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A PRO DEBTOR AND MAJORITY APPROACH TO THE “AUTOMATIC STAY” PROVISION OF THE BANKRUPTCY CODE—*IN RE COWEN* INCORRECTLY DECIDED

Abstract: On February 27, 2017, in *In re Cowen*, the U.S. Court of Appeals for the Tenth Circuit held that only affirmative actions to either obtain possession or exercise control over property of the bankruptcy estate constitute violations of the automatic stay provision. In doing so, the court concluded that the passive retention of an asset that was acquired pre-petition was not a violation of the automatic stay, and that the creditor had no obligation to relinquish the asset to the bankruptcy estate. This Comment argues that the Tenth Circuit misinterpreted the automatic stay provision of the Bankruptcy Code, disregarding clear policy considerations and legislative history, which evidence Congress’s intent behind the provision’s 1984 amendment.

INTRODUCTION

The bankruptcy system is a “system of federal law, enacted by Congress.”¹ When a person (or municipality) files for bankruptcy, it generally means they are in a state in which they cannot repay money they owe to creditors.² Bankruptcy can be filed either voluntarily by the debtor or invol-

¹ JACK AYER, *BANKRUPTCY OVERVIEW: ISSUES, LAW AND POLICY* 7 (5th ed. 2006). The goals of the bankruptcy system are threefold: to provide debtors with a “fresh start” by discharging their debts, to allow those who can financially reorganize a chance to do so, and to provide an equitable set of rules for the distribution of the debtor’s property (or its value). *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 76 (2d Cir. 2013) (discussing the automatic stay and turnover provisions and how they enforce the goals of bankruptcy, which include relief to the debtor and allowing them a “fresh start”); *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 706 (7th Cir. 2009) (stating that both corporate and personal reorganization are aimed at assisting the debtor in “regain[ing] his financial foothold” in order to pay off his debts); *see also United States v. Whiting Pools Inc.*, 462 U.S. 198, 203 (1983) (stating that the goal of reorganization through bankruptcy is to allow businesses to continue running in order to pay off debts to creditors); *BANKR. JUDGES DIV., ADMIN. OFFICE OF THE UNITED STATES COURTS, BANKRUPTCY BASICS*, 6 (Nov. 2011), <http://www.uscourts.gov/sites/default/files/bankbasics-post10172005.pdf> [<https://perma.cc/2J7G-9TDZ>] (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)) (referencing a Supreme Court statement that the purpose of bankruptcy law was to give the “honest but unfortunate debtor” a “fresh start”); *CHARLES JORDAN TABB, LAW OF BANKRUPTCY* 2 (4th ed. 2016) (stating that one goal of bankruptcy is to address claims for the same asset between more than one creditor).

² *Bankruptcy*, *BLACK’S LAW DICTIONARY* (10th ed. 2014); *TABB, supra* note 1. Upon the filing of bankruptcy, this person (or municipality) becomes a debtor. *See* 11 U.S.C. § 101(13) (2012) (defining debtor as the person or municipality who is the subject of a bankruptcy case). A person, for the purposes of bankruptcy, includes an individual, a partnership, and a corporation. *Id.* § 101(41). A creditor is an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.” *Id.* § 101(10)(A). An entity includes a person,

untarily against the debtor, and when filed, the court helps these consumers repay their debts to their creditors under the organization and protection of the bankruptcy system.³ There are two types of bankruptcy cases: liquidation and reorganization.⁴ In liquidation cases, the court will order a bankruptcy trustee to sell the debtor's assets to pay off the debts owed to creditors.⁵ In reorganization cases, the court may allow the debtor to keep certain assets in order to develop and implement a plan to repay debts using future earnings of those assets.⁶

Under the Bankruptcy Code, the filing of a bankruptcy petition creates an estate containing all of the debtor's assets, so that the bankruptcy trustee (or the debtor in possession) can manage those assets.⁷ The turnover provision of the Bankruptcy Code helps create this estate by requiring that anyone "in possession, custody, or control, during the case, of property that the

among other things. *Id.* § 101(15). A claim is defined as a right to payment or "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." *Id.* § 101(5). In voluntary cases, the order for relief is the date the petition is filed. *Id.* § 301. In involuntary cases, the court enters the order for relief, which will occur after the petition is filed. *See id.* § 303(c) (stating that a creditor can join the bankruptcy case after the petition is filed but before the court enters the order for relief).

³ Edward H. Tillinghast, III, *U.S. Bankruptcy Basics*, SHEPPARD, MULLIN, RICHTER & HAMPTON LLP (2018), https://www.iiiglobal.org/sites/default/files/066_US_Bankruptcy_Basics_Ed_Tillinghast.pdf [<https://perma.cc/7HSQ-DBPH>]; *Bankruptcy*, FINDLAW LEGAL DICTIONARY (online ed. 2018), <http://dictionary.findlaw.com/definition/bankruptcy.html> [<https://perma.cc/L9RA-EERB>].

⁴ TABB, *supra* note 1, at 3, 6. The Bankruptcy Code provides six different types of relief: Liquidation (Chapter 7), Adjustment of Debts of a Municipality (Chapter 9), Reorganization (Chapter 11), Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income (Chapter 12), Adjustment of Debts of an Individual with Regular Income (Chapter 13), and Ancillary and Other Cross-Border Cases (Chapter 15). *BANKRUPTCY BASICS*, *supra* note 1, at 6–8; Tillinghast, *supra* note 3. Chapter 7 is a liquidation chapter, while Chapters 9, 11, 12, and 13 are reorganization chapters. *See generally* *BANKRUPTCY BASICS*, *supra* note 1 (explaining the difference between the different bankruptcy chapters). Chapter 15 deals with bankruptcy cases in other countries. *Id.* at 8.

⁵ *BANKRUPTCY BASICS*, *supra* note 1, at 6. The bankruptcy trustee is a representative of the debtor's bankruptcy estate and is in charge of the estate during the bankruptcy proceeding. *Id.* at 76. In a reorganization case, the debtor acts as the bankruptcy trustee and is called the debtor in possession. *See* 11 U.S.C. § 1306(b) (stating that with a "confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate").

⁶ *BANKRUPTCY BASICS*, *supra* note 1, at 7; TABB, *supra* note 1, at 6. Reorganization is sometimes preferred by both debtors and creditors because the debtor is allowed to keep certain assets that are valuable to them, and the creditors, assuming a minimal risk of default, may potentially receive payments valued higher than those they would receive from a Chapter 7 filing. *BANKRUPTCY BASICS*, *supra* note 1, at 7; TABB, *supra* note 1, at 6.

