

Consumer:
Automatic Stay
Understanding the Difference
between Property of the Estate
and Property of the Debtor under § 362

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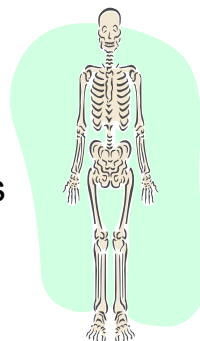
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The Automatic Stay—The Bones

- Scope of the stay
- Exceptions to the stay
- Duration of the stay
- Relief from the stay – grounds
- Relief from the stay – process
- Violations of the stay



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Scope of the Stay, § 362(a)

Upon filing, broad stay goes into effect and prohibits most acts to collect debts or enforce liens, including efforts to:

- Commence, continue judicial or other proceedings to collect pre-petition claims
- Create, perfect or enforce liens against property of the estate or property of the debtor
- Take possession of or control property of the estate
- Enforce a pre-petition judgment against debtor or property of the estate
- Set-off a debt owing to debtor

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Catch-all, § 362(a)(6)

The stay also prohibits creditors from engaging in **any act to collect** a pre-petition claim.

This means no collection at all—no dunning phone calls or letters.

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Exceptions to the Stay, § 362(b)

There are 28 exceptions to the stay, 10 of which were added in 2005.

Exceptions include:

- Criminal proceedings
- Enforcement of domestic support obligations against the debtor (property of the estate usually still protected)
- Enforcement of police or regulatory powers – including enforcement of court orders, except money judgments
- Certain tax determinations and proceedings – audits, notices of deficiency, assessments

A stay could be ordered, but automatic stay is withheld for policy and practical reasons

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Duration of the Stay, § 362(c)

- Stay against any act against property of the estate – until the property is no longer property of the estate; e.g., exemption or abandonment
- Stay against any other act, until earliest of:
 - Case is closed;
 - Case is dismissed; or
 - Discharge is granted or denied
 - Special provisions under section 362(c)(3) and (4)

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Relief from Stay, § 362(d)

Court may terminate, annul, modify or condition the stay:

- (1) For cause, including lack of adequate protection
 - Not exhaustive; bad faith has been held to be a cause for relief from automatic stay.
 - Adequate protection is illustrated in §361 and may consist of:
 - Periodic payments
 - Additional or replacement liens
 - Indubitable equivalent of creditor's lien (such as equity cushion)
 - Insurance is often a component of adequate protection
- (2) Due to lack of equity, when property not necessary for effective reorganization

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§ 362 – More than meets the eye

Complex Statute with number of subsections and over 12 pages of text, and over 6,400 words

No longer just the 10 fingers to find stuff – you will need your toes.

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Relief from Stay – More

Burden of proof, § 362(g)

- Lack of equity – burden is on the party requesting relief
- Most courts view equity as the difference between the value of the property and all encumbrances upon it
- All other issues – burden is on the party opposing relief
- Debtor must prove property is necessary for an effective reorganization (two elements: property is necessary, effective reorganization is a real prospect)

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Damages for Violation of Stay, § 362(k)

- Stay violation must be willful – means intentional act, with knowledge of the filing
- Actual damages can be awarded, including attorneys' fees
- In “appropriate” circumstances, can include punitive damages; has been interpreted to require “egregious” violation

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Putting Flesh on those Bones: Special Issues to consider

1. “Arguable” Property – Are there winds of change blowing in from the 5th Circuit

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Putting Flesh on those Bones: Special Issues to consider

2. “Sliver of the Stay” and other attempts to curb frequent filing abuse

§ 362(c)(3): The “Rodney Dangerfield Statue” It gets no respect a/k/a the “2 Strike Statue”

§ 362(c)(4): The “3 Strikes and you are Out Statue”

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Putting Flesh on those Bones: Special Issues to consider

3. The Adalian Affair: A Cautionary Tale of § 362(c) issues

4. Judge McEwen unveils a unique aspect of section § 362(c)(4) and a Debtor’s Attempt to Reimpose the Stay

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Putting Flesh on those Bones: Special Issues to consider

5. § 362(d) Relief from Stay

Tweaked Ground for Stay Relief – § 362(d)(3)

§ 362(d)(4) atomic lift language – We Mean it

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Putting Flesh on those Bones: Special Issues to consider

6. § 362(e) Let' s NOT be Patient – The Court
has to act within the constraints of the statute.
Failing to act can result in termination of the Stay

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Putting Flesh on those Bones: Special Issues to consider

7. The § 362(h) Bomb
Only applies to Individuals in chapter 7
Only applies to Personal Property

Cross refer and Compare with § 521(a)(2) and 521(a)(6)
Debtor's Duties – SOI and Perform Intentions
Trap Door for Trustees/Consequential
Property

Can Trustees administer property that transforms from Estate Property
to no longer Property of the Estate?

