AMERICAN BANKRUPTCY INSTITUTE

42nd Annual Alexander L. Paskay Memorial Bankruptcy Seminar

Intersection of Bankruptcy Court and State Court

Hon. Catherine Peek McEwen, Moderator
U.S. Bankruptcy Court (M.D. Fla.); Tampa

Kristina E. Feher
Feher Law, P.L.L.C.; St. Petersburg

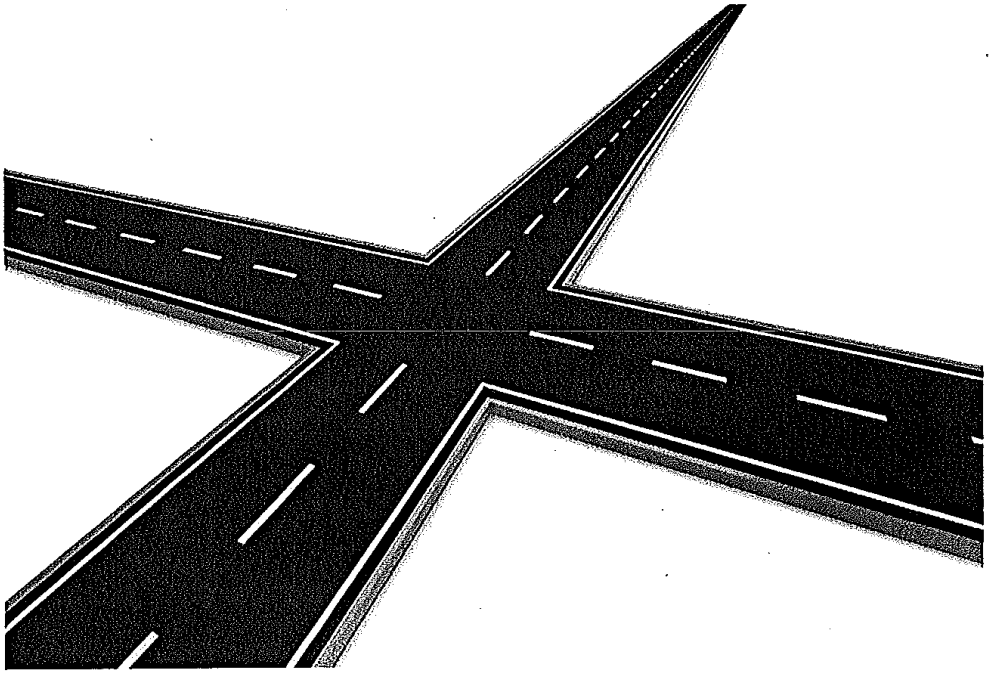
Matthew M. Holtsinger
Kass Shuler, P.A.; Tampa

Richard A. Johnston, Jr.
Richard Johnston Law; Fort Myers

CONSUMER SESSION

2018

INTERSECTION OF BANKRUPTCY COURT AND STATE COURT



Kristina E. Feher
Matt Holtsinger
Richard Johnston, Jr.
Honorable Catherine Peek McEwen (Moderator)

Benefits and Drawbacks when Bankruptcy intersects with Family Law

Materials prepared by: Kristina Feher

I. State Court Proceedings

a. Dissolution of Marriage – PEACE (aka divorce)
   i. Parenting Plan
   ii. Equitable Distribution (formal process for dividing up assets – equitable, not equal)
   iii. Alimony/Spousal Support
      1. Need of receiving spouse
      2. Ability to pay of payor spouse
   iv. Child Support
   v. Everything Else
b. Paternity – proceeding to determine parentage, timesharing (custody), and child support

II. Automatic Stay

a. Domestic Support (child support/alimony)
   i. Domestic Support recipient (aka "the ex") is a creditor
   ii. Chapter 7 – An ex may collect domestic support from post-petition wages, exempt property, and post-petition acquired property
   iii. Chapter 13 – post-petition wages are property of the estate and 100% of arrears must be paid back in the plan
b. Exceptions to the Stay
   i. Paternity cases (parentage)
   ii. Proceedings to Establish or Modify domestic support
   iii. Proceedings re: child custody/visitation
   iv. Proceedings for dissolution of marriage, so long as it does not determine the division of property of the estate
   v. Proceedings for Domestic Violence
c. The Court/Trustee MAY
   i. Withhold income or property of the estate to pay domestic support obligations
   ii. Withhold or suspend or restrict driver's licenses, professional licenses, or recreational licenses
   iii. Report overdue support
   iv. Intercept a tax refund
   v. Enforce a medical obligation under the Soc. Sec. Act (Title IV)

III. Property of the Estate

a. Division of marital property is traditionally a matter for state courts
   i. Until/Unless the state court classified and divided the marital property, it may be unclear which property is property of the estate
   ii. If bankruptcy needs to determine property rights, balance interests of the divorcing spouses with the creditors

iii. Some Courts lift the automatic stay, allow creditors to participate in the state court proceeding (extent allowed)
iv. Some Courts allow the state court to determine the parties' rights in property but maintain jurisdiction over distribution of property

b. Jointly owned property becomes property of the estate
   i. TBE – may be immune from seizure or execution of judgment; usually homestead property
   ii. Majority view – proceeds from sale of TBE property retains the character of the TBE property and does not become property of the estate where only one spouse files bankruptcy

IV. Discharge/Dischargeability

a. Section 727 objection to discharge must be filed no later than 60 days following the 341 meeting
b. Chapter 7 – Trustee usually block discharge; creditors usually file adversary proceedings
c. Chapter 13 – Trustee and family creditors can block discharge by blocking the plan
   i. Cannot obtain discharge without completing all payments
   ii. Cannot obtain discharge without paying all post-petition obligations
   iii. Cannot obtain discharge without paying all pre-petition overdue support (arrears)
d. Exceptions to Discharge under 523(a)(5) and 523(a)(15)
   i. 523(a)(5) – debts in the nature of alimony, support, or maintenance are not dischargeable
      1. 101(14A) – defines DSO as "a debt that accrues before, on or after the date of the order for relief in a case under this title…owed to or recoverable by (i) a spouse, former spouse or child of the debtor or such child's parent, legal guardian, or responsible relative; or (ii) a governmental unit" (DOR)
      2. 101(14A) also includes a debt "in the nature of alimony, maintenance or support (including assistance provided by a governmental unit) of such spouse, former spouse or child of the debtor or such child's parent without regard to whether such debt is expressly so designated.
      3. In re Strickland, 90 F.3d 444 (11th Cir.1996) – domestic support obligations could be deemed to be in the nature of support and nondischargeable, even if it was not considered support under state law.
      4. In re Harrel, 754 F.2d 902 (11th Cir. 1985), whether obligation is in nature of alimony or support requires simple inquiry by court as to whether obligation can be legitimately characterized as support, even if not considered support by state law.

