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AUTOMATIC STAY PROVISIONS OF THE BANKRUPTCY ACT OF 1978

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INTRODUCTION***

In this article, the authors intend to provide guidance to New Mexico practitioners by discussing bankruptcy court decisions¹ which construed sections 361 and 362² of the Bankruptcy Code.³ To that end, the authors

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***On June 28, 1982, the United States Supreme Court held the grant of jurisdiction to bankruptcy judges in the Bankruptcy Act of 1978 unconstitutional. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982). While there is some disagreement over exactly which provisions of the law were invalidated by that opinion, the Judicial Conference of the United States issued a rule to be adopted by local federal courts which it believes will solve the jurisdiction infirmity until Congress enacts remedial legislation or until March 31, 1984 (the end of the so-called transition period), whichever comes first. The New Mexico Federal District Judges adopted that rule as N.M. Fed. Dist. Ct. R. 31 (as amended), effective December 25, 1982. While the rule affects the bankruptcy court in very substantial ways, the basic workings of the automatic stay (and thus this article) are unaffected by the Rule.

Serious discussion of the jurisdiction problem and Rule 31 would require a separate article. The authors have noted one textual reference which they believe may have been brought into question by the *Marathon* decision. Any other doubtful sections were deleted. It is the authors' speculation and expectation that construction of the Rule or enactment of legislation to remedy the jurisdictional problem will not affect the automatic stay provisions of the Bankruptcy Code.

1. The authors have cited appropriate published New Mexico decisions where available; however, many New Mexico decisions are unpublished and are not easily retrievable. Therefore, the authors have also cited opinions from other jurisdictions which are in accord with New Mexico decisions and practices. The authors also frequently cite legislative history because it is a useful tool in construing this relatively new statute. Even when the legislative history is entirely clear, however, reliance on such history is no substitute for reading the statute. See, e.g., the conflict between the text of 11 U.S.C. § 303(h) (Supp. V 1981), and its legislative history.

2. 11 U.S.C. § 361 (Supp. V 1981) provides as follows:

When adequate protection is required under section 362, 363, or 364 of this title [11 U.S.C. § 362, 363, or 364] of an interest of an entity in property, such adequate protection may be provided by—

- (1) requiring the trustee to make periodic cash payments to such entity, to the extent that the stay under section 362 or this title [11 U.S.C. § 362], use, sale, or lease under section 363 of this title [11 U.S.C. § 363], or any grant of a lien under section 364 of this title [11 U.S.C. § 364] results in a decrease in the value of such entity's interest in such property;
- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
- (3) granting such other relief, other than entitling such entity to compen-

sation allowable under section 503(b)(1) of this title [11 U.S.C. § 503(b)(1)] as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 362 (Supp. V 1981) provides as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 U.S.C. § 301, 302, or 303] 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 proceeding against the debtor that was or could have been commenced before the commencement of the case under this title [11 U.S.C. §§ 1 et seq.], or to recover a claim against the debtor that arose before the commencement of the case under this title [11 U.S.C. §§ 1 et seq.];

(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 [11 U.S.C. §§ 1 et seq.];

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(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 [11 U.S.C. §§ 1 et seq.];

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title [11 U.S.C. §§ 1 et seq.];

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title [11 U.S.C. §§ 1 et seq.] against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title [11 U.S.C. § 301, 302, or 303] does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 U.S.C. § 546(b)];

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing

Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; and

(C) if the case is a case under chapter 7 of this title [11 U.S.C. §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, or 13 of this title [11 U.S.C. §§ 901 et seq., 1101 et seq., or 1301 et seq.], the time a discharge is granted or denied.

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

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

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

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

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

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any action against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing—

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

3. 11 U.S.C. §§ 101 to 151326 (Supp. V 1981) [hereinafter referred to as "the Code"]. Pursuant to 11 U.S.C. § 103 (Supp. V 1981), the Code sections with numbers 100, 300, or 500 are generally applicable throughout the Code. Sections with numbers of 700 are applicable only to Chapter 7, which deals with liquidation; those with numbers of 1100 are applicable to Chapter 11, aptly titled Reorganization; and those in the 1300 series apply to what is now rather grandly titled "Adjustments of Debts of an Individual with Regular Income." The latter chapter used to be called merely "Wage Earner."

discuss the importance of the automatic stay provisions of the Code, explaining these provisions and their relationship to other Code provisions. Then, the article delineates which creditor actions are and are not stayed, as well as the duration of the stay. The authors follow with an explanation of relief from the stay. They set out other applicable powers of the bankruptcy court, the time limits within which it must render its decision, and the elements a creditor must prove in a hearing for relief from the stay. Finally, the authors examine the removal provisions and the penalties for violation of the stay.

The bankruptcy court is bound only to follow appellate decisions of its own circuit, and because of the relatively short time the Code has been in effect, these decisions are rare. Precedential value of decisions of coordinate courts is ordinarily limited, and their persuasiveness depends on the confidence one bankruptcy judge has in the views of another. Like the Bible, bankruptcy court decisions can be found to support any idiosyncratic view.⁴ The researcher must take care not to conclude too quickly that one case found in support of a particular point of view will be convincing to the court. Despite the lack of precedential value of bankruptcy court decisions, however, publication of them provides a useful forum for the exchange of ideas and elucidation of this recent and complex statute.

THE AUTOMATIC STAY

The automatic stay provisions of the Bankruptcy Code are among the most important in the Code.⁵ Once a petition in bankruptcy has been filed, the automatic stay of proceedings assures the debtor a breathing space in which to take stock of assets and assess liabilities free from the pressure of anxious creditors. The stay prevents piecemeal dismantling of the estate and guarantees creditors that no one in their same position will receive proportionately more return on an extension of credit than will they. Once the stay is in effect and the assets have been gathered, the trustee can begin the orderly distribution of the estate. The purpose

4. See, e.g., *Coleman Am. Cos. v. The Littleton Nat'l Bank* (*In re Coleman Am. Companies & Properties*), 8 Bankr. 384 (Bankr. D.Kan. 1981); *Griffith v. Realty Executives* (*In re Griffith*), 6 Bankr. 753 (Bankr. D.N.M. 1980). Both cases reached results contrary to those of almost all other courts on their respective issues.

5. Other articles on the automatic stay which might be of interest to the reader include Kennedy, *Automatic Stay Under the New Bankruptcy Law*, 12 Mich. J.L. Ref. 3 (1978); Martin, *Relief from Automatic Stay Under the Bankruptcy Code*, 9 Colo. Law. 1288 (1980); Comment, *Automatic Stay Under the 1978 Bankruptcy Code: An Equitable Roadblock to Secured Creditor Relief*, 17 San Diego L. Rev. 1113 (1980). See also Miller, *Bankruptcy Reform Act Bibliography*, 85 Com. L.J. 373 (1980).

of the stay is not to alter substantive rights of creditors, but merely to stay the exercise of these rights.⁶

A knowledge of the workings of the automatic stay is essential for persons concerned with enforcing a right against a debtor. On the positive side, certain actions against a debtor are not stayed and may proceed. The collection of alimony and child support are examples of such actions.⁷ On the other hand, the kinds of proceedings stayed are those which creditors usually use to obtain satisfaction for a debt, such as phone calls, demand letters, and filing of a suit. Employment of those kinds of procedures in violation of the stay could render both a creditor and the creditor's attorney liable for contempt.⁸

While it is true that courts do not hold parties in contempt for an unknowing violation of the automatic stay,⁹ and it is rare that attorneys knowingly proceed in the face of the stay, two untoward effects can result from an attorney's lack of understanding of the workings of the stay. The first is that attorneys conversant with the Bankruptcy Code can intimidate creditors with the spectre of the contempt powers of the bankruptcy court. Only someone who is familiar with the Code will know if such a threat is a bluff. The second and more important result is that any action taken in violation of the stay is void.¹⁰ At the very least, it is important to avoid wasting resources in taking action which at best has no effect.