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Putting Flesh on those Bones: Special Issues to consider

8. § 362(k) STAY VIOLATIONS (SO WHAT?)

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Putting Flesh on those Bones: Special Issues to consider

9. Let's Play Ping Pong – The Battle of Wits between Lessors and Lessees in Residential Tenancy Situations (But not much of this matters in Florida)

§ 362(l)

§ 362(m)

§ 362(b)(22)

§ 362(b)(23)

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Putting Flesh on those Bones: Special Issues to consider

10. **§ 362(n) Repeat Small Business Filers and Successor Filers – No Stay at All (Maybe)?**

Pay attention to the Expanded 2 year period

Does the Ab Initio section apply? Who knows?

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Putting Flesh on those Bones: Special Issues to consider

11. **Termination in Favor of Personal Property Lessors in § 365(p)**

Permits the Debtor in chapter 7 to assume
If not assumed in chapter 13 it is rejected and stay terminates

Only statute that addresses a termination of the CoDebtor Stay under BAPCPA

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Putting Flesh on those Bones: Special Issues to consider

12. Termination (Really Ab Initio Inapplicability) in Favor of Utilities in Amended Section 366

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Putting Flesh on those Bones: Special Issues to consider

13. § 549(c) and Real Property Foreclosures and § 362(b)(24)

Best Practices to Protect the Debtor

If Transferee meets all required elements – No Knowledge, good faith purchaser, Present Fair Equivalent Value – Transfer cannot be avoided – If Purchaser meets good faith and without knowledge, but does not pay Present Fair Equivalent Value test – Transfer is avoided and purchaser gets a lien on the property for the amount paid

Does it only apply to voluntary debtor transfers?

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Conclusion: Importance of the Stay

- Means debtor and property of the estate are protected while the case is pending
- Stops “grab law” – race of creditors to pursue their own claims against whatever assets they can
- Chance to gather assets, let individual debtor claim exemptions
- Creditors make claims
- Distribution is orderly and according to entitlements

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- No, Larry isn't going to give you a Full Monty.
- Thank you for your attendance.
- Please complete your evaluation
- Good luck with the Stay, whichever side of it you are on!



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**STAY GONE?
TERMINATION OR INAPPLICABILITY OF AUTOMATIC STAY
BY OPERATION OF LAW WITHOUT COURT ORDER**

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| | IF PROPERTY OF ESTATE, STAY IS GONE ... | IF PROPERTY OF DEBTOR, STAY IS GONE ... |
|------------------|---|---|
| Chapter 7 | <ul style="list-style-type: none"> <input type="checkbox"/> In individual case, if debtor had 2 pending cases dismissed within year prior to filing (absent order imposing) (see § 362(c)(4))¹. <input type="checkbox"/> In individual case, with respect to certain personal property, if debtor does not comply with duties under § 521(a)(2) and (6) (see §§ 362(h) and 521(a)(2)). <input type="checkbox"/> If lease of personal property is not timely assumed (see § 365(p)). <input type="checkbox"/> When case is dismissed (see § 362(c)(1)). <input type="checkbox"/> In individual case, 60 days after request for stay relief, absent court's compliance with specific requirements of statute (see § 362(e)(2)). | <ul style="list-style-type: none"> <input type="checkbox"/> In individual case, if debtor had 2 pending cases dismissed within year prior to filing (absent order imposing) (see § 362(c)(4)). <input type="checkbox"/> In individual case, with respect to certain personal property, if debtor does not comply with duties under § 521(a)(2) and (6) (see §§ 362(h) and 521(a)(2)). <input type="checkbox"/> If lease of personal property is not timely assumed (see § 365(p)). <input type="checkbox"/> When case is dismissed (see § 362(c)(2)). <input type="checkbox"/> In individual case, 60 days after request for stay relief, absent court's compliance with specific requirements of statute (see § 362(e)(2)). |