ii. Factors to determine if a debt is in the nature of alimony, maintenance, and support:
   1. Whether the parties or the court intended the obligation to be for support
   2. The parties' relative financial resources and earning power
   3. How the debt was characterized in the order or decree
   4. How other obligations in the order or decree were characterized
   5. Whether the non-debtor spouse had custody of minor children
   6. Whether the obligation was expressly subject to modification
   7. Whether the obligation would terminate upon non-debtor's remarriage
   8. How the parties treated the obligation for tax purposes
   9. Whether the obligation was expressly enforceable by contempt

iii. 523(a)(15) – property settlement debts are only dischargeable in Chapter 13 cases
   1. 523(a)(15) does not discharge a debt to a spouse, former spouse, or child of the debtor that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record.
   2. Is it in the nature of support under federal law?
   3. State court can also make a determination
   4. Creditor can seek relief to take the issue to state court

iv. Distinguishing between support debts and property settlement debts are important
   1. Property settlement debts are dischargeable in Chapter 13
   2. DSO is entitled to priority; property settlement debts are not
   3. When in doubt – ask the trial judge
      a. Review Order/Final Judgment

v. Attorneys Fees
   1. In re Lopez, 405 B.R. 382 (Bankr. S.D. Fla. 2009) – order to pay attorneys's fees for litigation misconduct is not a domestic support obligation because it was not based on parties' financial circumstances or ability to pay.
   2. In re Palomino, 355 B.R. 349 (Bankr. S.D. Fla. 2006) – court considers what obligation is the attorney's fee tied to, spouse's need, and relative financial positions of the parties.
   3. In re Bell, 357 B.R. 167 (Bankr. M.D. Ala. 2006) – award of attorney fees to ex-wife for litigation of the enforcement of paying child support obligations is non-dischargeable.

V. Divorce during bankruptcy

a. Bankruptcy first!
   i. If in divorce, but pre-judgment –

Benefits and Drawbacks when Bankruptcy intersects with Family Law

Materials prepared by: Kristina Feher

1. File a Motion for Relief from Stay to go back to state court to complete the divorce (where there is property)
2. File a claim as a creditors
3. Adversary Proceeding to Determine Dischargeability?

ii. If post-judgment – get a court order to determine that debts are not discharged

b. Transfers between spouses
   i. Sham? Fraud? Collusion?
   ii. Bona fide debt payment or transfer for DSO
   iii. Property settlement obligation payments are not protected from avoidance of 547(c)(7)
c. Judicial Liens
   i. May NOT avoid judicial liens that secure a DSO
   ii. Propety settlement debts may be avoided to the extent they impair the debtor's exemptions
d. Notice
   i. There is no requirement of the Debtor to notify non-bankruptcy courts of the filing of a bankruptcy.
      1. This means that a state court judge may not know a litigant is in bankruptcy. The state court judge may enter orders in violation of the stay
      2. The majority of courts hold that acts in violation of the stay are void
e.

STATE COURT PRECLUSION DOCTRINES: A PRIMER

Materials prepared by: Matt Holtsinger

I. Generally

a. The main policy reason behind preclusion doctrines is the federalism and the jurisdictional boundaries inherent therein. The foundation of the preclusion doctrines are recognized in the Full Faith and Credit Clause of the United States Constitution.

   i. Article IV, Section 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

   ii. Full Faith and Credit Act - 28 U.S.C. §1738. This federal statute mandates that federal courts give preclusive effect to a state court judgment, if under state law, such judgment would be given preclusive effect. So, if under state law, the judgment precludes a cause of action to be brought in a subsequent proceeding under a state law preclusion doctrine, then the federal court must apply that preclusion doctrine and forego hearing the case

b. Additional policy reasons for preclusion doctrines include:

   i. A need for finality: Parties must have a sense of certainty as to their rights and property after a judgment has been entered by a court of competent jurisdiction and such judgment has become final

   ii. Judicial economy: it is costly, inefficient, and inequitable to re-litigate the same or substantially similar issues in multiple forums

c. Examples:

   i. Res Judicata

   ii. Collateral Estoppel

iii. Judicial Estoppel

iv. Rooker-Feldman Doctrine

II. Res Judicata – Claim Preclusion

a. Generally

i. A final judgment bars further claims by the same parties based on the same or similar cause of action decided in the prior judgment

ii. In order to determine whether to give a state court judgment preclusive effect in a subsequent bankruptcy case, the bankruptcy court must apply state law. *In re Six*, 80 F.3d 452, (11th Cir. 1996).

iii. Courts look to the substance of the causes of action and not the form. *In re Brose,* 242 B.R. 531 (Bankr. M.D. Fla. 1999)

iv. Applies to both claims actually litigated in the prior proceeding and claims that could have been litigated in the prior proceeding.

b. Elements

i. An identity in the things sued for in both actions

ii. An identity in the cause of action in both actions

iii. An identity of the parties in both actions

iv. An identity in the capacity of the parties in both

c. Not applicable in dischargeability proceedings – see *Brown v. Felsen,* 442 U.S. 127 (1979).

d. Considerations

i. When determining whether res judicata applies to a claim not actually litigated, the court must ascertain whether the non-litigated cause of action arises from the same set of facts, requires the same evidence, is a compulsory counterclaim in the prior proceeding, etc – See *In re Daniels*, 350 B.R. 619 (Bankr. S.D. Fla. 2009) (holding that a cause of action for a lender's failure to provide notice to a borrower regarding rescission rights is not barred by the lender's state court foreclosure judgment under res judicata principles)

III. Collateral Estoppel – Issue Preclusion

a. Generally

i. Precludes relitigation of issues that were actually decided on the merits in a prior proceeding. *I.A. Durbin, Inc. v. Jefferson Nat'l Bank,* 793 F.2d 1541 (11th Cir. 1986)

ii. Collateral estoppel is applicable in dischargeability proceedings. *Grogan v. Garner,* 498 U.S. 279 (1991).

b. Elements

i. The issue at stake must be identical to the one decided in the prior litigation

ii. The issue must have been actually litigated in the prior proceeding;

iii. The prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision

iv. The standard of proof in the prior action must have been at least as stringent as the standard of proof required in the later case

c. Application in dischargeability actions

i. First element - The 11th Circuit has decided that the elements necessary to establish common law fraud under Florida law "closely mirror" the elements at issue in a dischargeability proceeding under Section 523(a)(2). *In re Laurent,* 991 F.2d 672 (11th Cir. 1993)., citing to *In re Jolly*, 124 B.R. 365 (Bankr. M.D. Fla. 1991) and *In re Powell*, 95 B.R. 236 (Bankr. S.D. Fla. 1989).

ii. Second element – the inquiry is whether the defendant had a "full and fair opportunity to litigate" the issue in the prior judgment. *Allen v. McCurry*, 449 U.S. 90, 90, 101 S. Ct. 411, 412, 66 L. Ed. 2d 308 (1980)

iii. Third element – this issue is usually relevant when the underlying state court complaint contains multiple causes of action in addition to fraud.