Although one might assume that a debtor's attorney understands the Bankruptcy Code, it is unfortunately not true that the filing of a bankruptcy petition instills him or her with special knowledge of the Code. More and more attorneys with a general practice are finding some of their clients in need of the protection of the bankruptcy court.¹¹ To be of help to the client-debtor, an attorney should know what actions are not stayed, in order to be able to anticipate and plan for such eventualities. And of

6. See 11 U.S.C. § 363 (Supp. V 1981) [the "Adequate Protection" provisions]; H.R. Rep. No. 595, 95th Cong., 1st Sess. 340-2 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49-51 (1978). As a neat distinction, however, one might well ask whether a prohibition, however momentary in the enforcement of a right, does not "affect" the right.

7. 11 U.S.C. § 362(b)(2) (Supp. V 1981). See *supra* note 2.

8. For a discussion of violation of the automatic stay, see *infra* text accompanying notes 105-110.

9. See *infra* text accompanying notes 106-107.

10. See *infra* text accompanying note 105.

11. In the 12-month period ending March 31, 1982, 364,417 bankruptcy petitions and 127,118 adversary proceedings were filed nationwide. The pending bankruptcy case load rose to 677,460 estates, an increase of 20.9% over the previous 12-month period. Adversary proceedings rose 53.9%, resulting in an all-time record of 91,007 adversary proceedings pending. In New Mexico during the same period, 1329 voluntary petitions and 824 adversary proceedings were filed. Of the petitions, 1113 were in Chapter 7 (liquidation), 73 in Chapter 11 (business reorganization), and 143 in Chapter 13 (adjustment of debts). Administrative Office of the United States Courts Statistical Analysis and Reports Division, Federal Judicial Workload Statistics for the Twelve Month Period Ending March 31, 1982, at 18, A-55, A-56, A-57.

course, a clear understanding of what actions cannot be brought by creditors enables an attorney effectively to protect clients by enforcement of the stay.

AUTOMATIC STAY PROVISIONS OF THE CODE

The automatic stay goes into effect with the filing of the petition for relief. The effective date and notice of the stay are included in the notice of order for relief and order for creditors meeting sent by the clerk of the court to all creditors scheduled by the debtor in the petition.¹²

The automatic stay affects all property of the estate that is created by the commencement of a case under the Bankruptcy Code. Property of the estate receives an all-inclusive definition in the Code.¹³ Even exempt property comes into the estate, after which it can be exempted.¹⁴ While this article enumerates what makes up property of the estate, it should be noted that there are intricacies which the court might have to consider in determining exactly what is included in each category.¹⁵ For example, whether a non-debtor's one-half interest in an airplane could be sold, or whether it was property of the estate and thus subject to the automatic stay, was only one of these kinds of issues decided by the New Mexico Bankruptcy Court.¹⁶

Property of the estate includes all legal and equitable interests of the debtor in all kinds of property, tangible and intangible, including causes of action and property received by the trustee. Some examples of property of the estate are medical insurance proceeds,¹⁷ a liquor license,¹⁸ and rights created by a franchise agreement.¹⁹ The debtor's legal interest must be more than just naked title with no rights or obligations, however. A joint tenancy executed for purposes of a will substitute will not be allowed to be brought into the estate.²⁰ There are two minor exceptions to the

12. The notice of the § 341 meeting sent by the clerk of the bankruptcy court to all creditors scheduled by the debtor contains the following legend in bold type: "As a result of the filing of the petitions, certain acts not proceeding against the debtor and his property are stayed as provided in 11 U.S.C. § 362(a)."

13. 11 U.S.C. § 541 (Supp. V 1981).

14. H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978). This is a change from pre-Code law.

15. What constitutes property of the estate is a question of federal law. *In re Levy Ford, Jr.*, 3 Bankr. 559 (Bankr. D.Md. 1980) (en banc) (debtor's undivided interest in tenancy by the entirety property under state law is property of the estate).

16. *Bennett v. Aviation (In re Bennett)*, 22 Bankr. 3 (Bankr. D.N.M. 1982) (non-debtor's one-half undivided interest in an airplane coowned with debtor held not to be property of the estate and not subject to the automatic stay).

17. *In re Moskowitz*, 13 Bankr. 357 (Bankr. S.D. N.Y. 1981).

18. *Matto's Inc. v. Olde Colonie Place (In re Matto's Inc.)*, 9 Bankr. 89 (Bankr. E.D. Mich. 1981).

19. *Varisco v. Orowheat Food, Co. (In re Varisco)*, 16 Bankr. 634 (Bankr. M.D. Fla. 1981).

20. *Waldman v. Riley (In re Riley)*, 19 Bankr. 1017 (Bankr. D.N.M. 1981).

rights and obligations requirement: any power the debtor may exercise solely for the benefit of another, and a spendthrift trust which has a restriction on transfer enforceable under applicable non-bankruptcy law, are not property of the estate.²¹

All interest of the debtor *and the debtor's spouse* in community property is property of the estate. What is community property is governed by state law, and if one spouse files a petition in bankruptcy the Code reaches all of that community property.²² Although the commencement of a joint case creates two estates, each estate consists of virtually all community property of the joint debtor's spouse.²³ Thus, in a marriage in which most of the property is community property, couples usually file a joint petition so that the community, while losing all of its property to the estate, can at least benefit from the protections of the Code.²⁴

If the debtor receives within 180 days after filing a petition any property by bequest, devise, inheritance, as a result of a property settlement, or as a beneficiary of a life insurance policy, that property becomes property of the estate.²⁵ The estate also includes any proceeds, products, rents, or profits from the property of the estate, except for earnings of the individual debtor accruing after the filing of the petition.²⁶ Any interest in property the estate acquires after the commencement of the case, such as a contract, goes into the estate.²⁷ Only those interests which the debtor might have had in any such property pass to the estate,²⁸ regardless of any bankruptcy forfeiture provisions in a contract.²⁹ Property of the estate also includes any property which comes into the estate through the trustee's broad avoiding powers, for example, any preferential transfers returned to the estate.³⁰

A right of redemption is clearly property of the estate but is an item of property which is not affected by section 362 if the redemption period has not begun to run at the time the debtor filed the petition. In *Harris v. American Bank of Commerce (In re Harris)*,³¹ the court found that a right of redemption which had not expired by the time the petition was

21. 11 U.S.C. § 541(c)(2)(B) (Supp. V 1981).

22. *Id.* § 541(a)(2).

23. *Ageton v. Cervenka (In re Ageton)*, 14 Bankr. 833 (9th Cir. 1981).

24. 11 U.S.C. § 522(f) (Supp. V 1981). Assuming no separate property, all of the community property is property of the estate and available to pay claims of creditors. If only one spouse files, only one exemption will be granted; but if both file, the other spouse can claim a second set of exemptions.

25. 11 U.S.C. § 541(a)(5) (Supp. V 1981).

26. *Id.* § 541(a)(6).

27. *Id.* § 541(a)(7).

28. *Id.* Historical and Revision Notes: Legislative Statements.

29. *Id.* § 541(c)(1)(B).

