the discharge order and intended the actions which violated it. This standard is substantially identical to the standard typically used in assessing whether violations of the automatic stay are willful. *In re Banks*, 253 B.R. 25, 29 (Bankr. E.D. Mich. 2000) ("A party acts willfully by taking any action prohibited by § 362(a) after the party receives notice of the bankruptcy filing . . . . An intent to violate the stay is not necessary.") (internal citations omitted). And, prior to Taggart, this was considered the appropriate standard for assessing discharge injunction violations. See 4 *Collier on Bankruptcy* ¶524.02[2][c] (Richard Levin & Henry J. Sommers eds., 16th ed.). The Ninth Circuit bankruptcy appellate panel (the Supreme Court's opinion doesn't explain why this case was now before the BAP and not the district court) vacated the sanctions and the Ninth Circuit affirmed, applying a very different standard than the one applied by the bankruptcy court. According to the Ninth Circuit, a creditor's "good faith belief" that the discharge order does not apply to a creditor's claim precludes a finding of contempt, *even if the creditor's belief is unreasonable*. The Supreme Court granted cert on the issue "whether a creditor's good faith belief that the discharge injunction does not apply precludes a finding of civil contempt." 139 S.Ct. at 1801.

IV. **The New Standard (Part One):** In a unanimous opinion authored by Justice Breyer, the Supreme Court rejected both the "strict liability" test utilized by the bankruptcy court and the subjective "good faith belief" test utilized by the Ninth Circuit. According to the Supreme Court, two Bankruptcy Code provisions – sections 524 and 105 – provide the key to unlocking the correct standard to be applied. Section 524(a)(2) states that the discharge order "operates as an injunction . . . ." and section 105(a) provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Relying on "a longstanding interpretive principle: When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it," *Id.*, the Court concluded that these two provisions bring with them "the 'old soil' that has long governed how courts enforce injunctions." *Id*. Traditional standards in equity practice outside of the bankruptcy context, the Court noted, understand that civil contempt is a severe remedy, and that principles of basic fairness require that those enjoined receive explicit notice of what conduct is outlawed before being held in civil contempt. Therefore, "civil contempt 'should not be resorted to where there is a *fair ground of doubt* as to the wrongfulness of the defendant's conduct. *Id*. (internal citations omitted, emphasis in original). Stated another way, a bankruptcy court is authorized to impose civil contempt sanctions only "when there is *no objectively reasonable basis for concluding that the creditor's conduct might be lawful* under the discharge order." *Id*. (emphasis added)

V. **The New Standard (Part Two):** According to the Supreme Court, the announced standard is "generally an *objective* one." *Id*. at 1802 (emphasis in original). "[A] party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable." *Id*. But, according to the Court, that does not mean that subjective intent is always irrelevant. "[A] party's 'record of continuing and persistent violations' and 'persistent contumacy' justified placing 'the burden of any uncertainty in the decree . . . on [the] shoulders' of the party who violated the court order . . . . On the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction." *Id*. (internal citations omitted) In other words, a party's record of persistent bad behavior may tip the scale in favor of a finding of contempt even where there may be "fair ground of doubt" as to whether the order at issue barred the creditor's conduct. Conversely, a party's good faith, while not obviating the contempt sanction entirely, may result in a significantly lessened damage award.

VI. **Some Preliminary Concerns**: The vast majority of discharges are entered in consumers cases. As a result of the *Taggart* decision, a debtor who reasonably believes that the discharge injunction has been violated now has to fight whether a creditor's conduct was based on an "objectively unreasonable understanding of the discharge order" or whether there is a "fair ground of doubt as to the wrongfulness of the defendant's conduct." There likely will be many cases where a debtor simply cannot afford the litigation costs that may be necessary to vindicate the discharge; costs that a "strict liability" test would have avoided or at least substantially reduced. The Supreme Court rejected these concerns, opining that a "strict liability" test would risk additional federal litigation, additional costs, and additional delays that would interfere with a prompt and effectual resolution of bankruptcy cases; negative consequences that could work to the disadvantage of debtors as well as creditors. *Id.* at 1803. While there have been only a handful of reported decisions addressing discharge injunction violations since *Taggart*, the Supreme Court's prediction that its newly-announced standard will avoid additional costs or delays may turn out to be overly optimistic.

VII. **Discharge Injunction Cases Since *Taggart***:

1. ***In re Deemer***, 602 B.R. 770 (Bankr. M.D. Ala. 2019): In this case, debtor converted her chapter 13 case to chapter 7 sought to surrender to the secured creditor an inoperable 2005 automobile. The secured creditor would not repossess the automobile or release its lien on the title and, as a result, the debtor was forced to indefinitely retain and store a worthless vehicle. According to the debtor's testimony, the secured creditor stated it would only release its lien, thereby allowing debtor to dispose of the car, if debtor paid it $750. The debtor moved to reopen her case so that she could file a motion for contempt for violation of the discharge

injunction. The bankruptcy court found that the secured creditor's failure to either repossess the car or release its lien was objectively coercive and a violation of the discharge injunction. Relying on *Taggart*, the court could find no objectively reasonable basis for concluding that the secured creditor's conduct could be lawful given the specific language of the order of discharge, the creditor's failure to repossess the car or release its lien for over one year, and the creditor's $750 payment demand. The court awarded attorneys' fees and costs but refused to award compensatory or punitive damages due to the specific circumstances of the case.

2. ***Moore v. Automotive Finance Corp.***, 2019 WL 3323328 (M.D. Ala. July 24, 2019): In this case, plaintiff was previously in the car business and declared bankruptcy. Plaintiff's debt to defendant was discharged as part of that case. Subsequently, plaintiff and a business partner formed a new company to purchase cars at dealer or wholesale prices at auction and then resell the cars to the public at a profit. The new company attempted to gain credentials through an entity known as AuctionAccess, the number one dealer credentialing system for the wholesale automotive auction industry in North America. Without these credentials, the new company would be effectively blocked from participating in wholesale physical or virtual auctions anywhere in North America. *At defendant's request*, AuctionAccess denied the new company's credential request. Defendant agreed to remove its block if plaintiff paid it $2,000. Plaintiff sued defendant for violating the discharge injunction and the bankruptcy court dismissed the complaint with prejudice for failure to state a claim upon which relief could be granted. Relying on *Taggart*, the district court affirmed, holding that under the facts as alleged, there was an objectively reasonable basis to conclude that defendant's conduct was lawful. According to the district court, a creditor is not required to do business with a debtor just because the debtor received a bankruptcy discharge. Moreover, a bankruptcy discharge does not eliminate the underlying debt, only the debtor's personal liability for paying that debt. Thus, the district court held that the defendant had a right to condition its willingness to do business with the debtor on payment of a discharged debt. That plaintiff did not want to do business with defendant but with AuctionAccess, and defendant was the impediment to that relationship was, according to the court, "a distinction without a difference." Id. at *2. "If a creditor can lawfully choose not to do business with a debtor because of a discharged debt, then a creditor can lawfully tell a third-party credentialing service that it should not credential a debtor because of a discharged debt. *At the very least, there is 'an objectively reasonable basis for concluding that the creditor's conduct might be lawful*.'" *Id*., quoting *Taggart* at 1801 (emphasis added).

3. **Additional Concerns**: The *Moore* case highlights the core problem with the *Taggart* standard. It is not at all clear that the defendant's conduct in *Moore* was lawful. At a minimum, defendant may well have tortuously interfered with a contract or business expectancy. But because the conduct "might be lawful," that apparently is good enough to escape contempt liability for violating a discharge injunction. The *Taggart* standard seems like an awfully easy standard for a defendant to meet and, not coincidentally, easily met standards tend to encourage contemptuous conduct.

4. ***In re Sterling***, 2019 WL 3788242 (7th Cir., August 13, 2019): In this case, a creditor obtained a default judgment for approximately $2,500. The debtor filed bankruptcy and obtained a discharge about one year later. The creditor never bothered to inform its counsel, who initiated supplemental proceedings. Debtor's repeated (and unnecessary) failures to appear resulted in a bench arrest warrant being issued. A police officer stopped to assist debtor with a flat tire, discovered the warrant and arrested her. She then spent two nights in jail. Debtor sued both the creditor and its counsel. Counsel was dismissed because they had no knowledge of the bankruptcy or the debtor's discharge. The bankruptcy court also dismissed the creditor on the grounds that the creditor was unaware of its lawyers' actions and therefore didn't willfully violate the discharge injunction. The district court affirmed. On appeal, the Seventh Circuit upheld the dismissal of counsel, but reversed as to the creditor. As to the creditor, the court of appeals found significance in the fact the creditor had chosen to aggressively pursue small debts and was familiar with the process. "It had knowledge of the discharge yet turned a blind eye to the progress of [debtor's] case." Interestingly, the court of appeals never mentions or discusses *Taggart*, although the case was decided two months prior to the Seventh Circuit's opinion being released. Given the bankruptcy court's and district court's differing conclusions regarding the creditor's conduct, *Taggart* might have required a finding that the creditor's conduct "might be lawful," raising the question whether conflicting views of various judges is *per se* sufficient to satisfy the *Taggart* standard. Unfortunately, the Supreme Court did not address this issue.

VIII. **Application of Taggart to Violations of the Automatic Stay**: As noted above, the strict liability standard used by the bankruptcy court in Taggart is substantially identical to the standard used in imposing sanctions for willful violations of the automatic stay under section 362(k) of the Bankruptcy Code. *In re Banks, supra*. Debtor raised this point in the Supreme Court to no avail. Rather, the Court held:

> "This language [section 362(k)], however, differs from the more general language in section 105(a). The purposes of the automatic stays [sic] and

> discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but "'whose construction is often dependent on the context in which it appears . . . .'" We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.) 139 S.Ct. at 1804 (internal citations omitted).

IX. **Some Final Thoughts on the Stay**: Although the Court specifically stated that it was not deciding whether the word "willful" supports a standard akin to strict liability in the automatic stay context, one cannot help but wonder why Justice Breyer felt the need to include that lengthy parenthetical if not to invite further consideration of this issue. Unlike violations of the discharge injunction, however, the Bankruptcy Code sets out a standard for stay violations in section 362(k). Thus, courts and practitioners may not need to go digging in "old soil." At least one court has determined that *Taggart* does not change the standard for determining whether a creditor should be held in contempt for violating the automatic stay. *In re Spiech Farms, LLC*, ___ BR ___, 2019 WL 2913270 (Bankr. W.D. Mich., July 3, 2019).

Still the Same: Direct Payments In Chapter 13 Are "Payments Under the Plan"[1]

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I. Introduction[2]

Commentators have suggested that permitting chapter 13 debtors to make direct payments to a secured creditor, typically the holder of a mortgage on their residence, should generally be prohibited.[3] In most cases, that is probably true notwithstanding the potential savings that a chapter 13 debtor can obtain as a result of reducing the funds that flow through the chapter 13 trustee, which are necessarily subject to the trustee's fee. Nevertheless, direct payment of secured debts pre-dates the Bankruptcy Code,[4] and is permitted in many jurisdictions.

One of the most heavily debated and challenging issues in chapter 13 cases today is the issue of whether post-petition payments on a mortgage paid directly by the debtor to the mortgage holder and referenced in a chapter 13 plan are "payments under the plan" for purposes of section

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[2] The author wishes to thank Hon. Keith M. Lundin, Hon. James D. Gregg, Hon. John T. Gregg and Hon. Joel D. Applebaum for their helpful comments and edits with respect to this paper.

[3] *See e.g., Lawless et al.*, FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY, § 4.06, p. 184-88 (2019) (recommending that "Congress should amend the Bankruptcy Code to clarify that conduit payment of mortgage claims is required unless there are compelling reasons for the debtor to make direct payments to the mortgage holder").

[4] The Bankruptcy Code is set forth in 11 U.S.C. § 101 *et seq.* Specific sections of the Bankruptcy Code are identified as "section __." Similarly, specific sections of the Federal Rules of Bankruptcy Procedure are identified as "Bankruptcy Rule __."

1328(a).[5] This is an important issue because section 1328(a) provides, "as soon as practicable after completion by the debtor of *all payments under the plan*,… the court shall grant the debtor a discharge of all debts *provided for by the plan*…"[6] Conversely, the consequence of failing to make direct payments (if deemed "payments under the plan") can include dismissal of the debtor's bankruptcy case without discharge years after plan payments commenced.

Courts have reached different conclusions regarding the issue of whether direct payments to creditors are "payments under the plan" and, therefore, whether a debtor's failure to timely make such payments impacts eligibility for discharge. The split continues to grow. The majority view is that direct payments are "payments under the plan." As discussed below, the majority view is the better reasoned view, and is more consistent with the statutory language and the policies of chapter 13.

II. A Common Fact Pattern

The cases addressing this issue generally involve some variation of the following fact pattern. They are ordinary chapter 13 cases, in which the debtor has a mortgage on a residence the debtor desires to keep. The mortgage may or not be current. Arrearages on the mortgage as of the petition date are usually cured through payments to the chapter 13 trustee during the life of the plan but, in many jurisdictions, maintaining post-petition installment payments on the mortgage can be accomplished by payments directly by the debtor to the creditor if the debtor so elects.

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[5] *See e.g.,* Siomos, Ken, *Denying Chapter 13 Discharges for Direct-Payment Defaults*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, 37-JUN Am.Bankr.Inst.J. 24 (2019); Bass, Michelle H., *Failure to Make Direct Payments to Secured Creditors? No Discharge*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, 37-MAY Am.Bankr.Inst.J. 28 (2019); Weiss, Brett, *Failure to Make Direct Payments to Secured Creditors? Discharge OK*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, 37-MAY Am.Bankr.Inst.J. 29 (2019); Cox, David, *Don't Move the Goalposts: Section 1328 Should Not Deny Discharge to Debtor Who Completes Payments to Trustee, But is Behind on Direct Payments*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, 36-MAY Am.Bankr.Inst.J. 20 (2018).

[6] 11 U.S.C. § 1328(a) (emphasis added).

A debtor frequently makes such an election to avoid paying a fee to the chapter 13 trustee for administering such payments.[7] When the debtor makes the election, the confirmed chapter 13 plan states that, in addition to making arrearage payments and required payments of disposable income to the chapter 13 trustee for a period of 3-5 years, the debtor will maintain postpetition mortgage payments directly to the mortgage lender in accordance with the pre-petition loan documents.

When the debtor completes all payments to the trustee required by the plan, the debtor seeks a discharge. However, it is discovered at that time, often as a result of the filing of a statement by the mortgage holder pursuant to Bankruptcy Rule 3002.1, that the debtor failed to timely make one or more of the direct payments to the mortgage holder. Upon discovering this fact, the chapter 13 trustee files a motion to deny discharge and dismiss the bankruptcy case based on the debtor's material default in making payments under the plan.

III. Applicable Statutory Provisions

Section 1322 provides a list of what a chapter 13 plan shall do and may do, and expressly permits a debtor to cure an arrearage related to a mortgage and make maintenance payments while the chapter 13 case is pending. Section 1322(b) provides:

> (b) Subject to subsections (a) and (c) of this section, the plan may—
>
> * * *
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

[7] *See* 28 U.S.C. § 586(e) (setting forth the compensation mechanism for chapter 13 trustees). It should be noted, however, that some chapter 13 trustees may agree to reduce their percentage compensation when mortgages are paid as conduit payments. This reduction may be enough to negate or substantially eliminate any savings from avoiding trustee compensation by electing direct payments. Moreover, conduit payments eliminate late charges and minimize stay relief and other litigation, which may result in substantial savings to debtors. Thus, whether direct payment of mortgage debt actually results in savings to the debtor is debatable.

* * *

> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due….[8]

Subsection (b)(2) is often referred to as the anti-modification provision, and generally precludes a debtor from modifying the rights of a creditor secured by a mortgage on the debtor's principal residence. Notwithstanding the anti-modification provision, subsection (b)(5) permits debtors to cure pre-petition arrearages and maintain ongoing payments on their residence in the chapter 13 plan.

Although it is understood that Congress provided chapter 13 debtors with the option to make payments directly to their creditors, section 1326(c) provides that "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."[9] Thus, there is a statutory presumption that all payments to creditors will be made through the trustee. Many districts have chosen to expressly act as "conduit districts," meaning all plan payments must be made through the chapter 13 trustee.[10] Other districts provide by local rule that direct payments can be made, but only if there is no pre-petition arrearage on the petition date.[11] The resulting patchwork of practices includes the possibility that direct payment

[8] 11 U.S.C. § 1322(b).

[9] 11 U.S.C. § 1326(c).

[10] *See e.g., Local Rule 3015-1(b) for the United States Bankruptcy Court for the Southern District of Texas* ("Home mortgage payments will be made through the chapter 13 trustee"); *Local Rule 3070-1 for the United States Bankruptcy Court for the Eastern District of Michigan* ("In a chapter 13 case, all claims must be paid by and through the chapter 13 trustee unless the debtor's plan establishes cause for remitting payments on a claim directly to the creditor.").

[11] *See e.g., Local Rule 3094-1 for the United States Bankruptcy Court for the Western District of Missouri* (permitting direct payments but providing that if a debtor is delinquent on mortgage payments on the date of filing, then in addition to paying an amount sufficient to cure the arrearage, the debtor must make the ongoing postpetition mortgage payments through the chapter 13 trustee, unless the court orders otherwise).

of postpetition mortgage installments is allowed in some chapter 13 cases across many jurisdictions.

With certain exceptions, section 1328(a) provides that a discharge is to be granted after a chapter 13 debtor has completed all payments under the confirmed plan. Section 1328(a) provides:

> (a) … as soon as practicable after completion by the debtor of *all payments under the plan* …, the court shall grant the debtor a discharge of all debts *provided for by the plan* or disallowed under section 502 of this title, *except any debt* -
>
> (1) *provided for under section 1322(b)(5)*….[12]

While section 1328(a) provides for discharge of "all debts provided for by the plan" after "completion … of all payments under the plan," subsection (1) then clarifies that long-term debts – including those secured by the debtor's principal residence – that are "provided for under section 1322(b)(5)" are not discharged in chapter 13.

Failure to timely make a payment "under the plan" in chapter 13 case can have significant consequences. For example, section 1307(c) contemplates that a chapter 13 case can be dismissed for "cause," and sets forth a non-exclusive list of examples of "cause." Included in that list is a "material default by the debtor with respect to a term of a confirmed plan…."[13] It is generally accepted that failure to make "payments under the plan" constitutes a material default that can be cause for dismissal.