1. Practice pointer: when obtaining a judgment for fraud in state court when the complaint is a multi-count complaint, ensure that the judgment is not a general judgment, but that the judgment includes findings of fact and conclusions of law for each count. Otherwise, the bankruptcy court will not be able to conclude whether the basis of the judgment was in fact the fraud cause of action. Courts are

split on this issue in the context of a default judgment, where all allegations are admitted as true as a consequence of default. Compare *In re Bentov,* 514 B.R. 907 (Bankr. S.D. Fla. 2014)(applying collateral estoppel) and *In re Green,* 262 B.R. 557 (Bankr. M.D. Fla. 2001)(declining to apply collateral estoppel).

iv. Fourth Element – This will usually not be an issue, as preponderance of evidence is the applicable standard in a dischargeability proceeding. *Grogan v. Garner*, 498 U.S. 279 (1991). This is the same standard applicable to actions for common law fraud under Florida law. *Passaat, Ltd. v. Bettis*, 654 So. 2d 980 (Fla. Dist. Ct. App. 1995).

d. Default Judgments

i. If the judgment is a federal judgment, then collateral estoppel will likely not apply. Although this is not always the case. See *In re Bush,* 62 F.3d 1319 (11th Cir. 1995) where the Court applied collateral estoppel when the defendant participated in the case for over a year and had ample opportunity to defend the case.

ii. If the judgment was entered by a Florida state court, then the judgment may have collateral estoppel effect. See *In re Itzler*, 247 B.R. 546 (Bankr. S.D. 2000) – even a "pure" default judgment is given preclusive effect under Florida's collateral estoppel doctrine and therefore if the judgment in question was entered by a Florida state court, collateral estoppel law applies to the subsequent proceeding, as under Florida law, the party had a "full and fair" opportunity to litigate the issues in state court, notwithstanding the entry of a default.

e. Equitable considerations

i. Courts have discretion as to whether to apply the collateral estoppel doctrine and equity may militate in favor of declining to apply the doctrine

ii. See *In re Rubin*, 2000 WL 387657 (Bankr. S.D. Fla. 2000) a case with a similar procedural posture to *In re Itzler*, but where the District Court distinguished *Itzler* based on a unique set of facts. In *Rubin*, the prior judgment in question was a state court default judgment for fraud. The

defendant was deemed to have been "abandoned" by his attorney in the state court proceeding, who was later disbarred. Therefore, the Court found that the defendant did not have a "full and fair" opportunity to litigate in the prior forum and there were mitigating factors leading the court to decline to apply collateral estoppel.

IV. Judicial Estoppel

a. Generally
   i. Is an equitable doctrine that is designed to protect the court system from litigants seeking to manipulate the legal system by taking inconsistent positions in multiple proceedings.

b. Elements – two-part test:
   i. The party took an inconsistent position under oath in a separate proceeding. *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002), overruled by *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017)
   ii. These inconsistent positions were "calculated to make a mockery of the judicial system." *Id.*

c. *Slater v. United States Steel Corporation,* 871 F.3d 1174 (11th Cir. 2017)
   i. Recent 11th Circuit Opinion, in which the Court addressed the issue of whether non-disclosure of a civil lawsuit in bankruptcy schedules known to the debtor results in the application of judicial estoppel in that civil lawsuit post-bankruptcy. The 11th Circuit held that courts must decide the issue of collateral estoppel on a case by case basis and apply what amounts to a totality of circumstances test. The 11th Circuit instructed lower courts to look to the following factors in deciding whether to apply judicial estoppel in connection with the omission on the schedules:
      1. Debtor's level of sophistication
      2. Explanation for the omission
      3. Whether the nondisclosure on the schedules was subsequently corrected and under what circumstances was the omission corrected

4. Whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures
5. Whether the plaintiff identified other lawsuits to which he was party
6. Whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures
7. Any action taken by the bankruptcy court concerning the nondisclosure.

ii. The *Slater* Court made a point to mention that the above factors are not exhaustive and other factors may be relevant depending on the particular facts of each case.

iii. Prior to *Slater,* the 11th Circuit precedent was such that the courts were permitted to draw an inference of an intention to manipulate the judicial system when a debtor made an omission on the schedules because the debtor stood to benefit from non-disclosure.

iv. The Court in *Slater* held that a voluntary disclosure alone does not result in a categorical application of judicial estoppel.

d. Application to Foreclosure

i. *In re Failla* 838 F.3d 1170 (11th. Cir. 2016) – general holding is that a debtor who elects to surrender property through a statement of intentions is barred from later defending a foreclosure proceeding as the act of defending the foreclosure is inconsistent with the act of surrender.

1. "Surrender" does not require that the debtor accede possession or turnover the property immediately, but it does prevent the debtor from taking any overt act to frustrate the creditor's efforts to foreclose its lien in state court
2. Decided in the context of a chapter 7 – see *In re Metzler,* 530 B.R. 894 (M.D. Fla 2015) for analysis in the chapter 13 context.

ii. Post-*Failla* decisions

1. *Jones v. CitiMortgage, Inc.,* 666 F. App'x 766, (11th Cir. 2016) – Stands for the proposition that unless a debtor enters into a

reaffirmation agreement or redeems the property, the debtor cannot retain the property in a subsequent foreclosure proceeding.

2. *In re Kurzban*, 2017 WL 3141915 (Bankr. S.D. Fla. 2017) holding that a debtor's decision to surrender does not last in perpetuity where the Court declined to apply judicial estoppel where subsequent to surrendering the property in bankruptcy, the lender and debtor entered into negotiations for a loan modification and lender elected to dismiss its foreclosure proceeding
3. *In re Thomas*, 2017 WL 3309719 (Bankr. S.D. Fla. 2017) holding that by surrendering property in bankruptcy, a debtor is not waiving his or her right to contest the creditor's standing to foreclosure, however, that is the only defense available after surrender.
4. *In re Ayala*, 568 B.R. 870, (Bankr. M.D. Fla. 2017): holding that cause did not exist to reopen a five year old chapter 7 case on motion by creditor who was seeking to compel a debtor to surrender the property

iii. Practical considerations

1. Where should collateral estoppel be raised?
2. What is the mechanism for enforcing a surrender?
3. Is an Evidentiary Hearing required?