30. *Id.* § 547(b).

31. No 81-0464J (Bankr. D.N.M. Nov. 30, 1981) (unreported), *appeal docketed*, Civ. No. 82-0026C (D.N.M. Dec. 8, 1981).

filed was not stayed. The limited sixty-day extension of time under section 108 of the Code had expired, and the court held that the particular state-created property right, containing its own limitation, could not have its expiration extended by the automatic stay.³²

The heart of the automatic stay provisions is contained in 11 U.S.C. § 362(a) (Supp. V 1981).³³ That section sets out the actions stayed by the filing of the petition in a voluntary case or the order for relief in an involuntary case.

Subsection (1) is a broad section that stays the commencement or the continuation of all litigation against the debtor which was or could have been brought before the filing of the petition or which could be brought to recover on any prepetition claim against the debtor. All such proceedings are stayed, including less formal kinds of actions such as arbitration. Except for criminal proceedings, the stay halts any ongoing litigation in any other court, state or federal, no matter what the stage of the proceedings. In order for the proceedings to continue, the litigant must obtain relief from the stay in the bankruptcy court.³⁴

Subsection (2) stays the enforcement of a judgment against the debtor or against the property of the estate. The purpose of this subsection is to prevent the issuance of a writ of execution on behalf of a judgment creditor, and it stays the enforcement of a judgment obtained before the filing of the petition. This section also stays attempts at enforcement after the debtor has received a discharge.³⁵

Subsection (3) stays acts to obtain possession of property of the estate or from the estate. Property of the estate includes property in the possession of the estate such as leased property. Thus, a debtor's right to possession of leased premises is property of the estate and protected by the automatic stay.³⁶

Subsection (4) stays any act to create, perfect, or enforce a lien against property of the estate, for example, by possession or process, because such an act could change the status of a creditor from secured to unse-

32. See also *Butner v. United States*, 440 U.S. 48 (1979) (property rights which form the estate are defined by state law); *Trigg v. United States (In re Trigg)*, 630 F.2d 1370 (10th Cir. 1980) (the automatic stay under the Bankruptcy Act does not stop the automatic termination of oil and gas leases). But see *Jenkins v. Peet (In re Jenkins)* 19 Bankr. 105 (Bankr. D.Colo. 1982).

33. See *supra* note 2 for the text of § 362(a).

34. 11 U.S.C. § 362(d) (Supp. V 1981).

35. See *Newton v. Ahern & Montgomery, (In re Newton)*, No. 78-1044C-1, 78-1045C-1 (Bankr. D.N.M. July 20, 1981) (unreported), *aff'd*, No. 81-0941 HB (D.N.M. Jan. 27, 1982) (unreported) (creditor and creditor's attorney held liable for attorney fees and punitive damages for postdischarge attempts at enforcement of a judgment by writ of execution). Although the court decided *Newton* under the former Bankruptcy Act, its reasoning is still applicable under the Code.

36. *Pickus v. Vitagliano (In re Pickus)*, 8 Bankr. 114 (Bankr. D.Conn. 1980) (Code stays eviction of tenants from leased premises).

cured.³⁷ This subsection also stays foreclosure and self-help remedies.³⁸ It dovetails with section 362(c)(2) regarding the duration of the stay as to property of the debtor.³⁹

Subsection (6) stays any act to collect, recover, or assess a claim against the debtor that arose before the filing of the petition. The emphasis in this section is on *any* act, Congress having adopted this broad language to prevent the harassment of debtors by creditors in any way.⁴⁰

Subsection (7) stays the set-off of any prepetition debt owed by the debtor to the creditor. Legislative history indicates that the rights of the creditors are not affected, merely stayed.⁴¹ A practical problem arises, however, where a bank wishes to freeze a debtor's account for the purpose of set-off.⁴² One bankruptcy court ruled that the bank is entitled to freeze the account, but it must have the stay lifted before it can exercise its right to set-off.⁴³ Finally, subsection (8), new under the Code, stays the commencement or continuance of a proceeding before the United States Tax Court concerning the debtor.

ACTIONS NOT STAYED BY THE AUTOMATIC STAY

While section 362(b)⁴⁴ enumerates actions not stayed by the automatic stay, it should not be assumed that these kinds of acts always should proceed. Rather, just as the court can grant relief from the stay for actions

37. But see 11 U.S.C. § 546(b) (Supp. V 1981), which allows a creditor to perfect by timely notice against the trustee if the right could be perfected by seizure or commencement of action. See, e.g., *In re Fiorillo*, 19 Bankr. 21 (Bankr. S.D. N.Y. 1982) (court permitted creditor to perfect a mechanic's lien after the petition was filed).

38. 2 W. Collier, *Collier on Bankruptcy* 362-1, at 362-3 (15th ed. 1979). Subsection (5) stays any act to create, perfect, or enforce any lien against property of the debtor to the extent it secures a prepetition claim. Property of the debtor would include exempt property and most property acquired after the filing of the petition. Its purpose is to prevent preferential treatment of certain creditors and interference with the debtor's discharge. H.R. Rep. No. 595, 95th Cong., 1st Sess., 340-42 (1977).

39. The stay is in effect until the case is closed or dismissed or a discharge is granted. 11 U.S.C. § 362(c)(2) (Supp. V 1981); *Bundy v. Bank of New Mexico (In re Bundy)*, No. 81-0045 (Bankr. D.N.M. July 30, 1981) (unreported), *aff'd*, No. 81-0880 M (D.N.M. Dec. 29, 1981) (unreported).

40. H.R. Rep. No. 595, 95th Cong., 1st Sess., 340-42 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 49-51 (1978).

41. H.R. Rep. No. 595, 95th Cong., 1st Sess., 340-42 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 49-51 (1978).

42. For pertinent Code sections on setoff, see 11 U.S.C. §§ 553, 542(b) (Supp. V 1981).

43. *Third Nat'l Bank v. Carpenter (In re Carpenter)*, 14 Bankr. 405 (Bankr. M.D. Tenn. 1981). But cf. *Kenney's Franchise Corp. v. Central Fidelity Bank (In re Kenney's Franchise Corp.)*, 12 Bankr. 390 (Bankr. W.D. Va. 1981), for a holding that a freeze of a checking account in a Chapter 11 case violated the stay.

44. See *supra* note 2 for the text of section 362(b).

stayed,⁴⁵ so also can it stay matters not automatically stayed.⁴⁶ These sections permit the court to determine on a case-by-case basis whether acts which section 362 of the Code allows to proceed, but which could harm the estate, should be stayed. However, it must be emphasized that these acts are not affected by the automatic stay, and thus without intervention by the court will proceed without regard to the bankruptcy.