The enactment in 2011 of Bankruptcy Rule 3002.1[14] has brought increased attention to the consequences of defaults on direct payment of mortgages in chapter 13 cases. Bankruptcy Rule 3002.1 requires a creditor that holds a lien on the debtor's principal residence to file a statement

[12] 11 U.S.C. § 1328(a) (emphasis added).

[13] 11 U.S.C. § 1307(c)(6).

[14] *See e.g., In re Gibson*, 582 B.R. 15, 18 (Bankr. C.D. Ill. 2018) ("It is apparent that what triggered this recently identified theory of dismissal without discharge was the adoption of Rule 3002.1, added by the 2011 amendments to the Federal Rules of Bankruptcy Procedure.").

in response to the chapter 13 trustee's Notice of Final Cure Payment, that discloses whether the debtor is current on postpetition mortgage payments.[15] It is generally accepted that the purpose of requiring this disclosure was to safeguard the "fresh start" in chapter 13 cases involving home mortgages by protecting debtors from invisible charges and defaults that would tumble the debtor into mortgage foreclosure immediately after discharge.[16] When the mortgage holder's responsive statement reports a delinquency on payments that were to be made directly by the debtor, the chapter 13 trustee may feel compelled to file a motion to dismiss the chapter 13 case under section 1307(c)(6) due to "material default," which has the effect, if granted, of denying the debtor a discharge. This is true notwithstanding the fact that the debtor timely paid all conduit payments required by the confirmed plan to the chapter 13 trustee.

IV. A Split in the Case Law

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[15] Bankruptcy Rule 3002.1 provides, in pertinent part:

> **Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor**
>
> (a) In General. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments....
>
> * * *
>
> (f) Notice of Final Cure Payment. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g)….
>
> (g) Response to Notice of Final Cure Payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement….

Fed. R. Bankr. P. 3002.1.

[16] *See e.g., In re Tollios*, 491 B.R. 886 (Bankr. N.D. Ill. 2013); *In re Sheppard*, 2012 WL 1344112 (Bankr. E.D. Va. April 18, 2012).

The discharge issue can be distilled to this: what constitutes "payments under the plan" for purposes of section 1328(a)? Is the phrase limited to those payments made to the chapter 13 trustee or does "payments under the plan" also include a debtor's direct payments to a mortgage holder? There is a split in the case law, and there are compelling arguments in favor of both the majority view and the minority view.

a. The Majority View

The numerical majority view is that direct payments are "payments under the plan." The opinion most often cited as the source of this line of authority was penned by the Bankruptcy Court for the Western District of Texas in *In re Heinzle.*[17] In *Heinzle*, a Bankruptcy Rule 3002.1 statement by the holder of a mortgage on the debtors' residence brought to light the debtor's failure to make direct payments required by the confirmed plan. The bankruptcy trustee filed a motion to deny the debtors a discharge and dismiss the case pursuant to sections 1328(a) and 1307(c). Relying on a 1982 decision by the United States Court of Appeals for the Fifth Circuit which held that "mortgage payments made by the debtors directly to their lender constitute plan payments despite the debtors' characterization that the payments were being made outside the chapter 13 plan,"[18] the *Heinzle* court concluded that the debtors had not completed payments under the confirmed plan and were, therefore, not entitled to a discharge.

[17] *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014).

[18] *In re Heinzle*, 511 B.R. at 75-76 (citing *Foster v. Heitkamp (In re Foster)*, 670 F.2d 478 (5th Cir. 1982) (when the plan provides for curing or mortgage arrears, a debtor's direct mortgage payments to creditor are payments under the plan)).

Expanding on *Heinzle,* several other courts have held that "payments under the plan" refers to any payment made pursuant to a chapter 13 plan, regardless of whether the payment is made by a debtor directly to the creditor or through the trustee.[19]

Most recently, in *In re Mrdutt*[20] the Bankruptcy Appellate Panel of the Ninth Circuit considered whether direct payments by a chapter 13 debtor are "payments under the plan" for purposes of plan modification under section 1329(a).[21] The BAP looked to case law construing section 1328(a) and concluded the same meaning applied in both sections: "[a]lthough the language in § 1328(a) is slightly different than that in § 1329(a) … we see no reason to interpret these phrases differently."[22] After a thorough review of the case law, the BAP held that payment of postpetition mortgage maintenance payments was a requirement for confirmation of the plan under section 1322(b)(5), and the failure of the debtors to make those payments was a material

[19] *See e.g., In re Coughlin*, 568 B.R. 461 (Bankr. E.D.N.Y. 2017) (holding that a debtor is not entitled to a discharge under section 1328(a) when he or she fails to make direct payments but, nevertheless, declining to vacate discharge previously granted); *In re Evans*, 543 B.R. 213 (Bankr. E.D. Va. 2016) *aff'd Evans v. Stackhouse*, 564 B.R. 513 (E.D. Va. 2017) (failure to make direct payments, which constituted "payments under the plan," precluded grant of discharge and mandated dismissal of case); *In re Bethe*, 2017 WL 3994813 (Bankr. E.D. Wis. Sept. 8, 2017) (comparing section 1328(a) to section 1228(a) in chapter 12 cases, and finding that the language of chapter 12 provides additional support for the conclusion that direct maintenance payments are payments under the plan); *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2017) (finding no cogent authority to suggest that payments to be made directly to a creditor pursuant to the terms of a confirmed plan are not "payments under the plan" as used in § 1328(a)); *In re Thornton*, 572 B.R. 738, 742 (Bankr. W.D. Mo. 2017) ("since the Debtor's plan provides for payment of the ongoing mortgage directly to the mortgagee, and the Debtor defaulted in such payments, the Debtor is not entitled to a discharge under § 1328(a)"); *In re Hanley*, 575 B.R. 207, 210 (Bankr. E.D.N.Y. 2017) ("While it might seem inequitable or draconian to deny the [debtors] their discharge after making Plan payments to the Trustee for five years, the equitable powers of the Court cannot override the statute or the specific provisions of a confirmed chapter 13 plan."); *In re Hoyt-Kieckhaben*, 546 B.R. 868, 872 (Bankr. D. Colo. 2016) ("But in truth, regardless of who disburses the payment, it … remains a payment under the plan whenever the plan contains a provision effecting the treatment of that secured creditor's claim.").

[20] *Derham-Burk v. Mrdutt (In re Mrdutt)*, 600 B.R. 722 (B.A.P. 9th Cir. 2019).

[21] Section 1329(a) provides, in pertinent part: "At any time after confirmation of the plan but before the completion of *payments under such plan*, the plan may be modified…" 11 U.S.C. § 1329(a) (emphasis added). Because the debtors had not made direct mortgage payments, they contended that they had not completed plan payments and were thus entitled to modify the plan.

[22] *In re Mrdutt*, 600 B.R. at 81-82.

default that precluded "completion of payments under the plan" for purposes of discharge. To interpret "payments under the plan" to include only conduit payments through the trustee, the court reasoned, would result in debtors in direct payment districts and conduit districts being treated differently. Moreover, the BAP observed that allowing a discharge when direct payments are not made was unfair to other creditors because calculation of the debtors' projected disposable income assumed that the debtors were timely making all direct payments. The BAP stated, "we join the overwhelming majority of courts holding that a chapter 13 debtor's direct payments to creditors, if provided for in the plan, are 'payments under the plan' for purposes of a discharge under § 1328(a) and hold that this same rule should apply in the context of post-confirmation modification under § 1329(a)."[23]

Similarly, in *In re Kessler*[24] the Bankruptcy Court for the Northern District of Texas denied discharge under section 1328(a) when the debtors failed to make all required direct payments under the confirmed chapter 13 plan. The plan in *Kessler* provided for monthly payments to the trustee to cure prepetition mortgage arrears and for postpetition maintenance payments directly to the mortgagee. Although the debtors cured the prepetition arrears, they failed to make the direct mortgage payments, resulting in a postpetition arrearage of over $40,000.

Relying on its prior precedent, the United States Court of Appeals for the Fifth Circuit affirmed the bankruptcy court and dismissed the debtors' case, holding that "payments under the plan" includes maintenance payments to be made directly to a creditor under section 1322(b)(5).[25] Both payments toward curing prepetition mortgage arrears and postpetition maintenance payments

[23] *In re Mrdutt*, 600 B.R. at 81-82.

[24] *In re Kessler*, 655 Fed. Appx. 242 (5th Cir. 2016).

[25] *In re Kessler*, 655 Fed. Appx. at 243-44. (discussing *In re Foster*, 670 F.2d at 486 (holding that post-petition mortgage payments, whether paid directly or through a trustee, are paid "under the plan" when the plan also provides for the curing of pre-petition arrears on the debt)).

are payments under the plan, the court reasoned, "because both payments concern the same claim," which was "provided for in the plan."[26] Because the debtors failed to timely complete the post-petition mortgage payments, "they do not qualify for discharge under the plain terms of § 1328(a)."[27]

In *In re Finley,*[28] the Bankruptcy Court for the Southern District of Illinois considered a chapter 13 trustee's complaint to revoke the debtors' discharge under section 1328(e). The confirmed plan provided that the prepetition arrearage would be cured through the trustee and postpetition maintenance payments would be paid directly to the mortgagee. After five years of payments, the trustee filed a notice confirming that all payments to the trustee had been made. The debtors sought an order granting discharge. Prior to entry of discharge, however, the mortgagee filed a statement pursuant to Bankruptcy Rule 3002.1 advising that the debtors had a $70,000 delinquency in post-petition mortgage payments. Nevertheless, no objection to the motion for discharge was filed and the court entered an order discharging the debtor on February 1, 2018. Three weeks later, after reviewing the Bankruptcy Rule 3002.1 statement from the mortgagee, the chapter 13 trustee filed a complaint to revoke the discharge.

The court held that "payments under the plan" refers to any payment made pursuant to a chapter 13 plan, without regard to whether payment is made by a debtor directly to the creditor or through the trustee. The court reasoned:

> When a chapter 13 debtor proposes a plan, payments to mortgage creditors (and to all secured creditors for that matter) must be addressed in that plan. Otherwise, those creditors are left to guess how they will be paid. Whether the trustee is the disbursing agent for the mortgage payment or the debtor is paying the creditor directly does not matter. In either case, the payments are "payments under the

[26] *In re Kessler*, 655 Fed. Appx. at 244.

[27] *In re Kessler*, 655 Fed. Appx. at 244 (emphasis in original).

[28] *Simon v. Finley (In re Finley)*, 2018 WL 4172599 (Bankr. S.D. Ill. Aug. 28, 2018).

> plan." In short, "[a] standard discharge under § 1328(a) requires completion of all 'payments under the plan' and that language plainly embraces payments that a plan provides will be made directly by the debtor to a creditor."[29]

Because the debtors failed to timely make all required direct payments, the court found, discharge should not have been granted. Nevertheless, the court denied the chapter 13 trustee's motion to revoke the debtors' discharge because the chapter 13 trustee had been advised of the debtors' failure to make the direct payments in time to object to entry of discharge, but failed to do so.

b. The Minority View

The minority view concludes that a chapter 13 debtor is entitled to a discharge notwithstanding the failure to timely make all direct payments when the debtor has timely completed all conduit payments to the trustee. The minority view courts draw a distinction between "debts provided for by the plan" (which could include direct mortgage payments) as used in section 1328(a) and "payments under the plan" which, pursuant to that same section, are the payments that must be made in order for the debtor to receive a discharge.

The first minority view opinion was *In re Gibson,*[30] in which the Bankruptcy Court for the Central District of Illinois held "that a Chapter 13 debtor's direct payments on a nonmodifiable nondischargeable residential mortgage loan … are not 'payments under the plan' for purposes of section 1328(a)."[31] *Gibson* involved sympathetic debtors, whose failure to make direct payments on a junior mortgage was due to an innocent misunderstanding of the plan's requirements; they thought the trustee was going to make those payments. Further, the mortgage creditor failed to take any action until after the debtors had made their last plan payment to the trustee even though

[29] *Simon v. Finley (In re Finley)*, 2018 WL 4172599 at *2 (Bankr. S.D. Ill. Aug. 28, 2018).

[30] *In re Gibson*, 582 B.R. 15, 24 (Bankr. C.D. Ill. 2018).

[31] *In re Gibson*, 582 B.R. at 19.

the creditor never received any direct maintenance payments. The chapter 13 trustee filed a motion to dismiss the case without a discharge because of the debtors' failure to make the direct mortgage payments.

The *Gibson* court began by stating: "This Court, in seventeen years on the bench, has never dismissed a chapter 13 case without discharge, where the required payments to the trustee were completed, for the reason that the debtor failed to make all of the direct mortgage payments."[32] Reviewing the language of section 1328(a), the court applied canons of statutory interpretation to conclude that the "ambiguous" phrase "payments under the plan," which is used in section 1328(a) to define when completion of payments occurs (thus triggering entitlement to a full compliance discharge), and the phrase "provided for by the plan," which is also used in section 1328(a) to describe the scope of the discharge, should have different meanings. The court reasoned that the phrase "'under the plan' was intended to have a narrower effect, allowing for the possibility that not all creditors holding debts provided for by the plan are receiving payments under the plan" — *i.e.,* direct payments by the debtor to a creditor.[33] It followed, therefore, that completion of all "payments under the plan" meant only those payments made to the trustee.[34]

The court also relied on section 1322(d)(2), which prohibits approval of a plan that is longer than five years. Because payments under the plan must conclude in five years, the court reasoned, "it follows that payments on longer-term debts that extend beyond the term of the plan, such as most mortgage loans, where the regular payments are being maintained via direct payments by the debtor, cannot be payments under the plan."[35] Moreover, the court explained, a mortgage holder

[32] *In re Gibson*, 582 B.R. at 18.

[33] *In re Gibson*, 582 B.R. at 19.

[34] *In re Gibson*, 582 B.R. at 19.

[35] *In re Gibson*, 582 B.R. at 20.

that fails to receive direct payments can protect itself by seeking stay relief to enforce its contractual rights, none of which are dischargeable.

The court claimed that its interpretation was consistent with the policy in chapter 13 that ambiguities should be resolved in the debtor's favor, stating:

> In this Court's view, whether direct payments are payments "under the plan" for purposes of section 1328(a) is not discernable from the statutory text. Either interpretation is plausible, meaning the statute is ambiguous. A general policy is recognized favoring resolution of ambiguities in the Bankruptcy Code in favor of debtors and even more so where the provision at issue affects a debtor's right to discharge.[36]

Because the statute was ambiguous, the *Gibson* court advocated for a case-by-case determination whether discharge should be granted. Here, the court found, the debtor's conduct was innocent with no harm to creditors.

Finally, addressing Bankruptcy Rule 3002.1, the *Gibson* court blamed the rule for the recent trend favoring dismissal without discharge when the debtor made required payments to the trustee but failed to make direct payments to a mortgagee. The court observed that, prior to adoption of Bankruptcy Rule 3002.1 in 2011, the trustee generally was not privy to a debtor's direct payment status and, thus, "countless" pre-2011 debtors had received a discharge despite a failure to timely make all direct payments. The court stated that Bankruptcy Rule 3002.1 was created to protect debtors, and "was not intended to serve as the impetus for dismissal without discharge."[37]

[36] *In re Gibson*, 582 B.R. at 18.

[37] *In re Gibson*, 582 B.R. at 19 ("[I]t is universally recognized that the Rule was intended to benefit debtors by better ensuring the fresh start to a Chapter 13 debtor who completes a plan, by providing a mechanism for review and a forum for resolving disputes over whether the debtor's obligations to the mortgage holder are correct at the conclusion of the bankruptcy case.").

Another recent minority view case is *In re Rivera.*[38] As in *Gibson*, *Rivera* involved sympathetic debtors. The debtors in *Rivera* paid their prepetition mortgage arrearage over the course of their 41 month plan through the chapter 13 trustee. They also managed to stay current on direct postpetition mortgage payments throughout the life of the plan. Shortly after completion of payments to the trustee, they defaulted on a direct mortgage payment. The chapter 13 trustee, without much enthusiasm, sought dismissal of the case.

The court held that "payments under the plan," when read in "the context of Chapter 13 as a whole brings clarity to the meaning and confirms that such words should only refer to the debtor's payments paid to the trustee pursuant to the plan's terms."[39] The court relied heavily on *Gibson,* concluding that "provided for by the plan" and "payments under the plan," as used in section 1328(a), must have different meanings, with "under the plan" being a narrower phrase. This interpretation, the court found, was consistent with how the Bankruptcy Code has been implemented and how the statutory language has been interpreted elsewhere in chapter 13. The court viewed the direct payments by the debtors as payments "outside the plan," even though the plan provided for both the curing of the prepetition mortgage arrears and the debtors' direct postpetition mortgage payments to the creditor.[40]

The *Rivera* court agreed with the *Gibson* court that Bankruptcy Rule 3002.1 was the cause of this issue, and suggested that the Bankruptcy Rule was misapplied by some courts to deny

[38] *In re Rivera*, 599 B.R. 335, 339–42 (Bankr. D. Ariz. 2019).

[39] *In re Rivera*, 599 B.R. at 340.

[40] *In re Rivera*, 599 B.R. at 341-42 (discussing *Giesbrecht v. Fitzgerald (In re Giesbrecht),* 429 B.R. 682 (B.A.P. 9th Cir. 2010) and *Cohen v. Lopez (In re Lopez),* 372 B.R. 40 (B.A.P. 9th Cir. 2007)).

discharge. The court found that the Bankruptcy Rule was "designed to be a rule of creditor disclosure, not a procedure for denial of discharge."[41]

The court also noted that the long-term mortgage debt was "already statutorily excepted from discharge by § 1328(c)."[42] Thus, denial of discharge of all debts of the debtor simply because of his or her failure to directly pay one nondischargeable debt made little sense. In essence, the court concluded that other creditors were not harmed by the direct payment default because they received what they were entitled to under the plan. The direct-pay mortgagee likewise was not materially affected by the default, because it retained its state-law and contractual remedies post-discharge.