V. Rooker Feldman Doctrine

a. Generally

i. Separation of powers doctrine" federal courts cannot act in an appellate capacity with respect to state court judgments. A Bankruptcy Court lacks subject matter jurisdiction to review a state court judgment, as it only has original jurisdiction and not appellate jurisdiction. the Supreme Court of the United States is the only federal court with appellate jurisdiction over a state court judgment

ii. Because Rooker-Feldman doctrine is jurisdictional, it cannot be waived and there are no equitable exceptions, unlike the other preclusion doctrines

b. Elements
    i. Identities of the parties
    ii. The prior state court ruling was a final judgment on the merits
    iii. The party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceeding
    iv. The issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment.
        1. "A claim is inextricably intertwined if it would effectively nullify the state court judgment, ... or it succeeds only to the extent that the state court wrongly decided the issues." *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009)
c. The Rooker-Feldman doctrine applies even when the state court judgment was entered in clear error. See *Waisome v. JP Morgan Chase Bank NA*, 2017 WL 3446755 (11th Cir. 2017)
d. Automatic stay litigation: because state courts and bankruptcy courts have concurrent jurisdiction to determine the applicability of the automatic stay, a state court judgment, in which the application of the automatic stay was at issue, can be given preclusive effect under Rooker-Feldman – *In re Glass*, 240 B.R. 782, (Bankr. M.D. Fla. 1999)
e. Limits
    i. A judgment that is void ab initio is not given preclusive effect. *Id.*
    ii. Rooker-Feldman only deprives federal court of jurisdiction if the state court action has finally concluded. *Nicholson v. Shafe*, 558 F.3d 1266, 1275 (11th Cir. 2009).

Third Party Releases – Free, Free Set them Free[1]

Materials prepared by Richard Johnston, Jr.

The Genesis. This concept took root in the mass tort cases of the 1980s and beyond where releases of insurers of the Debtor's product liability claims were the lynchpin to a successful plan. The essential element of those plans was to compensate current and later creditors while insulating the source of the settlement funds from endless contribution or subrogation claims. *See e.g. A.H. Robins v. Piccinin,* 788 F.2d 994 (4th Cir. 1986)(Dalkon Shield Litigation) and *Class Five Nev. Claimants v. Dow Corning Corp.,* 280 F.3d 648, 658 (6th Cir. 2002) (Silicone implant litigation).

Later insider creditors who were liable to corporate creditors under personal guarantees but who had resources to fund a corporate reorganization sought refuge from the guaranty claims in the arms of the corporate Debtor's bankruptcy case. *In re Master Mortgage Investment Fund, Inc.,* 168 B.R. 930(W.D. Miss. 1994)("Master Mortgage"). Thus arose the jurisprudence of nonconsensual, third party releases in bankruptcy cases.

Although many cases describe the limited and rare circumstances where a bankruptcy court will consider a third party or non-debtor release as part of a confirmed Chapter 11 plan[2], the recent 11th Circuit opinion restates the positions of the circuits, the genesis of third party releases in the 11th Circuit and requisites for approving a third party releases. In *SE Property Holdings, LLC v. Seaside Engineering & Surveying,* 780 F.3d 1070 (11th Cir. 2015) the court after careful review sought to provide guidance to the Circuit's bankruptcy courts on the 'significant' issue of issuing non-consensual, non-debtor releases or bar orders and the circumstances under which such bar orders might be appropriate. *Id.* at 1074.

The Court first noted that it had previously authorized a third party release in *In re Munford, 97 F.3d 449 (11th Cir.1996).* In *Munford,* the court protected a settling defendant from the indemnity or contribution claims of the non-settling defendants. The protective injunction was integral to the settlement of the pending adversary proceeding. Unlike *Munford,* the *Seaside* releases prevented claims against non-debtors who were related to the debtor where the claims would undermine the operations, and doom the success of, the reorganized debtor.

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[1] From the 1985 album 'The Dream of the Blue Turtles" by Sting a/k/a Gordon Sumner.

[2] *See e.g. In re Transit Group, Inc.,,* 286 B.R. 811(Bankr. M.D. Fla 2002) and *In re HWA Properties, Inc.*, 544 B.R. 231 (Bankr. M.D. Fla. 2016).

Minority View. The 11th Circuit then traced the positions of its sister courts. It noted that the Fifth, Ninth and Tenth Circuits were in the minority[3]. Those court refused to recognize third party, non-consensual releases largely upon the authority of Section 524(e) of the Bankruptcy Code, which states that 'discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Majority View. The majority of circuits hold that under certain circumstances that such non-consensual releases are permitted. Those circuits are the Second, Third, Fourth, Sixth and Seventh Circuits along with the First, Eleventh and D.C. Circuits that identified as 'pro-release circuits'.[4] The majority view utilizes Section 105(a) of the Bankruptcy Code along with other Code provisions to authorize a non-debtor release. Also the majority courts note that Section 524(e) does not preclude a third party release from creditor claims. *Id.* at 1078.

The majority view is clear. The bar orders are reserved for unusual cases where such an order is essential to the success of the reorganization. The order must be fair and equitable. The inquiry in measuring the need for the order is 'fact intensive in the extreme'. *Id.* at 1078-1079. The majority cases all employ the so-called Dow Corning Factors in measuring whether to impose a third party release or bar. For ease of reference, those factors are:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or

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[3] With respect to the Ninth Circuit,: *In re Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995)*, cert. denied, *517 U.S. 1243, 116 S. Ct. 2497, 135 L. Ed. 2d 189 (1996)*, and *In re American Hardwoods, Inc., 885 F.2d 621, 625-26 (9th Cir. 1989)*. With respect to the Tenth Circuit; *In re Western Real Estate Fund, Inc., 922 F.2d 592, 601 (10th Cir. 1990)*. With respect to the Fifth Circuit, *In re Vitro SAB De CV, 701 F.3d 1031, 1061 (2012)*,

[4] *See e.g.* as to the Second Circuit: *In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992)*; as to the Third Circuit: *In re Continental Airlines, 203 F.3d 203, 214 (3d Cir. 2000)*; as to the Fourth Circuit: *In re A.H. Robins Co., Inc., 880 F.2d 694, 700-02 (4th Cir. 1989)*; as to the Sixth Circuit: *In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002)*; and as to the Seventh Circuit: *In re Airadigm Communications, Inc., 519 F.3d 640, 655-58 (7th Cir. 2008)*. *See also,* as to the Eleventh Circuit: *In re Munford, Inc., 97 F.3d 449 (11th Cir. 1996)*; as to the First Circuit: *In re Monarch Life Ins. Co., 65 F.3d 973, 984-85 (1st Cir. 1995)*; and as to the D.C. Circuit: *In re AOV Industries, 792 F.2d 1140, 1152, 253 U.S. App. D.C. 186 (D.C. Cir. 1986)*.

contribution claims against the debtor;

(4) The impacted class, or classes, has overwhelmingly voted to accept the plan;

(5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;

(6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and

(7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Although all of the factors are important, three factors seem to recur when the bar order is entered. Substantial contribution by the released party; substantial or full recovery by the releasing party; and overwhelming approval of the plan by the class giving the release.