Although not specifically treated in section 362(b), the New Mexico Bankruptcy Court has held that it does not have jurisdiction to grant petitioners a divorce and that a divorce proceeding initiated by a debtor after filing a joint petition in bankruptcy was not stayed by the automatic stay.⁴⁷ Other courts have decided this issue in the same way but with a different rationale. These courts have relied on abstention under 28 U.S.C. § 1471(d),⁴⁸ on the theory that domestic relations are traditionally state court matters and should be left to the state.⁴⁹ Other reasoning has been that although under its broad jurisdictional grant the bankruptcy court would have jurisdiction, there is not a sufficient nexus between the divorce action and the bankruptcy case to justify the exercise of bankruptcy jurisdiction.⁵⁰ The bankruptcy court may, of course, have an interest in the property settlement to prevent abuse of the bankruptcy court's power by an improper characterization by counsel or the state court that the payment was alimony and therefore not dischargeable or that it was a property settlement and therefore dischargeable.⁵¹

Subsection (1) of section 362(b) excepts from the stay commencement or continuation of criminal action or proceedings against a debtor. While most criminal proceedings clearly come within this exception, others are merely disguised debt collection. The issue arises both if an individual is empowered to swear out warrants and if the state brings the action.⁵² Where an aggrieved party is empowered by statute to have a criminal complaint issued against another party, the bankruptcy court must decide whether the creditor is using the criminal process to exact a preference or circumvent a discharge and thus thwart the policy of the Bankruptcy

45. *Holtkamp v. Littlefield (In re Holtkamp)*, 669 F.2d 505 (7th Cir. 1982) (relief from the stay granted to allow a personal injury suit to proceed, the court reasoning that it was not restricted to situations specifically exempted in the statute in allowing such relief).

46. See 11 U.S.C. § 105 (Supp. V 1981), which permits the bankruptcy court to issue any order, process, or judgment necessary to carry out the provisions of the Code.

47. *Cunningham v. Cunningham (In re Cunningham)*, 9 Bankr. 7 (Bankr. D.N.M. 1981).

48. 28 U.S.C. § 1471(d) (Supp. V 1981).

49. *Chrysler v. Heslar (In re Heslar)* 16 Bankr. 329 (Bankr. W.D. Mich. 1981).

50. 1 W. Collier, *Collier on Bankruptcy* ¶ 3.01, at 3-46 (15th ed. 1979).

51. *Dirks v. Dirks (In re Dirks)*, 15 Bankr. 775 (Bankr. D.N.M. 1981) (payments due to third parties in lieu of alimony are dischargeable); *In re Danley*, 14 Bankr. 493 (Bankr. D.N.M. Oct. 8, 1981) (debtor filed bankruptcy and discharged debts he assumed as a settlement in a divorce action).

52. See, e.g., N.M. Stat. Ann. § 30-36-9 (Repl. Pamp. 1980) ("Citizen's complaint"), which appears to allow a private citizen to bring a criminal complaint, and N.M. Stat. Ann. § 33-36-1 (Repl. Pamp. 1980), which is New Mexico's worthless check law.

Code. The better reasoning in cases such as these supports a decision which does not exclude disguised debt collection from the automatic stay.⁵³

As with many of the issues faced by bankruptcy courts, questions of comity as well as provisions of the Code itself restrain the bankruptcy judge from interfering with state court proceedings. For example, the Code prohibits a bankruptcy judge from enjoining another court,⁵⁴ although the All Writs Statute gives the court power to enjoin individuals and issue injunctions.⁵⁵ Undoubtedly any state action which has as its genuine objective the swift punishment of an infraction of a state statute prohibiting the issuance of worthless checks is entirely proper, at least where there is no express or implied arrangement under which, if restitution is made, the criminal charge is dropped. Such cases undoubtedly will be permitted to proceed. As always, it may be considerably more difficult to classify some particular activity than the easy legal rationale suggests. It may be possible to get some collection activity by, but not too much.⁵⁶ The fresh start objectives of the Code would seem to militate in favor of not allowing state court criminal laws which are in reality statutes enacted for the benefit of creditors to frustrate the purpose of the Code.

Subsection (2) allows collection of alimony, maintenance, and support from property which is not property of the estate. Thus, most property acquired after the commencement of a liquidation case, any other property which does not pass to the estate, and exempt property are available for these payments as far as bankruptcy law is concerned.⁵⁷ Because alimony, maintenance, and child support are excepted from discharge,⁵⁸ it would be inconsistent with this policy decision to stay collection of these obligations.

Subsection (3) does not stay postpetition perfection of certain liens. This subsection dovetails with section 546(b) which allows a creditor to perfect certain liens if such perfection is allowed by applicable law.⁵⁹

Subsection (4) allows the commencement or continuation of an action or a proceeding of a governmental unit to invoke its police or regulatory

53. *Bray v. Holley* (*In re Bray*), 12 Bankr. 359 (Bankr. M.D. Ala. 1981); *In re Caldwell*, 5 Bankr. 740 (Bankr. W.D. Va. 1980). In both cases creditors were enjoined from using the criminal process to collect on claims.

54. 28 U.S.C. § 1481 (Supp. V 1981).

55. 28 U.S.C. § 1651 (1976). It is questionable whether this statute still applies to the bankruptcy court after *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982). See N.M. Fed. Dist. Ct. R. 31 (as amended).

56. How much is too much is beyond the scope of this article.

57. 11 U.S.C. § 522(c)(1) (Supp. V 1981), allows exempt property to be used to pay alimony and certain taxes.

58. *Id.* § 523(a)(5).

59. *E.g.*, Uniform Commercial Code; H.R. Rep. No. 595, 95th Cong., 1st Sess., 371 (1977).

power, and subsection (5) allows the enforcement of a judgment, other than a money judgment, obtained in such an action. These exceptions allow actions such as injunctions to enforce environmental regulations. Courts usually construe these sections narrowly, requiring the action taken to relate to public health and safety.⁶⁰ The New Mexico Bankruptcy Court held that an Indian tribe was not a governmental entity for the purposes of this subsection and thus its actions were not exempted from the stay.⁶¹ In another example, state law suspending a driver's license until the licensee posts financial security for damages from an automobile accident was found to serve a particular class of creditors rather than the broad public interest, and the court did not except its enforcement from the stay.⁶² Thus, courts hold that if the focus of the state's regulatory power is directed at the debtor's financial obligations rather than the state's legitimate health and safety concerns, section 362(b)(4) does not apply and courts do not except such actions from the stay.

The final three subsections of section 362(b) are narrow and have limited application. Subsection (6) excepts from the stay the setoff of any mutual debt and claims which are commodity transactions. Subsection (7) allows actions by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust insured under the National Housing Act and covering five or more living units. Subsection (8) allows a governmental unit to issue to the debtor a notice of a tax deficiency.

Following the course taken by a hypothetical Chapter 7 debtor might help illustrate the workings of the stay. Assume that our debtor is a divorced individual who has lost his full-time job, is only working half-time, and has fallen upon hard times. He was buying his house on a real estate contract, but has not been able to make the payments in several months. The house is structurally deteriorating and is in the path of a new street. Debtor recently was involved in an automobile accident and was cited for driving while intoxicated. As a result of that accident, his car struck and killed a pedestrian, whose survivors have decided to sue him. Among other debts, Debtor has borrowed from a bank to buy a car, giving the car as collateral for the loan, and he owes a department store money on a charge account. All of his obligations are in arrears.

After proper counseling by a diligent attorney,⁶³ Debtor has decided to file a Chapter 7 petition. Which of his creditors will be able to proceed

60. *Missouri v. United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981) (Missouri's law regulating grain warehouses was found to have as its primary purpose the protection of the pecuniary interest in the property of the debtor, and as such was not excepted from the stay under § 362(b)(4)).

61. *In re Sandmar Corp.*, 12 Bankr. 910 (Bankr. D.N.M. 1981).

62. *Muzio v. Samson (In re Samson)*, 17 Bankr. 528 (Bankr. D.Conn. 1982).

