



AMERICAN
BANKRUPTCY
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Consumer Track

Automatic Stay Violations and Sanctions Litigation

Hon. Beth E. Hanan, Moderator

U.S. Bankruptcy Court (E.D. Wis.); Milwaukee

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THE AUTOMATIC STAY

11 U.S.C. 521 (a)(2)

“The debtor shall...if an individual debtor’s schedule of assets and liabilities includes debts which are secured by property of the estate...

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor’s or the trustee’s rights with regard to such property under this title, except as provided in section 362(h).”

11 U.S.C. 521 (a)(6)

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

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

(B) redeems such property from the security interest pursuant to section 722....”

11 U.S.C. 362 (h)(1)

“In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)...

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor’s intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.”

A. REAFFIRMATION AGREEMENTS AND VEHICLE LOANS

- Under 11 U.S.C. 521 (a)(2) debtor must file a statement of intent in a Chapter 7 case.
- Debtor must perform stated intention within 30 days after the first date set for the meeting of creditors (see 11 U.S.C. 521 (a)(2)(B)).
- If the Debtor fails to comply with the 45-day period referred to in 11 U.S.C. 521 (a)(6) the stay is terminated with respect to the personal property of the estate which is affected. Such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable non-bankruptcy law;
 - Unless the court determines on the motion of the trustee that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

Question: The debtor provides a statement of intention to her vehicle lender with the intent to reaffirm the debt, but the lender never sends a proposed reaffirmation agreement, and the debtor never requests one. Ultimately, the debtor fails to enter into a reaffirmation agreement and misses a post-petition payment. The lender repossesses the vehicle while the debtor's bankruptcy case is pending and without obtaining relief from the automatic stay.

Case: *In re Heflin*, 464 B.R. 545 (Bankr. D. Conn. 2011).

Summary: The debtor had to take some action to reaffirm the loan obligation and prevent the stay from terminating with respect to his vehicle. The debtor did not come within exception to termination of stay as to truck, and there was no violation of stay.

Question: The debtor provides notice to creditor that he intends to redeem his vehicle in his Chapter 7 bankruptcy. The debtor repeatedly calls the creditor to work out the terms of the redemption, but the lender is unhelpful. The Lender files a motion for an order confirming termination of the automatic stay for failure by the debtor to properly exercise his intent to redeem the vehicle.

Case: *In re Molnar*, 441 B.R. 108 (Bankr. N.D. Illinois 2010)

Summary: In order to timely “perform” his stated intent to redeem the motor vehicle securing the creditor's claim, the debtor did not have to file a motion, but could “perform” less formally, and debtor timely “performed” his stated intent to redeem the collateral by filing a Statement of Intention and making repeated attempts to discuss redemption with the creditor. The automatic stay did not terminate as to vehicle.

B. BANK ISSUES

- Misapplication of post-petition payment to pre-petition debt
- Sending a post-petition default letter to Debtor in error
- Filing an incorrect proof of claim
- Placing an administrative hold on bank accounts

Question: 1st mortgage holder of Debtor's homestead applies a post-petition regular monthly payment to a pre-petition arrearage while Debtor is in a pending Chapter 13, then deems the loan to have a post-petition default and files a foreclosure action.

Case: *In Re Ogden*, 532 B.R. 329 (Bankr. D. Colo. 2014).

Summary: Lender did not violate automatic stay by attempting to improperly collect debtor's prepetition escrow arrears, already accounted for in her plan, by increasing her post-petition escrow payments.

Question: Bank places an “administrative hold” on the Debtor's bank account pending the bank's resolution of the Bank's right to setoff.

Case: *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995).

Summary: The Supreme Court determined that the bank's administrative hold, in order to protect its setoff rights, on the debtor's bank account was not a violation of the automatic stay. The Court found that the bank's refusal to pay its debts to the debtor upon the latter's demand was not a setoff within the meaning of § 362(a)(7). *Id* at 19. “Petitioner refused to pay its debt, not permanently and absolutely, but only while it sought relief under § 362(d) from the automatic stay.” *Id*.

Question: Bank puts a freeze on debtor's bank account after the filing of a chapter 7 bankruptcy case even though the bank does not intend to exercise a setoff right. Violation?

Case: *Weidenbenner v. Wells Fargo Bank*, Case 7:15—cv-00244-kmk (S.D.N.Y. 2019).

Summary: The Southern District of New York recently overturned a bankruptcy court decision and held that Wells Fargo did not violate the automatic stay when it put an administrative pledge on a chapter 7 debtor's account. This opinion follows a number of cases across the country which have faced this issue.

Wells Fargo has a process in which, upon the filing of a chapter 7 consumer account, to place the debtor's accounts in "bankruptcy status" which "recognizes them as property of the estate under the control of the bankruptcy trustee." Wells Fargo then immediately notifies the bankruptcy trustee about the administrative pledge and asks the trustee what they want to do with the account. This process is only for account(s) in excess of \$5,000.

The Judge analyzed section 362(a) of the bankruptcy code and emphasized section 362(a) (3) which prohibits "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." Next, the Judge analyzed section 542(b) of the bankruptcy code which provides that "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to or on the order of, the trustee, except". The Court cited *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 19 (1995) by stating that bank accounts have been interpreted as a debt owed by the bank to the depositor for purposes of 542(b). Finally, the Court reviewed section 522 of the bankruptcy code which states that "an individual debtor may exempt property of the estate." However, Bankruptcy Rule 4003(b) provides a 30 day period after the 341 meeting of creditors to object to the claim of exemption and the property will be property of the estate until the end of the 30 day period unless there is an objection to the claim of exemption.

The Court recognized that "(A)n entity's obligation to turn over property of the estate to the trustee under Section 542(b) is in tension with Section 362(a)(3)'s prohibition on exercising control over property of the estate; the process of turning over property to the trustee arguably requires the exercise of control, if only temporarily." The Supreme Court in *Strumpf* addressed a similar issue with a setoff claim and rejected the argument that the bank's actions violated Section 362(a) (3).

Also see *In re Mwangi*, 764 F.3d 1168, 1177 (9th Cir. 2014): The Ninth Circuit upheld Wells Fargo's use of the Policy on the rationale that because a bank account is a debt owed to the debtor, and thus becomes property of the estate upon filing of the bankruptcy petition, a debtor cannot be injured by a bank's refusal to distribute funds to the debtor, because debtors have no right to control or use property of the estate absent approval of the trustee. See *Wells Fargo Bank, N.A. v. Jimenez*, 406 B.R. 935 (D.N.M. 2008); *In re Calvin*, 329 B.R. 589 (S.D. Tex. 2005); *In re Phillips*, 443 B.R. 63 (Bankr. M.D.N.C. 2010).

Question: A bank continues to auto debit a debtor's account post-petition because of a 401k loan. Violation?

Case: *In re Turner*, 376 B.R. 370 (Bankr. D. N.H. 2017).