The Eleventh Circuit in Seaside also engrafted the 'fair and equitable' requirement of *Munford* in approving the release. The court noted that the parties in *Seaside* had been engaged in a litigation "death struggle" and the release was intended to break that struggle. The bankruptcy court also required that the debtor cease litigation of its claims against the releasing party – thus preventing 'asymmetrical benefit' to one party *Id.* at 1081.

Finally the 11th Circuit in *Seaside* reviewed the 'good faith' of the plan including the release provisions. In particular it measured the realistic possibility of reorganization including achieving a result consistent with the purposes of the Code. The Court looked at benefits to others beside the debtor's insiders including its non-shareholder employees; its customers and its creditors (other than the releasing creditor). It discounted the dissatisfaction of one creditor (out of many) in finding good faith under the plan.

Does *Stern* Bar the Bar Order – Bankruptcy Courts in two recent cases have considered their constitutional authority regarding the entry of a confirmation order containing a non-consensual, third party release.

The court in *In re SunEdison, Inc,* 2017 Bankr. LEXIS 3864, n.5, confirmed a Chapter 11 plan containing a broad third-party release but *sua sponte* reserved ruling on the issue of whether that release should be approved. One of the issues raised by the Court in considering the release was whether it had constitutional authority under *Stern v. Marshall,* 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed. 2d 475 (2011) to approve the release. The Bankruptcy Court noted that the Second Circuit had interpreted *Stern* narrowly and limited the ruling to its facts but then declined to resolve the issue based upon its decision to withhold approval of the release on separate grounds.

Judge Silverstein's decision in *In re Millennium Lab Holdings II, LLC,* 575 B.R. 252 (Bankr. D. Del. 2017) contains a masterful and detailed analysis of bankruptcy court jurisdiction and constitutional authority in the context of confirming a plan containing a third party release. The

opinion was written in response to a district court question clarifying the Bankruptcy Court's constitutional adjudicatory authority to approve the nonconsensual release. Judge Silverstein explored bankruptcy jurisdiction under 28 U.S.C. §§ 157 and 1334 as interpreted by the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line, Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) and its progeny, including *Stern*. The analysis of both jurisdiction and constitutional authority was detailed and nuanced. The opinion conclusively demonstrated that a Bankruptcy Court has both subject matter jurisdiction and the requisite constitutional authority under *Stern* to confirm a Chapter 11 plan containing a third party release that impacts released parties' rights.

Consensual Bar Orders – Assuming that a debtor cannot satisfy the *Dow Corning* factors which would support entry of a non-consensual, third party release, the Bankruptcy Court can nonetheless approve releases with the consent of the releasing parties. The thorny issue is whether the consent must be express or can be implied from a failure to object or opt out of the release provision.

The *SunEdison* Court applied contract principals in determining consent to a release. The court found that consent can be either express or manifested by conduct. So an affirmative vote on a plan would be express consent. The Court further stated that consent through silence or inaction is problematic because absent a duty to speak, silence is not constitute consent. Therefore a non-voting, non-objecting creditor could not be deemed to have consented to a release in a plan. *See also, In re Washington Mutual, Inc.*, 442 B.R. 355 (Bankr. D. Del. 2011) (failure to return a ballot is not a sufficient manifestation of consent).

Compare that analysis with the holding of *In re Neogenix Oncology, Inc.*, 508 B.R. 345 (Bankr. D. Md. 2014) which initially withheld a finding of implied consent based upon the creditors' abstention from voting or opting out because there was no conspicuous disclosure of the release provision on the face of the ballot. *See In re DBSD North America, Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009). Based upon that ruling, the plan proponent and equity committee sought approval of supplemental solicitation procedures including: amendment of the ballots to add an opt-out of the release to a specific class of creditors and detailed notice to creditors describing the ramifications of their vote or failure to return the supplemental ballot. *See In re Neogenix Oncology, Inc.*, 2015 Bankr. LEXIS 3343 (Bankr. D. Md. 2015). The *Neogenix* court focused on the sufficiency of the notice given to the voting interest holders. [5] Given the divergence of opinions, this issue of implied consent will continue to impact plans containing release clauses.

Another Basis for Litigation Preclusion – the All Writs Act – it's Fundamental

The majority of cases allowing imposition of bar orders through a plan utilize Section 105(a) of the Bankruptcy Code as the jurisdictional basis for barring further litigation. Section 105(a) authorizes Bankruptcy Courts to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. However in the context of complex litigation some elements of the litigation may have an insufficient nexus to the

[5] See *I "Noticed" You want a Third-Party Release,* Roy M. Terry, Jr. and Thomas J. McKee, Jr., ABI Journal, November 2016

bankruptcy case, and therefore the Bankruptcy Code, which would limit the scope or effectiveness of a bar order entered pursuant to Section 105.

The Twin Statutes. In addition to Section 105 of the Bankruptcy Code, the Bankruptcy Court has authority to issue injunctive relief under the All Writs Act, 28 U.S.C. §1651(a) tempered by the Anti-Injunction Act, 28 U.S.C. §2283. The 11th Circuit discussed the operation of these tandem statutes:

> The Anti-Injunction Act serves as a check on the broad authority recognized by the All Writs Act. It prohibits federal courts from utilizing that authority to stay proceedings in state court unless the requirements of one of three narrow exceptions are met. Under the Anti-Injunction Act, an injunction halting a state court proceeding is inappropriate, "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. The All Writs Act and the Anti-Injunction Act are closely related, and where an injunction is justified under one of the exceptions to the latter a court is generally empowered to grant the injunction under the former. Thus, in assessing the propriety of an injunction entered to stop a state court proceeding, the sole relevant inquiry is whether the injunction qualifies for one of the exceptions to the Anti-Injunction Act. *(citations omitted). Burr & Forman v. Blair,* 470 F.3d 1019, 1027-1028 (11th Cir. 2006).