| | | |
|--|--|---|
| | <p><input type="checkbox"/> 20 days after petition date, utilities may take action specified in statute absent trustee's or debtor's provision of adequate assurance (see § 366(b)).</p> <p><input type="checkbox"/> When a utility sets off against a security deposit provided by debtor pre-petition (see § 366(c)(4)).</p> <p><input type="checkbox"/> In individual case, if property claimed exempt, property is no longer property of estate 30 days after exemption objection period closes and all objections are resolved in debtor's favor (see § 362(c)(1)). Now, go to column on Property of Debtor.</p> <p><input type="checkbox"/> In individual case, if property not claimed exempt, when trustee abandons the property (see § 362(c)(1)). Now, go to column on Property of Debtor.</p> <p><input type="checkbox"/> In corporate case, when trustee abandons the property (see § 362(c)(1)). Now, go to</p> | <p><input type="checkbox"/> 20 days after petition date, utilities may take action specified in statute absent trustee's or debtor's provision of adequate assurance (see § 366(b)).</p> <p><input type="checkbox"/> When a utility sets off against a security deposit provided by debtor pre-petition (see § 366(c)(4)).</p> <p><input type="checkbox"/> In individual case, upon discharge or denial of discharge (see § 362(c)(2)).</p> <p><input type="checkbox"/> In individual case, if debtor had 1 pending case dismissed within year prior to filing, then stay terminates 30 days after filing (absent order extending) (see § 362(c)(3))².</p> <p><input type="checkbox"/> If an exception to the stay applies (see § 362(b)(1)-(22)-(28) for most of the exceptions).</p> |
|--|--|---|

² Some courts apply this provision to both property of the estate and property of the debtor. In such jurisdictions, this checkbox should be in both columns and be in green font.

| | | |
|-------------------------------|--|--|
| | <p>column on Property of Debtor.</p> <ul style="list-style-type: none"> <input type="checkbox"/> If an exception to the stay applies (see § 362(b)(1)-(22)-(28) for most of the exceptions). <input type="checkbox"/> 30 days after request for stay relief (absent order continuing stay) (see § 362(e)(1)). Now, got to column on Property of Debtor. | |
| Chapter 13³ | <ul style="list-style-type: none"> <input type="checkbox"/> If debtor had 2 pending cases dismissed within year prior to filing (absent order imposing) (see § 362(c)(4)). <input type="checkbox"/> If lease of personal property is not timely assumed (see § 365(p)). <input type="checkbox"/> When case is dismissed (see § 362(c)(1)). <input type="checkbox"/> In individual case, 60 days after request for stay relief, absent court's compliance with specific requirements of statute (see § 362(e)(2)). <input type="checkbox"/> 20 days after petition | <ul style="list-style-type: none"> <input type="checkbox"/> If debtor had 2 pending cases dismissed within year prior to filing (absent order imposing) (see § 362(c)(4)). <input type="checkbox"/> If lease of personal property is not timely assumed (see § 365(p)). <input type="checkbox"/> When case is dismissed (see § 362(c)(2)). <input type="checkbox"/> In individual case, 60 days after request for stay relief, absent court's compliance with specific requirements of statute (see § 362(e)(2)). <input type="checkbox"/> 20 days after petition |

³ This chart does not address codebtor stay termination under § 1301(d) or exceptions to the codebtor stay under § 1301(b) and § 365(p)(3).

| | | |
|--|--|--|
| | <p>date, utilities may take action specified in statute absent trustee's or debtor's provision of adequate assurance (see § 366(b)).</p> <p><input type="checkbox"/> When a utility sets off against a security deposit provided by debtor pre-petition (see § 366(c)(4)).</p> <p><input type="checkbox"/> If property claimed exempt, property is no longer property of estate 30 days after exemption objection period closes and all objections are resolved in debtor's favor (see § 362(c)(1)). Now, go to column on Property of Debtor.</p> <p><input type="checkbox"/> Upon confirmation (unless plan states that property remains in estate) (see §§ 1328(b), 362(c)(1)). Now, go to column on Property of Debtor.</p> <p><input type="checkbox"/> If an exception to the stay applies (see § 362(b)(1)-(22)-(28) for most of the exceptions).</p> <p><input type="checkbox"/> 30 days after request for stay relief (absent</p> | <p>date, utilities may take action specified in statute absent trustee's or debtor's provision of adequate assurance (see § 366(b)).</p> <p><input type="checkbox"/> When a utility sets off against a security deposit provided by debtor pre-petition (see § 366(c)(4)).</p> <p><input type="checkbox"/> If debtor had 1 pending case dismissed within year prior to filing, then stay terminates 30 days after filing (absent order extending) (see § 362(c)(3))⁴.</p> <p><input type="checkbox"/> Upon discharge, usually upon completion of plan, or denial of discharge (see §§ 1328(a), 362(c)(2)).</p> <p><input type="checkbox"/> When case is closed (see § 362(c)(2)).</p> <p><input type="checkbox"/> If an exception to the stay applies (see § 362(b)(1)-(22)-(28) for most of the exceptions).</p> |
|--|--|--|