Summary: Amount which was deducted each month from Chapter 7 debtor's paycheck in repayment of loans from her 401k employee retirement plan was not a "mandatory payroll deduction," such as debtor could subtract from her current monthly income in applying the means test. The court further held that a debtor who takes out a 401k loan is really only taking an advance from herself, and the retirement account entity does not have a right to payment from the debtor and therefore there is no debt, claim or right to payment. The Court further stated that

“The Debtors point to various Code provisions added by BAPCPA that explicitly concern retirement funds, such as section 362(19) (providing that it is not a violation of the automatic stay for an employer to withhold 401k loan repayments from a debtor’s paycheck).

Question: A bank continues with auto debts because its computer system cannot shut off auto debits timely. Willful violation of the automatic stay?

Case: *In re Kuzniewski*, 508 B.R. 678 (N.D. IL 2014).

Summary: To establish a willful violation of the automatic stay, the movant bears the burden showing by a preponderance of the evidence that (1) a bankruptcy petition was filed, (2) the violator received notice of the petition; and (3) the violator’s actions were in willful violation of the automatic stay. The violation of the automatic stay is willful if the violator knew of the bankruptcy case and intentionally committed the violative act, it does not matter whether the violator specifically intended to violated the stay. Here, “where a debtor voluntarily initiates an automatic payroll deduction arrangement to pay a prepetition debt, the creditor violates the automatic stay by continuing to deduct such amounts post-petition without the debtor’s formal post-petition consent.

Also see *Sundquist v. Bank of America*, 566 B.R. 563 (E.D. Cal. 2017); *Houseworth v. Three Rivers Federal Credit Union*, 117 B.R. 557 (N.D. Ohio 1994) (bank violated automatic stay by continuing to receive automatic withdrawals from debtor’s account in payment of prepetition debt).

C. STATE COURT ISSUES

- Acts in violation of the automatic stay are void. 11 U.S.C.A. § 362.
- In action to recover damages for violation of automatic stay, the court must first determine whether there was a violation of the stay. If the court finds a stay violation occurred, it must then determine whether the violation was willful and whether debtor is entitled to damages.
- Willful violation of automatic stay supporting award of damages does not require specific intent to violate stay. 11 U.S.C.A. § 362(k)(1).
- Party can be subject to liability for willful violation of automatic stay if it engages in conduct which violates automatic stay with knowledge that bankruptcy petition has been filed. 11 U.S.C.A. § 362(k)(1).
- Foreclosure sales – beware of post-petition actions in furtherance of a foreclosure action. Stay violations may include obtaining a foreclosure judgment, noticing or conducting a

foreclosure sale, confirming a foreclosure sale, or executing a deed after a sheriff sale without first obtaining relief from the automatic stay.

- Garnishment actions.
- Appeals.
- “Passive Holding.” See *Rochelle’s Daily Wire* (May 21, 2019) (re: Tyson Prepared Foods) <https://www.abi.org/newsroom/daily-wire/supreme-court-agrees-to-rule-on-what-is-or-is-not-a-%E2%80%98final-appealable%E2%80%99-order>

Question: Creditor of the Debtor’s non-filing spouse obtains a judgment and docketts its judgment without obtaining relief from the automatic stay.

Case: *In re Thongta*, 401 B.R. 363 (Bankr. E.D. Wisconsin 2009).

Summary: Creditor could sue non-filing spouse because the debt was not “of the debtor,” as required for co-debtor stay to apply. However, the judgment creditor violated Section 362(a)(4) when it docketed its judgment, which created a lien because real property owned by the non-filing spouse and debtor was marital property. Creditor’s stay violation rendered judgment lien void and warranted award to debtor of his costs and attorney fees.

Question: Debtor is taken into custody at her 341 meeting based on a pre-petition bench warrant resulting from her failure to appear at a supplemental examination to discover assets in a state court case. Creditor was provided notice.

Case: *In re Galmore*, 390 B.R. 901 (Bankr. N.D. Ind. 2008).

Summary: Judgment creditor who, despite having notice of debtor’s Chapter 7 filing, took no steps to cancel the bench warrant “willfully” violated automatic stay.

Question: Debtor files Chapter 13 prior to sheriff sale on homestead. Unbeknownst to the Debtor, the lender continues to record accruing post-petition attorneys’ fees in its internal records. The lender does not include such amounts on its proof of claim nor notify the Debtor of the post-petition attorneys’ fees.

Case: *Mann v. Chase, Manhattan Mortg. Corp.*, 316 F.3d 1 (1st Cir. 2003).

Summary: Lender did not violate the automatic stay by accruing post-petition attorneys’ fees on its internal records. In *Mann*, Chase Mortgage filed a claim for prepetition attorneys’ fees. *Post-petition attorneys’ fees* continued to accrue but were only tracked in Chase’s internal records. Chase failed to file a claim or give notice to the debtor for the post-petition fees. The First Circuit found no violation because Chase’s conduct lacked some “overt act or resulting effect on the debtor” to find a stay violation.

Question: A pre-petition garnishment is not dismissed upon the filing of a bankruptcy case? Violation?

- Note: 11 U.S.C. § 522(f)(1) provides that a debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption...if such lien is (A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5). Also, the fixing of the garnishment lien may also be a preference under 11 U.S.C. §547.

Cases:

A. *In re Mims*, 209 B.R. 746 (D. FL 1997); *Roche v. Pep Auto Supply*, 361 B.R. 615 (N.D. GA 2005).

Summary: The Courts in these cases held that the automatic stay not only prevented action to collect prepetition debt, but there was also an affirmative duty to dismiss garnishment proceedings which they had filed prepetition.

B. *Linsenchbach v. Wells Fargo Bank*, 482 B.R. 522 (M.D. Penn. 2012).

Summary: A garnishee bank, in refusing to release funds to debtor until debtor ultimately contacted garnishing creditor and it released garnishment, was not acting as agent of creditor to collect prepetition debt and did not violate stay. Also, because a judicial lien is created and perfected in Pennsylvania law upon service of a writ of execution on a garnishment, a garnishing creditor does not violate the automatic stay by refusing to immediately release a garnishment upon being notified of a judgment debtor's bankruptcy filing and instead of waiting to be provided with adequate protection. See also, *Miller v. Montgomery Kolodny Amatuzio Dusbabek (In re Miller)*, 2011 WL 6217342 (Bankr. D. Colo 2011); *In re Giles*, 271 B.R. 903 (Bankr. M.D. Fla 2002). On the contrary, see *Bank of America v. Adomah (In re Adomah)*, 368 B.R. 134 (E.D.N.Y. 2007).

Question: ABC Corporation initiated action to recover a claim against Debtor. ABC Corp. wins in District Court. Debtor then files appeal and subsequently a Chapter 11. ABC Corp. moves forward with the appeal. Violation?

Case: *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 497 (10th Cir. 2011).

Statute: Section 362(a)(1) does not prevent the debtor from pursuing an appeal of a prepetition judgment or a party where the debtor initiated the claim against another party. The automatic stay does apply to stay proceedings brought against the debtor where debtor is filing an appeal.