63. See I W. Norton, *Norton Bankruptcy Law and Practice* §§ 7.01 to 7.18 (1982), for a checklist of factors to be covered by an attorney at the outset of undertaking a bankruptcy case.

in an attempt to have their debts satisfied and which will be stayed?⁶⁴

First of all, if Debtor is paying alimony as a result of his divorce settlement, he must continue to pay. The state may institute any criminal proceedings which could be brought as a result of his drunken driving because commencement or continuation of criminal proceedings are not stayed. However, any civil proceedings in wrongful death brought by the survivors of the accident victim may not proceed. Relief from the stay must be sought in the bankruptcy court in order to initiate or proceed with such a suit in state court. If the suit is in progress in state court, the plaintiff could remove the case to the bankruptcy court under 28 U.S.C. § 1478⁶⁵ or request relief from the stay to proceed in state court. If the suit has proceeded to judgment in state court, but the judgment has not yet been entered by the court, relief from the stay must be obtained so that the judgment can be entered.

Assuming Debtor has not made his loan payments for his automobile, the bank cannot make demand on Debtor or attempt to repossess the car. The bank must first seek relief from the stay in order to do so. The bank will even be in violation of the stay if it calls or sends dunning letters to Debtor. Likewise, the unsecured department store cannot take steps to enforce payment on the account. The store can revoke Debtor's charging privileges, however, because such an act is not an attempt to obtain payment for prepetition debts. If the creditor has a judgment and wishes to execute on Debtor's property or garnish his wages, it must first obtain relief from the stay. The payee on the real estate contract may not send a demand letter and may not accelerate on the note without relief from the stay. The city can initiate condemnation proceedings and enforce a judgment pursuant to such proceedings. It must be obvious that practically any action which a creditor might want to take can only proceed after relief from the stay has been granted. The exceptions to the stay are narrow and specific.

DURATION OF THE AUTOMATIC STAY

Any act against property of the estate is stayed until the property is no longer property of the estate⁶⁶ and until it is no longer property of the debtor.⁶⁷ Section 362(c)⁶⁸ of the Code delineates the duration of this

64. Support for all of the actions which may and may not be taken in this hypothetical case can be found in 11 U.S.C. § 362(a) & (b) (Supp. V 1981), which previously have been discussed *supra* at text accompanying notes 12-62.

65. 28 U.S.C. § 1478 (Supp. V 1981).

66. See 11 U.S.C. § 362(c)(1), (4) (Supp. V 1981).

67. *Id.* § 362(a)(5).

68. See *supra* note 2 for the text of § 362(c).

protection of property both of the estate and of the debtor. The legislative history clarifies this section to mean that the stay of an act against the property of the *estate* ceases when that property ceases to be property of the estate.⁶⁹ Even so, when that property then becomes property of the debtor, for example, by abandonment, the stay under section 362(a)(5) comes into play. The stay of an act against the property of a *debtor*, then, is terminated only by the end of the bankruptcy by closing, dismissal, or discharge.⁷⁰ Thus, if the property is exempted or abandoned by the trustee to the debtor, it is still subject to the stay.⁷¹

RELIEF FROM THE AUTOMATIC STAY

Upon the filing of a complaint for relief from the stay and the payment of a filing fee,⁷² an expedited hearing will be held. As a practical matter, a complaint is always initiated by a secured creditor who fears that the secured collateral is diminishing in value, usually because the debtor is failing to make payments as they become due. There may be, however, occasional situations where an unsecured creditor will have a legitimate claim for relief from the stay. For example, a court will undoubtedly grant such relief to a tort claimant who asserts a claim for damages arising from an automobile accident, so long as the claim is within the limits of any applicable insurance policy and there is no claim for punitive damages, which no insurance policy covers. The suit thus framed will not have any impact upon the bankruptcy estate. But if the damage claim exceeds the policy limits, or includes a demand for punitive damages, the impact upon the bankruptcy estate (including, of course, the fees of an attorney to defend what is not covered by the policy), may well result in a continuation of the stay by the bankruptcy court.

Although the statutory language provides for relief on "request of a party," a request has been thought to mean a complaint rather than a motion because Bankruptcy Rule 701, denominating which matters shall be decided in an adversary proceeding, includes a proceeding to obtain

69. H.R. Rep. No. 595, 95th Cong., 1st Sess., 343 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 52 (1978).

70. H.R. Rep. No. 595, 95th Cong., 1st Sess., 343 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 52 (1978).

71. H.R. Rep. No. 595, 95th Cong., 1st Sess., 343 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 52 (1978). See also *Bundy v. Bank of New Mexico (In re Bundy)* No. 81-0045 (Bankr. D.N.M. July 30, 1981) (unreported), *aff'd*, No. 81-0880 M (D.N.M. Dec. 29, 1981) (unreported). In *Bundy*, the court entered an order of abandonment, but held that the stay continued as a stay applicable to property of the debtor, even though the stay applicable to property of the estate had terminated. See also *In re Cruseturner*, 8 Bankr. 581 (Bankr. D.Utah 1981).

72. At this time the filing fee under Chapter 7 is \$60, and the filing fee under Chapter 11 is \$200. 28 U.S.C. § 1930(a) (Supp. V 1981).

relief from a stay.⁷³ At the expedited hearing,⁷⁴ the court will only hear matters relating to the lifting of the stay and adequate protection. It will not hear issues extraneous to the lifting of the stay raised by counterclaim, crossclaim, third party complaint, or otherwise. The crowded dockets of bankruptcy courts simply do not permit full scale hearings on all issues to be expedited. Such claims are dismissed without prejudice from the stay proceeding and may be raised separately in another proceeding.⁷⁵ There are some situations where this bifurcation can create considerable problems. For example, where the debtor's defense to the creditor's claim also can establish a counterclaim, the bankruptcy judge may permit full litigation of the counterclaim at the hearing on the complaint for relief from stay. But if the damage issue on the counterclaim promises to become lengthy, it may well be severed for convenience and tried another day. In a court where there may be from ten to fifty complaints for stay pending at any given time, the requirement of a hearing within thirty days from the date of filing would impose excessive burdens upon the time of the court if severance were not possible.

Because section 362(e) allows the stay to terminate automatically thirty days after the complaint is filed, the court must hold a hearing within that time. The statute requires notice and a hearing. Whenever that language is used, however, reference must be made to 11 U.S.C. § 102(1) (Supp. V 1981), which explains that notice means "such notice as is appropriate in the particular circumstance," and defines a hearing as "such opportunity for a hearing as is appropriate in the particular circumstance." The subsection goes on to authorize action without a hearing in emergency situations. However, a hearing is virtually always held after notice to appropriate parties, that is, anyone whose rights might be affected by relief from the stay.

Because the stay automatically terminates unless a hearing is held,⁷⁶ stay complaints have priority on the court's calendar. In a complex case, the Code allows the court to hold a preliminary hearing at which it can continue the stay if it is likely the debtor will prevail at the final hearing.⁷⁷ In that case, the final hearing must begin thirty days after the preliminary hearing.⁷⁸

73. But see Bankr. R. 4001 (proposed Mar. 1, 1982) (published by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States), in which relief for a stay is requested by motion.

74. See 11 U.S.C. § 362(e) (Supp. V 1981).

75. Wyatt v. Bennett (*In re Bennett*), 17 Bankr. 843 (Bankr. D.N.M. 1982); Lekvold v. Henderson (*In re Lekvold*), No. 81-01032 MA (Bankr. D.N.M. Mar. 30, 1982) (unreported).

76. 11 U.S.C. § 362(e) (Supp. V 1981); Navajo Tribe v. Sandmar Corp. (*In re Sandmar*), 16 Bankr. 120 (Bankr. D.N.M. 1981).

77. 11 U.S.C. § 362(e)(1) (Supp. V 1981).