⁴ Some courts apply this provision to both property of the estate and property of the debtor. In such jurisdictions, this checkbox should be in both columns and be in green font.

| | | |
|-------------------|--|--|
| | order continuing stay) (see § 362(e)(1)). Now, got to column on Property of Debtor. | |
| Chapter 11 | <ul style="list-style-type: none"> <input type="checkbox"/> In individual case, if debtor had 2 pending cases dismissed within year prior to filing (absent order imposing) (see § 362(c)(4)). <input type="checkbox"/> If lease of personal property is not timely assumed (see § 365(p)). <input type="checkbox"/> When case is dismissed (see § 362(c)(1)). <input type="checkbox"/> In a repeat small business case (absent order imposing) (see § 362(n) for circumstances indicating repeat filing). <input type="checkbox"/> In individual case, 60 days after request for stay relief, absent court's compliance with specific requirements of statute (see § 362(e)(2)). <input type="checkbox"/> 30 days after petition date, utilities may take action specified in statute absent trustee's or debtor's provision of adequate assurance (see § 366(c)(2)). | <ul style="list-style-type: none"> <input type="checkbox"/> In individual case, if debtor had 2 pending cases dismissed within year prior to filing (absent order imposing) (see § 362(c)(4)). <input type="checkbox"/> If lease of personal property is not timely assumed (see § 365(p)). <input type="checkbox"/> When case is dismissed (see § 362(c)(2)). <input type="checkbox"/> In a repeat small business case (absent order imposing) (see § 362(n) for circumstances indicating repeat filing). <input type="checkbox"/> In individual case, 60 days after request for stay relief, absent court's compliance with specific requirements of statute (see § 362(e)(2)). <input type="checkbox"/> 30 days after petition date, utilities may take action specified in statute absent trustee's or debtor's provision of adequate assurance (see § 366(b)(2)). |

| | | |
|--|---|---|
| | <p><input type="checkbox"/> When a utility sets off against a security deposit provided by debtor pre-petition (see § 366(c)(4)).</p> <p><input type="checkbox"/> In individual case, if property claimed exempt, property is no longer property of estate 30 days after exemption objection period closes and all objections are resolved in debtor's favor (see § 362(c)(1)). Now, go to column on Property of Debtor.</p> <p><input type="checkbox"/> Upon confirmation (unless plan states that property remains in estate) (see §§ 1141(b), 362(c)(1)). Now, go to column on Property of Debtor.</p> <p><input type="checkbox"/> If an exception to the stay applies (see § 362(b)(1)-(22)-(28) for most of the exceptions).</p> <p><input type="checkbox"/> 30 days after request for stay relief (absent order continuing stay) (see § 362(e)(1)). Now, got to column on Property of Debtor.</p> | <p><input type="checkbox"/> When a utility sets off against a security deposit provided by debtor pre-petition (see § 366(c)(4)).</p> <p><input type="checkbox"/> In individual case, if debtor had 1 pending case dismissed within year prior to filing, then stay terminates 30 days after filing (absent order extending) (see § 362(c)(3))⁵.</p> <p><input type="checkbox"/> In individual case, upon discharge, usually upon completion of plan, or denial of discharge (see §§ 1142(d)(5), 362(c)(2)).</p> <p><input type="checkbox"/> For a corporation, upon confirmation, which effects a discharge (see §§ 1142(d), 362(c)(2)).</p> <p><input type="checkbox"/> When case is closed (see § 362(c)(2)).</p> <p><input type="checkbox"/> If an exception to the stay applies (see § 362(b)(1)-(22)-(28) for most of the exceptions).</p> |
|--|---|---|

Updated 3-17-12

⁵ Some courts apply this provision to both property of the estate and property of the debtor. In such jurisdictions, this checkbox should be in both columns and be in green font.

Section 362(h) Deprives a Trustee of Property of the Estate

Written by:

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In Trustee Talk in the December/January 2011 *Journal*,¹ Neil Gordon argued that § 362(h) does not deprive a trustee of the ability to pursue lien avoidance. I reluctantly must disagree.