⁷ 11 U.S.C. § 541; Tillinghast, *supra* note 3. The estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Who holds the property or where the property is held at the time of the filing is irrelevant for the purposes of creating the bankruptcy estate. *Id.*; *BANKRUPTCY BASICS*, *supra* note 1, at 71. The Bankruptcy Code allows for both federal and state "exemption laws," which protect certain property of the debtor from creditor claims. 11 U.S.C. § 522; *BANKRUPTCY BASICS*, *supra* note 1, at 16, 73. This property is not included in the bankruptcy estate. 11 U.S.C. § 522(b)(1).

trustee may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, and account for, such property or the value of such property”⁸

Upon filing for bankruptcy, one immediate debtor protection that arises is the “automatic stay” under 11 U.S.C. § 362.⁹ This provision protects the debtor and/or the debtor’s property against most collection or proceeding actions by creditors.¹⁰ This Comment analyzes the U.S. Court of Appeals for the Tenth Circuit’s 2017 decision in *In re Cowen*, which addressed the issue of whether a creditor’s refusal to turn over the debtor’s property violated the automatic stay, when the creditor re-possessed the property before the debtor filed their petition for bankruptcy.¹¹

I. THE AUTOMATIC STAY PROVISION OF THE BANKRUPTCY CODE IN MORE DETAIL AND THE FACTUAL AND PROCEDURAL HISTORY OF *IN RE COWEN*

The specific issue regarding the automatic stay provision and what constitutes a violation of the stay has created disagreements between the

⁸ 11 U.S.C. § 542; see H.R. REP. NO. 95-595, at 367 (1977), as reprinted in 1978 U.S.C.A.N. 5963, 6322–6323 (stating that the scope of the provision that creates the bankruptcy estate is broad and property that is recovered under the turnover provision, § 542, is part of the estate). There are three situations in which turnover to the bankruptcy trustee is not required: 1) if the property is of insignificant value to the estate; 2) if whoever was in possession of the property rightfully transferred title before becoming aware of the bankruptcy filing; or 3) if “transfer of the property is automatic to pay a life insurance premium.” See *Whiting Pools*, 462 U.S. at 206 n.12 (enumerating the three exceptions where the Bankruptcy Code does not require turn over based on 11 U.S.C. § 542(a), (c), and (d)).

⁹ 11 U.S.C. § 362; see H.R. REP. NO. 95-595, at 174 (stating that the automatic stay is one of the general provisions that applies and comes into effect as soon as bankruptcy is filed, regardless of the type of bankruptcy case).

¹⁰ BANKRUPTCY BASICS, *supra* note 1, at 24, 71. The automatic stay provision provides the eight categories of actions that are prohibited by the stay: 1) “the commencement or continuation . . . [of any] action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case . . .”; 2) “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case . . .”; 3) “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate”; 4) “any act to create, perfect, or enforce any lien against property of the estate”; 5) “any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title”; 6) “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . .”; 7) “the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;” and 8) “the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor . . . for a taxable period” 11 U.S.C. § 362(a)(1)–(8). A “willful violation” of the stay could make the creditor liable for damages to the debtor. *Id.* § 362(k)(1).

¹¹ See *infra* notes 12–90 and accompanying text; see also *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 946–951 (10th Cir. 2017) (reviewing the bankruptcy court’s decision that failing to return an asset that was taken pre-petition was a violation of the automatic stay).

courts, leaving the Tenth Circuit's *In re Cowen* decision in the minority.¹² Section A of this Part explains the history of the Bankruptcy Code's automatic stay provision and its practical applications to debtors and creditors.¹³ Section A looks specifically at § 362(a)(3), which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" by the creditor.¹⁴ Section B of this Part provides and analyzes the facts, procedural history, and opinion of the Tenth Circuit's *In re Cowen* decision.¹⁵

*A. Explanation and History of the Automatic Stay Provision,
Specifically § 362(a)(3) of the Bankruptcy Code*

The automatic stay is essentially an injunction that arises as soon as bankruptcy is filed and goes into effect immediately, without any notice to the creditors.¹⁶ It prevents formal and informal actions and proceedings regarding collection of assets or recovery of claims by the creditor against the debtor, property of the estate, or property of the debtor as defined in § 362(a).¹⁷ If the creditor seizes property that the trustee can use, sell, or lease from the debtor's bankruptcy estate after the debtor has filed for bankruptcy, § 542(a) of the Bankruptcy Code, the turnover provision, demands that the creditor relinquish the asset to the bankruptcy trustee.¹⁸ The automatic stay, however, can be lifted, modified, or conditioned by the court

¹² See *In re Cowen*, 849 F.3d at 948, 950 (ruling in favor of the defendants and concluding that only "affirmative acts" to possess or control are violations of the stay, and therefore, passively holding onto a debtor's assets that were acquired pre-petition and refusing to turn them over once bankruptcy has been filed is not a violation of the automatic stay). *But see In re Weber*, 719 F.3d at 79, 83 (concluding that the creditor refusing to return the pre-petition possessed vehicle belonging to the debtor's estate constituted "exercising control" over it and withholding the vehicle violated the automatic stay); *Thompson*, 566 F.3d at 703 (holding that merely possessing an asset is "exercising control" over it, which violates of the automatic stay); *Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1152 (9th Cir. 1996) (concluding that by retaining taxes, the State violated the automatic stay by exercising control over the funds after the debtor filed for bankruptcy); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989) (ruling that failing to turn over property, whether repossessed pre-petition or post-petition, is a violation of the automatic stay).

¹³ See *infra* notes 16–23 and accompanying text.

¹⁴ 11 U.S.C. § 362(a)(3) (2012); see *infra* notes 16–23 and accompanying text.

¹⁵ See *infra* notes 24–45 and accompanying text.

¹⁶ See BANKRUPTCY BASICS, *supra* note 1, at 71 (defining the automatic stay); TABB, *supra* note 1, at 237 (discussing that the automatic stay is effective immediately and that it is effective without notice to the relevant parties).

¹⁷ See 11 U.S.C. § 362(a) (defining the automatic stay); H.R. REP. NO. 95-595, at 340 (stating that the automatic stay prevents the creditor from initiating a collection or otherwise harassing the debtor); BANKRUPTCY BASICS, *supra* note 1, at 24 (pointing out that even making phone calls demanding payments, although informal, constitutes a violation of the automatic stay provision).

¹⁸ 11 U.S.C. § 542(a). If the asset is of inconsequential value or benefit to the estate, the turnover provision does not require the creditor to relinquish the asset. *Id.*

under certain circumstances.¹⁹ The scope of the automatic stay is intended to be broad, despite some necessary limitations and exceptions, in order to further its purpose of protecting both creditors and debtors and, in turn, to further the goals of bankruptcy as a whole.²⁰

In determining what constitutes a violation of the automatic stay under § 362(a)(3), courts have relied on interpreting the plain language of the provision.²¹ Prior to 1984, this provision only prohibited acts to obtain possession of property belonging to the bankruptcy estate.²² Since the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, § 362(a)(3) now prohibits “any act to obtain possession or property of the estate or of property from the estate or to exercise control over property of the estate.”²³

¹⁹ *Id.* § 362(d). In order for the stay to be lifted or modified, the creditor must request the court to consider such termination or modification. *Id.* The stay can also be terminated or modified under two additional circumstances: 1) when the property in question is no longer part of the estate, or 2) when the bankruptcy case is closed or discharge is granted. *Id.* § 362(c)(1)–(2); PRACTICAL LAW, AUTOMATIC STAY: OVERVIEW (2018), Westlaw Practice Note 9-380-7953.