Summary: The continuation of the appeal DOES violate the stay. Section 362 stays all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be

determined at the case's inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.

In a decision written by then Circuit Court Judge Neil Gorsuch, the Court stated that “at least nine other circuit courts of appeals disagree with [*Gindi*] and have held ‘that a bankruptcy filing automatically stays appellate proceedings where the debtor has filed an appeal from a judgment entered in a suit against the debtor.’” *Id.* (quoting *In re Gindi*, 642 F.3d at 876). Gorsuch went on to state:

Accordingly, we overrule this circuit's prior interpretation of § 362(a)(1), as stated in *In re Gindi*, 642 F.3d at 870, 875–76; *Morganroth & Morganroth*, 213 F.3d at 1310; *Mason*, 115 F.3d at 1450; *In re Lyngholm*, 24 F.3d at 91–92; and *Autoskill Inc.*, 994 F.2d at 1485–86. From this date forward, this Circuit will read “section 362... to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.

Id. (quoting *Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir.1982)).

D. STUDENT LOANS

- Automatic stay and discharge injunction provisions of the Bankruptcy Code apply only when a creditor acts to collect a prepetition or discharged debt. 11 U.S.C.A. §§ 362(a), 524(a)(2).

Question: Debtor requests college transcript from former University and University refuses to provide it because a pre-petition debt remains unpaid.

Case: *In re Kuehn*, 563 F.3d 289 (7th Cir. 2009).

Summary: The university's refusal to provide transcripts constituted an “act” to collect tuition debt, in violation of the automatic stay and discharge injunction.

Conversely: *In re Billingsley*, 276 B.R. 48 (Bankr. D. N.J. 2002).

The university's refusal to provide transcripts was not a violation of the automatic stay and discharge injunction.

E. PASSIVE HOLDING

11 USC Section 362(a)(3)

Question: Whether the act is an “exercise of control over property of the estate” so as to be a violation of the stay?

The 2nd, 7th, 8th, 9th and 11th Circuits have held that passively holding estate property or passively obtaining an interest in estate property after filing DOES violate the automatic stay. In those circuits, for example, a creditor who repossessed an auto before bankruptcy must automatically return the car after the debtor files a chapter 13 petition, on pain of contempt. The 1st, 10th and District of Columbia Circuits have the minority rule, holding that an affirmative action is required to underpin an automatic stay violation and passive holding does NOT violate the stay.

SCOTUS denies cert for *Davis v. Tyson Prepared Foods Inc.*, [18-941](#) (Sup. Ct.) (cert. denied 5/20/2019); *Davis v. Tyson Prepared Foods Inc. (In re Garcia)*, 740 Fed. Appx. 163 (10th Cir. Oct. 17, 2018)(5/20/2019) (finding the automatic stay does NOT prevent a statutory workers’ compensation lien from attaching automatically after bankruptcy to a recovery in a lawsuit. Passively holding an asset of the estate in the face of a demand for turnover does NOT violate the automatic stay in Section 362(a)(3) as an act to “exercise control over property of the estate.”); *See also Rochelle’s Daily Wire* (May 21, 2019): <https://www.abi.org/newsroom/daily-wire/supreme-court-agrees-to-rule-on-what-is-or-is-not-a-%E2%80%98final-appealable%E2%80%99-order>

City of Chicago v. Fulton, 18-2527 (7th Cir.) (pending on appeal now): Does a City violate the automatic stay by failing to automatically turnover an impounded car for unpaid parking tickets upon the filing of a chapter 13 petition? City of Chicago believes that the mere filing of a chapter 13 petition does NOT compel the automatic turnover of an impounded car. The debtors argue that holding onto a car DOES violate the automatic stay.

F. MISC and EXCEPTIONS

US TRUSTEES. Question: Can the U.S. Trustee Program enforce violations of the automatic stay?

Case: *Resurgent Capital Service, L.P. v. Harrington, United States Trustee for Region I, Case No.*, 16-01017 (D. Maine 2017).

Summary: The Court questioned the ability of the U.S. Trustee to bring a case for a nationwide claim for alleged bankruptcy servicing practices. Also see, *Casamatta v. Resurgent Capital Services, et al.*, Case No. 16-04102-drd (Bankr. W.D. Miss. 2017).

CONSUMER FINANCIAL PROTECTION BUREAU RULES – PRIORITY?

Question: The bank attempts to comply with the CFPB mortgage servicing rules by contacting the bankruptcy debtor and send mortgage statements post-petition. Violation?

Summary: The Consumer Financial Protection Bureau issued a final rule clarifying that the 2016 mortgage servicing rule requires that servicers send modified periodic statements or coupon books to certain consumers in bankruptcy starting April 19, 2018. The CFPB’s website has forms available on its website.

Also, the CFPB has issued rules clarifying a servicer’s early intervention live contact and written notice obligations. The 2016 Mortgage Servicing Rule clarifies that a servicer must establish or make good faith efforts to establish live contact so long as the borrower remains delinquent and must provide multiple early intervention written notices in certain circumstances. However, the 2016 Mortgage Servicing Rule exempts a servicer from the early intervention live contact requirements for a mortgage loan when either the following first or second condition is met: (1) any borrower on the loan is in bankruptcy; or (2) the servicer is a debt collector under the FDCPA with respect to the mortgage loan, and any borrower on the loan has invoked the FDCPA’s cease communication protection. If either the first or second condition is met, the servicer is also exempt from the written notice requirements for the mortgage loan if no loss mitigation option is available. If any loss mitigation option is available the servicer must comply with modified written notice requirements for the mortgage loan, unless both the first and second conditions are met. If both of these conditions are met, the servicer is exempt from the written notice requirements for the mortgage loan.

Query: Are bankruptcy judges bound by CFPB rulemaking.

GOVERNMENTAL UNIT. Section 362(b)(4) excepts from the automatic stay “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s or organization’s policy and regulatory power.”

Case: *In re Wade*, 948 F.2d 1122 (9th Cir. 1991).

Background: Gene Wade, an attorney and member of the Arizona bar, and his wife filed a Chapter 11 bankruptcy petition on October 1, 1987. *Id.* at 1123. The next day, the Arizona Bar initiated a disciplinary proceeding against Wade alleging that he violated the Arizona rules of professional conduct promulgated by the Arizona Supreme Court. *Id.*

[For added color to the case: Wade was ultimately suspended from the practice of law for four years stemming from conflict of interest business relations with a client. The Bar found that he did not properly advise a client of a conflict of interest in the purchase of the client’s property by a corporation owned by the attorney, nor did he advise the client to seek outside counsel with regard to the transaction. Wade also violated the ethics rule requiring preservation of the identity of funds and property of the client in connection with Wade’s and the client’s business ventures. *See In re Wade*, 814 P.2d 753 (Ariz. 1991).]

Key issue: Did the disciplinary action initiated by the Arizona Bar constitute a “proceeding by a governmental unit?”