All Writs Application. An example of the application of the All Writs Act in the context of protecting a bankruptcy settlement is found in Judge Williamson's decision, *Estate of Jackson v. GE Capital Corp. (In re Fundamental Long Term Care, Inc.),* 527 B.R. 497 (Bankr. M.D. Fla. 2015) aff'd 873 F.3d 1325 (11th Cir. 2017) (C.J. Williamson)(Fundamental I). This decision was the culmination of more than a decade of litigation in several state and federal venues. It began when the estates of several deceased nursing-home patients (the "Estates") brought a series of wrongful-death suits against a network of nursing homes. These suits collectively resulted in $1 billion in empty-chair judgments against the network. In an effort to evade enforcement of these and other liabilities, the defendant entities orchestrated a so-called "bust out" scheme under which they transferred the useful assets of the nursing-home business into a newly formed operating entity, leaving the core judgment debtor a judgment-proof shell company. When the Estates learned that this judgment debtor had been stripped of its assets, they filed an involuntary Chapter Seven bankruptcy petition in the Middle District of Florida and initiated an adversary proceeding seeking to avoid, as fraudulent, the transfer of the debtor's assets. The complaint named seventeen entities and individuals as defendants and described a wide-reaching scheme in which assets were secretly diverted in order to hinder, delay, and defraud the debtor's various judgment creditors. One of the individual defendants was Rubin Schron.

After granting the Estates an opportunity to comprehensively amend their lengthy initial complaint—the bankruptcy court dismissed Schron from the suit, concluding that his alleged connection with the transaction was speculative at best. Claims against several additional defendants survived dismissal, and the case culminated in a twelve-day bench trial. At its

conclusion, the Estates settled with the remaining defendants for $24 million. The bankruptcy court approved the settlement as fair and equitable on the condition that the Estates be permanently enjoined from pursuing any additional claims arising from the bust-out scheme against Schron individually. The Bankruptcy Court found that the permanent injunction was 'justified' under the All Writs Act.

The 11th Circuit upheld the injunction, including certain future state court actions, under the All Writs Act. The 11th Circuit adopted the Bankruptcy Court analysis and found that so long as an All Writs injunction falls within one of the Anti-Injunction Act's exceptions, then it is authorized under the All Writs Act. *Id. at 1338.* The 11th Circuit upheld the Bankruptcy Court's finding that the second and third Anti-Injunction Act's exceptions applied to the Fundamental injunction. The second exception is that the injunction was necessary to aid in the Bankruptcy Court's jurisdiction. The third exception was that the injunction was needed to protect or effectuate its judgments (i.e. the dismissal of Shron and the orders approving the settlement between the remaining parties) or the so-called relitigation exception. The 11th Circuit found that this exception is designed to implement claim and issue preclusion. The relitigation exception is limited to issues which were actually litigated. So the injunction was necessary aid to the Bankruptcy Court's jurisdiction in order to protect the parties from certain 'potential claims' which could be made in the state courts.

Finally the 11th Circuit, citing its decision in *Battle v. Liberty National Life Insurance Co.,* 877 F.2d 877, 880-3(11th Cir. 1989), found that the All Writs injunction was issued as part of a settlement of complex and time consuming litigation and presumptively satisfied the second Anti Injunction exception. The necessity of the All Writs injunction in preserving the comprehensive resolution through the settlement underscores that it was entered in furtherance of the bankruptcy court's jurisdiction.

Co-Debtor Stays – Should I Stay or Should I Go?[6]

No debtor would dispute the salutary effects of the automatic stay pursuant to Section 362(a) of the Bankruptcy Code. The stay provides the debtor with relief from the pressure and harassment of creditors seeking to collect their claims. It protects property that may be necessary for the debtor's fresh start and, in terms of a debtor in a chapter 11, 12 or 13 case, provides breathing space to permit the debtor to focus on rehabilitation or reorganization. In addition, the stay provides creditors with protection by preventing the dismemberment of a debtor's assets by individual creditors levying on the property. 3 Collier on Bankruptcy, ¶362.03. It is particularly beneficial in stemming legal proceedings against the debtor. In general, however, the stay inures only to the debtor's benefit. *Id. See McCartney v. Integra National Bank North,* 106 F.3d 506, 509-10 (3rd Cir. 1997)(explaining that it is 'universally acknowledged that an automatic stay of proceedings accorded by §362(a) may not be invoked by entities such as sureties, guarantors, co-obligors or others with a similar legal or factual nexus to the debtor")(*citations omitted).*

[6] Hit single from the 1982 album 'Combat Rock' performed by The Clash.

Statutory Protections – Chapters 12 and 13. Co-debtor protection is available under the Bankruptcy Code in certain limited circumstances. A creditor may not act or commence or continue any collection action to collect all or any part of a consumer debt from a co-debtor in a Chapter 12 family farm case or Chapter 13 individual debt adjustment case. The stay continues until the closure, dismissal or conversion of the case to a case under Chapter 7 or 11. There are exclusions to this stay for business debts incurred in the ordinary course of the co-debtor's business. Also special stay relief provisions for debts which are not to be paid in the Chapter 12 or 13 plan.

Chapter 11 Co-Debtor Stays – the Power of §105(a). The typical Chapter 11 stay is sought by a corporate debtor's insider (shareholder/member/officer/director) who has guaranteed some or all of the corporate debt. Usually this individual will be a key officer or director who is going to be operating or managing the debtor through the Chapter 11 process. The statutory predicate for a Chapter 11 co-debtor stay is Section 105(a) of the Bankruptcy Code. The 'necessary and appropriate' orders to carry out the provisions of the Bankruptcy Code include the issuance of preliminary or permanent injunctions. *See, In re Kasual Kreation, Inc.* 54 B.R. 915 (Bankr. M.D. Fla. 1985).

It is commonly recognized that a bankruptcy court may enjoin a party from proceeding against parties other than the debtor in appropriate circumstances. *Lahman Manufacturing Company v. First National Bank of Aberdeen (In re Lahman Manufacturing Company)*, 33 B.R. 681 (Bankr. S.D. 1983) *citing In re Otero Mills, Inc.*, 21 B.R. 777 (Bankr.N.M. 1982) *aff'd.* 25 B.R. 1018 (D.C.N.M. 1982). The jurisdictional test is whether the failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally pressure the debtor through a third party. Such injunctions are common when court proceedings against a non-debtor party would have a negative impact on the debtor's case. *Id.; GAF Corp. v. Johns-Manville Corp.*, 26 B.R. 405 (Bankr. S.D.N.Y. 1983).