²⁰ See H.R. REP. NO. 95-595, at 340 (stating that the automatic stay is a fundamental protection for both debtors and creditors and therefore has a broad scope and application). The limitations associated with the automatic stay are judicial and statutory. See AUTOMATIC STAY: OVERVIEW, *supra* note 19 (discussing the limitations of the automatic stay); *supra* note 19 and accompanying text. Section 362(b) of the Bankruptcy Code provides the exceptions to the automatic stay, which include: “Criminal Proceedings”; “Post-Petition Lawsuits”; “Discovery from the Debtor”; “Alimony, Maintenance or Support Actions”; “Perfection of Certain Interests in Property”; “Actions to Enforce Police and Regulatory Powers”; “Setoffs in Securities-Related Transactions”; “HUD Foreclosures”; “Tax Audits, Notices and Demands”; “Actions for Possession of Expired Leases”; “Presentment of Negotiable Instruments”; “Foreclosures Under Merchant Marine Act”; “Actions to Enforce Higher Education Act”; “Liens for Ad Valorem Property Taxes”; “Loans from a Pension”; “Actions Against an Ineligible Debtor”; “Nonavoidable Transfers”; “Setoff of Income Tax Refund”; and “Medicare Exclusion[.]” 11 U.S.C. § 362(b); *Understanding The Automatic Stay in Bankruptcy*, LAW360 (June 25, 2014), <https://www.law360.com/articles/551844/understanding-the-automatic-stay-in-bankruptcy> [<https://perma.cc/SR58-ZGTT>]. Another limitation to the stay is that it is not permanent. See *supra* note 19 and accompanying text. Moreover, the stay prevents recovery on claims that arose before the commencement of the case. 11 U.S.C. § 362(a)(1); see AUTOMATIC STAY: OVERVIEW, *supra* note 19 (explaining that the automatic stay does not apply to claims that arise post-petition). It also prohibits the enforcement of judgments, but this only applies to ones that were obtained before the start of the case. 11 U.S.C. § 362(a)(2); AUTOMATIC STAY: OVERVIEW, *supra* note 19.

²¹ See *In re Cowen*, 849 F.3d at 949 (interpreting § 362(a)(3) grammatically and defining the word “act,” so as to determine whether passively holding onto an asset that was repossessed pre-petition is a violation of the automatic stay); *In re Weber*, 719 F.3d at 79 (consulting the dictionary for the definition of the word “control” in order to determine if the creditor’s refusal to return the debtor’s vehicle is a violation of the stay); *Thompson*, 566 F.3d at 702 (interpreting the phrase “exercise control” to determine if an asset possessed by the creditor pre-petition and the creditor’s refusal to turn over said asset is a violation of the automatic stay).

²² See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (amending the language of § 362(a)(3) in the Bankruptcy Code).

²³ *Id.*; 11 U.S.C. § 362(a)(3). Since Congress did not provide any explanation or commentary as to why it added this language to the provision, it has been left to the courts to interpret its meaning and application. *In re Young*, 193 B.R. 620, 623 (Bankr. D.D.C. 1996); see *In re Weber*, 719 F.3d at 80 (concluding that the Bankruptcy Amendments and Federal Judgeship Act of 1984

B. Factual and Procedural History of *In re Cowen*

In 2013, Jared Trent Cowen borrowed money from WD Equipment, owned by Aaron Williams, to repair one of his commercial trucks.²⁴ In exchange for the funds, Mr. Cowen gave WD Equipment a lien on the truck and promised Mr. Williams that he would pay off his loan.²⁵ A few weeks after getting his truck repaired, Mr. Cowen's truck broke down and was in need of about \$9,000 in additional repairs, which Mr. Cowen did not have.²⁶ Because Mr. Cowen could not use his truck, his source of regular income, he could not meet his payment obligations to WD Equipment.²⁷ Mr. Cowen attempted to refinance the loan and communicated his situation to Mr. Williams, who in return accelerated the payoff date to August 6th.²⁸ While attempting to repay WD Equipment, Mr. Cowen defaulted on a different loan that was owed to Bert Dring and secured by a second truck.²⁹ On July 29th, Mr. Dring repossessed the truck using intimidation and false pretenses.³⁰ Mr.

broadened the automatic stay provision, which is consistent with Congress' intent to further the goals of debtor protection by preventing creditors from holding onto assets, regardless of when they acquired possession of the assets); *Thompson*, 566 F.3d at 702 (explaining that the amendment to the automatic stay provision is proof of Congress' intent to expand potential violations of the stay so as to include more than mere possession of an asset).

²⁴ *In re Cowen*, 849 F.3d at 945. Mr. Cowen owned a trucking company, J & S Trucking, as a sole proprietorship, which he ran by operating two semi-trucks: a Peterbilt and a Kenworth. Appellant's Opening Brief at 5, *In re Cowen*, 849 F.3d 943 (No. 15-1413); Appellee's Opening Brief at 2, *In re Cowen*, 849 F.3d 943 (No. 15-1413). Mr. Cowen borrowed money from Mr. Williams in order to repair the Peterbilt. *In re Cowen*, 849 F.3d at 945.

²⁵ *In re Cowen*, 849 F.3d at 945. A lien, as defined in the Bankruptcy Code, is an "interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37).

²⁶ *In re Cowen*, 849 F.3d at 945.

²⁷ *See id.* at 945–46 (explaining that without his trucks, Mr. Cowen had no consistent income).

²⁸ *Id.* at 945. In attempting to refinance, Mr. Cowen had meetings with his bank and his family members. *Id.* "Refinancing" refers to finding other sources of funding, such as taking out larger loans to pay off old loans or negotiating a lower interest rate. *Refinancing*, BLACK'S LAW DICTIONARY (10th ed. 2014). The communications between Mr. Cowen and Mr. Williams occurred over text between August 1st and August 2nd. *In re Cowen*, 849 F.3d at 945. During these interactions, Mr. Williams changed and moved the date forward by which Mr. Cowen had to repay Mr. Williams before setting it for August 6th. *Id.* Because Mr. Williams was able to accelerate the loan payments, the loan agreement must have had an acceleration clause, which states that upon default, the creditor can accelerate the remaining future payments to a present due date. *Acceleration Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see In re Cowen*, 849 F.3d at 945 (stating that Mr. Williams accelerated the payoff date). Additionally, in these text exchanges, Mr. Williams was inconsistent regarding the amount that Mr. Cowen would need to pay to settle the debt. *In re Cowen*, 849 F.3d at 945.

²⁹ *In re Cowen*, 849 F.3d at 945. Mr. Dring, Mr. Williams's father-in-law, had a "purchase money security interest" in the second truck, the Kenworth. *Id.* A purchase money security interest is effectuated when a lender extends credit to a buyer in order to purchase something specific, with the lender retaining a security interest in that property. *See* U.C.C. § 9-103(b) (2010).

³⁰ *In re Cowen*, 849 F.3d at 945. Mr. Dring tricked Mr. Cowen into going to Mr. Dring's place of business with the truck by asking him to drop off a trailer. *Id.*; Appellee's Opening Brief,

Cowen received a letter a few days after the encounter, which stated that he had ten days to pay off the debt owed to Mr. Dring on the second truck.³¹

On August 6th, after having both trucks repossessed, Mr. Cowen filed for relief under Chapter 13 of the Bankruptcy Code.³² Mr. Cowen made both Mr. Williams and Mr. Dring aware that he had filed for bankruptcy and requested the return of his trucks immediately.³³ Both defendants refused to return the trucks, claiming that title had been transferred or that they had already sold the trucks prior to Mr. Cowen filing for bankruptcy.³⁴

One month later, Mr. Cowen filed a motion asking the bankruptcy court to provide orders showing why the defendants have not been held in violation of the automatic stay.³⁵ In granting Mr. Cowen's motion, the bankruptcy court ordered the immediate turnover of the trucks.³⁶ Neither defendant complied, and Mr. Cowen subsequently filed an adversary proceeding for violations of the automatic stay.³⁷ The bankruptcy court ruled in favor

supra note 24, at 2. When Mr. Cowen arrived with his son, Mr. Dring told him to leave the keys in the ignition and exit the vehicle. *In re Cowen*, 849 F.3d at 945. Mr. Cowen did as he was told, and Mr. Dring entered the truck and declared the truck "repossessed." *Id.* Mr. Dring and five other men intimidated and threatened Mr. Cowen and his son with a can of mace until they left the property on foot. *Id.* This series of events was disputed by both Mr. Dring and the men that were with him; however, the bankruptcy court gave more weight to Mr. Cowen's testimony. Appellee's Opening Brief, *supra* note 24, at 2; see *In re Cowen*, 849 F.3d at 946 (stating that the bankruptcy court didn't believe defendants' testimony).