Arguments: The Wades argued “that the Bar is not a governmental unit enforcing its policy or regulatory power” and therefore, “the Bar’s disciplinary proceedings against Mr. Wade are not excepted from the automatic stay.” *Id.* The Bar argued that “although it is not a governmental unit for all purposes, it is an instrumentality of the Arizona Supreme Court for the purpose of prosecuting attorney disciplinary proceedings, and that therefore such proceedings are excepted from the automatic stay.” *Id.*

Ruling: The Ninth Circuit Court of Appeals sided with the Arizona Bar. In support of the decision, the Court explained that the Arizona Bar “exists by virtue of a rule promulgated by the Arizona Supreme Court,” and “the bar exercises [its] delegated authority under the ‘direction and control’ of the Arizona Supreme Court.” *Id.* at 1124. Moreover, the Arizona Supreme Court established the procedures that the Bar must follow in investigating and prosecuting attorney disciplinary actions, and the court reviews the Bar’s decisions over the Bar’s disciplinary proceedings. *Id.* For those reasons, the Court concluded that “with respect to disciplinary proceedings, the Bar acts as an instrumentality of the Arizona Supreme Court enforcing its police or regulatory power, and therefore the disciplinary proceedings against Wade are excepted from the automatic stay under 11 U.S.C. § 362(b)(4).” *Id.*

GOVERNMENTAL UNITS / CRIMINAL RESTITUTION. The Mandatory Victims Restitution Act (the “MVRA”). The MVRA was passed in 1996, almost twenty years after the automatic stay was passed in Bankruptcy Reform Act of 1978. The purpose of the MVRA is to ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime regardless of the criminals’ economic status. The MVRA’s enforcement provision provides that the “United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. *Notwithstanding any other Federal law* (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined....” 18 U.S.C. § 3613(a)(emphasis added).

Case: *In re Partida*, 531 B.R. 811 (Bankr. App. 9th Cir. 2015), *aff’d*, 862 F.3d 909 (9th Cir. 2017); *In re Partida*, 862 F.3d 909 (9th Cir. 2017).

Background: In 2002, the Debtor “pleaded guilty to one count of embezzlement and theft of labor union assets, for which she served eighteen months in prison and agreed to pay \$193,337.33 in criminal restitution.” *In re Partida*, 862 F.3d at 911. In 2013, 11 years later, the Debtor had still failed to pay the restitution and proceeded to file for Chapter 13 bankruptcy. *Id.* The Debtor owed \$218,500.777 at the time of filing. *Id.* “Following the bankruptcy filing, the government sent [Debtor] notice relating to the restitution balance and the government’s intent to offset [Debtor’s] income.” *Id.* “Then, on March 1, 2014, the government provided notice that it had, in fact, offset payments made as income to [Debtor] against the balance of the restitution debt and would continue to do so.” *Id.* at 911-12. Five days later, on March 6, 2014, Debtor’s Chapter 13 plan was confirmed and Debtor proceeded to file “a motion to hold the government in contempt for violating the automatic stay through its collection efforts.” *Id.*

The Bankruptcy Court ruled that the government's actions were excepted from the automatic stay under Section 362(b)(1) which provides that the automatic stay does not operate as a stay for the "commencement or continuation of a criminal action or proceeding against the debtor." *In re Partida*, 531 B.R. at 812. Debtor appealed the bankruptcy court's decision.

Key issues: (1) Does the enforcement provision of the MVRA override the operation of the automatic stay as to the enforcement of criminal restitution orders; and (2) Are post-conviction enforcement of criminal restitution orders excepted from the automatic stay under Section 362(b)(1)?

Ruling: The Bankruptcy Appellate Panel of the Ninth Circuit began its analysis by pointing out that "[a]lthough the bankruptcy court based its decision on the exception to the automatic stay provided by § 362(b)(1), the significant threshold issue is whether the operation of the automatic stay under § 362(a) is superseded by the subsequent enactment of the [MVRA] as to the enforcement of restitution orders against Debtor and property of the bankruptcy estate." *Id.* The Court went on to explain that:

Section 362(a) details the various stays triggered upon a bankruptcy filing. Subsection (2) provides that entities are stayed from the enforcement of a prepetition judgment "against the debtor or against property of the estate," while subsection (3) stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." These two subsections of § 362(a) were enacted as part of the Bankruptcy Act of 1978.

In direct conflict, the 1996 enactment of the MVRA provides in relevant part that "[n]otwithstanding any other Federal law (including section 207 of the Social Security Act)" the United States may enforce a judgment imposing criminal fines "against all property or rights to property of the person fined."

Id. Debtor made two arguments in support of the automatic stay trumping the MVRA:

First, in not adding the MVRA as an exception under § 362(b) as part of the 2005 BAPCPA amendments, Congress implicitly expressed an intent that the MVRA would not override the operation of the automatic stay; and second, the 2005 BAPCPA amendments to certain subsections of § 362 reenacted all of § 362(a) such that § 362(a) should be characterized as being enacted after the MVRA.

Id. at 813-14. The Court disagreed, noting:

First, the broad sweeping language of the MVRA enforcement provision already accomplished an effective override of § 362(a). As such the addition of the MVRA as an exception to the stay under § 362(b) would be superfluous. Second, the concept that an amendment to one part of a broad, multi-faceted statute would make the entire statute deemed enacted on the amendment date is supported by neither case law nor statutory interpretation. The relevant parts of § 362(a), subsections (2)

and (3), were not amended. The MVRA was clearly adopted after them and its enforcement provision was intended to override “any other Federal law.”

Id. at 814. Thus, the Court concluded that the government “did not violate the automatic stay,” and “because the MVRA enforcement provision precludes the application of Section 362(a) in this case,” it is not necessary to decide whether Section 362(b)(1) provides an exception to the stay. *Id.* This ruling was consistent with the decisions of both the Sixth and Second Circuit Courts. *In re Partida*, 862 F.3d at 913.

DISSOLUTIONS - PROPERTY. Section 362(b)(2)(A) excepts from the automatic stay “the commencement or continuation of a civil action or proceeding: (i) for the establishment of paternity; (ii) for the establishment or modification of an order for domestic support obligations; (iii) concerning child custody or visitation; (iv) for the dissolution of a marriage, *except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or regarding domestic violence.*”

Case: *In re Kallabat*, 482 B.R. 563 (Bankr. E.D. Mich. 2012).