Injunction Requirements. The courts in the Middle District of Florida recognize the use of Section 105 to impose an injunction protecting non-debtors such as guarantors or key officers of a debtor corporation from collection efforts. *In re Steven P. Nelson, DC, P.A.*, 140 B.R. 814, 816 (Bankr. M.D. Fla 1992). The stay is imposed via injunction pursuant to Rule 7065, Federal Rules of Bankruptcy Procedure. A co-debtor must show with the requisite degree of proof: (1) substantial likelihood of success on the merits; (2) that the movant will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs any damage the injunction may cause the opposing party; and (4) that the injunction would not adversely affect the public interest. *Id. citing Zardui-Quintana v. Richard,* 768 F.2d 1213 (11th Cir. 1985).

Irreparable Harm. Although a stay of litigation against a non-debtor guarantor is the exception and not the rule, bankruptcy courts have found 'unusual circumstances' (equating to irreparable harm) sufficient to justify entry of a preliminary injunction staying litigation against a non-debtor in three circumstances. First where there is such identity between the debtor and the third party such that the debtor is essentially the real party defendant so that a judgment against the third party will, in effect, be a judgment or finding against the debtor. *McCarney, supra.* Second where actions against the non-debtor threaten the funding source for a plan or are impairing

credit rating which will play a significant and meaningful role in the debtor's reorganization. *In re Regency Realty Associates,* 179 B.R. 717, 719 (Bankr. M.D. Fla. 1995) and *In re St. Petersburg Hotel Associates, Ltd.,* 37 B.R. 380 (Bankr. M.D. Fla. 1984). Third, when the non-debtor is a 'key person' and should be protected from lawsuits in order to devote full time and energy to the debtor's affairs. *Nelson, supra,* and *In re Ionosphere Clubs, Inc.,* 111 B.R. 423, 435 (Bankr. S.D.N.Y. 1990)(protecting Frank Lorenzo, chairman of the debtor's board).

Substantial Likelihood of Success. Generally the likelihood of a successful reorganization. *See In re Lazarus Burman Associates,* 161 B.R. 891 (Bankr. E.D.N.Y. 1993). However this element may be satisfied in the early stages of a Ch. 11 if there is nothing in the record which demonstrates that the debtor will be unable to reorganize. *Nelson, supra.*

Co-Debtor Stay in Chapter 7. In very rare cases, bankruptcy courts have imposed co-debtor stays in favor of non-debtor in Chapter 7 liquidation.

The court in *In re Archambault,* 174 B.R. 923 (Bankr. W.D. Mich. 1994), a Chapter 7 debtor sought injunctive protection for his wife from a creditor's prosecution of a state law claim against the debtor, his wife and his business. The debtor's wife had been dismissed with prejudice pre-petition in a prior action brought by the same creditor. The court found that allowing the state court action to go forward would adversely or detrimentally influence and pressure the debtor through his wife. The creditor should not be allowed to do indirectly what he cannot do directly. The threatened state court action was manifest bad faith by the creditor because he had no facts to support the claim against the debtor's wife – it was a spite suit. The court found it was an 'end run' around the automatic stay. Also it was duplicative of two adversary proceedings the creditor had filed in the bankruptcy court. The stay/injunction was temporary until the adversary proceedings were decided – which could end all of the litigation.

In *In re Chiron Equities, LLC,* 552 B.R. 674 (Bankr. S.D. Tex. 2016) the bankruptcy court used both Section 105 and the All Writs Act to enjoin the actions of one of two shareholders of the debtor from prosecuting causes of action which had been sold by the trustee in the bankruptcy case.. The purchaser of the claims was the other shareholder's wife's trust (called the Gobsmack Trust). The court found that to preserve its sale order it could use the All Writs Act and the second exception of the Anti-Injunction Act to protect its jurisdiction and the sale order by enjoining the adverse state litigation. Using similar analysis it utilized Section 105(a) of the Code to protect the sale order and enjoined the shareholder's state court action.

Exceptions to the Automatic Stay for Landlords

By Catherine Peek McEwen

Residential

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added two procedurally complicated landlord-friendly exceptions to the automatic stay aimed at curbing abusive filings by residential tenants. The two exceptions are found in 11 U.S.C. § 362(b)(22), (23) as supplemented by § 362(l) [lower case "L"] and (m), permitting debtors a brief — or sometimes even permanent — reprieve from the exceptions.

One addition, § 362(b)(22), applies to landlords who have a prepetition judgment of possession, and the other, § 362(b)(23) , applies to a landlord who has a right to evict based on endangerment of the property or use of controlled substances on the property. The § 362(b)(22) exception is basically self-executing unless the debtor invokes a procedure (described below) or contrives a technical noncompliance to delay the exception. The § 362(b)(23) exception is not self-executing; the landlord must file a paper to invoke the exception. The procedures prescribed in §362(l) and (m) can require a hearing within ten days of the filing of these papers.

§362(b)(22) — Prepetition Eviction Judgment

Section 362(b)(22) excepts from the stay residential eviction actions in which the landlord has received a "judgment of possession" prepetition. Some courts have concluded that the judgment must be a final, nonappealable judgment. *See In re Lewis, Jr.*, Case no. 8:16-bk-07166-RCT, Doc. 25 (Bankr. M.D. Fla. Sept. 4, 2016) ("Courts interpreting [§ 362(b)(22)] have ruled that a judgment for possession must be final to trigger the exception to the automatic stay set forth in § 362(b)(22).") (internal citations omitted). However, the statute does not say "final," and, arguably, the question could turn on whether the effect of the judgment was stayed under nonbankruptcy law and procedural rules as of the time the bankruptcy case is filed.

Under § 362(l), the debtor may obtain a 30-day delay to the effectiveness of the exception provided in § 362(b)(22) if the debtor files with the debtor's petition and serves on the landlord a certification under penalty of perjury that (i) under

applicable nonbankruptcy law the debtor has a right "to cure the entire monetary default giving rise to the judgment of possession," after the judgment was entered, and (ii) the rent that will accrue during the first 30 days of the case has been deposited with the clerk of the bankruptcy court. 11 U.S.C. § 362(l)(1).

The debtor may get further, and perhaps permanent, relief from the exception if the debtor:

(i) does what is required to get the 30-day reprieve,

(ii) has actually deposited the first 30 days' rent, and

(iii) files and serves on the landlord within the first 30 days of the case a second certification under penalty of perjury indicating the monetary default giving rise to the judgment for possession has been cured.

If the debtor does all of those things, then the exception under § 362(b)(22) does not apply unless ordered by the court. 11 U.S.C. § 362(l)(2).