³¹ *In re Cowen*, 849 F.3d at 945.

³² *Id.* at 946. The opinion is silent as to when and how Mr. Williams repossessed the truck he had a lien on. See *id.* at 945–46. Mr. Cowen filed for bankruptcy on the deadline for paying off the first truck to Mr. Williams, and before the ten-day cure period ended for the second truck. *Id.* Chapter 13 bankruptcy, also called a wage earner's plan, provides relief for individual consumers with a regular income. BANKRUPTCY BASICS, *supra* note 1, at 22. Having a regular income is a requirement for relief under Chapter 13. 11 U.S.C. § 109(e) (2012). Filing Chapter 13 allows the debtor to reorganize, come up with a plan to pay off debts, and discharges remaining debt. See Shu-Yi Oei, *Taxing Bankrupts*, 55 B.C. L. REV. 375, 389 (2014) (explaining the power of the Chapter 13 discharge).

³³ *In re Cowen*, 849 F.3d at 946.

³⁴ *Id.* Mr. Williams argued that he transferred the title of the truck to himself prior to Mr. Cowen filing for bankruptcy. *Id.* There is no evidence, however, that Mr. Williams made Mr. Cowen aware of a title change regarding the truck in the text exchange between the two. *Id.* Mr. Dring claimed that he sold the second truck before Mr. Cowen filed for bankruptcy. *Id.* At first, he claimed that he sold it in an undocumented sale prior to Mr. Cowen's filing; however, he later produced a bill of sale, which showed that he sold the truck for cash on August 4th. *Id.*

³⁵ *Id.*

³⁶ *Id.* The defendants were warned that they could be liable for damages if they did not turn over the trucks, which could be found to be a willful violation of the automatic stay. *Id.*

³⁷ *Id.* A debtor can file an adversary proceeding, which is a separate lawsuit brought by the debtor in order to recover money or property for the bankruptcy estate. BANKRUPTCY BASICS, *supra* note 1, at 37. Because Mr. Cowen was not producing a regular income stream, he was no longer eligible for relief under Chapter 13. *In re Cowen*, 849 F.3d at 946; see 11 U.S.C. § 109(e) (2012) (stating an individual's requirements to be eligible for Chapter 13 relief). Consequently, the bankruptcy court dismissed Mr. Cowen's bankruptcy case. *In re Cowen*, 849 F.3d at 946. The court continued with the adversary proceeding. *Id.* During the adversary proceeding, the defend-

of Mr. Cowen, finding that the defendants produced counterfeit paperwork regarding the sales of the trucks and that their testimony regarding the transfer of title of the trucks was not credible.³⁸ The court concluded that the defendants violated § 362(a)(3) of the automatic stay provision and subsequently awarded both actual and punitive damages to Mr. Cowen.³⁹

Defendants appealed, first to the district court and then to the United States Court of Appeals for the Tenth Circuit.⁴⁰ The defendants argued that the bankruptcy court did not have jurisdiction over the adversary proceeding, and that the bankruptcy court incorrectly interpreted the automatic stay provision, § 362(a)(3).⁴¹ Regarding the interpretation of the automatic stay, the district court affirmed the bankruptcy court's decision, finding that defendants' refusal to return the trucks after Mr. Cowen filed for bankruptcy violated § 362(a)(3).⁴² On appeal to the Tenth Circuit, the court reviewed the bankruptcy court's legal conclusions *de novo* and the factual findings for error.⁴³ The Tenth Circuit concluded that the bankruptcy court incorrectly interpreted § 362(a)(3) and that passive retention of an asset of the bankruptcy estate was not a violation of the automatic stay.⁴⁴ Consequently, the

ants argued they did not violate the automatic stay because Mr. Cowen no longer had any rights to the trucks, since they correctly terminated his rights before the start of the bankruptcy case. *Id.*

³⁸ *In re Cowen*, 849 F.3d at 946. The court found that the defendants likely forged the sale documents. *Id.* It also concluded that the defendants gave perjured testimony and told their witnesses what to say on the stand in order to convince the court that there was a proper transfer of rights before Mr. Cowen filed for bankruptcy. *Id.* The bankruptcy court also mentioned that even if there were a proper transfer of rights pre-petition, the actions they claimed to take were in violation of Colorado state law and therefore did not properly cut off Mr. Cowen's ownership rights in the two trucks. *Id.*

³⁹ *Id.*

⁴⁰ *Id.*; see *Cowen v. WD Equip., LLC (In re Cowen)*, 549 B.R. 774, 789 (Bankr. D. Colo. 2015) (*In re Cowen District*) (ruling on defendants' first appeal).

⁴¹ *In re Cowen*, 849 F.3d at 946–47.

⁴² See *In re Cowen District*, 549 B.R. at 789 (holding that the bankruptcy court did not err in its interpretation application of § 362(a)(3) on these facts). Although the district court affirmed the bankruptcy court's conclusion regarding the violation of the automatic stay, it reversed on the calculation of damages for such violation. *Id.* Regarding the jurisdictional issue, the district court held that the bankruptcy court had jurisdiction over the adversary proceeding even though the original bankruptcy case was dismissed. *Id.*

⁴³ See *In re Cowen*, 849 F.3d at 947 (quoting *FB Acquisition Prop. I, LLC v. Gentry (In re Gentry)*, 807 F.3d 1222, 1225 (10th Cir. 2015)). The district court was treated as “a subordinate appellate tribunal whose rulings [were] not entitled to any deference” See *id.* (quoting *Nelson v. Long (In re Long)*, 843 F.3d 871, 873 (10th Cir. 2016)).

⁴⁴ See *id.* at 948, 950 (holding that it does not agree with the bankruptcy court's interpretation of the automatic stay and finding that “only affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3)”). Regarding the issue of jurisdiction, the Tenth Circuit affirmed the district court's decision that the bankruptcy court did have jurisdiction in the adversary proceeding. *Id.* at 948. Under 28 U.S.C. § 157(b)(1), bankruptcy courts properly exercise jurisdiction whenever they “enter final judgments in ‘all core proceedings arising under Title 11, or arising in a case under Title 11.’” *Id.* at 947 (citing *Stern v. Marshall*, 564 U.S. 462, 474 (2011)). The Bankruptcy Code provides a non-exclusive list of matters that are considered core

Tenth Circuit reversed the district court's ruling and remanded the case back to the district court.⁴⁵

II. MAJORITY VERSUS MINORITY VIEWS OF § 362(a)(3) OF THE AUTOMATIC STAY PROVISION

Various courts have addressed the issue of whether refusing to turn over an asset of the estate, which a creditor acquired pre-petition, is a violation of the automatic stay provision.⁴⁶ The majority of courts have concluded that refusal to turn over an asset of the estate acquired pre-petition is a violation.⁴⁷ The minority of courts, including the Tenth Circuit, have concluded that such refusal is not a violation and determined instead that only affirmative acts can constitute violations.⁴⁸ Section A of this Part discusses the majority view's interpretation of § 362(a)(3) of the automatic stay.⁴⁹ Section B of this Part discusses the Tenth Circuit's decision in *WD Equipment v. Cowen* (*In re Cowen*) and analyze the reasoning behind this minority view.⁵⁰

matters. 28 U.S.C. § 157(b)(2) (2012). A claim for damages asserting a violation of the automatic stay is defined as a “core proceeding.” *In re Cowen*, 849 F.3d at 947 (citing *Johnson v. Smith (In re Johnson)*, 575 F.3d 1079, 1083 (10th Cir. 2009)).