Background: The Debtor was a pro se defendant in a divorce case pending in the Oakland County Circuit Court. *Id.* at 566. The divorce case was scheduled for trial on June 5, 2012, however, one day prior to the trial, the Debtor filed a Chapter 7 bankruptcy petition. *Id.* Immediately upon filing the Chapter 7 petition, Debtor’s bankruptcy attorney informed the Debtor’s wife’s divorce attorney of the filing and provided a copy of the notice issued by the Bankruptcy Court showing the Chapter 7 filing. *Id.* at 567. The next morning, the judge presiding over the divorce case acknowledged the automatic stay but explained that “although pursuant to [Section 362(b)], certain matters in a divorce case are stayed, certainly, I’m still able to do certain things, including divorce the parties, and I intend to do that.” *Id.*

During closing arguments of the trial, the Debtor’s wife’s divorce attorney made two requests: (1) that the Debtor be held responsible for credit card debt in the amount of \$4,000 because the Debtor allegedly fraudulently opened the credit card account without his wife’s knowledge; and (2) that the marital home be awarded to Debtor’s wife free and clear of any interest by the Debtor. *Id.* at 568. The divorce court granted the first request regarding the credit card debt, but refused to grant the request regarding the home due to the automatic stay. *Id.*

One week later, the Debtor filed a motion in Bankruptcy Court seeking actual and punitive damages for a willful violation of the automatic stay pursuant to Section 362(k) of the Bankruptcy Code. *Id.* at 569.

Key issue: Did the divorce attorney violate the automatic stay in closing arguments by requesting the Debtor be held responsible for the credit card debt and requesting that the home be awarded to the Debtor’s wife?

Ruling: The Bankruptcy Court held that both of the divorce attorney’s requests violated the automatic stay. The Court explained:

Section 362(b)(2)(A)(iv) clearly states that there is an exception to the automatic stay for dissolution of a marriage, but qualifies that exception by saying that it does not apply ‘to the extent that such proceeding seeks to determine the division of property that is property of the estate[.]’ Whatever interest, if any, that the Debtor may have in the marital home, became property of the Debtor's bankruptcy estate when he filed his Chapter 7 petition on June 4, 2012. As a result, § 362(a)(3) stayed any request that the Oakland County Circuit Court adjudicate the Debtor's interest in the marital home. Despite this fact, as noted above, the transcript shows that [the divorce attorney] expressly did make such a request. . . . The second place where there was a violation of the automatic stay at the trial pertains to the request by [the divorce attorney] that the Oakland County Circuit Court impose liability upon the Debtor for the \$4,000.00 balance owing on the Comerica credit card account. The sole basis for [the attorney's] request to make the Debtor liable for the \$4,000.00 balance on the Comerica credit card was [Debtor's wife's] allegation that the Debtor had defrauded [her] by signing her name to open the account. Unlike the establishment of a domestic support obligation, which is by definition in the nature of support, the request to impose liability because of fraud is plainly based upon a pre-petition claim that [Debtor's wife] holds against the Debtor that has nothing to do with [her] need for support.

Id. at 571-72. The Bankruptcy Court concluded its decision by recommending that “[o]nce a bankruptcy case is filed, any entity seeking relief against a debtor must take the time to first review this statutory scheme rather than proceed blindly and run the risk of violating the stay.” *Id.* at 576.

ABI
CENTRAL STATES
2019

AUTOMATIC STAY VIOLATIONS & SANCTIONS!

Hon. Beth E. Hanan, Moderator

U.S. Bankruptcy Court (E.D. Wis.); Milwaukee

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AGENDA

- INTRODUCTIONS
- AUTHORITY
- STAYS AND SANCTIONS



THUMPS UP – **THUMBS DOWN**



AUTHORITY: 11 USC Section 362 (1 of 3)

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

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

AUTHORITY: 11 USC Section 362 (2 of 3)

- **(5)** any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
- **(7)** the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- **(8)** the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

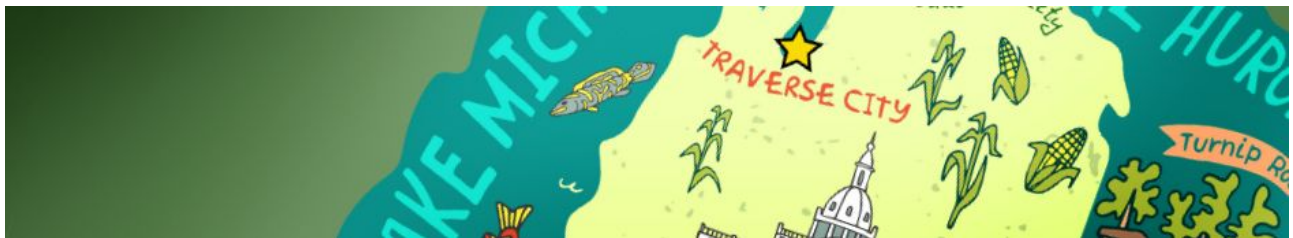
AUTHORITY: 11 USC Section 362 (3 of 3)

Exceptions - 11 USC Section 362(b) (1 – 28); 362 (n)

Stay is in effect until – 362(c), 362(h), 362(i), 362 (j), 362(l), 362 (m)

Relief from stay – 362 (d, e, f, g)

Remedy for willful violation – 362 (k)



STAYS AND SANCTIONS



THUMBS DOWN (STOP - IT IS A VIOLATION)

THUMBS UP (GO – IT IS NOT A VIOLATION)



CATEGORY IS:

Bank Issues – application of payments,
administrative holds, continued fees



QUESTION 1: 1st mortgage holder of Debtor's homestead applies a post-petition regular monthly payment to a pre-petition arrearage while Debtor is in a pending Chapter 13. The Lender then deems the loan to have a post-petition default and files a foreclosure action. Violation?



Case: *In Re Ogden*, 532 B.R. 329 (Bankr. D. Colorado 2014).

Summary: lender did **NOT** violate automatic stay by attempting to improperly collect debtor's prepetition escrow arrears, already accounted for in her plan, by increasing her post-petition escrow payments.

QUESTION 2: Bank places an “administrative hold” on the Debtor’s bank account pending Bank’s resolution of the Bank’s right to setoff. Violation?



Case: *Citizens Bank of Maryland v. Strumpf*, 116 S. Ct. 286 (U.S. 1995).

Summary: lender did **NOT** violate automatic stay. The Supreme Court determined that the bank’s administrative hold, in order to protect its setoff rights, on the Debtor’s bank account was not a violation of the automatic stay. The Court found that the bank’s refusal to pay its debts to the debtor upon the latter’s demand was not setoff within the meaning of § 362(a)(7). *Id.* at 19. “Petitioner refused to pay its debt, not permanently and absolutely, but only while it sought relief under § 362(d) from the automatic stay.” *Id.*

QUESTION 2b: Variation

What if Bank places an “administrative hold” on the Debtor’s bank account even though the Bank has NO intention of exercising a setoff right. Violation?



Case: *Weidenbenner v. Wells Fargo Bank*, Case 7:15—cv-00244-kmk (S.D.N.Y. 2019) (citing *Strumpf*).

Summary: lender did **NOT** violate automatic stay. The Court recognized that “(A)n entity’s obligation to turn over property of the estate to the trustee under Section 542(b) is in tension with Section 362(a)(3)’s prohibition on exercising control over property of the estate; the process of turning over property to the trustee arguably requires the exercise of control, if only temporarily.”