78. *Id.* § 362(e)(2).

Interim Bankr R. 4001 as adopted by the local rules requires the final order to be issued within thirty days of the final hearing. Therefore, although the stay can terminate within thirty days if the complaint is not heard, it is possible ninety days will elapse between the filing of the complaint and the entry of the final order. The court could presumably modify or alter that time limit. Ex parte relief is also available to an interested party by showing that irreparable damage to its interest will occur before there is an opportunity for notice and hearing.⁷⁹

If the stay automatically terminates, the court can reimpose it.⁸⁰ It would also be possible in a district such as New Mexico, where the bankruptcy judges must travel the state to hold hearings, to have a preliminary telephone hearing within the first thirty-day period. The court could make a preliminary determination at that time. Also, the court will sometimes set stay hearings in Albuquerque for cases scheduled in Las Cruces or Roswell so that the hearings will take place within thirty days. This policy, however, conflicts with the theory behind having the court available to the debtor so as to alleviate travel costs to the party in bankruptcy.

ELEMENTS TO BE PROVED IN THE HEARING FOR RELIEF FROM THE STAY

The hearing to request relief from the stay is a full-blown evidentiary hearing with testimony and evidence offered by both parties.⁸¹ The court may grant relief from the stay by terminating, modifying, annulling, or conditioning the stay.⁸² In fact, as a usual alternative to terminating the stay, the court frequently will condition its continuation on payments to be made by the debtor to the creditor.⁸³

The Code requires the court to grant relief from the stay in two situations. First, for any act stayed under section 362(a), which includes both acts against property and other kinds of acts, the court must grant relief for "cause." The example of "cause" given in the statute is lack of

79. *Id.* § 362(f).

80. See *supra* text accompanying notes 45-46.

81. 11 U.S.C. § 362(d) (Supp. V 1981). See *supra* note 2 for the text of the statute.

82. See N.M. Bankr. R. 1-114 ("Automatic Stay Litigation") for detailed pretrial and trial procedure for stay litigation. The Local Rules Committee anticipated that the procedure set out would expedite the hearing itself, which is already given an expedited docket placement. See 11 U.S.C. § 362(e) (Supp. V 1981).

83. See *First Interstate Bank v. Becht* (*In re Becht*), No. 81-0535 (Bankr. D.N.M. Oct. 13, 1981) (unreported), *aff'd*, No. 81-1039JB (D.N.M.) (unreported), in which the court lifted the stay because the debtor had not made the monthly payments on which its continuation depended; see also *Hargis v. Southwest Mineral Corp.* (*In re Hargis*) No. 81-0538 (Bankr. D.N.M. Oct. 21, 1981), *appeal docketed*, No. 82-023SC (D.N.M.) (unreported) (stay continued so long as lease payments timely made).

adequate protection.⁸⁴ Regarding a proceeding before another tribunal, "cause" would include a determination by the bankruptcy judge that the case should proceed in that other forum. Or the court could decide there is not a sufficient nexus between the two proceedings. An example of this latter act would be a stay of a child custody proceeding. As an alternative to "cause," the Code requires that the court must lift the stay of an act against property if the debtor has no equity in the property *and* if the property is not necessary for an effective reorganization.⁸⁵ In a liquidation proceeding the latter requirement would not apply, and the court would only have to find that there was no equity in the property.

The reference in section 362(d) to a lack of adequate protection relates back to section 361,⁸⁶ which sets out examples of three ways adequate protection may be provided. The concept of adequate protection is derived from the constitutional protection of property interests.⁸⁷ The secured creditor is guaranteed not to lose the benefit of its bargain; that is, it is entitled to receive the payments owed or to repossess the collateral. In reorganization proceedings under the Code, conflict can arise between a creditor secured by property in the hands of the debtor, and the debtor who must use that property for reorganization. The automatic stay can impair the value of the creditor's lien. For example, if the lien is secured by real property and the debtor has stopped making payments, the creditor can be harmed if the debtor's equity in the property does not exceed the value of the lien. Again, one in second position on a real estate contract to which the debtor is obligated may be required to make the payments to the senior lienholders in order to avoid default on the contract and a loss of its interest. If the property is a kind which depreciates with use or time (for example, a motor vehicle or heavy equipment), a halt in payments almost surely leads to a loss in the value of the creditor's lien, and if the creditor cannot quickly repossess, the value of the collateral will be less than the value of the lien.

The Code suggests three methods of providing adequate protection when necessary. These are nonexclusive examples of the substantial equivalent of the secured creditor's bargain.⁸⁸ The first is to require the trustee (or the debtor in possession) to make periodic cash payments to the creditor to the extent that the stay results in a decrease in the value of the creditor's interest in the property.⁸⁹ For example, a court might

84. 11 U.S.C. § 362(d)(1) (Supp. V 1981).

85. *Id.* § 362(d)(2).

86. See *supra* note 2 for the text of the statute.

87. *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273 (1940) (the right of the debtor under the Bankruptcy Act to redeem property does not conflict with a secured creditor's constitutional right to have the value of the property protected during the proceedings).

88. I W. Norton, *Norton Bankruptcy Law and Practice* § 22.04 (1982).

89. 11 U.S.C. § 361(1) (Supp. V 1981).

require the debtor in possession to make monthly payments on a vehicle which would compensate the creditor for depreciation. It is important to note that the measure of payment may not be in the amount of the contract payment.⁹⁰

The second method is to provide a replacement lien to the extent that the stay results in a decrease in value of the creditor's interest.⁹¹ This can be done by marshalling assets, selling them, and having the lien attach to the proceeds. It can also be done by having the debtor put up additional security, for example, land, as security for accounts receivable which may not be collectible.

The third method is to give the creditor what will result in the "indubitable equivalent" of its interest in the property.⁹² This idea of indubitable equivalence came from Judge Learned Hand's opinion in *Metropolitan Life Ins. Co. v. Murel Holding Corp.*⁹³ Judge Hand reasoned that the Bankruptcy Act would not deny a creditor his money or property without providing him the indubitable equivalence.⁹⁴ It is difficult to determine what this method suggested by the Code adds to the other two. In fact, one court has seen it as redundant.⁹⁵ On the other hand, a creditor can use this strong language to underscore that the United States Constitution guarantees it will not lose the benefit of its bargain. The phrase can best be appreciated for its marvelous vagueness, rather than its clarity or usefulness.

Each of these three methods would assure that the creditor would not lose ground as a result of the automatic stay. They provide a way for the debtor to retain possession of the collateral while assuring the creditor that the value of its lien will not be diminished.

The court must also lift the stay if the debtor does not have an equity in the property and the property is not necessary to an effective reorganization. Legislative history explains that these requirements in subsection 362(d) are to apply in situations where a debtor files a bankruptcy petition on the eve of foreclosure.⁹⁶ This subsection does not apply, however, if the debtor is leasing or managing the real property as a part of a business, such as a hotel operation.⁹⁷ In that situation, the debtor would have no equity in the property, but the property would be necessary to an effective

90. *ABD Federal Credit Union v. Williams (In re Williams)*, 6 Bankr. 789 (Bankr. E.D. Mich. 1980) (debtor required to make payments to creditor to compensate for a decline in value of vehicle).

91. 11 U.S.C. § 361(2) (Supp. V 1981).

92. *Id.* § 361(3).

93. 75 F.2d 941 (2d Cir. 1935).

94. *Id.* at 942.

95. *Bankers Life Ins. Co. v. Alyucan Interstate Corp. (In re Alyucan Interstate Corp.)*, 12 Bankr. 803 (Bankr. D.Utah 1981).