⁴⁵ *In re Cowen*, 849 F.3d at 951. When an appellate court reverses a decision of a lower court, it is invalidated. *Reverse*, BLACK'S LAW DICTIONARY (10th ed. 2014). Remanding a case means to send it back to the court that last ruled on it. *Remand*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Tenth Circuit gave the district court the authority to remand the case to the bankruptcy court. *In re Cowen*, 849 F.3d at 951.

⁴⁶ See *supra* note 12 and accompanying text.

⁴⁷ See *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 79, 83 (2d Cir. 2013) (concluding that the creditor refusing to return the pre-petition, repossessed vehicle belonging to the estate of the debtor was “exercising control” over it and that withholding the vehicle violated the automatic stay); *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009) (holding that merely possessing an asset is “exercising control” over it, which in turn violates of the automatic stay); *Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1152 (9th Cir. 1996) (concluding that by retaining taxes, the State violated the automatic stay by exercising control over the debtor's assets after the debtor filed for bankruptcy); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989) (ruling that failing to turn over property, whether that property had been repossessed pre-petition or post-petition, is a violation of the automatic stay).

⁴⁸ See *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 950 (10th Cir. 2017) (ruling in favor of the defendants and concluding that only “affirmative acts” to possess or control a debtor's assets are violations of the stay, and therefore, passively holding onto a debtor's assets, acquired pre-petition, and refusing to turn them over once bankruptcy has been filed is not a violation of the automatic stay); *In re Young*, 193 B.R. 620, 629 (Bankr. D.D.C. 1996) (holding that a creditor's retention of a debtor's property did not constitute a violation of the automatic stay).

⁴⁹ See *infra* notes 51–62 and accompanying text.

⁵⁰ See *supra* note 48 and accompanying text; *infra* notes 63–73 and accompanying text.

A. Explanation of the Majority View

Courts that have supported the majority view, which include the Second, Sixth, Seventh, Eighth, and Ninth Circuits, concluded that when a creditor refuses to turn over an asset of the estate that they acquired pre-petition, that creditor was in violation of the automatic stay.⁵¹ These courts all began their argument with the 1983 case *United States v. Whiting Pools, Inc.*, in which the U.S. Supreme Court addressed a similar issue involving a Chapter 11 bankruptcy.⁵² *Whiting Pools* addressed the issue of whether § 542(a) of the turnover provision required the creditor to turn over property that was repossessed pre-petition.⁵³ The Court ruled that debtor property, including property subject to a lien, that was not in the debtor's possession at the time of petition was still subject to the turnover provision and part of bankruptcy estate.⁵⁴

⁵¹ See *supra* note 47 and accompanying text.

⁵² See *In re Weber*, 719 F.3d at 77 (using the *Whiting Pools* decision as the basis for deciding the issue of whether failing to turn over an asset of the estate immediately after filing of bankruptcy is "exercising control" over the equitable interest in the asset, and therefore a violation of the automatic stay); *Thompson*, 566 F.3d at 700, 701 (beginning the court's opinion by discussing the *Whiting Pools* discussion); *In re Knaus*, 889 F.2d at 775 (citing to *Whiting Pools* in determining what constitutes property of the estate); *infra* note 53 and accompanying text. See generally *United States v. Whiting Pools Inc.*, 462 U.S. 198 (1983). In *Whiting Pools*, the debtor filed for bankruptcy after the Internal Revenue Service took possession of the debtor's property to satisfy a tax lien. *Whiting Pools*, 462 U.S. at 199. Chapter 11 bankruptcy generally provides relief for commercial enterprises. BANKRUPTCY BASICS, *supra* note 1, at 7. The idea is to have the business repay its debts while still being able to run as a business, so this type of relief focuses on reorganization. *Id.*

⁵³ *Whiting Pools*, 462 U.S. at 202. The turnover provision of the Bankruptcy Code requires the creditor to turn over certain property of the estate to the bankruptcy trustee that the trustee can use sell or lease under § 363, unless the property is of "inconsequential value or benefit to the estate." 11 U.S.C. § 542(a) (2012). The Supreme Court in *Whiting Pools* did not address whether its ruling could be extended to Chapter 13 bankruptcy cases; rather, the Court limited their decision to Chapter 11 cases. See generally *Whiting Pools*, 462 U.S. at 198 (focusing on Chapter 11 cases). Throughout the case, the Court specified that this was a decision regarding a Chapter 11 bankruptcy case and made no other commentary regarding the other chapters of the Bankruptcy Code. See generally *id.* Courts, however, have not limited the ruling in this case to Chapter 11 cases, observing that all of the relevant statutes of the Bankruptcy Code apply to the "estate." See *Thompson*, 566 F.3d at 705 (stating that the policy behind Chapter 11 and 13 is similar—providing the debtor with an opportunity to repay his debts by reorganizing—and, therefore, the holding in *Whiting Pools* should apply to both Chapters); *Unified People's Fed. Credit Union v. Yates (In re Yates)*, 332 B.R. 1, 6–7 (B.A.P. 10th Cir. 2005) (acknowledging that even though *Whiting Pools* was limited to Chapter 11 cases, there is no explicit reason why the ruling should not also be applied to Chapter 13 cases).

⁵⁴ See *Whiting Pools*, 462 U.S. at 207, 209 (concluding that § 542(a) gives the bankruptcy estate a possessory interest in property that was not in the possession of the debtor at the outset of the case and therefore was part of the bankruptcy estate). The Court examined both § 541(a), which defines the bankruptcy estate, and § 542(a), the turnover provision. *Id.* at 204–05. Regarding the bankruptcy estate provision, § 541(a)(1), the Court noted that the provision's scope is wide and not limiting in any way, according to House and Senate Reports. *Id.* This provision is intended to include property that other provisions of the Bankruptcy Code allocate to the estate, regardless of whether the

Because the *Whiting Pools* decision effectively converts a debtor's equitable interest into a possessory interest, superior to the interest of the creditor, the turnover provision is self-executing and possession of an asset belonging to the bankruptcy estate after bankruptcy has been filed could be a violation of the automatic stay.⁵⁵ The view taken by the majority of courts emphasizes the relationship between § 542(a) and § 362(a)(3), and states that these two provisions work together to further the goals of bankruptcy.⁵⁶ Together, these provisions accomplish this by grouping all of the debtor's property together, protecting it from creditors, and allowing the debtor a "fresh start" via paying off their debts.⁵⁷

debtor maintained physical possession of the asset at the time of filing. *Id.* at 205. The Court concluded that § 542(a), although not without limitations, is one of the provisions that allows property that the debtor did not possess when the debtor filed for bankruptcy to be included as part of the estate. *Id.* at 205–06. In other words, there is no requirement or limitation that the debtor have a possessory interest in an asset at the time bankruptcy is filed in order to include it as part of the estate. *Id.* at 206. Accordingly, this turnover provision gives the estate a possessory interest in property, and therefore that property can be included as part of the estate. *See id.* at 207 (concluding that the estate has a possessory interest in such property).