QUESTION 3: Debtor files Chapter 13 before sheriff sale on his homestead. Unbeknownst to the Debtor, the lender continues to record accruing post-petition attorneys' fees in its internal records. The lender does not include such amounts on its proof of claim nor notify the Debtor of the post-petition attorneys' fees. Violation?



Case: *Mann v. Chase*, 316 F.3d 1 (1st Cir. 2003).

Summary: Lender did **NOT** violate automatic stay by accruing post-petition attorneys' fees on its internal records. In *Mann*, Chase Mortgage filed a claim for pre-petition attorneys' fees. Post-petition attorneys' fees continued to accrue, but were only tracked in Chase's internal records. Chase failed to file a claim or give notice to the debtor for the post-petition fees. The First Circuit found no violation because Chase's conduct lacked some "overt act or resulting effect on the debtor."

QUESTION 4: Bank continues with automatic debits because its computer system cannot shut off the auto debits timely. Willful violation?



Case: *In re Kuzniewski*, 508 B.R. 678 (N.D. IL 2014).

Summary: lender **DID** violate automatic stay. Where a debtor voluntarily initiates an automatic payroll deduction arrangement to pay a prepetition debt, the creditor violates the automatic stay by continuing to deduct such amounts post-petition without the debtor's formal post-petition consent.

See also: *Sundquist v. Bank of America*, 566 B.R. 563 (E.D. Cal. (2017); *Houseworth v. Three Rivers Federal Credit Union*, 117 B.R. 557 (N.D. Ohio 1994).

Willfulness Inquiry

To establish a willful violation of the automatic stay, the movant bears the burden showing by a preponderance of the evidence that

- (1) a bankruptcy petition was filed,
- (2) the violator received notice of the petition; and
- (3) the violator's actions were in willful violation of the automatic stay. The violation of the automatic stay is willful if the violator knew of the bankruptcy case and intentionally committed the violative act, it does not matter whether the violator specifically intended to violated the stay.

In re Kuzniewski, 508 B.R. 678 (N.D. IL 2014).

QUESTION 4b: VARIATION. Debtor files Chapter 7 and the Bank or employer continues with automatic monthly debits from debtor's paycheck for repayment of a 401K loan. Violation?



Case: *In re Turner*, 376 B.R. 370 (Bankr. D. N.H. 2017).

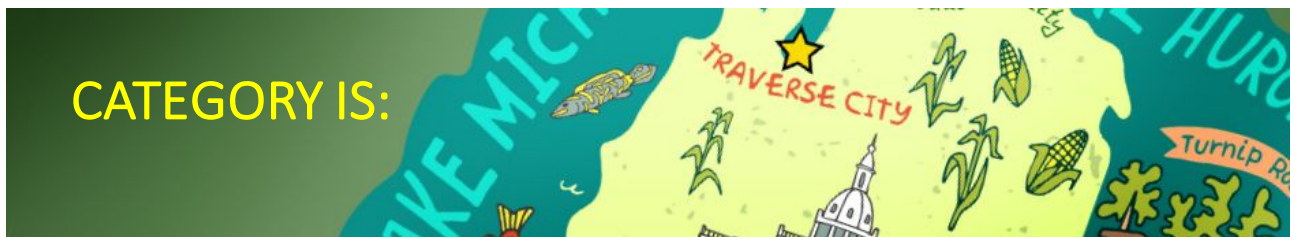
Summary: lender did **NOT** violate automatic stay where the amount deducted each month in repayment of 401K loans from her retirement plan was only the debtor taking an advance from herself, and the retirement account entity does not have a right to payment from the debtor, thus there is no "debt, claim or right to payment." Further, various Code provisions added by BAPCPA explicitly concern retirement funds, such as section 362(19) (providing that it is not a violation of the automatic stay for an employer to withhold 401k loan repayments from a debtor's paycheck.

QUESTION 4C: Variation. Bank attempts to comply with the Consumer Financial Protection Bureau (CFPB) mortgage servicing rules by sending mortgage statements post-petition. Violation?



2016 CFPB Mortgage Servicing Rules

- The CFPB issued rules that a servicer must establish or make good faith efforts to establish live contact so long as the borrower remains delinquent and must provide multiple early intervention written notices in certain circumstances.
- After April 19, 2018, the 2016 Mortgage Servicing Rules exempt a servicer from the early intervention live contact requirements for a mortgage loan under 2 conditions – one of which is when any borrower on the loan is in bankruptcy.
- **Summary:** lender DID violate automatic stay by continuing to send statements.
- BUT → Are Bankruptcy Judges bound by the CFPB Rulemaking?



State Court Issues



QUESTION 5: Creditor of the Debtor's non-filing spouse obtains a judgment and docketed its judgment without obtaining relief from the stay. Violation?



Case: *In re Thongta*, 401 B.R. 363 (Bankr. E.D. Wis. 2009).

Summary: Creditor DID violate automatic stay. Creditor could sue non-filing spouse because the debt was not “of the debtor,” as required for the co-debtor stay to apply. However, the judgment creditor violated Section 362(a)(4) when it docketed its judgment, which created a lien because real property owned by the non-filing spouse and debtor was marital property. Creditor's stay violation rendered the judgment lien void and warranted an award to Debtor of his costs and attorneys' fees.

QUESTION 6: Debtor files Ch 7 the day before his divorce trial. Trial moves forward acknowledging Section 362(b)'s applicability but stating the Court can still divorce the parties. Wife's counsel in closing argued (1) the Debtor should be liable for the fraudulently incurred credit card debt of \$4,000, and (2) that the marital home be awarded to the wife free and clear of Debtor's interest. Were the arguments a Violation?



Case: *In re Kallabat*, 482 B.R. 563 (Bankr. E.D. Mich. 2012).

Summary: Wife's counsel DID violate automatic stay by both requests. Section 362(b)(2)(A)(iv) exception to the automatic stay for dissolution of a marriage & support does not apply “to the extent that such proceeding seeks to determine the division of property that is property of the estate[.]” Debtor's interest, if any, in the marital home became property of the estate. The liability for the credit card balance based on alleged fraud is the wife's pre-petition claim against Debtor and had nothing to do with her need for support.

QUESTION 7: Debtor is taken into custody at her 341 meeting based on a pre-petition bench warrant resulting from her failure to appear at a supplemental examination to discover assets in a pending state court case. Creditor was provided notice of the Bankr filing. Violation?



Case: *In re Galmore*, 390 B.R. 901 (Bankr. N.D. Indiana 2008).

Summary: Creditor DID willfully violate automatic stay where the Judgment creditor who, despite having notice of Debtor's Chapter 7 filing, took no steps to obtain recall of bench warrant.

QUESTION 8: ABC Corporation initiated action to recover a claim against Debtor. ABC Corp. wins in District Court. Debtor then files appeal and subsequently a Chapter 11. ABC Corp. moves forward with the appeal. Violation?



Case: *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 497 (10th Cir. 2011).

Summary: The continuation of the appeal DOES violate the stay. Section 362 stays all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at the case's inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.