96. *See* 124 Cong. Rec. 32,350 (1978).

97. *Id.*

reorganization. On the other hand, where the debtor *owns* hotel property, both requirements would still need to be proved.⁹⁸

The Code establishes the burden of proof, requiring the moving party to prove the debtor's lack of equity in the property⁹⁹ and the opposing party to carry the burden of proof on all other issues.¹⁰⁰ As an example, a creditor requesting relief from the stay in order to foreclose on a parcel of real property must prove that the amount of its lien and any other prior liens exceeds the value of the property.¹⁰¹ The creditor will do this by proof of the debt and expert appraisal testimony of the value of the property. This showing is crucial because it is an element which must be proved under section 362(d)(2), and because it is the basis of the cause for which the stay can be lifted under section 362(d)(1). Because expert witnesses are usually needed to present this information, Local Bankruptcy Rule 1-114 has been adopted to require disclosure before trial of essential matters which the shortness of time between filing and trial would make difficult to obtain by usual discovery tools.

REMOVAL OF STATE AND FEDERAL DISTRICT COURT PROCEDURES

Because all proceedings in other courts are stayed with the filing of the petition, the creditor must take affirmative action in order to allow those proceedings to go forward. A creditor can request relief from the stay to allow a proceeding under way in state or federal district court to go forward, or the case can be removed to the bankruptcy court. A case that is removed does not get any particular priority on the bankruptcy court's docket and, depending on the extent of the proceedings in the original court, removal could delay matters. A case removed on the eve of trial will not proceed to trial immediately in the bankruptcy court. On the other hand, any ruling which already has been made by a state or federal district judge is likely to stand in the bankruptcy court. Although the bankruptcy court could decide matters differently from other courts or change decisions made in those courts, it rarely will do so, for reasons of comity and judicial economy, and to discourage forum shopping. Therefore, a removal to bankruptcy court in order to get a "second

98. See, e.g., *Bankers Union Life v. Amlani Enterprises (In re Amlani)*, No. 82-0396R, (Bankr. D.N.M. July 20, 1982) (unreported), where the debtor *owned* a motel necessary to the reorganization. The creditor met the burden of proving that the debtor had no equity in the property, and the court lifted the stay.

99. 11 U.S.C. § 362(g)(1) (Supp. V 1981).

100. 11 U.S.C. § 362(g)(2) (Supp. V 1981). Usually the opposing party will be the debtor, although it could be another creditor.

101. *La Jolla Mortgage Fund v. Rancho El Cajon Associates*, 18 Bankr. 283 (Bankr. S.D. Cal. 1982) (junior lien on real property should not be counted in determining whether creditor is adequately protected by an equity cushion).

opinion" after an oral decision has been announced by the trial judge at the close of a hearing but before the ruling is reduced to writing, will be met with cheerful disfavor.

Presently there is no specified time within which a case should be removed.¹⁰² If a time limit for removal should be imposed, it will relate to the time of the filing of the petition for relief. It is important to note that the "petition for relief" is the petition filed in the bankruptcy court which begins the proceedings, and not the discharge. At any rate, the New Mexico Bankruptcy Court has adopted the rule, set out by United States District Judge Rogers in *Patterson v. Refinery Engineering Co.*,¹⁰³ that jurisdiction of the removed case attaches when the application for removal is filed in the bankruptcy court.¹⁰⁴

VIOLATION OF THE AUTOMATIC STAY

At the very least, actions taken in violation of the automatic stay are void.¹⁰⁵ Further, one who intentionally violates the stay can be held in contempt of court.¹⁰⁶ While it is agreed that one who has no actual notice of the stay cannot be held in contempt, such notice does not have to be formal notice. An entity who "heard of" the filing of the bankruptcy petition, that is, who had actual knowledge but not formal notice, has been held in contempt.¹⁰⁷

Intentional violations of the stay are dealt with seriously, as they should be. In Georgia, a debtor lost his job as a result of a garnishment of wages instituted by a creditor. The judge ordered the creditor to pay the debtor \$5,000 in damages for loss of employment, plus \$500 in attorneys fees and costs.¹⁰⁸

Some creditors become creative in their stay violations, without realizing the gravity of their acts. A creditor who obtained the key to a restaurant sold to the debtor removed rotting food from the restaurant and dumped it onto the debtor's yard. The court held the creditor in civil

102. The local rules for the New Mexico Bankruptcy Courts have eliminated the time requirements in which a case must be removed. Bankr. R. 9027 (proposed Mar. 1, 1982) (published by the Committee on Rules of Practice & Procedure of the Judicial Conference of the United States), does however set a time limit of 30, 90, or 180 days, depending on the circumstances of the case.

103. 183 F. Supp. 459 (D.N.M. 1960).

104. *Frontier Leasing v. CFB, Inc. (In re CFB, Inc.)*, No. 80-0018 (Bankr. D.N.M. Nov. 30, 1981) (unreported) (the court found the untimely removal of a state court case not to be jurisdictional).

105. *Kalb v. Feuerstein*, 308 U.S. 433, 443 (1940); *Zestee Foods, Inc. v. Phillips Foods Corp.*, 536 F.2d 334 (10th Cir. 1976); *Meyer v. Rowen*, 181 F.2d 715 (10th Cir. 1950).

106. *Fidelity Mortgage Investors v. Camelia Builders*, 550 F.2d 47 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977) (fine upheld against counsel for contractors who sued in state court to foreclose mechanics' liens with knowledge of bankruptcy); 2 W. M. Collier, *Collier on Bankruptcy* ¶362.11, at 326-58 (15th ed. 1979).

107. *In re Sandmar*, 12 Bankr. 910 (Bankr. D.N.M. 1981).

108. *In re Batla*, 12 Bankr. 397 (Bankr. N.D. Ga. 1981).

contempt and ordered him to pay the debtor \$500 in damages and \$300 in costs.¹⁰⁹ It is worth emphasizing that an attorney may incur personal liability for such violations.¹¹⁰

OTHER INJUNCTIONS

The Code empowers the bankruptcy court to issue any order, process, or judgment necessary to carry out the provisions of the Code.¹¹¹ Therefore, the court can issue injunctions and stay matters over and above those automatically stayed in section 362. The New Mexico Bankruptcy Court has stayed court action to foreclose a note on which a debtor was jointly and severally liable but not named as a defendant. The court enjoined the creditor from proceeding in state court because that court's decision would bind the debtor and affect future bankruptcy court proceedings.¹¹² The court cited a previous New Mexico Bankruptcy Court decision holding that a state court judgment accelerating the unpaid balance of a note has a res judicata effect on the bankruptcy court.¹¹³

The bankruptcy court can also issue writs of execution to enforce its judgments.¹¹⁴ In addition, the court is included in the All Writs Statute,¹¹⁵ which empowers it to issue all writs necessary to implement its jurisdiction. The bankruptcy court possesses all the powers of a court of equity, law, and admiralty.¹¹⁶ Its powers are limited from enjoining another court or punishing a criminal contempt not committed in the presence of the judge or warranting a punishment of imprisonment.¹¹⁷ The federal rule of civil procedure dealing with injunctions also applies to the bankruptcy court.¹¹⁸ A debtor could invoke this rule to reimpose a stay which has automatically terminated.¹¹⁹ Any of these powers could be used if the stay of any action would benefit creditors and the estate.

109. *In re Reed*, 11 Bankr. 258 (Bankr. D.Utah 1981).