⁵⁵ *See id.* at 207 (concluding that § 542(a) grants a possessory interest to the debtor's estate even if such asset was not held by the estate and was held by the secured creditor when the bankruptcy petition was filed); *In re Weber*, 719 F.3d at 79 (citing 5 COLLIER ON BANKRUPTCY § 542.02 (Richard Levin & Henry J. Sommer eds., 16th ed. 2013)) (stating that the trustee does not have to do anything for the turnover provision to come into effect, making it self-executing).

⁵⁶ *See Thompson*, 566 F.3d at 702 (pointing out that the primary goal of reorganization bankruptcy is to allow the debtor use of all assets of the estate, including those that a creditor possessed before bankruptcy was filed, so that the debtor can pay off debts); Anne Zoltani & Janice Miller Karlin, *Examining § 362(a)(3): When "Stay" Means Stay*, AM. BANKR. INST. J., May 1, 2017, at 20, 21 (discussing the majority view on the automatic stay issue and the relationship that the courts make between the automatic stay provision and the turnover provision). This interpretation supports the idea that § 362 provides relief when the turnover provision is not complied with under § 542. Zoltani & Karlin, *supra*, at 21; *see Abrams v. Sw. Leasing & Rental Inc.* (*In re Abrams*), 127 B.R. 239, 243 (B.A.P. 9th Cir. 1996) (stating that support for the idea that § 542 provides the right and § 362 provides the remedy is found in the fact that the Bankruptcy Code does not have any remedy or violation provisions under § 542, whereas § 362 does).

⁵⁷ *See Thompson*, 566 F.3d at 702 (making the additional policy argument that an asset will be both beneficial to the debtor and the creditor when it is part of the bankruptcy estate); Zoltani & Karlin, *supra* note 56, at 20–21 (discussing how these provisions, in unison, enable the goals of bankruptcy to be achieved). The goals of the bankruptcy system are to resolve priority issues between competing creditors who have claims on the same assets and to relieve the debtor of these claims and give them a "fresh start." *See In re Weber*, 719 F.3d at 76 (discussing the automatic stay and turnover provisions and how they enforce the goals of bankruptcy, which include relief to the debtor and allowing them a "fresh start"); *Thompson*, 566 F.3d at 706 (stating that the purpose of both corporate and personal reorganization seek to assist the debtor in "regain[ing] his financial foothold" in order to pay off his debts to his creditors); *see also Whiting Pools*, 462 U.S. at 203 (stating that the goal of reorganization is to allow businesses to continue running in order to pay off debts to creditors); BANKRUPTCY BASICS, *supra* note 1, at 6 (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)) (referencing a Supreme Court statement that the purpose of bankruptcy law was to give the "honest but unfortunate debtor" a "fresh start"); TABB, *supra* note 1, at 2 (stating that another goal of bankruptcy is to address claims for the same asset between creditors).

The various courts that have deemed a failure to turn over an asset acquired pre-petition to be a violation of the automatic stay continued their discussion by interpreting the plain meaning of the provision.⁵⁸ These courts looked at the plain meaning of the phrase “exercise control” and concluded that passively holding onto an asset while depriving the debtor of the beneficial use of that asset fell under the definition of “exercising control,” which in turn was a violation of the automatic stay provision.⁵⁹

Moreover, the majority approach, which is highly dependent on policy considerations, views the Bankruptcy Amendments and Federal Judgeship Act of 1984 as broadening the reach of the automatic stay provision to include more than just merely “obtaining possession.”⁶⁰ The courts acknowledged the lack of explanation for the amendments by Congress; however, they reasoned that the expansion intrinsically illustrated that Congress intended the automatic stay to apply to assets that were acquired before the petition for bankruptcy was filed.⁶¹ The expansion of the provision is consistent with the Supreme Court’s explicit understanding that the overarching goal of bankruptcy is to allow the debtor to get back in a position where they can satisfy all of their debts.⁶²

⁵⁸ See *In re Weber*, 719 F.3d at 79 (consulting the dictionary for definition of “control” in order to determine if the creditor’s refusal to return the debtor’s vehicle is a violation of the stay); *Thompson*, 566 F.3d at 702 (interpreting the phrase “exercise control” in order to determine if an asset possessed by the creditor pre-petition coupled with the same creditor’s refusal to turn over the asset is a violation of the automatic stay).

⁵⁹ See *In re Weber*, 719 F.3d at 79 (citing WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed. 2002) (relying on the dictionary definition of “control,” which means “to exercise authority over[,] direct[,] or command,” and concluding that by refusing to return the vehicle to the debtor, the creditor was “exercising control” over an asset in which the debtor had an equitable interest and that retaining such asset was a violation of the stay); *Thompson*, 566 F.3d at 702 (using the dictionary definition of the word “control” in concluding that holding on to an asset and prohibiting the debtor from using that asset for their benefit was a violation of the automatic stay provision).

⁶⁰ See *In re Weber*, 719 F.3d at 80 (concluding that the Bankruptcy Amendments and Federal Judgeship Act of 1984 broadened the automatic stay provision, which is consistent with Congress’s intent to further the goals of debtor protection by preventing creditors from holding onto an asset, regardless of when they acquired possession of the asset); *Thompson*, 566 F.3d at 702 (explaining that the amendment to the automatic stay is proof of Congress’s intent to expand violations of the stay to include more than just those merely possessing the asset); see also *supra* notes 22–23 and accompanying text.

⁶¹ See *In re Weber*, 719 F.3d at 80 (agreeing that Congress intended to include repossession of assets by creditors and the refusal to return such assets to be considered violations of the automatic stay); *Thompson*, 566 F.3d at 702 (explaining that the expansion suggests Congress intended to include the act of repossessing an asset pre-petition as a violation of the automatic stay); *Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359, 368 (6th Cir. 1997) (stating that the amendment to the automatic stay provision could be perceived as evidence that Congress intended for the provision to be applied to property that was not in the possession of the debtor when bankruptcy was filed).

⁶² See *Whiting Pools*, 462 U.S. at 203 (stating that the goal of reorganization is to allow the debtor to continue producing income, in order to pay off their debts); *Thompson*, 566 F.3d at 703

B. Explanation of the Minority View, as in *In re Cowen*

In *In re Cowen*, the Tenth Circuit concluded that it was not a violation of the automatic stay when the creditors refused to turn over the commercial trucks they had each repossessed prior to the debtor's filing of bankruptcy.⁶³ The court began its analysis by pointing out that the majority view is too reliant on "practical considerations" and policy, as opposed to following the plain words of the automatic stay provision.⁶⁴ Accordingly, the Tenth Circuit started its language analysis by focusing on and defining the phrase "any act."⁶⁵ It reasoned that "any act" applies to both "obtain[ing] possession" "exercise[ing] control" and defined "act" to mean "take action" or "do something."⁶⁶ The Tenth Circuit's analysis led it to conclude that the automatic stay provision only prohibits creditors from actively "*doing* something to obtain possession of or to exercise control over the estate's property."⁶⁷

(quoting *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (B.A.P. 6th Cir.1999)) (stating that refusal to return an asset to the bankruptcy estate constitutes "exercising control" because it does not allow the debtor to use that asset to his benefit and in turn, to the benefit of the creditor); *In re Del Mission*, 98 F.3d at 1151 (pointing out that the purpose of the automatic stay is to relieve debtors from claims or proceedings against them during bankruptcy); *In re Knaus*, 889 F.2d at 774, 775 (acknowledging that the purpose of the automatic stay, specifically in a Chapter 11 case, is to allow the debtor to use their assets to produce income so that they can eventually repay their debts, and when the creditor refuses to turn over assets, they are preventing the debtor from continuing his business). There is an additional policy argument that states that the case law and legislative history relating to the automatic stay provision shows that Congress did not intend to "place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions, at least not without providing a means to recover damages sustained as a consequence thereof." *In re Del Mission*, 98 F.3d at 1151–52 (quoting *In re Abrams*, 127 B.R. at 243).