QUESTION 9: The Arizona State Bar Association initiated a disciplinary proceeding against an Attorney the day after he filed a Chapter 11 bankruptcy petition. Violation?



Case: *In re Wade*, 948 F.2d 1122 (9th Cir. 1991).

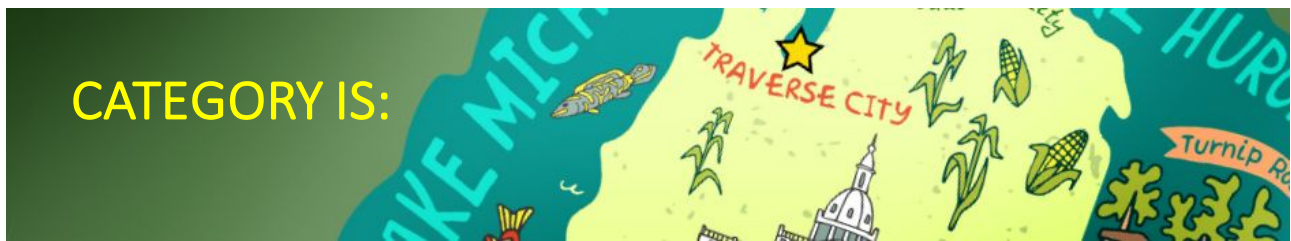
Summary: The Arizona State Bar Association did **NOT** violate automatic stay and fell under the exception of Section 362(b)(4) for “the commencement or continuation of an action or proceeding by a governmental unit.” Debtor argued the Bar was not a governmental unit; Bar argued it was an instrumentality of the AZ Supreme Court. The 9th Cir. stated the Bar exists by virtue of a rule promulgated by the AZ Supreme Court and exercises the Court’s delegated authority. The Court also established the investigation and prosecution procedures and reviews the Bar’s decisions of the proceedings. The Bar “acts as an instrumentality of the Arizona Supreme Court enforcing its police or regulatory power... and [its proceedings] were exempted from the automatic stay.”

QUESTION 10: Debtor pled guilty to embezzlement and theft and in addition to prison sentence was ordered to pay criminal restitution to her Creditor. Debtor’s Ch 13 plan was filed and confirmed. Creditor continued to receive income offsets for restitution collection. Debtor filed a motion for contempt and violation of automatic stay. Violation?



Case: *In re Partida*, 531 B.R. 811 (Bankr. App. 9th Cir. 2015), *aff'd*, 862 F.3d 909 (9th Cir. 2017); *In re Partida*, 862 F.3d 909 (9th Cir. 2017).

Summary: Restitution offsets are **NOT** violations of the automatic stay and fell under the exception of Section 362(b)(1) for the commencement or continuation of an action or proceeding by a governmental unit due to the Mandatory Victims Restitution Act (MVRA). The United States was enforcing the restitution judgment debt as part of the Debtor’s prior criminal proceeding.



“Passive Holding” Actions or Assets



QUESTION 11: A pre-petition garnishment is not dismissed by the Creditor upon the filing of Debtor’s bankruptcy case. Violation?



Case: *In re Mims*, 209 B.R. 746 (D. Fla 1997);
Roche v. Pep Auto Supply, 361 R.R. 615 (N.D. Georgia 2005).

Summary: Creditor DID violate automatic stay. The courts in these cases held that the automatic stay not only prevented action to collect prepetition debt, but there was also an affirmative duty to dismiss garnishment proceedings which they had filed pre-petition.

QUESTION 11b: Variation.

A pre-petition garnishment is not dismissed upon the filing of Debtor's bankruptcy case and the Garnishee Bank does not release the garnishment. Violation?



Case: *Linsench v. Wells Fargo Bank*, 482 B.R. 522 (M.D. Penn. 2012).

Summary: Garnishee Bank did NOT violate automatic stay. Until Debtor actually contacted creditor, the Garnishee Bank was not acting as an agent of the creditor to collect pre-petition debt. Also, because a judicial lien is created and perfected in Pennsylvania upon service of the writ of execution, a garnishing creditor does not violate the stay by refusing to immediately release the garnishment upon notification of the filing instead of waiting for adequate protection.

QUESTION 12: Secured creditor repossessed debtor's car before Ch. 13 petition filed. Creditor refused to return the car after debtor's filing and argued it was maintaining the status quo with its passive holding of the asset due to perceived lack of adequate protection. (7th Cir.) Violation?



SPLIT IN CIRCUITS (see next slide)

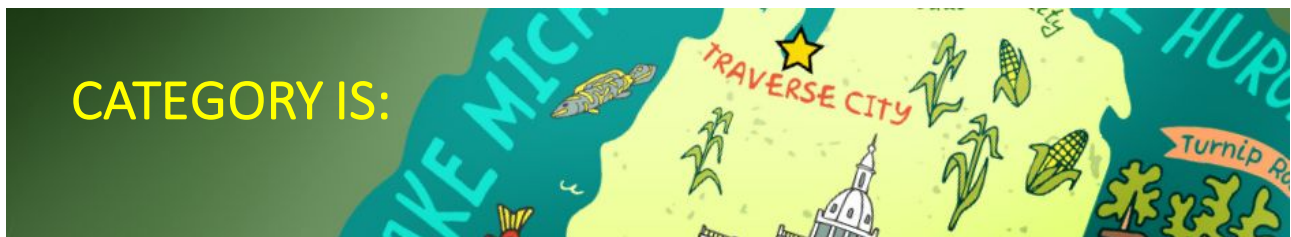
Case: *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009).

Summary: Creditor DID violate automatic stay. Seventh Circuit found it was a violation of the stay and the creditor "exercised control" over vehicle within meaning of automatic stay statute by refusing to return it to bankruptcy estate upon request; further, upon the request of debtor that has filed for bankruptcy, creditor must first return asset in which debtor has interest to his bankruptcy estate and then, if necessary, seek adequate protection of its interests in bankruptcy court.

“Passive Holding” Assets - SPLIT IN CIRCUITS

AUTHORITY: 11 USC Section 362(a)(3)

- INQUIRY: Whether the act is an “exercise control over property of the estate” so as to be a violation of the stay?
- The 2nd, 7th, 8th, 9th and 11th Circuits have held that passively holding estate property or passively obtaining an interest in estate property after filing **DOES** violate the automatic stay. In those circuits, for example, a creditor who repossessed an auto before bankruptcy must automatically return the car after the debtor files a chapter 13 petition, on pain of contempt. The 1st, 10th and District of Columbia Circuits have the minority rule, holding that an affirmative action is required to underpin an automatic stay violation and passive holding does **NOT** violate the stay.
- SCOTUS denies cert for *Davis v. Tyson Prepared Foods Inc.*, [18-941](#) (Sup. Ct.) (cert. denied 5/20/2019); *Davis v. Tyson Prepared Foods Inc. (In re Garcia)*, 740 Fed. Appx. 163 (10th Cir. Oct. 17, 2018)(5/20/2019) (finding the automatic stay does **NOT** prevent a statutory workers’ compensation lien from attaching automatically after bankruptcy to a recovery in a lawsuit. Passively holding an asset of the estate in the face of a demand for turnover does **NOT** violate the automatic stay in Section 362(a)(3) as an act to “exercise control over property of the estate.”); See also *Rochelle’s Daily Wire* (May 21, 2019): <https://www.abi.org/newsroom/daily-wire/supreme-court-agrees-to-rule-on-what-is-or-is-not-a-%E2%80%98final-appealable%E2%80%99-order>
- *City of Chicago v. Fulton*, 18-2527 (7th Cir.) (pending on appeal now): Does a City violate the automatic stay by failing to automatically turnover an impounded car for unpaid parking tickets upon the filing of a chapter 13 petition? City of Chicago believes that the mere filing of a chapter 13 petition does **NOT** compel the automatic turnover of an impounded car. The debtors argue that holding onto a car **DOES** violate the automatic stay.