Assuming the debtor does what is necessary to get beyond the 30-day reprieve, the landlord is not without a remedy. The landlord may counter either of the debtor's first two certifications with an objection, which must be heard within ten days. 11 U.S.C. § 362(l)(3)(A). If the court sustains the objection, finding the debtor's certifications not to be truthful, the exception of § 362(b)(22) applies and permits the landlord to continue with the eviction. 11 U.S.C. § 362(l)(3)(B)(i). The clerk of the bankruptcy court must immediately serve a certified copy of the court's order on the landlord and debtor. 11 U.S.C. § 362(l)(3)(B)(ii).

If the debtor does not file an initial certification to get a 30-day reprieve from the operation of § 362(b)(22), may the landlord proceed as if § 362(b)(22) applies as an exception to the stay? One would think so. Yet the condition for immediate application of this exception also requires the debtor to have first affirmatively disclosed on the petition the existence of the judgment of possession and the landlord's contact information. If the debtor does so and also fails to trigger the 30-day reprieve with the filing of a certification along with the petition, the clerk of the bankruptcy court must immediately serve on the landlord and debtor a certified copy of the docket demonstrating the absence of a certification by the debtor and the applicability of the exception under § 362(b)(22). 11 U.S.C. § 362(l)(4). However, if the debtor fails to honestly fill out the petition's segment concerning the existence of the judgment of possession, the literal reading of §

362(l)(4) may require the landlord to seek relief from the stay rather than rely on the exception of § 362(b)(22) in going forward with the eviction action.

Lest debtors' counsel rely on this technical tactic to buy more time, know that courts have sanctioned attorneys directly (by awarding fees to the landlord's counsel) for failing to disclose the existence of the judgment, citing the noncompliance as a delay to the landlord's ability to confirm the existence of the exception. *See, e.g., In re Plumeri*, 2010 WL 3087685 (Bankr. S.D.N.Y. March 25, 2010), *aff'd*, 434 B.R. 315 (S.D.N.Y. 2010); *In re Green*, 422 B.R. 469 (Bankr. S.D.N.Y. 2010). And another court, describing § 362(b)(22) and § 362(l) together as the "automatic, swift, and immediate mechanism that is meant to provide a quick and easy remedy for landlords," similarly shifted the landlord's expenses to the debtor when she failed to disclose the judgment for possession from the outset. *In re Sweetenburg*, 2012 WL 1835517 *3 (Bankr. W.D.N.C. May 18, 2012). The court there noted that although the Bankruptcy Code requires a debtor to make disclosure of the judgment, it "does not address the situation where a debtor . . . does not reveal the judgment." *Id.* Expressing dismay that the debtor "should not be entitled to more protection for her failure to make the disclosure or otherwise comply with the duties of certification and deposit of rent," the court concluded that, "yet that is what occurred in this case." *Id.* at *4. The court's remedy was to require the debtor to reimburse the landlord for fees that ought not to have been incurred. *Id.*

As a practical matter, residential landlords in Florida who have obtained a prepetition judgment of possession should not be delayed by the debtor's resort to § 362(l) certifications because that subsection requires the initial certification to include a statement that a debtor in Florida typically cannot make: that the monetary default giving rise to the judgment for possession can be cured. In Florida, once a judgment for possession is entered, there is no claw-back for the tenant. An exception might occur if, *by agreement of the parties*, the court enters a post-judgment order withholding execution pending completion or default on a repayment agreement. In that event, it might be more efficient and likely less expensive for a landlord to seek stay relief the good old fashioned way, by seeking stay relief for cause under § 362(d)(1), which is granted on negative notice in the Middle District of Florida.

If faced with a debtor the likes of those in *Green*, *Plumeri*, and *Sweetenburg*, landlord's counsel might raise a creative, yet plausible argument to defeat the notion that the stay exception's effectiveness is necessarily dependent on the technical prerequisite of the debtor's disclosure of the judgment, even when the

non-disclosure is a result of gamesmanship aimed at prolonging the stay undeservedly. Perhaps the *Sweetenburg* court's identification of a hole in the statute would justify use of 11 U.S.C. § 105's power?

Section 362(b)(23) — Endangerment and Drugs

Under § 362(b)(23), a residential landlord's action to evict a tenant who has endangered the leased property or illegally used controlled substances thereon is not stayed, but this exception is not self-executing, not immediate, and, as with its § 362(b)(22) counterpart, is subject to a delay attempt by the debtor.

To obtain the exception, the landlord must file and serve on the debtor a certification under penalty of perjury that such an eviction action has been filed or that the debtor endangered the property or illegally used controlled substances within the 30-day period before the petition date. 11 U.S.C. § 362(23). Thereafter, once the landlord files the certificate, the exception to the stay kicks in 15 days later to permit the landlord to kick out (figuratively speaking, of course) the debtor, 11 U.S.C. § 362(m)(1), *unless* the debtor goes on the offensive.

If the debtor files and serves on the landlord an objection to the truth or "legal sufficiency" of the landlord's certification (which objection must be filed within 15 days of the landlord's filing under § 362(m)(3)), the stay does not go into effect unless ordered by the court. 11 U.S.C. § 362(m)(2)(A). The court must thereafter hold a hearing within ten days. 11 U.S.C. § 362(m)(2)(B).

If the court finds that the offending conduct either did not exist or has been remedied (how does one unwind illegal use of controlled substances?), the stay remains in effect. 11 U.S.C. § 362(m)(2)(C). If the court finds for the landlord, the landlord may proceed with the eviction, and the clerk of the bankruptcy court is required to immediately serve a certified copy of the court's order on the landlord and debtor. 11 U.S.C. § 362(m)(2)(D)(i),(ii).

If the debtor does not challenge the landlord's certification within the 15-day period to do so, the exception applies, and the clerk of the bankruptcy court is required to immediately serve on the landlord and debtor a certified copy of the docket indicating the absence of a filing by the debtor. 11 U.S.C. § 362(m)(3)(A),(B).

Nonresidential

Commercial landlords get some relief, albeit limited, from the automatic stay, too, courtesy of The Bankruptcy Amendments and Federal Judgeship Act of 1984. If a nonresidential lease has "terminated by the expiration of the stated term of the lease" either before or during the bankruptcy case, 11 U.S.C. § 362(b)(10) provides an exception to the stay for any act to obtain possession of the property. *Cf.*, 11 U.S.C. § 541(b) (debtor's interest is not property of the estate if the lease expires prepetition and ceases to be estate property if the lease expires during the case).

Notice that a termination short of the stated term, such as a landlord's accepting the keys upon the tenant's vacating the property before the term expires, does not trigger the exception. And mere possession is protected by the automatic stay. *In re R.E.B. & B., Inc.*, 200 B.R. 262 (Bankr. M.D. Fla. 1996).