Finally, although in a slightly different context, a recent opinion by the United States Court of Appeals for the Eleventh Circuit, *In re Dukes,*[43] appears to be consistent with the minority view. In *Dukes*, the debtor had two mortgages with a credit union, both of which were current on the petition date. The debtor's confirmed chapter 13 plan provided for direct payments to the credit union. The debtor made plan payments to the trustee for several years, but failed to make direct payments to the credit union. The credit union eventually foreclosed on the residence. The debtor received a discharge in the bankruptcy case. The credit union had a deficiency claim, and moved to reopen the bankruptcy case for a determination that it had the right to pursue the debtor personally for the deficiency. The debtor defended, claiming that personal liability was discharged at the completion of payments in the chapter 13 case under section 1328(a) because the mortgage was provided for under the plan.

[41] *In re Rivera*, 599 B.R. at 344.

[42] *In re Rivera*, 599 B.R. at 345.

[43] *Dukes v. Suncoast Credit Union (In re Dukes)*, 909 F.3d 1306 (11th Cir. 2018).

Ruling for the credit union, the Eleventh Circuit held that the plan did not "provide for" the debt to the credit union for purposes of section 1328(a) and, thus, the credit union's deficiency claim was not discharged. Under section 1328(a), the court stated, only claims "provided for" by the plan are discharged. Although the debt to the credit union was mentioned in the plan, the court held it was not "provided for" because it was merely referenced in the plan.

The Eleventh Circuit articulated two "critical lessons" in its statutory analysis. First, "provided for" by the plan means to "make a provision for" or "stipulate to" something in the plan.[44] Second, chapter 13 plans generally split the debt owed to the mortgage holder into two separate claims: (i) the underlying debt to be maintained, and (ii) the arrearage. The court stated that arrearages on mortgages are generally "provided for" by the plan because they are paid off within the life of the plan pursuant to a repayment schedule set forth in the plan. By contrast, the underlying debt paid "outside the plan" is "simply maintained" according to the terms of the mortgage documents. Claims governed solely by their original loan instruments rather than the terms of the bankruptcy plan, the court held, are not "provided for by the plan" in the sense chapter 13 contemplates.[45]

Applying these principles, the court held that the plan did not "provide for" the direct payments. First, the debtor's plan neither made provision for, nor stipulated to, anything regarding the credit union's claim. Rather, the plan merely stated that the credit union's mortgage would be paid "outside the plan." Second, the court found, by doing nothing more than mentioning that the credit union's mortgage would be maintained "outside the plan," the credit union's rights and the debtor's liability remained governed solely by the original loan documents. The court closed by

[44] *In re Dukes*, 909 F.3d at 1314 (discussing and citing *Rake v. Wade,* 508 U.S. 464 (1993)).

[45] *In re Dukes*, 909 F.3d at 1315.

stating, "By neither stipulating to nor making provisions for the Credit Union's mortgage, the plan did not 'provide for' it, and the mortgage was not included in the discharge under § 1328(a)."[46] Although *In re Dukes* was interpreting "provided for under the plan" in section 1328(a), not "payments under the plan", the analysis suggests that the Eleventh Circuit would agree with the minority view courts that direct payments are not "payments under the plan."

V. The Better View: Direct Payments Are "Payments Under the Plan"

Although compelling arguments have been made in support of the minority view, the majority has the better of this debate: direct payments are "payments under the plan" for purposes of section 1328(a). There are significant consequences of the majority view, including that some chapter 13 debtors who dutifully make all payments to the chapter 13 trustee over the life of their plans will not receive a discharge. But such consequences shouldn't be considered a surprise or undeserved for failing to pay directly the (typically) largest debt in the chapter 13 case – in essence, living for years for free in a residence – especially when the debtors promised otherwise from the beginning of the case. The only difference between direct payments and payments through the trustee is the disbursing agent; either requires a provision for payment in the chapter 13 plan. The Bankruptcy Code does not contemplate that designation of a disbursing agent determines the scope of discharge – or of many other statutory provisions - in a chapter 13 case.

First, granting a discharge to debtors who have not paid significant sums to a mortgage holder despite promising to do so to accomplish confirmation of their plan, contravenes the text of the statute. The plain language of section 1328(a) makes clear that a court shall grant discharge "after completion by the debtor of *all payments under the plan*."[47] Had Congress intended that

[46] *In re Dukes*, 909 F.3d at 1315.

[47] 11 U.S.C. § 1328(a)(1) (emphasis added).

discharge only be granted after completion by the debtor of all conduit payments through the chapter 13 trustee, Congress could have easily included language limiting the payments that needed to be completed prior to receiving a discharge. It did not.

Furthermore, section 1322(b)(5) expressly provides that a plan providing for the curing of arrears must also provide for regular maintenance payments. That statutory provision references two different components of the same claim, both of which must be dealt with in the plan to accomplish confirmation. The discharge provision in section 1328(a) presupposes that claims treated under section 1322(b)(5) are "payments under the plan" because it expressly carves out section 1322(b)(5) claims from the general discharge in section 1328(a)(1). If claims treated under section 1322(b)(5) were not "payments under the plan," there would be no reason for Congress to carve out an exception to discharge for those claims in section 1328(a)(1).[48] The argument that long term debts provided for under section 1322(b)(5) can't be "under the plan" because of the five-year plan limitation in section 1322(d) is misguided: long term debts can also be paid through the chapter 13 trustee, creating an odd and unnecessary disconnect in the Bankruptcy Code, and section 1322(b)(5) has always been interpreted by the courts as a clear statutory exception to the five-year limitation in the sense that the underlying debt is not discharged at the completion of payments to other creditors, without regard to disbursing agent. Thus, the plain language of the statute makes clear that maintenance payments on mortgages, regardless of who is the disbursing agent, are "payments under the plan."

[48] *See Rake v. Wade*, 508 U.S. 464, 474 (1993); *In re Evans*, 543 B.R. 213, 22 (Bankr. E.D. Va. 2016).

Second, the minority view tortures Supreme Court precedent to avoid inconsistency with *Rake v. Wade.*[49] In that case, the Supreme Court directly addressed the meaning of "provided for by the plan" in section 1328(a):

> Section 1328(a), for example, utilizes the phrase "provided for by the plan" in dealing with the discharge of debts under Chapter 13. *As used in § 1328(a), that phrase is commonly understood to mean that a plan "makes a provision" for, "deals with," or even "refers to" a claim….*[50]

While completion of "payments under the plan" was not at issue in *Rake,* it is difficult to argue that the language in section 1328(a) should be construed narrowly to include only those payments made to the chapter 13 trustee given the Supreme Court's broad construction of the phrase "provided for by the plan" in that same section to include claims that are merely referred to in the plan.[51] In other words, if the plan references a claim, then the payments on that claim are made "under the plan" pursuant to *Rake.* Oddly, the Eleventh Circuit in *In re Dukes* relied heavily on *Rake* in reaching its contrary conclusion, stating that the Supreme Court said "provided for" means "to 'make a provision for' or 'stipulate to' something in the plan."[52] The *Dukes* court disregarded the "refers to" language in *Rake,* dismissing that language as dicta "unmoored from the Court's actual holding and analysis."[53]

Third, since October 1, 1979, the Bankruptcy Code has contemplated that a chapter 13 plan must address all claims against the debtor; there is no such thing as paying a creditor "outside the plan." The phrase "outside the plan" is a remnant from pre-Bankruptcy Code practice. Under the

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[49] *Rake v. Wade*, 508 U.S. 464 (1993).

[50] *Rake v. Wade*, 508 U.S. at 474 (citations omitted) (emphasis added).

[51] *See In re Mrdutt*, 600 B.R. at 78-79; *In re Coughlin*, 568 B.R. at 474-75; *In re Gonzales*, 532 B.R. at 832; *In re Evans*, 543 B.R. at 224-25.

[52] *In re Dukes*, 909 F.3d at 1313-15.

[53] *In re Dukes*, 909 F.3d at 1315.

Bankruptcy Act, the precursor of the Bankruptcy Code, debtors could not confirm a wage earner plan that dealt with secured debt without the approval of secured creditors.[54] Chapter XIII plans were forbidden altogether to provide for claims secured by real property.[55] As a result, when a secured creditor did not approve a plan, there arose the practice of treating the dissenting creditor "outside the plan," by making payments directly and not referring to the creditor in the plan.[56] The inability to provide for secured debts without consent was explicitly changed by section 1322(b)(2) of the Bankruptcy Code and the pre-Bankruptcy Code practice of paying nonconsenting secured claims "outside" the plan was effectively abolished. The Bankruptcy Code now allows for confirmation of a plan without the acceptance of secured creditors,[57] and contemplates that all claims (including secured debt) will be dealt with through the chapter 13 plan. The minority view courts resurrect a distinction that no longer exists based on a permissive power to designate disbursing agents which has nothing to do with discharge.

Section 1326(c) was included in the Bankruptcy Code in 1978 to address disbursement of payments to creditors. That section creates a strong presumption that all payments to creditors will be made through the trustee, while permitting direct payments:

> Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.[58]

The minority courts ignore the plain language above that the only way a debtor can make a direct payment is if the plan or confirmation order itself provides for direct payment. All payments to creditors, whether through the trustee or paid directly, must be provided for in the plan and, thus,

[54] *See* § 652 of former Bankruptcy Act.

[55] *See* § 606 of former Bankruptcy Act.

[56] *See In re Thornton*, 572 B.R. at 742.

[57] *See* 11 U.S.C. §§ 1325(a)(5)(B) and 1322(b)(5).

[58] 11 U.S.C. § 1326(c).

constitute "payments under the plan." It is illogical to say that a plan does not provide for a claim, or that a claim will be treated "outside the plan," when section 1326(c) says that the only way to make a direct payment is to provide for direct payment in the plan or confirmation order.

Fourth, granting a discharge to a debtor who has not paid substantial sums dedicated to postpetition mortgage payments is contrary to the inherent bargain in chapter 13 and perversely incentivizes debtor misconduct. A fundamental trade-off in chapter 13 is that a debtor retains the exclusive use of all property and discharges most debts only if the debtor is willing to commit payment to creditors of all projected disposable income over a period of 3-5 years pursuant to a court-approved plan.[59] The calculation of disposable income under section 1325(b) necessarily accounts for postpetition payment of a home mortgage when promised by the debtor to accomplish confirmation under section 1322(b)(5) – without regard to whether payments are through the trustee or directly by the debtor to the mortgage holder. If a debtor is not making postpetition mortgage payments, they are effectively claiming an expense in the projected disposable income calculation to which they are not entitled. Put another way, debtors who confirm a plan contemplating direct payments who then fail to remit such payments have materially defaulted under the plan and have additional disposable income that they are not using to pay other creditors - contrary to the commitment that debtors pledge all disposable income for the duration of the chapter 13 case. Absent focused creditor action, condoning this behavior allows the debtor to

[59] See section 1325(b)(1)(B), which provides:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless …, the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period … will be applied to make payments to unsecured creditors under the plan.

11 U.S.C. § 1325(b)(1)(B).

benefit from years of living without mortgage payments at the expense of the entitlements of other creditors, and is inconsistent with the inherent bargain of chapter 13.[60]

Fifth, the minority view leads to inconsistent and unfair results. It is unfair to deny discharge to debtors who promise but fail to make mortgage payments through the trustee while permitting similarly situated debtors who promise but fail to make direct payments to obtain a discharge. As the *Mrdutt* court observed:

> Whether postpetition mortgage payments are paid directly by the debtor or paid by the chapter 13 trustee should not be dispositive of granting a discharge under § 1328(a). A direct-pay debtor should not receive a discharge that a conduit debtor would not. Such a result "is inconsistent both with the words and intent of chapter 13."[61]

Chapter 13 is intentionally and necessarily flexible. Debtors are, in many jurisdictions, permitted to pay mortgage holders directly. But debtors who elect to make direct payments should not be given more favorable treatment than those who pay through the trustee. After all, when a debtor defaults on direct payments, it is frequently the result of choices that he or she controls. A debtor who does not keep their end of the chapter 13 bargain should not be granted a discharge without regard to the mechanism for disbursements during the case.

Finally, although this issue admittedly has come to light more frequently in recent years as a result of the enactment of Bankruptcy Rule 3002.1, the increased exposure that the Bankruptcy Rule provides to post-petition mortgage defaults does not, and should not, change the rights and

[60] *See In re Mrdutt*, 600 B.R. at 81 (noting that the debtors failed to pay $123,819 in postpetition mortgage payments which they had committed to pay, yet they paid nothing to unsecured creditors); *In re Thornton*, 572 B.R. at 742-43 ("Here, the Debtor has not made mortgage payments for over three years postpetition. She therefore did not have an actual expense for housing despite the fact that the schedules on file show that, with a mortgage expense, she had no disposable income for payment to unsecured creditors."); *In re Coughlin*, 568 B.R. at 472-473 ("Chapter 13 debtors who do not pay their post-petition mortgage payments are essentially claiming a [projected disposable income] deduction to which they are not entitled.").

[61] *In re Mrdutt*, 600 B.R. at 80 (citing *In re Coughlin*, 568 B.R. at 474).

obligations of parties under the Bankruptcy Code. It matters not whether the revision to the Bankruptcy Rules was intended to benefit debtors or creditors, and it is irrelevant that debtors prior to 2011 were "flying under the radar" and receiving discharges despite not making all maintenance payments as required under section 1322(b)(5).[62] Bankruptcy Rule 3002.1 merely requires disclosure, and when such disclosure is unfavorable to a debtor under the Bankruptcy Code, then denial of discharge is the consequence of the debtor's inability to fulfill his or her obligations.

VI. Conclusion

There will likely continue to be disagreement whether direct payments constitute "payments under the plan" for purposes of section 1328(a). In this author's view, the better reasoned approach is the majority view. Chapter 13 debtors must promise to maintain postpetition mortgage payments - whether paid directly or through the chapter 13 trustee - to accomplish confirmation of a plan under section 1322(b)(5), and then must perform that promise to be entitled to discharge upon completion of payments under the plan. The minority view is not wholly without attraction – especially in cases involving sympathetic debtors – but history, statutory construction and policy favor the majority conclusion that direct payments are payments "provided for by the plan" and direct payments are payments "under the plan." A default in direct payment of a mortgage will frequently be "material" and will form a barrier to discharge if the default cannot be repaired by modification or otherwise.

The time-tested way to avoid the problems discussed above is to require, as many judicial districts do by local rule, mortgage maintenance payments to be paid through the chapter 13 trustee (and not directly) absent compelling circumstances. When maintenance payments are paid through the chapter 13 trustee, there is dependable recordkeeping with respect to what is usually the

[62] *In re Mrdutt*, 600 B.R. at 81.

debtor's largest obligation. Conduit districts experience dramatically less stay relief and other litigation between debtors and mortgage holders. Perhaps most importantly, the trustee ensures that the debtor remains current on both cure and maintenance payments throughout the life of the plan. This avoids surprises at the end of the case and maximizes the likelihood that the debtor will exit chapter 13 with a discharge and a mortgage that is completely current.

Big Things Have Small Beginnings - Passive Retention of Property of the Estate Repossessed Prepetition

By Hon. John T. Gregg[*]

I. *Introduction*

Thirty-five years ago and without explanation, Congress amended section 362(a)(3) of the Bankruptcy Code to add the seemingly innocuous phrase "any act . . . to exercise control over property of the estate."[1] Section 362(a)(3) has since metastasized from its relatively small beginnings into one of the more controversial and perplexing provisions in the Bankruptcy Code.[2] Today, it is unclear whether section 362(a)(3) is violated when a creditor passively retains property of the estate repossessed prepetition.

Because section 362(a)(3) applies to cases filed under chapters 7, 11, 12 and 13, this issue manifests itself in numerous contexts, from the chapter 13 debtor who depends on his or her vehicle to travel to and from work each day, to the chapter 11 debtor in possession that relies on intangible personal property to continue as a going concern, and even to the chapter 7 trustee simply seeking to liquidate property of the estate.[3] A court's interpretation of section 362(a)(3) thus has the potential to affect not only the rehabilitation of a debtor, but also the distributions to creditors of a debtor's estate.

Courts and commentators are divided on the issue.[4] Representing the "majority approach," the Second, Seventh, Eighth, Ninth and arguably the Eleventh Circuit Courts of Appeal have held that passive retention of property of the estate repossessed prepetition constitutes a violation of section 362(a)(3).[5] The D.C. Circuit and, most recently, the Tenth Circuit Courts of Appeal disagree.[6] They adhere to the "minority approach" by reasoning, among other things, that because passive retention does not involve any affirmative post-petition act, section 362(a)(3) is not violated. Although the issue remains unaddressed in the First, Third, Fourth, Fifth and Sixth Circuit Courts of Appeal, the lower courts in those circuits are, not surprisingly, similarly divided.[7] As various decisions highlight, the issue is arguably as much about sections 541, 542 and 363 as it is about section 362.[8]

Unfortunately, this article provides no definitive answer; rather, it is intended merely as a guide to the two contrasting approaches. Unless

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[*]United States Bankruptcy Court, Western District of Michigan. This article is only intended to summarize the majority and minority approaches. Nothing contained herein should be construed as the views or opinions of the author. For more argumentative and unconstrained analyses, see infra note 4. The author appreciates the contributions of his law clerk, Elizabeth K. Lamphier, and his judicial assistant, Martha Ledezma.

Congress or the United States Supreme Court intervenes, parties in bankruptcy cases will continue to be subject to inconsistent interpretations dependent upon the jurisdiction in which a case is filed.