Student Loans



Student Loans

AUTHORITY: 11 USC Sections 362(a) and 524 (a)(2)

- Automatic stay and discharge injunction provisions of the Bankruptcy Code apply only when a creditor acts to collect a prepetition or discharged debt. [11 U.S.C.A. §§ 362\(a\), 524\(a\)\(2\)](#).

QUESTION 13: Debtor requests college transcript from his former University and University refuses to provide it because a pre-petition debt remains unpaid. Violation?



Case: *In re Kuehn*, 563 F.3d 289 (7th Cir. 2009).

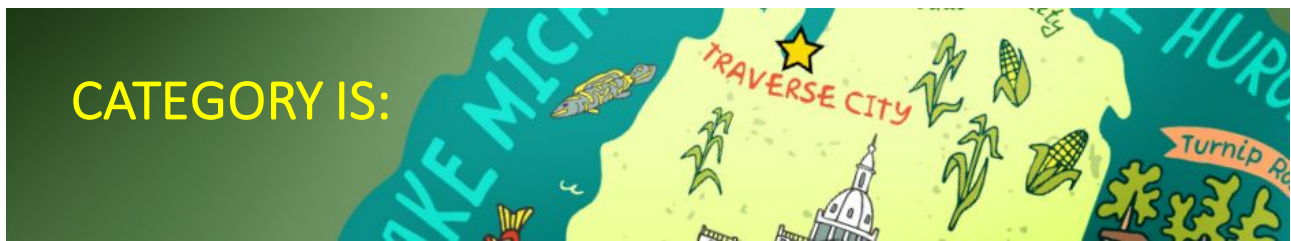
Summary: University **DID** violate automatic stay.

The University's refusal to provide transcripts was act to collect tuition debt, in violation of the automatic stay and discharge injunction.

BUT SEE

Case: *In re Billingsley*, 276 B.R. 48 (Bankr. D. N.J. 2002).

Summary: University did **NOT** violate automatic stay. Withholding transcripts per the school's official policy, was merely refusal to perform on contractual promise to create and deliver record of debtor's academic performance, and did not violate stay, particularly given debtor's failure to uphold her end of parties' contractual arrangement by failing to repay her student debt in timely manner.



Reaffirmation Agreements



QUESTION 14: The debtor provides a statement of intention to her lender with the intent to reaffirm the debt on her truck, but the lender never sends a proposed reaffirmation agreement, and the debtor never requests one. Ultimately, the debtor fails to enter into a reaffirmation agreement and misses a post-petition payment. The lender repossesses the truck while the debtor's bankruptcy case is pending and without obtaining relief from the automatic stay. Violation?



Case: *In re Heflin*, 464 B.R. 545 (Bankr. D. Conn. 2011).

Summary: lender did **NOT** violate automatic stay. The debtor had to take some action to reaffirm the loan obligation and prevent the stay from terminating with respect to her vehicle. The debtor did not come within exception to termination of stay as to truck, and there was no violation of stay.

Reaffirmation Agreements and Vehicle Loans

AUTHORITY: 11 USC Section 521 (a)(2)

- Under 11 U.S.C. § 521 (a)(2) debtor must file a statement of intent in a Chapter 7 case.
- Debtor must perform stated intention within 30 days after the first date set for the meeting of creditors (see 11 U.S.C. § 521 (a)(2)(B)).
- If the Debtor fails to comply with the 45-day period referred to in 11 U.S.C. § 521 (a)(6) the stay is terminated with respect to the personal property of the estate which is affected. Such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable non-bankruptcy law.
 - Unless the court determines on the motion of the Trustee that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, or orders the debtor to deliver any collateral in the debtor's possession to the Trustee.

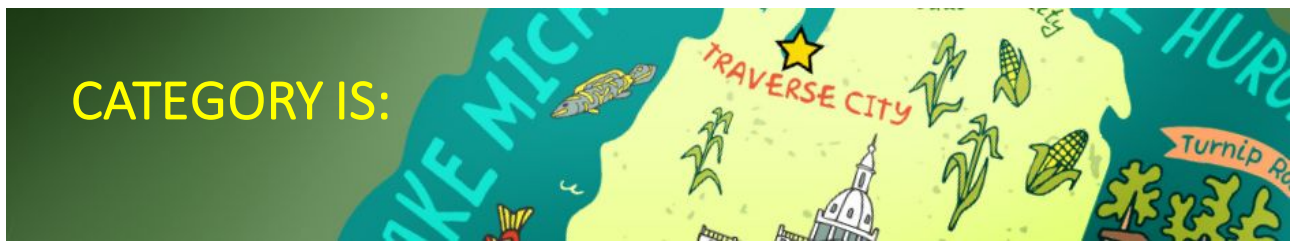
QUESTION 14b: VARIATION

The Debtor provides notice to Lender that he intends to redeem his vehicle in his Ch 7 bankruptcy. The Debtor repeatedly calls the Lender to work out the terms of the redemption, but the Lender is unhelpful. The Lender files a motion for an order confirming termination of the automatic stay for failure by the debtor to properly exercise his intent to redeem the vehicle. Violation?



Case: *In re Molinar*, 441 B.R. 108 (Bankr. N.D. IL 2010).

Summary: Lender DID violate the automatic stay. In order to timely “perform” his stated intent to redeem, the debtor did not have to file a motion, but could “perform” less formally, and debtor timely “performed” his stated intent to redeem the collateral by filing a Statement of Intention and making repeated attempts to discuss redemption with the Lender. The automatic stay did NOT terminate as to the vehicle.



Court and Trustee



QUESTION 15: Can the US Trustee enforce violations of the automatic stay? Red no; Green yes.



Case: *Resurgent Capital Service, L.P. v. Harrington, United States Trustee for Region1*, Case No. 16-01017 (D. Maine 2017).

Summary: The Court questioned the ability of the U.S. Trustee to bring a case for a nationwide claim for alleged bankruptcy servicing practices. *See also, Casamatta v. Resurgent Capital Services, et al.*, Case No. 16-04102-drd (Bankr. W.D. Miss. 2017).



QUESTIONS?

THANK YOU.

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