⁶³ See *In re Cowen*, 849 F.3d at 950 (holding that only affirmative acts to "obtain possession" and "exercise control" are violations of the automatic stay).

⁶⁴ *Id.* at 948–49. *In re Cowen* cites to *In re Weber* and *Thompson*, which each rely heavily on legislative history and policy considerations to interpret the automatic stay provision. *Id.*; see *Weber*, 719 F.3d at 81 (relying on the policy behind reorganization and what it seeks to achieve); *Thompson*, 566 F.3d at 703 (stating that *Whiting Pools* and policy considerations support the majority view of the interpretation of the automatic stay); see also *supra* notes 60–62 and accompanying text. The Tenth Circuit puts more weight on the plain language of the statute, stating that if the plain language interpretation answers the question, the analysis need not go any further. *In re Cowen*, 849 F.3d at 949.

⁶⁵ *In re Cowen*, 849 F.3d at 949.

⁶⁶ *Id.* The court stated that "any act" was a prepositive modifier to both the phrases "to obtain possession" and "to exercise control." *Id.*

⁶⁷ *Id.* Because the Tenth Circuit reasoned that the creditor has to actively do something, it concluded that the automatic stay provision does not cover a situation where the creditor merely holds on to an asset. *Id.* The court also stated that "stay means stay, not go[.]" meaning that this provision does not make the creditor liable to turn over the property. *Id.* In addressing the same issue regarding the automatic stay, the United States Bankruptcy Court of the District of Columbia attacked the majority view's conclusion by criticizing its interpretation of the phrase "exercise control." See *In re Young*, 193 B.R. at 624 (stating that the phrase is ambiguous and that without any legislative history, we cannot truly understand what Congress intended). In order to attempt to understand what the phrase means, the court looked at the wording of the turnover provision,

The Tenth Circuit determined that courts which support the majority view have relied too heavily on the legislative history of § 362(a)(3) and incorrectly assumed that Congress intended to prohibit creditors from holding on to property that belongs to the debtor or the bankruptcy estate.⁶⁸ The court instead took the position that, by using the word “control,” Congress intended to reach conduct in which the creditor did not have possession of the asset but would still interfere with the estate’s property interest.⁶⁹ Additionally, the court concluded that the automatic stay provision does not impose an affirmative obligation to turn over property because there is no legislative history to support that assertion and Congress would have explicitly done so had that been the intention.⁷⁰

The Tenth Circuit acknowledged that the majority’s best argument was that the automatic stay and the turnover provision should be read together; however, the court concluded that this analysis too was unsupported.⁷¹ The Tenth Circuit noted that bankruptcy courts do not need the automatic stay provision to enforce the turnover provision, because these courts have been granted “broad equitable powers” by law and can enforce the turnover provision independently, when appropriate.⁷² The Tenth Circuit concluded, after consideration of the reasons discussed above, that only affirmative acts of possession or control are violations of the automatic stay provision.⁷³

which uses the phrase “possession, custody, or control.” *Id.* The court therefore concluded that because every word Congress used was significant, the definition of “control” must not include the definition of “custody.” *Id.*

⁶⁸ *See In re Cowen*, 849 F.3d at 949 (criticizing the majority view’s assumption that Congress intended to prohibit creditors from possessing debtor property). The Tenth Circuit posited that the majority view came to this assumption based on the sole fact that Congress amended the automatic stay provision to prohibit more than merely obtaining possession. *Id.*

⁶⁹ *Id.* at 949–50 (quoting Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is “Exercising Control” Over What?*, 33 BANKR. L. LETTER, Sept. 2013, at 1, 1–11). An example of an act that “exercises control” but does not “obtain possession” of the property would be when a creditor who possesses a debtor’s property improperly sells the asset. *Id.*

⁷⁰ *Id.* at 950.

⁷¹ *Id.* Courts that support the majority view have held that the turnover provision was unconditionally self-executing and together, these provisions furthered the goals of bankruptcy to group all of the debtor’s assets together for the purposes of financial relief and repayment of debt to creditors. *Id.* The Tenth Circuit stated that this majority view was unsupported because there is no “textual link” between the two provisions, nor is there any legislative history to support the conclusion. *Id.*

⁷² *Id.* (citing *Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258, 1263 (10th Cir. 2008)). Bankruptcy courts have been granted these “broad equitable powers” under 11 U.S.C. § 105(a), and can enforce the turnover provision to provide relief as “necessary or appropriate to carry out the provisions of” § 542(a).” *Id.* (citing 11 U.S.C. § 105(a) (2012)).

⁷³ *Id.*; *see supra* notes 63–72 and accompanying text. There is an additional argument of “adequate protection,” which states that secured creditors do not have to turn over assets immediately upon the filing of bankruptcy unless and until they are given adequate protection. *See Thompson*, 566 F.3d at 703 (citing *Nash v. Ford Motor Credit Co. (In re Nash)*, 228 B.R. 669 (Bankr. N.D. Ill. 1999)) (stating that several district courts in multiple jurisdictions have ruled that a creditor does

III. THE TENTH CIRCUIT INCORRECTLY DECIDED *IN RE COWEN*

The Tenth Circuit incorrectly decided *WD Equipment v. Cowen* (*In re Cowen*) by concluding that a violation of the automatic stay is only limited to affirmative acts to possess or control an asset.⁷⁴ The law of bankruptcy has two overarching goals: to provide equal treatment to creditors in terms of repaying the debt and to provide the debtor a “fresh start.”⁷⁵ Enforcement of the automatic stay enhances these overall bankruptcy goals and is a benefit to both debtors and creditors.⁷⁶ For debtors, the automatic stay prevents all collection efforts and actions by creditors, giving the debtor financial relief and the ability to collect their assets into an estate, in order to repay the debts or create a reorganization plan.⁷⁷ Additionally, when the automatic stay is in effect, it allows for multiple creditor claims to be handled in an organized and equitable fashion by the court.⁷⁸ Ruling that the defendants in *In re Cowen* were not in violation of the stay by refusing to turn over the trucks, the Tenth Circuit effectively undermined important policy considerations surrounding bankruptcy and the automatic stay.⁷⁹ Mr. Cowen was not able to receive the financial relief that the stay was intended to provide due to the court’s holding, which removed his main source of income in the form of his trucks, and therefore Mr. Cowen could not attempt to repay or reorganize, to the potential detriment of other possible creditors.⁸⁰

not need to turn over the asset if they receive no adequate protection); *Spears v. Ford Motor Credit Co.* (*In re Spears*), 223 B.R. 159 (Bankr. N.D. Ill. 1998); *In re Young*, 193 B.R. at 625 (reasoning that a creditor does not have to turn over an asset to a debtor or bankruptcy estate until they receive adequate protection from the court); *see also* 11 U.S.C. § 361 (establishing adequate protection). The purpose of this requirement of assured “adequate protection” is to provide protection for the creditor in situations where the value of the asset that they maintain an interest in decreases due to it being used by the debtor or due to the automatic stay provision. MARY K. DENEVI, *EVADING THE AUTOMATIC STAY IN BANKRUPTCY: A PRACTICAL GUIDE TO OBTAINING RELIEF FROM THE AUTOMATIC STAY IN BANKRUPTCY COURT* 43 (1991).