II. *Statutory Overview*

A brief review of sections 362, 363, 541 and 542 is helpful, as they form an inter-related statutory scheme.[9] To begin, upon the filing of any bankruptcy case, an estate is created by operation of law.[10] Section 541 provides, with limited exceptions, that the bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case, regardless of where the property is located and by whom it is held.[11]

A leading treatise has explained section 541 as follows:

> By establishing the content of the bankruptcy estate, Code § 541 identifies the property which will be available to satisfy creditors' claims. In short, Code § 541's operative scheme may be summarized as follows: Any and all property rights of the debtor at the time of the commencement of the case become part of the estate, and remain property of the estate unless specifically removed from the estate.[12]

Section 541 works in tandem with other sections of the Bankruptcy Code, including section 362. Section 362, like section 541, becomes effective by operation of law upon the filing of a bankruptcy case.[13] It automatically imposes a stay of post-petition actions, with certain exceptions.[14] The legislative history to section 362 states, in pertinent part, that:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.[15]

Under the version of section 362(a)(3) enacted as part of the Bankruptcy Reform Act of 1978,[16] only acts to obtain possession of property of the estate were prohibited.[17] However, Congress amended section 362(a)(3) in 1984 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[18] After the 1984 amendments and continuing through the present, section 362(a)(3) states that all entities are automatically stayed from "*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*."[19] Congress provided no substantive legislative history with which to discern its intent.[20]

Section 542, which assembles a debtor's property, provides that:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.[21]

An entity is therefore required to "deliver" all property that the trustee is either able to use, sell or lease under section 363, unless one of the following applies:

- the property is of inconsequential value or benefit to the estate;
- the holder of the property has transferred it in good faith without knowledge of the bankruptcy; or
- the transfer of the property occurs automatically to pay a life insurance premium.[22]

Section 363 is a significant part of the statutory scheme. To paraphrase, section 363(b) allows a trustee, with certain restrictions, to use, sell or lease property of the estate outside the ordinary course of business after notice and a hearing.[23] Section 363(c)(1), which is also subject to certain exceptions, allows a trustee to use property of the estate and to enter into transactions, including for the sale or lease of property of the estate, in the ordinary course of the debtor's business, without notice and a hearing or prior court approval, provided that the trustee is authorized to operate the debtor's business.[24]

The Bankruptcy Code provides an entity with an interest in property of the estate with a means by which to protect its interest. Section 363(e) provides in pertinent part that:

> Notwithstanding any other provision of this section, at anytime, on request of an entity that has an interest in property used, sold or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest . . .[25]

Section 363(e) arguably places the burden to seek adequate protection on the party with an interest in the property, not the trustee.[26] However, such interpretation has not been universally accepted by the courts.[27] Section 363(e) also contains no temporal restriction, meaning that a party can request, and the court may order, adequate protection "at any time."[28] The court, not the party requesting adequate protection, ultimately determines whether the adequate protection is sufficient.[29]

The relationship among sections 362, 363, 541 and 542 can be complicated. To some extent, *Whiting Pools*, a decision from the Supreme Court one year prior to the 1984 amendments, addresses this relationship:

> [Section] 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.
>
> Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee. Given the broad scope of the reorganization estate, property of the debtor repossessed by a secured creditor falls within this rule, and therefore may be drawn into the estate. While there are explicit limitations on the reach of § 542(a), none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings.
>
> * * *
>
> In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorgani-

zation proceedings.[30]

In the context of passive retention of property of the estate repossessed prepetition, *Whiting Pools* is important not only for what it says, but also for what it does not say. Among other things, *Whiting Pools* does not address whether the failure to deliver such property results in a violation of the automatic stay under section 362(a)(3). Although *Whiting Pools* emphasizes that its rationale applies in chapter 11 reorganizations, the Supreme Court was careful not to foreclose a different interpretation in cases under chapters 7 and 13.[31] Importantly, the Supreme Court also did not need to determine in *Whiting Pools* whether section 542(a) is self-effectuating because the debtor in possession had counter-claimed for turnover in an adversary proceeding.[32] Finally, *Whiting Pools* did not directly address whether property must be delivered to the trustee before any adequate protection determination.[33]

III. *Contrasting the Majority and Minority Approaches*

The majority and minority approaches depend primarily on their respective (and conflicting) interpretations of the following:

- the plain meaning of the phrase "any act . . . to exercise control";
- the impact of the 1984 amendments;
- the self-effectuating nature (if any) of section 542(a);
- the reach of *Whiting Pools*;
- the right to adequate protection of an entity with an interest in property sought to be used, sold or leased by a trustee as a condition to turnover; and
- the overall purpose of the Bankruptcy Code and underlying policy considerations.

Each approach has merit.

A. *The Plain Meaning Rule*

When addressing whether a creditor violates section 362(a)(3) by passively retaining property of the estate repossessed prepetition, the majority and minority approaches find support for their respective positions in the plain meaning of the statute.[34] None of the terms in the phrase, "any act . . . to exercise control over property of the estate" are defined in the Bankruptcy Code, leaving the courts to turn to the plain meaning of those words as defined in legal and general dictionaries.[35]

The majority approach focuses on the plain meaning of the phrase "to exercise control." A leading legal dictionary defines "control" as, among other things, "[t]o exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern."[36] A frequently cited general dictionary similarly defines "control" as "to exercise restraining or directing influence over" regulate . . . to have power over . . ."[37] Accordingly, the majority concludes that by retaining property of the estate post-petition, entities are nevertheless exercising control. After all, the majority stresses, an entity continuing to retain property of the estate, even without doing more, does do something.

The entity deprives the trustee of the opportunity to use, sell or lease property of the estate.[38] One court has illustrated this point as follows:

> In light of that definition, we see no way to avoid the conclusion that, by keeping custody of the vehicle and refusing . . . access to or use of it, [the creditor] was "exercising control" over the object in which the estate's equitable interest lay, and its retention of the vehicle violated the stay.[39]

The minority finds a fundamental flaw with the majority's interpretation of the plain meaning of section 362(a)(3). According to courts adopting the minority approach, the majority mistakenly emphasizes the infinitive "to exercise control."[40] Instead, the plain meaning of the term "any act" must first be considered.[41] The issue is not whether any "exercise of control" occurred. It is whether "any act" occurred at all, given that the status quo does not change when a creditor continues to hold property post-petition that was repossessed prepetition.[42] The minority concludes that the correct grammatical interpretation involves only post-petition acts:

> Breaking down the sentence, "any act" is the prepositive modifier of both infinitive phrases. In other words, § 362(a)(3) prohibits "any act to obtain possession of property" or "any act to exercise control over property." "Act", in turn, commonly means to "take action" or "do something." *New Oxford American Dictionary* 15 (3d ed. 2010) (primary definition of "act"). This section, then, stays entities from doing something to obtain possession of or to exercise control over the estate's property. It does not cover "the act of passively holding onto an asset," *Thompson*, 566 F.3d at 703, nor does 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 over property of the estate." Inslaw, 932 F.2d at 1474. Stay means stay, not go.[43]

In sum, under the minority approach, the exercise of control is not stayed; only *the act* to exercise control is stayed.[44]

B. *The 1984 Amendments*

Like their respective interpretations of the plain meaning of section 362(a)(3), the majority and minority disagree on the impact of the 1984 amendments. The majority concludes that the 1984 amendments expanded the scope of section 362(a)(3):

> This significant textual enlargement is consonant with our understanding and the Supreme Court's interpretation that Congress intended to prevent creditors from retaining property of the debtor in derogation of the bankruptcy procedure and the broad goals of debtor protection discussed above, without regard to what party was in possession of the property in question when the petition was filed. As the Seventh Circuit has pointed out, "Although Congress did not provide an explanation of that amendment, the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition.[45]

Courts adopting the minority approach are not persuaded by this interpretation, particularly because, as the majority concedes, there is no legislative history upon which to base its conclusion. The minority finds circumspect the majority's reliance on only a change in text, without more, to justify a departure from the interpretation of section 362(a)(3) that was employed

prior to the 1984 amendments.[46] According to the minority, the scope of the automatic stay was in no way expanded by the 1984 amendments. Instead, the amendments merely clarified that affirmative acts *to gain possession* and *to gain control* after the commencement of a bankruptcy case are covered by section 362(a)(3).[47] As such, notwithstanding the 1984 amendments, section 362(a)(3) continues to apply "only to acts taken *after* the petition is filed."[48] Relatedly, the minority points out, the prefatory language "any act" was not modified by the 1984 amendments. Because Congress did not express any intent to deviate from past practices as part of the 1984 amendments, the minority holds that section 362(a)(3) continues to cover only post-petition acts.[49]

One court adopting the minority approach has explained the impact (or lack thereof) of the 1984 amendments as follows:

> The amendments are equally "consonant" with another, less sweeping conclusion. "Since an act designed to change control of property could be tantamount to obtaining possession and have the same effect, it appears that § 362(a)(3) was merely tightened to obtain full protection." *In re Bernstein*, 252 B.R. 846, 848 (Bankr. D.D.C. 2000). "[U]se of the word 'control' in the 1984 amendment to § 362(a)(3) suggests that the drafters meant to distinguish the newly prohibited 'control' from the already-prohibited acts to obtain 'possession,' in order to reach nonpossessory conduct that would nonetheless interfere with the estate's authority over a particular property interest." Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 No. 9 Bankruptcy Law Letter NL 1 (September 2013).[50]

C. *The Self-Effectuating Nature of 11 U.S.C. § 542(a)*

Not surprisingly, the majority and minority analyze the relationship between sections 362 and 542(a) quite differently. The majority relies on the allegedly self-effectuating nature of section 542(a), an interpretation disputed by the minority. The majority reasons that because section 542(a) is self-effectuating, an entity in possession of property repossessed prepetition has an affirmative obligation to "deliver" the property to the trustee upon commencement (or at least notice) of a bankruptcy case, provided that the condition precedent is satisfied and none of the three exceptions applies.[51] If it does not satisfy this obligation, the entity violates section 362(a)(3) by not delivering the property, which itself is an act to exercise control over property.

According to the majority, the self-effectuating nature of section 542(a) is apparent from its text. The statute uses the term "shall deliver," indicating that the obligation to turn over property that may be used, sold or leased under section 363 is mandatory.[52] Moreover, if Congress meant to require an order as a condition to turnover, it arguably would have prefaced section 542(a) with "after notice a hearing," as it did in section 542(e).[53] It did not.

One court adopting the majority approach has explained the turnover process as follows:

> A creditor who possesses property of the estate on the date the bankruptcy peti-

> tion is filed has an obligation to turn that property over to the debtor or to the trustee . . . [T]he onus to return estate property is place[d] upon the possessor . . .
>
> . . . A creditor who requires possession in order to achieve or maintain perfection has the right to file a motion for relief from the stay and request adequate protection such that its lien rights are preserved. However, the creditor must tender the goods or face sanctions for violation of the stay. The creditor has a right to and may request terms of adequate protection while simultaneously returning the goods. However, while the creditor may suggest terms of adequate protection, it may not unilaterally condition the return of the property on its own determination of adequate protection. If the creditor and the debtor cannot agree on what constitutes adequate protection, the creditor can request a hearing, with the debtor having the burden of proving that the creditor's rights will be adequately protected. If the creditor is concerned that its interest will be irreparably harmed if the property is turned over before the motion for relief [from] stay can be heard, it may request an emergency hearing under § 362(f). In all cases, however, any prerequisite to turnover is determined by the bankruptcy court, not by the creditor.[54]

The minority finds that the majority approach fails to sufficiently reconcile the allegedly self-effectuating nature of section 542(a) with *Whiting Pools*. Because *Whiting Pools* identified a condition precedent and three exceptions to turnover, the minority maintains that section 542(a) is not self-effectuating.[55] By deeming turnover to be self-effectuating, the minority reasons that the majority approach inexplicably negates the defenses (i.e., the condition precedent and three exceptions) identified in *Whiting Pools*.[56] Moreover, the minority notes that *Whiting Pools* favorably referred to pre-Bankruptcy Code practice, whereby a court "could order" turnover.[57]

One court has suggested the better reading is that section 542(a) only provides a procedure for a trustee to request turnover.[58] Other courts adopting the minority approach conclude that Rule 7001(1) of the Federal Rules of Bankruptcy Procedure requires an adversary proceeding to effectuate turnover under section 542(a).[59] As such, section 362(a)(3) is violated only where an entity fails to deliver property after entry of a turnover order. Finally, other courts adopting the minority approach take it a step further. They conclude that because no "textual link" exists between sections 362 and 542, an entity that fails to comply with a turnover order is subject to sanctions under section 105(a) for violating a turnover order, not sanctions under section 362 for violating the automatic stay.[60]

D. *Adequate Protection Under 11 U.S.C. § 363(e)*

The relationship between sections 362(a)(3) and 542(a) is further complicated by an entity's right to adequate protection under section 363(e). Once again, the majority and minority approaches are wholly divergent.

The majority rejects any notion that turnover is conditioned on adequate protection first being provided to an entity passively retaining property of the estate.[61] According to the majority, nothing in the Bankruptcy Code permits a creditor to retain property of the estate unless and until adequate protection is provided.[62] The majority finds support in *Whiting Pools*, where

the Supreme Court stated that "[s]ection 542(a) simply requires the [creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize."[63] This interpretation has been explained as follows:

> [T]here is language in *Whiting Pools* . . . which tends to indicate that the Supreme Court favored an approach whereby the creditor would first turn over the seized asset and then petition the bankruptcy court for adequate protection. The Court commented that the Bankruptcy Code "*requires* an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee . . ." It further stated that turnover is not explicitly required in only three specific situations, the lack of adequate protection not being among them . . . Further, the Court intimated that the onus is on the creditor, rather than the debtor, to seek relief in the bankruptcy court when it stated: "*At the secured creditor's insistence*, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor." This language, combined with our analysis of sections 362(a)(3) (which was not amended at the time of the *Whiting Pools* decision) and 542, shows that it is unlikely that Congress, in creating the Bankruptcy Code, intended to affirm any pre-petition convention that might have existed that allowed a creditor to retain possession of an asset properly belonging to a debtor's bankruptcy estate while awaiting an adequate protection determination . . .[64]

The minority approach rejects the majority's rationale. First, courts adopting the minority approach note that the statements in *Whiting Pools* upon which the majority relies are *dictum*, not holdings.[65] Second, section 542(a) specifically cross-references section 363, meaning that the two sections must be read as part of a larger statutory scheme:

> The Court observed in *Whiting Pools* . . . that one of the "explicit limitations on § 542(a) is that "Section 542 provides that the property be usable under § 363 . . ." Property "usable under § 363" necessarily includes the limitation of § 363(e) that, "[n]otwithstanding any other provision of that section," any proposed use is subject to the trustee's obligation to comply with any order issued by the court for adequate protection. As observed in Brubaker, *Part II* at 5:
>
> > Of course, the most prominent among the explicit limitations on the reach of § 542(a)" that the Supreme Court specifically highlighted in *Whiting Pools* is "that property be usable under § 363." By express incorporation of § 363, then, when the estate seeks turnover of property "*proposed* to be used, sold, or leased, by the trustee, the court . . . *shall prohibit or condition* such use, sale, or lease as is necessary to *provide adequate protection*" of the secured creditor's lien rights.[66]

E. *Underlying Purpose and Policy Considerations*

The final point of tension between the majority and minority approaches involves policy considerations. The majority relies on the following practical considerations to support its view: (i) bankruptcy reorganizations are premised on allowing a debtor to use its assets for rehabilitative purposes, (ii) creditors should not be able to hold property of the estate hostage to the detriment of the debtor and creditors on the whole, and (iii) the debtor (and, indirectly, the creditor constituency) would be economically harmed if a

debtor is required to assemble property of the estate piecemeal.[67] Although a creditor may also be harmed if, for example, the creditor's collateral depreciates or is destroyed, the majority reasons that a creditor can address any such concerns by filing an emergency motion for relief from the automatic stay and, alternatively, adequate protection.[68]

The minority disagrees. The minority stresses that practical considerations should have little relevance, if any, because the plain meaning of the statute controls. However, even if policy and purpose play a role, the minority suggests that they should balance the interests of the estate and the entity with an interest in property, as illustrated by one court:

> The minority rule wisely balances both sides. The minority rule still prohibits creditors from taking post-petition action that would give them possession or control over qualifying property. This ensures that the property will remain a part of the estate and allows for a bankruptcy court to distribute those assets to all claimants in an orderly and just manner. It also still allows damages for wrongful post-petition conduct. [Debtors] may still request a creditor to return property repossessed pre-petition and may still move for a turnover of the property before a bankruptcy court. This allows a bankruptcy court to fully consider a creditor's defenses to turnover before a creditor has to turnover property to the estate.[69]

The practical considerations are perhaps best understood by a fairly common hypothetical. Prepetition, a secured creditor repossesses an individual debtor's vehicle. Before the creditor can fully divest the debtor of any property interest under applicable non-bankruptcy law, the debtor files for relief under chapter 13. The debtor immediately provides the creditor with notice of the bankruptcy. The creditor declines. Instead, the creditor files an emergency motion for relief from the automatic stay and requests adequate protection, including proof of insurance, which the debtor to date has not provided. The debtor then files a one-page motion asserting that the automatic stay has been violated but does not request turnover in the motion. The court is thus confronted with the following questions, among others, on an expedited basis:

- Is the requirement of turnover self-effectuating, meaning that the property may be used, sold, leased or exempted, and none of the three exceptions apply? Or, does the court need to order turnover?
- Assuming that turnover is self-effectuating, when was the automatic stay violated? Is it when the creditor failed to immediately/promptly deliver the vehicle after the creditor received notice of the bankruptcy? Or, does the debtor first need to make an informal demand for turnover?
- If the court grants relief from the automatic stay, has the creditor nonetheless violated the automatic stay by not delivering the vehicle upon receiving notice of the bankruptcy? Or, should the court order annulment of the automatic stay?
- Should the court condition turnover on adequate protection?
- Is the requirement that the creditor deliver the vehicle mutually exclusive from the debtor's obligation to provide adequate protection, including proof of insurance?

- Is the automatic stay violated if the creditor refused to return the vehicle solely because the vehicle was not insured?
- What if the debtor damages or destroys the vehicle and it is uninsured?
- What if the debtor is a serial filer who has previously voluntarily dismissed his case(s) immediately after the creditor delivers the vehicle, thereby requiring the creditor to repossess the vehicle again?
- Should the debtor be deprived of the ability to use, sell or lease property of his or her estate that is needed for work while the court considers the creditor's motion for relief from the automatic stay and request for adequate protection?
- Should the court fashion an interim order requiring, at the very least, proof of insurance as a condition to turnover pending a final hearing?