110. See *supra* note 35.

111. 11 U.S.C. § 105 (Supp. V 1981).

112. *New Mexico Properties v. Commerce Bank & Trust*, No. 81-0578 (Bankr. D.N.M. Nov. 9, 1981) (unreported).

113. *Romero v. Montoya (In re Montoya)*, No. 81-0412 (Bankr. D.N.M. Oct. 12, 1981) (unreported).

114. Bankr. R. 769.

115. 28 U.S.C. § 1651 (1976). *But see supra* note 55.

116. 28 U.S.C. § 1481 (Supp. V 1981).

117. *Id.* It is the contention of Glenn Keller, an eminent former Colorado bankruptcy judge, and it appears to comport with the reading of this statute, that the bankruptcy court can imprison for civil contempt. For a good example of the confusion between civil and criminal contempt, see *Niemyjski v. Niemyjski*, 98 N.M. 176, 646 P.2d 1240 (1982). For further discussion of this case, see Kelsey & Siegel, *Domestic Relations, Survey of New Mexico Law: 1981-1982*, 13 N.M.L. Rev. 379 (1983).

118. Fed. R. Civ. P. 65.

119. *Navajo Tribe v. Sandmar (In re Sandmar)*, 16 Bankr. 120 (D.N.M. 1981).

In addition to the stay provisions of the Code and the affirmative powers of the bankruptcy court, a discharge of the debtor operates as an injunction against any act to collect, recover, or offset any discharged debt as a personal liability of the debtor.¹²⁰ The discharge extinguishes the obligation of the debtor to repay the debt.¹²¹ Thus a creditor who attempts to collect a debt which has been discharged will be subject to the same sanctions which could be imposed for violation of the automatic stay.¹²²

STAY OF ACTION AGAINST A CODEBTOR

In a Chapter 13 proceeding, section 1301¹²³ stays actions against a codebtor to collect a consumer debt. The creditor's rights are not lost, merely stayed. If a debtor's Chapter 13 plan does not provide for payments to the creditor (or for repayment in full), the creditor can seek relief from the stay to collect from the codebtor. This would also be true if the debtor defaults on payments under the plan.¹²⁴ This stay does not apply to a debt incurred in the ordinary course of the debtor's business,¹²⁵ or if the Chapter 13 case is closed, dismissed, or converted to a Chapter 7 or 11 case.¹²⁶

120. 11 U.S.C. § 524(a)(2) (Supp. V 1981).

121. Of course, where a debt is secured by collateral, the discharge extinguishes the debtor's personal obligation but the collateral must revert to the secured party. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Rodrock v. Security Indus. Bank*, 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.*, *United States v. Security Indus. Bank*, ___ U.S. ___, 103 S. Ct. 407 (1982).

122. *See Newton v. Ahern & Montgomery, (In re Newton)*, No. 78-1044C-1, 78-1045C-1 (Bankr. D.N.M. July 20, 1981) (unreported), *aff'd*, 81-0941 HB (D.N.M. Jan. 27, 1982) (unreported).

123. 11 U.S.C. § 1301 (Supp. V 1981) provides as follows:

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter [11 U.S.C. §§ 1301 et seq.], a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

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

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title [11 U.S.C. §§ 701 et seq. or 1101 et seq.].

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

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

(1) as between the debtor and the individual protected under subsection

(a) of this section, such individual received the consideration for the claim held by such creditor;

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

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

124. S. Rep. No. 989, 95th Cong., 2d Sess., 138 (1978).

125. 11 U.S.C. § 1301(a)(1) (Supp. V 1981).

126. *Id.* § 1301(a)(2).

Excepted from this stay is the right of the creditor to present a negotiable instrument and to give notice of dishonor.¹²⁷ The Code also protects the creditor from irreparable harm by requiring the court to lift the stay if necessary to protect the creditor's interest, that is, if it appears the debtor might become unable to meet the obligation.¹²⁸

EXTENSIONS OF TIME

While section 108¹²⁹ of the Code is not really a stay provision of the kind previously discussed, it is in essence a stay or extension of the running of time periods in which to commence a legal action. The first subsection¹³⁰ extends the time period in which an action may be commenced by the trustee (or the debtor in possession by virtue of section 1107), to the longer of two years after the order of relief or the end of the relevant period. Thus, if a statute of limitations would ordinarily run shortly after the order of relief (the filing of the petition in a voluntary

127. *Id.* § 1301(b).

128. *Id.* § 1301(c)(3).

129. 11 U.S.C. § 108 (Supp. V 1981) reads as follows:

(a) If applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
- (2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title [11 U.S.C. § 1301] may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
- (2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title [11 U.S.C. § 524], if applicable law, an order entered in a proceeding or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1301 of this title [11 U.S.C. § 1301], and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
- (2) 30 days after notice of the termination or expiration of the stay under section 362, 722, or 1301 of this title [11 U.S.C. §§ 362, 722, or 1301], as the case may be, with respect to such claim.

130. 11 U.S.C. § 108(a) (Supp. V 1981).

proceeding), it will be extended by this section. The second subsection¹³¹ extends to the later of sixty days after the order for relief or the expiration of the right, other action which the debtor could take under the applicable law, order, or agreement, such as filing a pleading, giving notice, or curing a default. Thus, under a contract, the right of redemption or the right to cure a default, if it has not run, will be extended for sixty days. But if such a right has been terminated, neither this section nor section 362(a) will revive the right.¹³²

The final subsection¹³³ extends the statute of limitations for a creditor for thirty days after the expiration of the stay under section 362 (automatic stay), section 722 (redemption), and section 1301 (stay of action against a codebtor) of the Code. As with the rest of section 108, this subsection extends the statute of limitations only if it did not expire prior to the filing of the petition.

APPENDIX*

PRELIMINARY AUTOMATIC STAY CHECKLIST

ACTIONS STAYED

1. Proceedings to recover a prepetition claim against the debtor.
2. Enforcement of a prepetition judgment.
3. Any act to obtain estate property.
4. Any act to perfect or enforce a lien against the estate.
5. Any act to create, perfect, or enforce a lien against property of the debtor securing a prepetition claim.
6. Any act to collect, assess, or recover a prepetition claim against the debtor.
7. Any United States Tax Court proceeding.
8. The setoff of a prepetition debt.

ACTIONS NOT STAYED

1. Criminal proceedings.

131. *Id.* § 108(b).

132. *Trigg v. United States (In re Trigg)*, 630 F.2d 1370 (10th Cir. 1980). This case reinforces the concept that § 362 stays *acts* against property. The running of a right of redemption is not an *act*. In *Harris v. American Bank of Commerce (In re Harris)*, 81-0464J (Bankr. D.N.M. Nov. 30, 1981) (unreported), *appeal docketed*, Civ. No. 82-0026C (D.N.M. Dec. 8, 1981), the court held that the stay did not stay the running of the right of redemption in a mortgage foreclosure where the right had not yet expired at the filing of the petition.

133. 11 U.S.C. § 108(c) (Supp. V 1981).

*This checklist is provided only as a means of alerting the attorney into which category a specific act might fall. Careful examination of the Bankruptcy Code is always necessary.

2. Collections of alimony, maintenance, and support from non-estate property.
3. An act to perfect any interest in property against the trustee as allowed by the Code.
4. Proceedings to enforce governmental police power.
5. Enforcement of governmental police power (but not a money judgment).
6. Setoff of mutual debts in commodities transactions.
7. Certain HUD foreclosures.
8. Issuance of a notice of tax deficiency.