Wendell J. Sherk

As Gordon points out, the statute provides that the automatic stay is dissolved within 30 days of the filing of a case if an individual debtor fails to file a statement of intentions as required by § 521(a)(2)(A) or 30 days after the first setting for the meeting of creditors if the individual fails to act in accordance with those stated intentions as to personal property. More critically, under § 362(h), not only is the stay lifted, but the property is removed from the estate.²

If a debtor files a statement of intention indicating that he or she will reaffirm a car loan but fails to do so, the stay is lifted and the property removed from the estate on the 31st day following the first setting of the § 341 meeting, even if the reason for not reaffirming was a discovery of a flaw in lien perfection. Gordon argued that this scenario—*In re Baine*³—incorrectly concluded that the trustee lost the power to avoid an unperfected lien by operation of § 362(h). He argued that § 362(h) cannot operate as an abandonment of the asset and avoidance actions, in any event, are often premised on recovering property that was not property of the estate. He reasoned that any other conclusion must lead to absurd results—like the trustee losing potential assets before having an opportunity to evaluate them, or even losing assets of which he was not aware.

¹ Neil C. Gordon, "Section 362(h) Does Not Deprive a Trustee of Standing to Avoid a Lien," *XXIX ABI Journal* 10; 50-51, 96-97; December/January 2011.

² Confusingly, § 521(a)(6)'s "hanging paragraph" would also remove from the estate any personal property securing an "allowed secured claim for the purchase price" 45 days "after the first meeting of creditors under § 341(a)" unless the individual debtor reaffirms or redeems during that time. For a discussion of the conflicting issues in this "hanging paragraph," see *In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006), *In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006), and *In re Molnar*, 441 B.R. 108 (Bankr. N.D. Ill. 2010). For ease of discussion, references to § 362(h) abandonment will also include § 521(a)(6)'s "hanging paragraph" abandonment where applicable.

³ *Noland v. HSBC Auto. Fin. Inc.* (*In re Baine*), 393 B.R. 561 (Bankr. S.D. Ohio 2008).

About the Author

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In its simplest form, § 362(h) is an additional barrier protecting primarily automobile lenders. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), auto lenders sought to curtail the "drive-through" option wherein consumer debtors simply continued to pay auto loans without reaffirming them. In the process, they also narrowed the situations in which all personal property lenders could be exposed to avoidance actions based on perfection problems—exactly the scenario pending in *Baine*.⁴ The language is a tailor-made tool for these creditors.

Section 362(h) is obviously a trustee land mine, but it is not possible to wish it away. Gordon's reading would ren-

ance action is required as to property of the estate subject to a security interest.

It would not generally shorten the § 546 limitation period for all actions. Avoidance of transfers of unencumbered personalty or any real property prior to the filing of the case would be unaffected, for example. It is also not a unique result driven by BAPCPA. *Baine* relies on pre-BAPCPA cases,⁵ and there are other similar decisions⁶ reaching the conclusion that an abandonment of property of the estate resulted in a complete abandonment of any interest the estate might assert as to that property, including the right to assert avoidance actions. That also routinely happens under § 554(c) (abandonment at closing).

Whether this makes sense as public policy is open to debate and not initially compelled by the avoidance-provisions language. For example, § 544 indicates that the trustee can avoid a transfer of "an interest of the debtor in property"—and

Trustee Talk

der § 362(h) a partial nullity, and the entirety of § 362(h)(2) would be rendered meaningless. Section 554 does provide a mechanism for a trustee (or court) to abandon property of the estate, but § 362(h) now provides for something new: *statutory* abandonment. In essence, trustees need to get out their land mine detection gear.

Reliance on pre-BAPCPA decisions to conclude that Congress did not create this new form of abandonment is dangerous. The statute itself chooses what property is and is not brought *into* the estate by operation of law. The statute can provide a new mechanism for how that property *leaves* the estate—in this case, by operation of law and through a series of inactions. These inactions include the trustee's failure to file a motion to keep the property in the estate as contemplated by § 362(h)(2).

It is argued that *Baine*'s interpretation shortens a trustee's avoidance action limitation period provided in § 546 from two years to as little as 30 days. This is true in the circumstances where an avoid-

obviously nothing is limited therein to *only* estate property. One could imagine a statutory regime where abandonment does nothing to limit avoidance actions where a trustee can avoid transfers as to property that was *formerly* within the estate.