In theory, a bankruptcy court should adhere to either the majority or minority approach, or maybe even a hybrid of the two. In reality, however, the practical considerations in light of the facts and circumstances of each case likely weigh on bankruptcy courts. Courts are, in essence, confronted with a catch-22 policy debate, especially in chapter 13 cases. On the one hand, unless a creditor is required to relinquish possession of the vehicle, a chapter 13 debtor is in many instances unable to travel to work to fund his or her repayment plan. On the other hand, because chapter 13 is a voluntary process, nothing prevents a debtor from dismissing his or her case immediately after the vehicle is delivered.[70] The temptation is to consider the facts and circumstances of each case, keeping in mind the overall purpose of bankruptcy.[71] Yet, as the minority stresses, reliance on practical considerations may be inconsistent with Congress's statutory directives.[72]

IV. *Illustrative Decisions (Majority Approach)*

As noted above, the majority approach is endorsed by five circuit courts of appeal as well as numerous other lower courts.[73] The following decisions illustrate the majority approach and provide context with which to better understand its interpretation of section 363(a)(3).[74]

A. *Eighth Circuit*

The Eighth Circuit Court of Appeals was the first circuit court to hold that passive retention of property of the estate constitutes a violation of the automatic stay under section 362(a)(3).[75] In *Knaus*, a sheriff seized the debtor's equipment pursuant to a writ of execution.[76] Before any disposition of the equipment under applicable non-bankruptcy law and while it was still in the possession of the sheriff, the debtor filed a voluntary petition for relief under chapter 11.[77] When the creditor refused to instruct the sheriff to turn over the equipment, the debtor requested that the bankruptcy court compel turnover.[78] The bankruptcy court held that the creditor violated section 362(a)(3) by refusing to voluntarily relinquish possession of the equipment post-petition.[79] On appeal, the district court reversed, and a further appeal ensued.[80]

Affirming the bankruptcy court, the Eighth Circuit rejected the creditor's contention that the automatic stay is violated only when property of the

estate is seized after the petition date.[81] Rather, according to the court, section 542(a) requires turnover regardless of when the creditor first exercises control over property of the estate.[82] The duty arises when the creditor learns of the bankruptcy and does not require intervention by the bankruptcy court or even a demand by the trustee.[83] Concluding that section 362(a)(3) was violated when the property was not delivered, the Eighth Circuit favorably quoted the bankruptcy court:

> The principle is simply this: that a person holding property of a debtor who files bankruptcy proceedings becomes obligated, upon discovering the existence of the bankruptcy proceedings, to return that property to the debtor (in chapter 11 or 13 proceedings) or his trustee (in chapter 7 proceedings). Otherwise, if persons who could make no substantial adverse claim to a debtor's property in their possession could, without cost to themselves, compel the debtor or his trustee to bring suit as a prerequisite to returning the property, the powers of a bankruptcy court and its officers to collect the estate for the benefit of creditors would be vastly reduced. The general creditors, for whose benefit the return of property is sought, would have needlessly to bear the cost of its return. And those who unjustly retain possession of such property might do so with impunity.[84]

Knaus is not a highly analytical decision, but it does establish the relationship between sections 542(a) and 362(a)(3) at a circuit court level. Moreover, *Knaus* seems to rely heavily on the policy considerations underlying the majority approach. *Knaus* did not, however, consider whether adequate protection is a prerequisite to turnover, or even distinguish between pre- and post-petition acts under section 362(a)(3). Instead, based on its own prior interpretation, the Eighth Circuit relied on the broad scope of section 362(a)(3) after the 1984 amendments.

B. *Ninth Circuit*

Seven years after *Knaus*, the Ninth Circuit Court of Appeals was confronted with the same issue, albeit with quite different (and somewhat convoluted) facts in a chapter 7 case.[85] In *Del Mission Ltd.*, the chapter 7 trustee sought to sell a liquor license.[86] The State of California, however, refused to approve the sale until all outstanding taxes and interest were paid by the trustee.[87] After paying the taxes under protest in order to obtain the State's consent and consummate the sale, the trustee commenced an adversary proceeding seeking repayment.[88] The bankruptcy court concluded that the State's demand violated section 362(a)(3) and ordered repayment.[89] The State appealed.[90]

Because the State refused to repay the taxes while the appeal was pending, the trustee filed a motion to hold the State in contempt.[91] On appeal, the Ninth Circuit considered whether the State's continued retention of the tax payment constituted an act to exercise control over property of the estate in violation of section 362(a)(3).[92]

The Ninth Circuit first noted that although the clause "to exercise control over property of the estate" was added as part of the 1984 amendments, Congress provided no explanation with respect to the amendment.[93] The

Ninth Circuit nonetheless concluded, like in *Knaus*, that section 362(a)(3) should be given an extremely broad scope.

The Ninth Circuit further observed that "to effectuate the purpose of the automatic stay, the onus to return estate property is placed on the possessor; it does not fall on the debtor to pursue the possessor."[94] Finally, the Ninth Circuit inferred that from a policy perspective, Congress did not intend to burden the bankruptcy estate with the expense of multiple turnover actions.[95] The court therefore held that if property is not delivered pursuant to section 542(a), an entity violates section 362(a)(3).

Other than embracing the majority approach, *Del Mission Ltd.* provides limited discussion. Although it is a chapter 7 case, it does not address whether *Whiting Pools'* rationale is equally applicable in liquidations. In fact, it does not even mention *Whiting Pools*. Instead, it relies on *Knaus* in large part. *Del Mission Ltd.* may also rely on dictum. *Del Mission Ltd.* cites to *Abrams*, a decision from the bankruptcy appellate panel several years earlier.[96] In *Abrams*, the issue was whether the creditor's *post-petition* repossession of a leased vehicle violated section 362(a)(3).[97] In a footnote citing to *Knaus*, the *Abrams* court summarily stated there is no difference between pre- and post-petition acts for purposes of section 362(a)(3).[98] *Del Mission Ltd.* therefore indirectly relies on *Knaus*, which in turn relied on prior Eighth Circuit precedent to support its conclusion. For various reasons, *Del Mission Ltd.* may have its detractors.[99]

C. *Eleventh Circuit*

In a short per curiam opinion, the Eleventh Circuit Court of Appeals has similarly held in a chapter 13 case that a creditor violates the automatic stay when it refuses to return property of the estate that was lawfully repossessed prepetition.[100] Before the debtor filed his chapter 13 petition, the creditor repossessed the debtor's vehicle.[101] Because title to the vehicle remained with a debtor until disposition by the creditor under applicable non-bankruptcy law, the vehicle was property of the debtor's estate.[102] The Eleventh Circuit therefore held the creditor willfully violated the automatic stay by refusing to return the vehicle promptly upon demand by the chapter 13 debtor.[103]

Rozier does not refer to section 362(a)(3) or any other subsection of section 362. It also never mentions *Whiting Pools*. Nonetheless, in contrast to *Knaus* and *Del Mission Ltd.*, both of which require prompt turnover without any formal demand, *Rozier* highlights an inconsistency among courts adopting the majority approach. *Rozier* seems to say that a creditor must turn over property of the estate only upon informal demand by the chapter 13 trustee. Given its limited discussion and lack of cited authority, *Rozier's* precedential value may be limited.[104]

D. *Seventh Circuit*

In a case with a classic set of facts, the Seventh Circuit considered whether a secured creditor violated the automatic stay by retaining possession of the vehicle post-petition.[105] The secured creditor repossessed the vehicle after

default.[106] Before any foreclosure or other disposition of the collateral occurred, the debtor filed for relief under chapter 13.[107]

Relying on two intra-district decisions, the bankruptcy court denied the debtor's motion for sanctions and thereafter certified the matter for direct appeal.[108] The Seventh Circuit identified the underlying issues as (i) whether the creditor exercised control over property of the estate, and (ii) if so, whether the creditor was required to return the property before the court makes any determination with respect to adequate protection under section 363(e).[109]

With respect to the first issue, the Seventh Circuit relied on the plain meaning of "control," which is defined as "to exercise restraining or directing influence over" or "to have power over."[110] According to the court, "[h]olding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within this definition, as well as within the commonsense meaning of the word."[111]

The Seventh Circuit was also persuaded by the 1984 amendments. According to the Seventh Circuit, Congress's decision to include acts to exercise control over property of the estate logically suggests that even property seized prepetition falls within the expanded scope of section 362(a)(3).[112]

Finally, the Seventh Circuit found support in the primary purpose of bankruptcy reorganizations:

> [T]o hold that "exercising control" over an asset encompasses only selling or otherwise destroying the asset would not be logical given the central purpose of reorganization bankruptcy. The primary goal of reorganization bankruptcy is to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property lawfully seized prepetition . . . An asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot.[113]

The Seventh Circuit dissected the second issue as follows: (i) whether a creditor must turn over property of the estate and then seek adequate protection, or (ii) whether the creditor may retain possession of property of the estate, thereby placing the burden on the trustee to commence a turnover action.[114] Citing to several appellate court decisions from other jurisdictions, the court acknowledged that the majority of courts require the former.[115] The Seventh Circuit noted that the majority approach is supported by section 363(e) (in conjunction with section 542(a)), *Whiting Pools*, and policy considerations.

According to the Seventh Circuit, section 363(e) places the burden on the creditor to request adequate protection.[116] As such, the court reasoned, a creditor has no incentive to request adequate protection if it already has possession of the property.[117] Congress, therefore, must have intended that property be turned over to the estate, regardless of whether the creditor has requested adequate protection.[118]

The Seventh Circuit also noted that section 542(a) is mandatory, not permissive, as it uses the term "shall deliver":

> The right of possession is incident to the automatic stay. A subjectively perceived lack of adequate protection is not an exception to the stay provision and does not defeat this right . . . Instead, section 362(d) "works in tandem with § 542(a) to provide creditors with what amounts to an affirmative defense to the automatic stay . . ." First, the creditor must return the asset to the bankruptcy estate. Then, if the debtor fails to show that he can adequately protect the creditor's interest, the bankruptcy court is empowered to condition the right of the estate to keep possession of the asset on the provision of certain specified adequate protections to the creditor.[119]

Expanding *Whiting Pools*, the Seventh Circuit could discern no distinction between chapters 11 and 13, as the principle is the same - to facilitate reorganization while maximizing the distribution to creditors.[120] The court also emphasized that its holding is entirely consistent with *Whiting Pools*, because none of the three exceptions to turnover were at issue.[121] Focusing on the phrase, "[a]t the secured creditor's insistence" in *Whiting Pools*, the Seventh Circuit reiterated that the burden to request adequate protection under section 363(e) rests with the creditor, not the debtor.[122]

The Seventh Circuit appears to be ground zero for section 362(a)(3). The City of Chicago has taken an aggressive position with respect to impounded vehicles for, among other things, unpaid parking tickets. As such, *Thompson* continues to be at the forefront of numerous decisions from the Bankruptcy Court for the Northern District of Illinois.[123] The Seventh Circuit Court of Appeals has granted a direct consolidated appeal of four decisions addressing the exception to the automatic stay under section 362(b)(3), thus implicating *Thompson's* interpretation of section 362(a)(3).[124]

E. *Second Circuit*

More recently, the Second Circuit Court of Appeals adopted the majority approach in a case with facts similar to those in *Thompson* and *Knaus*.[125] Prepetition, the secured creditor repossessed the debtor's vehicle due to a default.[126] Four days later, the debtor filed for relief under chapter 13, notice of which was provided to the creditor.[127]

Notwithstanding the debtor's post-petition written demand for turnover of the vehicle, the creditor initially refused.[128] The creditor later returned the vehicle after the debtor commenced an adversary proceeding for turnover.[129] The debtor, however, continued to pursue damages due to his inability to use the vehicle for approximately two months.[130] The bankruptcy court found in favor of the creditor, the district court reversed, and the creditor appealed to the Second Circuit.[131]

After concluding the debtor's vehicle was property of the estate, the Second Circuit observed that section 542(a) is self-executing.[132] The court rejected the creditor's contention that a debtor must formally request turnover before a creditor is required to relinquish property of the estate in its possession.[133] By requiring a formal request for turnover, the debtor or the trustee would have the burden of assembling property of the estate through a series of time consuming and costly adversary proceedings.[134] The creditor thus had an obligation to turn over the property without court intervention.

The court next addressed the plain meaning of section 362(a)(3). Relying on an ordinary dictionary definition, the Second Circuit noted that "control" means "[t]o exercise authority over; direct; command."[135] According to the court, the creditor's decision to maintain possession while refusing the debtor access to or use of the vehicle was an exercise of control that violated the automatic stay.[136]

Finally, the Second Circuit was not persuaded that a trustee is required to provide adequate protection as a condition precedent to turnover. Unlike section 542(a), section 363(e) is not self-executing.[137] The party asserting an interest in the property subject to turnover has the burden of requesting adequate protection, which must be approved by the court.[138] In other words, the Second Circuit concluded, the lack of adequate protection is not an exception to the effectiveness of section 362(a)(3), much like it is not an exception to turnover identified by the Supreme Court in *Whiting Pools*.

Weber may be viewed as a persuasive adoption of the majority approach. However, if *Weber* has a flaw, it is, like *Thompson* and other similar decisions, the failure to address the minority's interpretation of the plain meaning by explaining why the starting point is "to exercise control" and not "any act." The utility of decisions like *Weber* may be subject to scrutiny in other jurisdictions, particularly after *Cowen*.

F. *Other Notable Decisions*

The Bankruptcy Appellate Panel for the Sixth Circuit has issued one of the more comprehensive decisions adopting the majority approach.[139] *Sharon* involved facts similar to those in *Thompson*, *Weber*, *Knaus*, and *Cowen*. Prepetition, a secured creditor repossessed the debtor's vehicle.[140] Less than two weeks later and prior to any disposition under applicable non-bankruptcy law, the debtor filed for chapter 13 bankruptcy.[141] Over the next two days, the debtor's attorney requested that the creditor return the vehicle.[142] The creditor refused.[143]

With little alternative, the debtor filed a motion seeking to hold the creditor in contempt for violating the automatic stay.[144] The creditor countered by filing a motion for relief from the automatic stay, as well as an objection to the debtor's motion.[145] The creditor also requested, as a condition to turnover, adequate protection payments and proof of insurance.[146] The bankruptcy court ordered that the creditor turn over the vehicle to the debtor and held that the creditor's failure to do so upon the commencement of the debtor's case constituted a violation of the automatic stay.[147] The creditor appealed.[148]

Identifying *Whiting Pools* as the starting point, the bankruptcy appellate panel found that the debtor's vehicle was property of the estate.[149] Accordingly, the court noted, a creditor is required to turn over property unless the condition precedent or one of the three exceptions identified in *Whiting Pools* applies.[150] The court explained, "[o]nce defined as 'property of the estate," the statutory consequence under § 362(a) is application of the automatic stay. The [d]ebtor's right to possession of the car was protected by the

automatic stay."[151]

The court next turned to the 1984 amendments. Citing to *Del Mission Ltd.* and relying on a previous interpretation of section 362(a)(3) from the Sixth Circuit, the court explained that the 1984 amendments broadened the scope of section 362(a)(3).[152] To that end, the court concluded that "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control' over possession."[153]

The court rejected the creditor's contention that the right to adequate protection under section 363(e) creates an exception to turnover under section 542(a). Relying again on *Whiting Pools*, the court explained:

> Nothing in § 362 itself suggests the "adequate protection" exception to the automatic stay argued by [the creditor]. As demonstrated above, the presence of "property of the estate" triggers the proscription in § 362(a)(3). There is no "exception" to property of the estate for property with respect to which a creditor claims a right of adequate protection." To the contrary, as recognized by the Supreme Court in *Whiting Pools*, §§ 541 and 542 of the Code work together to draw back into the estate a right of possession that is claimed by a lien creditor pursuant to a prepetition seizure; the Code then substitutes "adequate protection" for possession as one of the lien creditor's rights in the bankruptcy case . . . [T]he creditor's "adequate protection" right does not defeat the statutory obligation in § 542(a) that [the creditor] "shall deliver" possession of property of the estate.[154]

The court further noted that Congress has established procedures for requesting adequate protection, none of which were followed by the creditor.[155] Although the creditor may be entitled to adequate protection, the possibility of such request or even a request for relief from the automatic stay does not excuse turnover.[156] To hold otherwise, the court stressed, would improperly elevate a creditor's subjective judgment regarding adequate protection over a chapter 13 debtor's right to possess and use property of the estate under sections 363, 541 and 542(a).[157]

Finally, the court commented that a creditor subject to section 542(a) still has a means by which to protect itself. Section 362(f) expressly authorizes a court to grant relief from the automatic stay on an expedited or even emergency basis.[158] Thus, the creditor could have filed its motion for relief from the automatic stay upon learning of the bankruptcy case.[159] Yet, the court commented, section 362(d) is not an exception to the automatic stay, meaning that the creditor is not excused from section 362(a) by filing a motion for relief from the automatic stay.[160] Because the creditor did not deliver the vehicle promptly upon receiving notice of the debtor's bankruptcy, the court ultimately found that the creditor had improperly exercised control over property of the estate in violation of section 362(a)(3).[161]

A strongly-worded dissent in *Sharon* suggested the majority was "bludgeoning" creditors by depriving them of a hearing, as section 542(a) is not self-effectuating.[162] The dissent also found circumspect the majority's conclusion that a trustee need not provide adequate protection prior to turnover.[163] Instead, the dissent emphasized the need to maintain the status

quo pending a determination of adequate protection.[164] Finally, the dissent was unpersuaded by the majority's interpretation of section 362(a)(3). According to the dissent, no "act" occurred, because the creditor had done nothing post-petition.[165]

V. *Illustrative Decisions (Minority Approach)*

Although only the Tenth and D.C. Circuit Courts of Appeal have adopted the minority approach, numerous other lower courts have also found its rationale persuasive.[166] The recent trend seems to favor the minority approach, as these decisions highlight.

A. *D.C. Circuit*

The first circuit-level decision to adopt the minority approach, *Inslaw*, involves a strange set of facts.[167] Prior to seeking relief under chapter 11, the debtor agreed to develop and provide software to the United States government pursuant to written contract.[168] Subsequently, the government requested that the debtor also provide it with all computer programs and supporting documentation related to the contract without further payment.[169] The debtor acquiesced.[170]

Approximately six months after filing for bankruptcy, the debtor filed a claim against the government alleging that it had refused to pay for certain software enhancements that were not subject to the original contract.[171] The contracting officer, as the adjudicative body under 41 U.S.C. §§ 601 to 613, ruled in favor of the government.[172]

Later, the debtor commenced an adversary proceeding alleging that the government had willfully violated section 362(a) by continuing to use property without the debtor's consent.[173] The bankruptcy court agreed, enjoined the government's further use of the enhanced software, and awarded damages.[174]

After the district court affirmed in part, the D.C. Circuit Court of Appeals considered whether the government committed any act to exercise control over property of the estate. The court first concluded that the debtor had no right to possession of certain property because the government not only possessed the property, but it also asserted that it owned the property outright.[175] In other words, the condition precedent that the debtor be able to use, sale or lease the property under section 363 was not satisfied. The court therefore concluded that the debtor could not use the turnover provision under section 542(a) to liquidate a contractual dispute.[176]

The court next considered whether the government nonetheless exercised control over property of the estate by continuing to use the software subject to the dispute.[177] The court first noted that a bankruptcy court would impermissibly expand its jurisdiction to non-core disputes if it adjudicated a debtor's contract claims against third parties.[178] Moreover, if the debtor's interpretation of section 362(a)(3) was correct, any dispute regarding property of the estate could be turned into a violation of the automatic stay subjecting the non-debtor to damages.[179] To put it another way, a creditor would argu-

ably be foreclosed from contesting issues of title to property because by doing so, the creditor would per se violate section 362(a)(3).