⁷⁴ *See infra* notes 75–90 and accompanying text.

⁷⁵ *See supra* note 1 and accompanying text.

⁷⁶ *See infra* notes 77–78 and accompanying text.

⁷⁷ H.R. REP. NO. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6297–98; *see also* *Knaus v. Concordia Lumber Co.* (*In re Knaus*), 889 F.2d 773, 775 (8th Cir. 1989) (stating that the purpose of the automatic stay is to provide some financial relief for the debtor). When the debtor is in possession of the asset, they can put it to beneficial use in order to come up with the funds to repay their debts. *See In re Knaus*, 889 F.2d at 775 (stating that when the creditor has possession of the asset, the debtor cannot put that asset to use to continue business).

⁷⁸ *See* H.R. REP. NO. 95-595, at 340 (stating that without the stay, the first creditor to seek self-help against the debtor will be given full or at least some advantage over subsequent creditors).

⁷⁹ *See* *WD Equip., LLC v. Cowen* (*In re Cowen*), 849 F.3d 943, 950 (10th Cir. 2017) (ruling that only affirmative actions constitute violations of the automatic stay); *see also supra* notes 75–78 and accompanying text.

⁸⁰ *See In re Cowen*, 849 F.3d at 946 (stating that Mr. Cowen had no regular income without his commercial trucks); *see also supra* notes 77–78 and accompanying text. By allowing Mr. Wil-

The Tenth Circuit's decision additionally undermined the objective behind Chapter 13 bankruptcy itself.⁸¹ As established by the Supreme Court in *Whiting Pools*, Mr. Cowen had an equitable and possessory interest in the trucks, giving the bankruptcy estate a possessory right in the trucks as well.⁸² By depriving Mr. Cowen of his commercial trucks, Mr. Cowen could no longer earn any income, meaning he no longer qualified for relief under Chapter 13, which defeats the entire purpose of providing this type of bankruptcy relief.⁸³

Mr. Williams's and Mr. Dring's duty to turn over the trucks arose as soon as Mr. Cowen filed for bankruptcy, and the failure to do should be deemed a violation of the automatic stay.⁸⁴ Although secured creditors are entitled to "adequate protection" under § 361 of the Bankruptcy Code, this protection does not absolve them of their responsibility to return the asset to the bankruptcy estate.⁸⁵ The creditors first has to return the asset to the debtor or bankruptcy estate, and only then may they request adequate protection from the court.⁸⁶ This is supported both by the language of the

Williams and Mr. Dring to keep the trucks, they received payment for their loan; however, that result disregards any other possible creditors that Mr. Cowen may have had with interests in his trucks or other assets. *See supra* notes 77–79 and accompanying text. The Seventh Circuit has said that withholding assets from the debtor and the bankruptcy estate is a form of "exercising control" over such assets because the debtor can no longer benefit from the assets by putting them to use in running their business. *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009) (quoting *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999)).

⁸¹ *See Thompson*, 566 F.3d at 703, 705 (stating that the objective of Chapter 13 is to allow the debtor to reorganize so that they can pay off their debts without having to sell any of their assets, and in order to do this, the debtor has to be able to put their assets to use which they cannot do while the assets are in the hands of the creditor).

⁸² *See United States v. Whiting Pools Inc.*, 462 U.S. 198, 207 (1983) (concluding that the turnover provision granted the estate a possessory interest in the debtor's property, even if the debtor was not in possession of the property at the time that bankruptcy was filed); *see also Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 79 (2d Cir. 2013) (applying the Supreme Court's holding in *Whiting Pools* to conclude that the secured property became property of the estate as soon as the debtor filed for bankruptcy).

⁸³ *See In re Cowen*, 849 F.3d at 946 (stating that because Mr. Cowen could no longer use his trucks for his business, which was his main source of income, he no longer qualified for relief under Chapter 13 and his bankruptcy case was dismissed); *see also supra* note 81 and accompanying text.

⁸⁴ *See In re Knaus*, 889 F.2d at 775 (stating that regardless of whether property was repossessed pre-petition or post-petition by the creditor, the duty to turn over the property to the debtor or the bankruptcy trustee arises as soon as the debtor files for bankruptcy).

⁸⁵ *See Whiting Pools*, 462 U.S. at 207 (stating that the protections that are given to creditors by the Bankruptcy Code replace the protections that a creditor may obtain by physically possessing an asset); *In re Sharon*, 234 B.R. at 683 (concluding that there is no such exception where the creditor can rightly refuse to turn over the asset based on the idea that there was no adequate protection); *supra* note 73 (discussing "adequate protection").

⁸⁶ *See Thompson*, 566 F.3d at 703 (discussing that other circuits have held that the creditor has to turn over the asset first and then, after they do so, they may request adequate protection from the court if they desire it).

Bankruptcy Code and underlying policy reasons.⁸⁷ Section 363(e) allows courts to give the creditor adequate protection; however, it must be upon the creditor's request for such protection.⁸⁸ Moreover, if the courts allow creditors to continue possessing the property as opposed to requiring it to be turned over immediately, this part of the provision would be irrelevant because creditors would have no need to request protection for assets they already hold.⁸⁹

Looking at both policy considerations and the language of the statute, the Tenth Circuit incorrectly decided *In re Cowen* by concluding that only affirmative acts constitute a violation of the automatic stay.⁹⁰

CONCLUSION

In re Cowen addressed this very important issue of whether refusal of turning over an asset acquired pre-petition was a violation of the automatic stay provision. Depending on how courts rule on this issue, a burden to act will fall on either the creditor or the debtor. When courts conclude that passively holding onto an asset is not a violation of the automatic stay, it puts the burden on debtors, as they then need to initiate an adversary proceeding alleging a creditor's willful violation of the automatic stay to recover their assets. If courts agree that passively holding onto the asset constitutes a violation of the automatic stay, a burden is placed on creditors, who will then be required to return assets and subsequently request adequate protection from the court. A review of underlying policy reasons, legislative history, and plain language statutory interpretation indicates that the Tenth Circuit should have concluded that passive possession of an asset acquired pre-petition was a violation of the automatic stay. The automatic stay should not only apply to affirmative actions, but also to passive ones as well.

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⁸⁷ See *infra* notes 88–89 and accompanying text.

⁸⁸ See 11 U.S.C. § 363(e) (2012).

⁸⁹ See *Thompson*, 566 F.3d at 704 (concluding that because not requiring the creditor to request adequate protection would make § 363(e) meaningless, Congress must have intended for the creditor to first turn over the property before seeking its adequate protection right). Additionally, the court in *Thompson* pointed out that allowing the creditor to continue possessing property of the bankruptcy estate until it has adequate protection “unfairly tips the bargaining power in favor of the creditor.” *Id.* at 707.

⁹⁰ See *supra* notes 75–89 and accompanying text.