Finally, the D.C. Circuit commented that the bankruptcy court was guilty of having "left the words of [section 362(a)(3)] in the dust."[180] According to the court, the automatic stay restrains only acts "to gain possession or control" over property of the estate.[181] As the text of section 362(a)(3) makes clear, the act must have taken place post-petition.[182] Because the dispute over the government's use of the property arose prepetition, no post-petition "act" occurred.

Inslaw is at times hard to follow given the procedural posture of the dispute. However, it highlights the problem with requiring turnover where parties dispute title to property, particularly where the non-debtor has a good faith belief that the estate holds no interest whatsoever.

B. *Tenth Circuit*

The Tenth Circuit's decision adopting the minority approach has recently dominated discussion because it is somewhat factually, but certainly not legally, similar to *Knaus*, *Thompson* and *Weber*.[183] *Cowen* duels with the majority and revives the minority approach on a circuit level after over twenty years of dormancy.

In *Cowen*, the debtor's two vehicles were repossessed prepetition by his secured creditors.[184] Upon filing for chapter 13, the debtor notified the creditors of his bankruptcy and requested the immediate return of both vehicles.[185] The creditors refused.[186] One creditor claimed that by allegedly changing the title of the vehicle to the creditor's name prepetition, the debtor did not maintain any interest in the vehicle as of the petition date.[187] The other creditor contended that he sold the vehicle before the petition date, so he had nothing to turn over.[188]

Approximately one month later, the debtor filed a motion for an order to show cause why the creditors should not be held in contempt for their alleged willful violations of the automatic stay.[189] The bankruptcy court entered orders requiring the creditors to immediately turn over the vehicles.[190] The creditors, however, did nothing, precipitating the debtor's commencement of an adversary proceeding for violation of the automatic stay.[191] In response, the creditors contended that because the debtor's rights in the vehicles had been terminated prior to the bankruptcy, it was legally impossible for them to have violated the automatic stay.[192] The bankruptcy court was not persuaded, finding that the creditors forged documents, perjured themselves, and failed to comply with applicable non-bankruptcy law with respect to the disposition of the vehicles.[193] As such, the bankruptcy court concluded that the creditors had violated section 362(a)(3) by failing to deliver the vehicles to the debtor.[194] After the creditors appealed, the district court affirmed.[195]

The Tenth Circuit reversed. Although the Tenth Circuit recognized that the bankruptcy court's holding was consistent with the majority approach, it was unpersuaded by those courts' policy-driven considerations.[196] The Tenth Circuit analyzed the plain meaning of the statute by grammatically diagram-

ming the phrase, "any act . . . to exercise control over property of the estate."[197] It concluded that emphasis should be placed on "any act," not "to exercise control."[198]

The Tenth Circuit also criticized the majority approach for relying on non-existent legislative history. Returning to an oft-quoted remark from the Supreme Court, the court observed that "Congress does not 'hide elephants in mouseholes.' "[199] The Tenth Circuit thus reasoned that if Congress meant such a radical departure from pre-amendment practice, it would have said so. According to the Tenth Circuit, the clause "to exercise control over property of the estate" in section 362(a)(3) should be read as consistent with the statute in existence prior to the 1984 amendments.[200] It reasoned that because an act to change control of property "could be tantamount to obtaining possession and have the same effect, it appears that § 362(a)(3) was merely tightened to obtain full protection."[201] In other words, by adding the phrase "to exercise control," Congress was simply distinguishing "control" from "possession" in order to include non-possessory post-petition conduct that would similarly interfere with an estate's particular interest in property.[202]

As further support for its interpretation, the Tenth Circuit identified examples of acts that " 'exercise control' over but do not 'obtain possession of, the estate's property," such as a creditor in possession who sells property of the estate or a creditor who has control over intangible personal property.[203] Accordingly, the Tenth Circuit explained:

> If Congress had meant to add an affirmative obligation - to the automatic *stay* provision no less, as opposed to the *turnover* provision - to turn over property belonging to the estate, it would have done so explicitly. The majority rule finds no support in the text or its legislative history.[204]

Finally, the Tenth Circuit was not persuaded that sections 362 and 542 work in tandem. Instead, the court noted, those sections are bereft of any "textual link" to one another.[205] Moreover, the Tenth Circuit explained that section 362 is not needed to enforce turnover under section 542(a) in light of the broad equitable powers available to bankruptcy courts under section 105(a).[206] As such, the Tenth Circuit concluded that only post-petition acts to gain possession of, or to exercise control over, property of the estate violates section 362(a)(3).[207]

Cowen acts as the foil to the majority approach on a circuit level. It provides counter-arguments to *Thompson* and *Weber* in particular and highlights what they fail to address - the meaning of the term "any act." Since *Cowen*, courts in the Tenth Circuit have dutifully, but perhaps reluctantly, followed it.[208] *Cowen* could potentially be considered by the Supreme Court, albeit indirectly. A petition for certiorari was filed but denied in another case after the Tenth Circuit applied *Cowen's* plain meaning interpretation to section 362(a)(4).[209]

C. *Other Notable Decisions*

In another decision illustrative of the recent trend, the District Court for the District of New Jersey held that section 362(a)(3) is not violated when a

creditor passively retains property of the estate post-petition.[210] In *Denby-Peterson*, a secured creditor repossessed the debtor's vehicle prepetition, thus causing the debtor lose her job.[211] Less than a month after the vehicle was repossessed, the debtor filed for relief under chapter 13.[212] When the creditor would not return the vehicle despite the debtor's demands, the debtor filed a motion for turnover under section 542(a), which included a request for sanctions due to the creditor's alleged violation of the automatic stay.[213] The bankruptcy court first found that a written waiver of the redemption period executed by the debtor was unenforceable.[214] As such, the debtor had a possessory interest in the vehicle as of the petition date.[215] Nonetheless, the bankruptcy court concluded no violation of the automatic stay occurred because the creditor had a right to preserve the status quo by retaining possession while the bankruptcy court determined whether the waiver was enforceable (i.e., the property was subject to use, sale or lease under section 363).[216]

On appeal, the district court affirmed.[217] Although the act of exercising control over property of the estate is prohibited under section 362(a)(3), the court distinguished a prospective, post-petition act from an act that takes place entirely prepetition.[218] Similar to *Cowen*, the court noted that nothing in the 1984 amendments counseled against adhering to past practices under section 362(a)(3), which only applied to post-petition acts.[219]

Relatedly, the court observed that Congress expressed numerous affirmative duties in the text of the Bankruptcy Code, but did not do so with respect to section 362(a)(3) when it amended that section in 1984:

> Congress could have stated under § 362(a) that creditors must turnover property in their possession upon institution of the automatic stay . . . Instead, it added language to broaden prohibitions on actions taken post-petition that do not reach the level of possession but still amount to an exercise of control.[220]

Favorably citing *Cowen*, the court also explained that the majority approach impermissibly broadens the scope of section 362(a)(3) without any clear statutory directive or even legislative history.[221]

From a policy perspective, the court was persuaded that the minority approach appropriately balances between the rights of debtors and creditors in chapter 13 cases.[222] The creditor is prohibited from taking any post-petition action but the rights of the parties as of the petition date are preserved while any disputes regarding turnover are adjudicated.[223] Somewhat incongruously, however, the court seems to have created an exception to its holding where property is insured:

> If the creditor demands proof of insurance for a vehicle, naming it as loss payee, and the debtor complies, the creditor will be in violation of the automatic stay unless the vehicle is returned to the debtor. This protects both the interest of the debtor and creditor, as it assures both that in case of accident, insurance will cover the loss.[224]

Denby-Peterson is currently on appeal to the Third Circuit.[225] It provides a circuit court with the opportunity to consider the plain meaning of section

362(a)(3) for the first time since *Cowen*. If the Third Circuit affirms, the divide between the majority and the minority approaches will only intensify.

The Bankruptcy Court for the District of Columbia has given perhaps the most impassioned adoption of the minority approach.[226] In *Hall*, the debtor owned a condominium unit, which included a storage area accessed only through use of a security code.[227] To collect certain charges due prepetition, the property's manager and homeowners' association withheld from the debtor the access code to the storage area.[228]

Despite the debtor's requests upon the bankruptcy filing, the association did not provide the access code for two weeks.[229] The debtor sought sanctions, arguing that the delay in providing the access code and continued retention of his personal property was a violation of section 362(a)(3).[230] Citing to *Inslaw* as binding precedent, the court that found that the creditor had not violated the automatic stay because no affirmative act occurred postpetition.[231] Nevertheless, the court engaged in an extensive critique of the majority approach.[232]

The court explained that courts adopting the majority approach have erroneously deemed turnover under section 542(a) to be self-executing based upon *Whiting Pools*.[233] The court noted that prior to enactment of the Bankruptcy Code in 1978, turnover was conditioned upon adequate protection.[234] According to the court, section 542(a) was enacted to codify this pre-Bankruptcy Code practice, not to convert the concept of turnover into a self-executing injunctive order.[235]

As further support for its interpretation, the court noted that section 542(a) and section 542(b) both use the word "shall." However, unlike section 542(a), section 542(b) has not been interpreted by the courts to be self-executing.[236] Moreover, even if use of the term "shall" in section 542(a) could be seen as self-executing, it is not when read in the context of the Bankruptcy Code on the whole.[237] The court explained that interpreting section 542(a) as self-executing would be inconsistent with section 363(e), which requires a trustee to provide adequate protection where the trustee proposes to use, sell or lease property of the estate and an entity that has an interest in such property requests adequate protection.[238] A trustee cannot use, sell or lease property under section 363(b) or (c)(1) without first providing an entity with adequate protection because section 363(e) states "notwithstanding any other provision of this section." The court reasoned that turnover is excused under such circumstances because the condition precedent in *Whiting Pools* (i.e., a trustee's ability to use, sell or lease property under section 363) is not satisfied. As such, the court concluded, a creditor should not be held in contempt for disputing the condition precedent expressed in section 542(a).[239] Otherwise, creditors with legitimate defenses to turnover would be compelled to capitulate to a trustee's demand for fear of being found in contempt.[240]

The court similarly explained that by requiring immediate turnover without a court order, a creditor's right to adequate protection would be severely diminished if not eliminated by subjecting it to contempt for pursu-

ing such right.[241] For example, the court noted, a creditor could suffer harm if uninsured collateral is damaged or if the creditor is forced to relinquish a possessory or garnishment lien.[242]

The court also rejected the majority's interpretation of the 1984 amendments. Prior to the 1984 amendments, section 542(a) allowed for the assertion of defenses prior to turnover.[243] Because Congress did not express any intention to overturn existing practice, the phrase "to exercise control over property of the estate" captures only post-petition acts of control as a companion to post-petition acts of possession.[244] Unlike section 521(a)(6), which explicitly states that a debtor shall not retain certain property unless he or she takes certain actions, section 362(a)(3) does not state that a creditor shall not retain possession of collateral seized prepetition.[245] According to the court, section 362(a)(3) was amended to reach nonpossessory conduct that would nonetheless interfere with the estate's interest in property, such as intangible property interests in causes of action or contract rights.[246]

Moreover, the court noted, even if the plain meaning of section 362(a)(3) could be read as ambiguous, the majority approach conflicts with loose principles of statutory interpretation.[247] In this respect, the minority notes that "the act cannot be held to destroy itself."[248] The court observed that if the majority interpretation is adopted, a secured creditor's rights to (i) contest turnover, and (ii) request adequate protection would be negated.[249] Moreover, the court insisted that the majority approach leads to an absurd result.[250] For example, if turnover is not required because the condition precedent under section 363 is not satisfied or one of the three exceptions identified in *Whiting Pools* applies, an entity in possession of property repossessed prepetition will nonetheless have technically violated section 362(a)(3) before these issues have yet to be adjudicated by a bankruptcy court.[251]

Departing from *Whiting Pools*, the court explained that when a creditor retains possession of property it validly seized prepetition, it does so without interfering with property of the estate.[252] Under section 541(a)(1), possession is not an interest that comes into the estate upon filing.[253] Rather, only upon entry of a turnover order is the estate's possessory interest under sections 541(a)(3) and 541(a)(7) triggered.[254] The court questioned *Whiting Pools'* reliance on legislative history regarding property included in the estate under section 541(a)(1).[255] According to the court, section 542(a) does not provide an estate with a right to actual possession on the petition date. Instead, a turnover action is required so as to adjudicate any defenses that a creditor may have.[256]

Hall contains some fairly complicated and intense counter-arguments to the majority approach. *Hall's* discussion regarding turnover only upon satisfaction of the condition precedent in section 542(a) should not be discounted, as it provides a plausible basis for a creditor to assert adequate protection as a defense to turnover. *Hall's* discussion of pre-Bankruptcy Code practice is also notable in light of the Supreme Court's similar comments in *Whiting Pools*.

VI. *Conclusion*

Whether an entity violates section 362(a)(3) by passively retaining prop-

erty of the estate repossessed prepetition should be a relatively straightforward issue. It is not. Unless and until Congress or the Supreme Court addresses the issue, uncertainty will persist. If the Supreme Court eventually grants certiorari, the Court's decision has the potential to profoundly impact bankruptcy cases regardless of whether they are filed under chapter 7, 11, 12 or 13.

NOTES:

[1]11 U.S.C.A. § 362(a)(3). The Bankruptcy Code is set forth in 11 U.S.C.A. §§ 101 et seq. Specific sections of the current Bankruptcy Code are identified as "section __." The term "trustee" as used herein generally refers to trustee under chapters 7, 11, and 12, a debtor in possession in chapters 11 and 12, and a debtor in chapter 13. See 11 U.S.C.A. §§ 704, 1107, 1202, 1303; see also 11 U.S.C.A. §§ 1104, 1204.

[2]In the 1962 film, *Lawrence of Arabia*, Mr. Dryden proclaims to General Murray that "[b]ig things have small beginnings." *Lawrence of Arabia* (Horizon Pictures 1962). In *Prometheus*, a less heralded film released fifty years after *Lawrence of Arabia*, the android David admiringly quotes Mr. Dryden as he embarks on a rather sinister endeavor. *Prometheus* (20th Century Fox 2012).

[3]11 U.S.C.A. § 103(a). The majority of decisions arise in chapter 13 cases, and in some instances chapter 11 cases. Although published decisions regarding chapter 7 cases are few in comparison, nothing suggests that the statutory authority should be any different in chapter 7 cases.

[4]Commentary on the issue is abundant. See, e.g., Anne Zoltani & Hon. Janice Miller Karlin, Examining § 362(a)(3): When "Stay" Means Stay, 36 Am. Bankr. Inst. J. 20 (May 2017); Alvin C. Harrell, Casenote: In re Jared Trenton Cowen: Does the Bankruptcy Automatic Stay Require Turnover of Collateral Repossessed Prepetition, 71 Consumer Fin. L. Quarterly Rep. 92 (2017); Dennis J. LeVine, Creditor Must Return Repossessed Vehicle Post-Chapter 13 Filing, 33 Am. Bankr. Inst. J. 16 (June 2014); Kathleen Bardsley, Collateral Repossessed Prepetition and the Automatic Stay After In re Weber, 22 Norton J. Bankr. L. & Prac. 6 (Nov. 2013); Hon. Lawrence S. Walter, Passive Retention of Repossessed Collateral is a Stay Violation: A Developing Trend Among Appellate Courts, 8 Norton Bankr. L. Adviser 1 (Aug. 2009); David Gray Carlson, Turnover of Collateral in Bankruptcy: Must a Secured Party-in-Possession Volunteer?, 6 Norton J. Bankr. L. & Prac. 483 (July/Aug. 1997); John C. Chobot, Some Bankruptcy Stay Metes and Bounds, 99 Comm. L.J. 301 (Fall 1994); see also Paul R. Hage et al., 27th Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition Problem, 28 Norton J. Bankr. L. & Prac. 1 (Feb. 2019).

Over the last several years, two well-respected scholars have engaged in an ever-evolving, highly intellectual debate in which they explore the outer limits of the issue. Ralph Brubaker, Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power, 33 Bankr. L. Letter 8 (Aug. 2013); Ralph Brubaker, Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?, 33 Bankr. L. Letter 9 (Sept. 2013) [hereinafter Brubaker, Turnover Part II]; Hon. Eugene R. Wedoff, The Automatic Stay Under § 362(a)(3) - One More Time, 38 Bankr. L. Letter 7 (July 2018) [hereinafter Wedoff, Automatic Stay]; Ralph Brubaker, Turnover, Adequate Protection, and the Automatic Stay: A Reply to Judge Wedoff, 38 Bankr. L. Letter 11 (Nov. 2018); see Hon. Eugene R. Wedoff, Return of Vehicles Seized Before a Chapter 13 Filing, Am. Bankr. Inst. J. (April 2019). The author is not attempting to join this debate.

[5]In re Weber, 719 F.3d 72, 69 Collier Bankr. Cas. 2d (MB) 1168, Bankr. L. Rep. (CCH) P 82484 (2d Cir. 2013); Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); In re

Colortran, Inc., 165 F.3d 35 (9th Cir. 1998); In re Del Mission Ltd., 98 F.3d 1147, 29 Bankr. Ct. Dec. (CRR) 1155, 36 Collier Bankr. Cas. 2d (MB) 1658, Bankr. L. Rep. (CCH) P 77176, 36 Fed. R. Serv. 3d 512 (9th Cir. 1996); In re Knaus, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989); see In re Rozier, 376 F.3d 1323, Bankr. L. Rep. (CCH) P 80137 (11th Cir. 2004) (per curiam).

[6]In re Cowen, 849 F.3d 943, 63 Bankr. Ct. Dec. (CRR) 211, 77 Collier Bankr. Cas. 2d (MB) 438 (10th Cir. 2017); U.S. v. Inslaw, Inc., 932 F.2d 1467, 21 Bankr. Ct. Dec. (CRR) 1077, Bankr. L. Rep. (CCH) P 74056, 37 Cont. Cas. Fed. (CCH) P 76104 (D.C. Cir. 1991); see In re Garcia, 740 Fed. Appx. 163, Bankr. L. Rep. (CCH) P 83317 (10th Cir. 2018), cert. denied, 2019 WL 266858 (U.S. 2019) (applying rationale of Cowen in context of section 362(a)(4)).

[7]First Circuit: In re Carrigg, 216 B.R. 303, 31 Bankr. Ct. Dec. (CRR) 1324, Bankr. L. Rep. (CCH) P 77657 (B.A.P. 1st Cir. 1998) (majority); In re A & J Auto Sales, Inc., 210 B.R. 667, 97-1 U.S. Tax Cas. (CCH) P 50472, 79 A.F.T.R.2d 97-3037 (Bankr. D. N.H. 1997), aff'd, 223 B.R. 839, 98-1 U.S. Tax Cas. (CCH) P 50416, 81 A.F.T.R.2d 98-2002 (D.N.H. 1998) (finding violation under either majority or minority); In re Hilera, 1997 WL 34842743 (B.A.P. 1st Cir. 1997) (majority).

Third Circuit: In re Denby-Peterson, 576 B.R. 66, 93 U.C.C. Rep. Serv. 2d 1367 (Bankr. D. N.J. 2017), order aff'd, appeal dismissed, 595 B.R. 184 (D.N.J. 2018); In re APF Co., 274 B.R. 408 (Bankr. D. Del. 2001) (minority); In re U.S. Physicians, Inc., 235 B.R. 367, 34 Bankr. Ct. Dec. (CRR) 743 (Bankr. E.D. Pa. 1999), order aff'd, 2002 WL 31866247 (E.D. Pa. 2002) and order aff'd, 2002 WL 32364524 (E.D. Pa. 2002) (minority).

Fourth Circuit: In re Brown, 237 B.R. 316 (Bankr. E.D. Va. 1999) (majority); In re Massey, 210 B.R. 693 (Bankr. D. Md. 1997) (minority); In re Barrett, 62 Collier Bankr. Cas. 2d (MB) 601, 2009 WL 2058225 (Bankr. N.D. W. Va. 2009) (majority); In re Dillard, 2001 WL 1700026 (Bankr. M.D. N.C. 2001) (minority).

Fifth Circuit: Mitchell v. BankIllinois, 316 B.R. 891 (S.D. Tex. 2004) (majority); Nissan Motor Acceptance Corp. v. Baker, 239 B.R. 484 (N.D. Tex. 1999) (majority); In re Zaber, 223 B.R. 102 (Bankr. N.D. Tex. 1998) (majority); In re Richardson, 135 B.R. 256 (Bankr. E.D. Tex. 1992) (minority); Toyota Motor Credit Corporation v. Brinkley, 2019 WL 317446 (N.D. Tex. 2019) (majority); In re Parker, 2014 WL 35913 (Bankr. S.D. Miss. 2014) (majority); In re Foust, 36 Bankr. Ct. Dec. (CRR) 167, 2000 WL 33769159 (Bankr. S.D. Miss. 2000) (majority).

Sixth Circuit: In re Sharon, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (majority); In re Kolberg, 199 B.R. 929 (W.D. Mich. 1996) (minority); In re Barringer, 244 B.R. 402, 43 Collier Bankr. Cas. 2d (MB) 1615 (Bankr. E.D. Mich. 1999) (minority); In re Cepero, 226 B.R. 595 (Bankr. S.D. Ohio 1998) (majority); In re Caffey, 2014 WL 3888318 (Bankr. N.D. Ohio 2014) (majority); see also In re Harchar, 393 B.R. 160, Bankr. L. Rep. (CCH) P 81303, 2008-2 U.S. Tax Cas. (CCH) P 50448, 102 A.F.T.R.2d 2008-5274 (Bankr. N.D. Ohio 2008), aff'd, 435 B.R. 480, Bankr. L. Rep. (CCH) P 81841, 2010-2 U.S. Tax Cas. (CCH) P 50579, 106 A.F.T.R.2d 2010-5954 (N.D. Ohio 2010), aff'd, 694 F.3d 639, 68 Collier Bankr. Cas. 2d (MB) 219, Bankr. L. Rep. (CCH) P 82341, 2012-2 U.S. Tax Cas. (CCH) P 50563, 110 A.F.T.R.2d 2012-5892 (6th Cir. 2012) (IRS did not exercise control by processing tax return).

[8]Tangentially, sections 349(b)(2), 522 and 554 are also worth considering.

[9]See U.S. v. Whiting Pools, Inc., 1983-2 C.B. 239, 462 U.S. 198, 202–203, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983) (explaining relationship among sections 541, 542 and 363, but not section 362); accord In re Weber, 719 F.3d at 78 (discussing relationship among sections 541, 542, 362 and 363); contra In re Cowen, 849 F.3d at 950 (noting no textual link exists between sections 362 and 542).

[10]11 U.S.C.A. § 541(a).

[11]11 U.S.C.A. § 541(a)(1).

[12]Norton Bankr. L. & Prac. § 61:1 (3d ed. 2018).

[13]11 U.S.C.A. § 362(a).

[14]Compare 11 U.S.C.A. § 362(a) with e.g., 11 U.S.C.A. § 362(b).

[15]H.R. Rep. No. 95-595, at 340-41 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97; see Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 503, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) P 70923, 16 Envtl. L. Rep. 20278 (1986) (citations omitted).

[16]Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[17]11 U.S.C.A. § 362(a)(3) (1978).

[18]Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

[19]11 U.S.C.A. § 362(a)(3) (2019) (emphasis added).

[20]The legislative history states that:

> This amendment makes it clear that . . . the automatic stay against acts to obtain possession of property of or from the estate also encompasses acts to exercise control over such property without the need for actually obtaining such property.

H.R. Rep. No. 96-1195, at 10 (1980).

[21]11 U.S.C.A. § 542(a).

[22]Whiting Pools, 462 U.S. at 207 n.12.

[23]11 U.S.C.A. § 363(b).

[24]11 U.S.C.A. § 363(c)(1); cf. 11 U.S.C.A. § 363(c)(2) (use of cash collateral).

[25]11 U.S.C.A. § 363(e) (emphasis added); see 11 U.S.C.A. § 361.

[26]See, e.g., Matter of Kain, 86 B.R. 506, 512, 17 Bankr. Ct. Dec. (CRR) 816, 18 Collier Bankr. Cas. 2d (MB) 1236 (Bankr. W.D. Mich. 1988) ("[I]f you don't ask for it, you won't get it."); see also Whiting Pools, 462 U.S. at 204 ("at the secured creditor's insistence," the bankruptcy court must limit or condition a trustee's ability to use, sell or lease property by requiring adequate protection); cf. 11 U.S.C.A. § 1326(a)(1)(C) (requiring debtor to make adequate protection payments). Once adequate protection has been requested, the trustee has the burden to prove that the adequate protection proposed in response to the request is sufficient to prevent a diminution in the value of property to be used, sold or leased. 11 U.S.C.A. § 363(p)(1).

[27]See, e.g., In re Bernstein, 252 B.R. 846, 849–51, 36 Bankr. Ct. Dec. (CRR) 211, 45 Collier Bankr. Cas. 2d (MB) 297 (Bankr. D. D.C. 2000); Matter of Brown, 210 B.R. 878, 884–85 (Bankr. S.D. Ga. 1997).

[28]11 U.S.C.A. § 363(e).

[29]11 U.S.C.A. § 363(e) ("the court, with or without a hearing, shall prohibit or condition . . .").

[30]462 U.S. at 205–207. At least one commentator has questioned the efficacy of *Whiting Pools*, describing it as "dead wrong" and "one of the most troubling decisions in bankruptcy." Thomas E. Plank, The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy, 59 Md. L. Rev. 253 (2000); Thomas E. Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1193, 1234 (Fall 1998); see also Brubaker, Turnover Part II, supra note 4 (criticizing *Whiting Pools'* "dangerously misleading dictum"). Employing a "bundle of sticks" analogy, some courts and commentators contend that a debtor's interest in property as of the petition date is limited to those property rights available to the debtor under applicable

non-bankruptcy law (e.g., a right of redemption). See, e.g., In re Barringer, 244 B.R. at 406–407; Brubaker, Turnover Part II, supra note 4 (citation omitted).

[31]Whiting Pools, 462 U.S. at 208 n.17. The same can be said for cases under chapter 12, which was enacted three years after *Whiting Pools*. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 255, 100 Stat. 3088 (1986).

[32]Whiting Pools, 462 U.S. at 201. Section 542(a) states that an entity must deliver to the trustee property that is in its control "during the case." This appears to be the only temporal limitation.

[33]See Whiting Pools, 462 U.S. at 201. Commentators have suggested tension exists between Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995), a decision from the Supreme Court twelve years after *Whiting Pools*. See, e.g., Brubaker, Turnover Part II, supra note 4. In *Strumpf*, the court held that the trustee's right to turnover under section 542(b) is subject to the creditor's setoff rights under section 553. *Strumpf*, 516 U.S. at 20. Therefore, the trustee's right to turnover under section 542(a) is similarly subject to the creditor's right to adequate protection under section 363(e). Brubaker, Turnover Part II, supra note 4. *Strumpf*, which does not mention *Whiting Pools* even once, may be of limited relevance in the context of passive retention of property of the estate because only a promise to pay was at issue. See Strumpf, 516 U.S. at 21; see also Wedoff, Automatic Stay, supra note 4.

[34]See, e.g., Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992) (starting point of statutory interpretation is plain meaning of statute itself); U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240–41, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989) (same).

[35]See, e.g., Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1759, 201 L. Ed. 2d 102, 65 Bankr. Ct. Dec. (CRR) 194, Bankr. L. Rep. (CCH) P 83247 (2018) (citation omitted).

[36]Black's Law Dictionary 329 (6th ed. 1990).

[37]Webster's New Collegiate Dictionary 247 (1977).

[38]See, e.g., Thompson, 566 F.3d at 702.

[39]In re Weber, 719 F.3d at 79; see Thompson, 566 F.3d at 702; In re Sharon, 234 B.R. at 682.

[40]In re Cowen, 849 F.3d at 949.

[41]In re Cowen, 849 F.3d at 949; accord Ransom v. FIA Card Services, N.A., 562 U.S. 61, 70, 131 S. Ct. 716, 178 L. Ed. 2d 603, 54 Bankr. Ct. Dec. (CRR) 34, 64 Collier Bankr. Cas. 2d (MB) 1123, Bankr. L. Rep. (CCH) P 81914 (2011) (citation omitted) (all words of a statute must be given effect whenever possible).

[42]See, e.g., Denby-Peterson, 595 B.R. at 191.

[43]In re Cowen, 849 F.3d. at 949.

[44]See, e.g., Denby-Peterson, 595 B.R. at 190.

[45]In re Weber, 719 F.3d at 80 (citing Thompson, 566 F.3d at 702).

[46]Denby-Peterson, 595 B.R. at 190 (citation omitted) (quoting Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 522, 563 (1990) ("[T]he Supreme Court has observed that a court should 'not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.' ")); see Lamar, __ U.S. __, 138 S.Ct. at 1762 (citations omitted); but see Hartford Underwriters Ins. Co. v. Union Planters Bank,

N.A., 530 U.S. 1, 10, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000) (citation omitted) ("[w]hile pre-Code practice 'informs our understanding of the language of the Code,' it cannot overcome that language.").

[47]Inslaw, 932 F.2d at 1474; contra Wedoff, Automatic Stay, supra note 4 (*Inslaw* incorrectly displaces "exercising" with "gaining").

[48]Inslaw, 932 F.2d at 1474 (citations omitted); see In re Giles, 271 B.R. 903, 906, 38 Bankr. Ct. Dec. (CRR) 262, 47 Collier Bankr. Cas. 2d (MB) 1213 (Bankr. M.D. Fla. 2002) (citing Strumpf, 516 U.S. at 20–21) (creditor's refusal to release garnishment to the detriment of prepetition lien rights acquired prepetition did not violate section 362(a)(3)); but see In re Bailey, 428 B.R. 694, 699 (Bankr. N.D. W. Va. 2010) (garnishing creditor violates section 362(a)(3) by not acting to release garnishment); In re Roche, 361 B.R. 615, 622, 55 Collier Bankr. Cas. 2d (MB) 1210 (Bankr. N.D. Ga. 2005) (same).

[49]Denby-Peterson, 595 B.R. at 190–91; accord Dewsnup v. Timm, 502 U.S. 410, 419, 112 S. Ct. 773, 116 L. Ed. 2d 903, 22 Bankr. Ct. Dec. (CRR) 750, 25 Collier Bankr. Cas. 2d (MB) 1297, Bankr. L. Rep. (CCH) P 74361A (1992) (citation omitted) (when Congress amends the Bankruptcy Code, it does not write "on a clean slate").

[50]In re Cowen, 849 F.3d at 949–50 (emphasis in original); see Denby-Peterson, 595 B.R. at 190–91.

[51]See, e.g., In re Weber, 719 F.3d at 75; Thompson, 566 F.3d at 706 (citations omitted).

[52]Compare 11 U.S.C.A. § 542(a) ("shall") with 11 U.S.C.A. § 542(e) ("may"). See, e.g., In re Del Mission Ltd., 98 F.3d at 115; see also S. Rep. No. 95-989, 95th Cong., 2d Sess. 84 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977).

[53]Compare 11 U.S.C.A. § 542(a) with 11 U.S.C.A. § 542(e). The term "after notice and a hearing" is defined as "after such notice as is appropriate under the circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." 11 U.S.C.A. § 102(1)(A). However, an actual hearing need not occur where, among other things, "there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act." 11 U.S.C.A. § 102(1)(B)(ii).

[54]In re Sharon, 234 B.R. at 686 (quoting In re Colortran, Inc., 210 B.R. at 827).

[55]In re Hall, 502 B.R. at 668 (under section 541(a)(7), estate has equitable, not possessory, interest until court enters turnover order).

[56]In re Hall, 502 B.R. at 667–68.

[57]See Whiting Pools, 462 U.S. at 208 (citations omitted).

[58]In re Hall, 502 B.R. at 654–59; see In re Young, 193 B.R. 620, 625–26 (Bankr. D. D.C. 1996). The *Hall* court raises an interesting point. The majority generally fails to address the means by which to adjudicate the condition precedent and the three exceptions. It is unclear whether an entity in possession or control of property faces an all or nothing proposition - either prevail or be found to have violated the automatic stay. Neither the majority nor the minority devote much attention to what role, if any, section 554 plays, given that sections 542(a) and 554(a)-(b) refer to property with an "inconsequential value or benefit to the estate."

[59]See, e.g., In re Barringer, 244 B.R. at 410; In re Richardson, 135 B.R. at 259–60; cf Schwab v. Reilly, 560 U.S. 770, 779 n.5, 130 S. Ct. 2652, 177 L. Ed. 2d 234, 53 Bankr. Ct. Dec. (CRR) 78, Bankr. L. Rep. (CCH) P 81787 (2010) (Federal Rules of Bankruptcy Procedure must be read in light of Bankruptcy Code and "yield in the event of a conflict").

[60]See, e.g., In re Cowen, 849 F.3d at 950 (citations omitted); Denby-Peterson, 595 B.R. at 194. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions, . . ." of the Bankruptcy Code. 11 U.S.C.A. § 105(a)."

[61]See, e.g., Thompson, 566 F.3d at 703–706.

[62]In re Weber, 719 F.3d at 81–82.

[63]See, e.g., In re Sharon, 234 B.R. at 683 (citing Whiting Pools, 462 U.S. at 211–12).

[64]Thompson, 566 F.3d at 706 (citations omitted) (emphasis in original).

[65]In re Hall, 502 B.R. at 668.

[66]In re Hall, 502 B.R. at 659–660 (citations omitted) (emphasis in original); see In re Massey, 210 B.R. at 695–96 (explicit purpose of section 362(a)(3) is to maintain status quo until court can consider parties' respective rights in property); In re Dillard, 2001 WL 1700026, at *3 (Bankr. M.D. N.C. 2001) (creditor entitled to retain possession until chapter 13 debtor provides adequate protection in form of proof of insurance and first plan payment).

[67]Thompson, 566 F.3d at 706–707.

[68]Thompson, 566 F.3d at 707; In re Sharon, 234 B.R. at 685; see also 11 U.S.C.A. § 554(b).

[69]Denby-Peterson, 595 B.R. at 192.

[70]The Bankruptcy Code seems to address the latter by vacating turnover. See 11 U.S.C.A. § 349(b)(2) (dismissal vacates any order for turnover under section 542). However, section 349(b)(2) refers to an "order" under section 542, perhaps indicating that section 542(a) is not as self-effectuating as the majority contends. Moreover, the fact that an order is vacated does not remedy the reality - while a trustee will likely adhere to section 349(b)(2), a chapter 13 debtor may not be so inclined. Or, maybe that is simply an inherent risk of any secured creditor.

[71]In re Thompson, 566 F.3d at 706–707.

[72]See, e.g., In re Cowen, 849 F.3d at 948–49; accord Hartford Underwriters, 530 U.S. at 13–14 (citations omitted) (court should not "assess the relative merits of different approaches to various bankruptcy problems," but must instead accept the natural reading of a statute and leave the task of achieving a better policy outcome to Congress); see also Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 808 n.3, 109 S. Ct. 1500, 103 L. Ed. 2d 891, 10 Employee Benefits Cas. (BNA) 2097, 89-2 U.S. Tax Cas. (CCH) P 9456, 63 A.F.T.R.2d 89-1174 (1989) (court should review legislative history and purpose only if statute ambiguous).

[73]See supra notes 5 and 7.

[74]To some extent, the summary of decisions is unavoidably redundant.

[75]In re Knaus, 889 F.2d at 773.

[76]In re Knaus, 889 F.2d at 774.

[77]In re Knaus, 889 F.2d at 774.

[78]In re Knaus, 889 F.2d at 774.

[79]In re Knaus, 889 F.2d at 774.

[80]In re Knaus, 889 F.2d at 774.

[81]In re Knaus, 889 F.2d at 775.

[82]In re Knaus, 889 F.2d at 775 (citations omitted).

[83]In re Knaus, 889 F.2d at 775 (citation omitted).

[84]In re Knaus, 889 F.2d at 775.

[85]In re Del Mission Ltd., 98 F.3d at 1147.

[86]In re Del Mission Ltd., 98 F.3d at 1149.

[87]In re Del Mission Ltd., 98 F.3d at 1149.

[88]In re Del Mission Ltd., 98 F.3d at 1149.

[89]In re Del Mission Ltd., 98 F.3d at 1149–50.

[90]In re Del Mission Ltd., 98 F.3d at 1150.

[91]In re Del Mission Ltd., 98 F.3d at 1150.

[92]In re Del Mission Ltd., 98 F.3d at 1151.

[93]In re Del Mission Ltd., 98 F.3d at 1151.

[94]In re Del Mission Ltd., 98 F.3d at 1151 (citation omitted).

[95]In re Del Mission Ltd., 98 F.3d at 1151–52. Notably, the Ninth Circuit rejected and characterized as "frivolous" the State's argument that it did not repay the estate because the trustee failed to make a demand. In re Del Mission Ltd., 98 F.3d at 1152.

[96]In re Abrams, 127 B.R. 239, 21 Bankr. Ct. Dec. (CRR) 1283, 25 Collier Bankr. Cas. 2d (MB) 15, Bankr. L. Rep. (CCH) P 74023 (B.A.P. 9th Cir. 1991).

[97]In re Abrams, 127 B.R. at 241–42.

[98]In re Abrams, 127 B.R. at 242 (citing Knaus, 889 F.2d 775).

[99]See, e.g., In re Fitch, 217 B.R. 286, 290–91, 32 Bankr. Ct. Dec. (CRR) 152 (Bankr. S.D. Cal. 1998) (distinguishing Del Mission Ltd. and concluding that the right to possess collateral was not property of estate, thus entitling creditor to adequate protection as condition to turnover).

[100]In re Rozier, 376 F.3d at 1323; contra In re Lewis, 137 F.3d 1280, 1284, 32 Bankr. Ct. Dec. (CRR) 488, Bankr. L. Rep. (CCH) P 77671, 35 U.C.C. Rep. Serv. 2d 740 (11th Cir. 1998) (debtor's interest in property limited to right of redemption); cf. In re Kalter, 292 F.3d 1350, 1360, 39 Bankr. Ct. Dec. (CRR) 186, 48 Collier Bankr. Cas. 2d (MB) 474, Bankr. L. Rep. (CCH) P 78668, 48 U.C.C. Rep. Serv. 2d 411 (11th Cir. 2002) (title to vehicles passed upon repossession prepetition under applicable non-bankruptcy law).

[101]In re Rozier, 376 F.3d at 1324.

[102]In re Rozier, 376 F.3d at 1324.

[103]In re Rozier, 376 F.3d at 1324.

[104]See In re Stephens, 495 B.R. 608, 614 (Bankr. N.D. Ga. 2013) (noting that the Eleventh Circuit has not addressed the issue but generally citing to *Rozier* in a footnote).

[105]Thompson, 566 F.3d at 699.

[106]Thompson, 566 F.3d at 701.

[107]Thompson, 566 F.3d at 701.

[108]Thompson, 566 F.3d at 701 (citing In re Nash, 228 B.R. 669 (Bankr. N.D. Ill. 1999); In re Spears, 223 B.R. 159 (Bankr. N.D. Ill. 1998)).

[109]Thompson, 566 F.3d at 701.

[110]Thompson, 566 F.3d at 702 (citing Merriam-Webster's Collegiate Dictionary (11th ed. 2013)).

[111]Thompson, 566 F.3d at 702.

[112]Thompson, 566 F.3d at 702–703.

[113]Thompson, 566 F.3d at 702 (internal citations omitted).

[114]Thompson, 566 F.3d at 703.

[115]Thompson, 566 F.3d at 703 (citing In re Knaus, 889 F.2d at 773; In re Yates, 332 B.R. 1, 7, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005); In re Sharon, 234 B.R. at 685; In re Abrams, 127 B.R. at 239).

[116]Thompson, 566 F.3d at 703–704.

[117]Thompson, 566 F.3d at 704.

[118]Thompson, 566 F.3d at 704.

[119]Thompson, 566 F.3d at 704 (citations omitted). The court declined to apply pre-Bankruptcy Code procedure that required a trustee to offer adequate protection prior to the court ordering turnover. In re Thompson, 566 F.3d at 705–706 (citations omitted).

[120]Thompson, 566 F.3d at 705.

[121]Thompson, 566 F.3d at 706.

[122]Thompson, 566 F.3d at 706 (citation omitted).

[123]Compare e.g., In re Avila, 566 B.R. 558, 77 Collier Bankr. Cas. 2d (MB) 709 (Bankr. N.D. Ill. 2017) with e.g., In re Cross, 584 B.R. 833 (Bankr. N.D. Ill. 2018).

[124]In re Fulton, 588 B.R. 834 (Bankr. N.D. Ill. 2018); In re Shannon, 590 B.R. 467 (Bankr. N.D. Ill. 2018); In re Peake, 588 B.R. 811 (Bankr. N.D. Ill. 2018); In re Howard, 585 B.R. 252 (Bankr. N.D. Ill. 2018), appeal filed, No. 18-2527 (7th Cir. July 13, 2018).

[125]In re Weber, 719 F.3d at 72.

[126]In re Weber, 719 F.3d at 74.

[127]In re Weber, 719 F.3d at 74.

[128]In re Weber, 719 F.3d at 74.

[129]In re Weber, 719 F.3d at 74.

[130]In re Weber, 719 F.3d at 74–75.

[131]In re Weber, 719 F.3d at 75. The district court declined to follow its prior decision in another case that provided a basis for the creditor's refusal to turn over property of the estate absent a turnover order. See In re Alberto, 271 B.R. 223 (N.D. N.Y. 2001).

[132]In re Weber, 719 F.3d at 79 (citing Collier on Bankruptcy § 542.02 (16th ed. 2012)). *Weber* states that turnover is self-effectuating, "without condition," so long as the trustee can use, sell or lease the property. In re Weber, 719 F.3d at 79. However, a fair reading of *Weber* reveals that the three exceptions were implicitly recognized by the Second Circuit's citation to *Whiting Pools*. See In re Weber, 719 F.3d at 77–78 (citing Whiting Pools, 462 U.S. at 205–206).

[133]In re Weber, 719 F.3d at 80.

[134]In re Weber, 719 F.3d at 80.

[135]In re Weber, 719 F.3d at 79 (citation omitted).

[136]In re Weber, 719 F.3d at 79.

[137]In re Weber, 719 F.3d at 81–82.

[138]In re Weber, 719 F.3d at 81–82.

[139]In re Sharon, 234 B.R. at 676.

[140]In re Sharon, 234 B.R. at 680.

[141]In re Sharon, 234 B.R. at 680.

[142]In re Sharon, 234 B.R. at 680.

[143]In re Sharon, 234 B.R. at 680.

[144]In re Sharon, 234 B.R. at 680.

[145]In re Sharon, 234 B.R. at 680.

[146]In re Sharon, 234 B.R. at 680.

[147]In re Sharon, 234 B.R. at 681.

[148]In re Sharon, 234 B.R. at 681.

[149]In re Sharon, 234 B.R. at 681.

[150]In re Sharon, 234 B.R. at 681. Because section 1303 provides a chapter 13 debtor with certain rights of a trustee under section 363, the court concluded that section 1303 "supplies the 'usable under § 363' predicate" under *Whiting Pools*. In re Sharon, 234 B.R. at 681–82, 687; but see In re Brown, 210 B.R. at 882–88 (because section 1303 does not grant chapter 13 debtor rights under section 542, debtor's right to use, sell or lease property of estate under sections 1306(b) and 363 is subject to creditor's right of adequate protection under section 363(e)).

[151]In re Sharon, 234 B.R. at 682.

[152]In re Sharon, 234 B.R. at 682 (citing In re Del Mission Ltd., 98 F.3d at 1151; In re Javens, 107 F.3d 359, 368, 30 Bankr. Ct. Dec. (CRR) 541, 37 Collier Bankr. Cas. 2d (MB) 950, 1997 FED App. 0065P (6th Cir. 1997)).

[153]In re Sharon, 234 B.R. at 682 (citations omitted).

[154]In re Sharon, 234 B.R. at 683 (citing Whiting Pools, 462 U.S. at 211–12).

[155]In re Sharon, 234 B.R. at 683–84.

[156]In re Sharon, 234 B.R. at 684.

[157]In re Sharon, 234 B.R. at 685.

[158]In re Sharon, 234 B.R. at 685; see 11 U.S.C.A. § 362(f) (relief from automatic stay may be granted "with or without a hearing . . . to prevent irreparable damage").

[159]In re Sharon, 234 B.R. at 685.

[160]In re Sharon, 234 B.R. at 684.

[161]In re Sharon, 234 B.R. at 686.

[162]In re Sharon, 234 B.R. at 688–89 (Stosberg, J., dissenting); see In re Barringer, 244 B.R. at 409 (disagreeing with Sharon).

[163]In re Sharon, 234 B.R. at 689.

[164]In re Sharon, 234 B.R. at 689.

[165]In re Sharon, 234 B.R. at 690.

[166]See supra notes 6 and 7.

[167]932 F.2d at 1467.

[168]Inslaw, 932 F.2d at 1469.

[169]Inslaw, 932 F.2d at 1469.

[170]Inslaw, 932 F.2d at 1469.

[171]Inslaw, 932 F.2d at 1470.

[172]Inslaw, 932 F.2d at 1470.

[173]Inslaw, 932 F.2d at 1470.

[174]Inslaw, 932 F.2d at 1470–71. As part of the debtor's separate request, the court found that the government had further violated the automatic stay when the Department of Justice urged the Office of the United States Trustee to request conversion of the case to chapter 7. Inslaw, 932 F.2d at 1471.

[175]Inslaw, 932 F.2d at 1472.

[176]Inslaw, 932 F.2d at 1472; see In re U.S. Physicians, Inc., 235 B.R. 367, 376, 34 Bankr. Ct. Dec. (CRR) 743 (Bankr. E.D. Pa. 1999), order aff'd, 2002 WL 31866247 (E.D. Pa. 2002) and order aff'd, 2002 WL 32364524 (E.D. Pa. 2002) (entity's failure to return prepetition receivables violated underlying contract, not automatic stay).

[177]Inslaw, 932 F.2d at 1472.

[178]Inslaw, 932 F.2d at 1472–73 (citations omitted).

[179]Inslaw, 932 F.2d at 1473.

[180]Inslaw, 932 F.2d at 1474.

[181]Inslaw, 932 F.2d at 1474.

[182]Inslaw, 932 F.2d at 1474.

[183]In re Cowen, 849 F.3d at 945–46.

[184]In re Cowen, 849 F.3d at 945.

[185]In re Cowen, 849 F.3d at 946.

[186]In re Cowen, 849 F.3d at 946.

[187]In re Cowen, 849 F.3d at 946.

[188]In re Cowen, 849 F.3d at 946.

[189]In re Cowen, 849 F.3d at 946.

[190]In re Cowen, 849 F.3d at 946.

[191]In re Cowen, 849 F.3d at 946.

[192]In re Cowen, 849 F.3d at 946.

[193]In re Cowen, 849 F.3d at 946.

[194]In re Cowen, 849 F.3d at 946.

[195]In re Cowen, 849 F.3d at 946–47.

[196]In re Cowen, 849 F.3d at 948–49.

[197]In re Cowen, 849 F.3d at 949.

[198]In re Cowen, 849 F.3d at 949.

[199]In re Cowen, 849 F.3d at 949 (citing Whitman v. American Trucking Associations, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1, 51 Env't. Rep. Cas. (BNA) 2089, 31 Envtl. L. Rep. 20512 (2001)).

[200]In re Cowen, 849 F.3d at 949.

[201]In re Cowen, 849 F.3d at 949 (citing In re Bernstein, 252 B.R. at 848).

[202]In re Cowen, 849 F.3d at 949–50 (citing Brubaker, Turnover Part II, supra note 4).

[203]In re Cowen, 849 F.3d at 950 (citing In re Hall, 502 B.R. at 665).

[204]In re Cowen, 849 F.3d at 950 (emphasis in original).

[205]In re Cowen, 849 F.3d at 950.

[206]In re Cowen, 849 F.3d at 950.

[207]In re Cowen, 849 F.3d at 950.

[208]See In re Garcia, 2017 WL 2951439 (Bankr. D. Kan. 2017), aff'd, 740 Fed. Appx. 163, Bankr. L. Rep. (CCH) P 83317 (10th Cir. 2018), cert. denied, 2019 WL 266858 (U.S. 2019); In re Waldrop, 2017 WL 1183937 (Bankr. W.D. Okla. 2017).

[209]In re Garcia, 740 Fed. Appx. 163, Bankr. L. Rep. (CCH) P 83317 (10th Cir. 2018), cert. denied, 2019 WL 266858 (U.S. 2019)

[210]Denby-Peterson, 595 B.R. at 192.

[211]Denby-Peterson, 595 B.R. at 187.

[212]Denby-Peterson, 595 B.R. at 187.

[213]Denby-Peterson, 595 B.R. at 187.

[214]Denby-Peterson, 595 B.R. at 187.

[215]Denby-Peterson, 595 B.R. at 187.

[216]Denby-Peterson, 576 B.R. at 82–83.

[217]Denby-Peterson, 595 B.R. at 190. While the appeal was pending, the debtor's bankruptcy case was dismissed. Because damages under section 362(k) were at issue, the court concluded that the appeal was not moot. Denby-Peterson, 595 B.R. at 188 (citations omitted).

[218]Denby-Peterson, 595 B.R. at 190.

[219]Denby-Peterson, 595 B.R. at 190.

[220]Denby-Peterson, 595 B.R. at 190–91.

[221]Denby-Peterson, 595 B.R. at 191.

[222]Denby-Peterson, 595 B.R. at 191–92.

[223]Denby-Peterson, 595 B.R. at 192.

[224]Denby-Peterson, 595 B.R. at 192, 194 n.10. The court did not thoroughly explain the legal basis for this exception, which seems to require turnover if adequate protection in the form of insurance is provided.

[225]Denby-Peterson v. NU2U Autoworld, No. 18-3562 (3d Cir. Nov. 28, 2018).

[226]In re Hall, 502 B.R. at 650. *Hall* is part of a trilogy of decisions from the Bankruptcy Court for the District of Columbia. See In re Bernstein, 252 B.R. at 846; In re Young, 193 B.R. at 620. *Barringer* might be considered a companion to this trilogy, as it similarly presents counter-arguments to the majority approach. See In re Barringer, 244 B.R. at 406–410.

[227]In re Hall, 502 B.R. at 652.

[228]In re Hall, 502 B.R. at 652.

[229]In re Hall, 502 B.R.at 652.

[230]In re Hall, 502 B.R. at 652.

[231]In re Hall, 502 B.R. at 653.

[232]In re Hall, 502 B.R. at 654–72; see In re Bernstein, 252 B.R. at 849–51.

[233]In re Hall, 502 B.R. at 654–55.

[234]In re Hall, 502 B.R. at 656 (citing R. F. C. v. Kaplan, 185 F.2d 791 (1st Cir. 1950)); accord Whiting Pools, 462 U.S. at 208 (citing Kaplan, 185 F.2d at 796).

[235]In re Hall, 502 B.R. at 657.

[236]In re Hall, 502 B.R. at 658 (citations omitted). The court relied on the principle of statutory construction that words in a statute should be given the same meaning. In re Hall, 502 B.R. at 658 n.18 (citations omitted). Because section 542(b) also includes the term "shall" and is interpreted permissively, the court concluded section 542(a) should be interpreted similarly. In re Hall, 502 B.R. at 658–59; cf. Strumpf, 516 U.S. at 20 (identifying section 553 as exception in section 542(b) but making no mention of the permissive nature of section 542(b)).

[237]In re Hall, 502 B.R. at 659 (citations omitted).

[238]In re Hall, 502 B.R. 659.

[239]In re Hall, 502 B.R. at 663.

[240]In re Hall, 502 B.R. at 663. The court suggested that any illegitimate defenses are more appropriately addressed under Rule 9011 of the Federal Rules of Bankruptcy Procedure. In re Hall, 502 B.R. at 663.

[241]In re Hall, 502 B.R. at 660.

[242]In re Hall, 502 B.R. at 660–61. The court highlighted a perceived flaw in the majority approach because some courts have inexplicably created an exception to turnover where possessory liens are involved. In re Hall, 502 B.R. at 661 (citing In re WEB2B Payment Solutions, Inc., 488 B.R. 387, 393, 57 Bankr. Ct. Dec. (CRR) 202, Bankr. L. Rep. (CCH) P 82449 (B.A.P. 8th Cir. 2013)).

[243]In re Hall, 502 B.R. at 664.

[244]In re Hall, 502 B.R. at 664–65.

[245]In re Hall, 502 B.R. at 665 (citation omitted).

[246]In re Hall, 502 B.R. at 663 (citations omitted).

[247]In re Hall, 502 B.R. at 665–66; see Conn. Nat'l Bank, 503 U.S. at 253–54 (court should consider canons of construction prior to legislative history).

[248]In re Hall, 502 B.R. 650, 666, 59 Bankr. Ct. Dec. (CRR) 6 (Bankr. D. D.C. 2014) (quoting Strumpf, 516 U.S. at 20).

[249]In re Hall, 502 B.R. at 660.

[250]In re Hall, 502 B.R. at 666.

[251]In re Hall, 502 B.R. at 666.

[252]In re Hall, 502 B.R. at 667; accord In re Barringer, 244 B.R. at 407 n.4 (majority "misconstrues" Whiting Pools).

[253]In re Hall, 502 B.R. at 667; contra Whiting Pools, 462 U.S. at 205–209.

[254]In re Hall, 502 B.R. at 667.

[255]In re Hall, 501 B.R. at 668 (citation omitted); cf. Wedoff, Automatic Stay, supra note 4 (noting that other than Hall, no judicial decision adopts such position with respect to property of the estate); but see also In re Barringer, 244 B.R. at 407.

[256]In re Hall, 502 B.R. at 669. The court criticized the majority's reliance on section 362(f) as misplaced. In re Hall, 502 B.R. at 669–71.