However, abandonment is meant to bring finality to the process, a settlement of ownership rights and responsibilities as to assets. It gives the debtor and secured creditors a level of certainty that these assets are returned to the non-bankruptcy world for use, sale, further borrowing or repossession. The alternative is that post-discharge, the debtor is potentially under a cloud for almost two years while the § 546 avoidance period runs out. It would be a serious limitation on the fresh start for all consumer debtors, not to mention their past and future lenders, simply in order to protect trustees in a small set of cases.

This is no different than the process under which a debtor's properly claimed

⁵ See, e.g., *Keller v. CIT Group/Consumer Finance Inc.* (*In re Keller*), 229 B.R. 900 (Bankr. S.D. Ohio 1998); *In re Adair*, 253 B.R. 85 (9th Cir. B.A.P. 2000).

⁶ See, e.g., *In re Tadlock*, 338 B.R. 436 (10th Cir. B.A.P. 2006).

⁴ Also see *Fidelity Financial Services Inc. v. Fink*, 522 U.S. 211 (1998).

exemptions become “final” 30 days after the § 341 meeting of creditors, absent an objection.⁷ The 30-day period can be a rough deadline for a trustee to make a decision to initiate litigation or let assets leave the estate. As the *Taylor* Court pointed out, “[d]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality.”⁸

Tactically, there is an opportunity for “gaming the system.” It could be in the lender’s—or the debtor’s—best interests to not follow through on a stated intent to redeem, reaffirm or surrender if there is reason to fear that a trustee may be pursuing the asset or a related avoidance action. Auto lenders do not like losing their collateral, and debtors sometimes want to keep their pledged cars.

However, the gamesmanship can be defeated easily enough. In this instance, the trustee needs to file a motion under § 362(h)(2) requesting the court to determine that the property is “of consequential value or benefit to the estate,” provides for adequate protection of the security interest and directs the turnover of the personal property to the trustee. This language mirrors the abandonment

language of § 554. As a practical matter, it is clear that Congress intended for the trustee—as well as the debtor—to be forced to take affirmative steps with regard to personal property subject to secured claims fairly quickly. While that congressional direction is disruptive to a trustee’s pre-BAPCPA standard operating procedure, it is well within Congress’ province to discomfit trustees just as it has debtors.

A final issue raised is that the operation of § 362(h) could result in the statutory abandonment of assets of the estate that are not scheduled. Gordon has a point. In *In re Blixseth*,⁹ the Ninth Circuit Bankruptcy Appellate Panel agreed that a trustee who failed to file a § 362(h)(2) motion as to stock that he asserted was not scheduled but was subject to a lender’s security interest was removed by operation of § 362(h).

Unscheduled personalty becomes property of the estate, but not being scheduled, the statement of intentions will not routinely provide for the reaffirmation, redemption or surrender of such collateral to the secured creditor. Thus, a

trustee may be surprised to discover he or she had a car (or stock) at about the same time that § 362(h) causes the abandonment thereof.

The *Blixseth* court reasoned that the trustee’s recourse in such situations is to seek sanctions against the debtor (for filing false schedules) or potentially the debtor and creditor, if they act collusively to exploit § 362(h). These are certainly options, but they are poor consolation prizes to a trustee working on commission.

However, similar scenarios have occurred and been dealt with in other ways. For example, several courts have applied a Rule 60(b)(1) (F.R.B.P. 9024) standard where the abandonment happened through mistake, inadvertence or excusable neglect.¹⁰ Arguably, relief could be granted as well under Rule 60(b)(2) (newly discovered evidence) and the debtor’s deliberate failure to disclose personal property could give rise to relief under Rule 60(b)(6) (fraud). In reality, the court has sufficient equitable tools available to protect the diligent trustee who is surprised by the undisclosed-asset scenario. ■

⁷ Fed. R. Bankr. P. 4003(b); *Schwab v. Reilly*, ___ U.S. ___, 130 S.Ct. 2652 (2009); *Taylor v. Freeland & Kranz*, 503 U.S. 638 (1992).

⁸ *Taylor* at 644.

⁹ *Samson v. Western Capital Partners LLC (In re Blixseth)*, ___ B.R. ___, (9th Cir. B.A.P. May 25, 2011), appeal pending. Although not dispositive, it appears that the stock was described in a motion for relief that was pending when the case was converted from chapter 11 to chapter 7.

¹⁰ See, e.g., *Woods v. Kenan (In re Woods)*, 173 F.3d 770 (10th Cir. 1999); *Matter of Lintz West Side Lumber Inc.*, 655 F.2d 786 (7th Cir. 1981); *In re Gonzalez*, 302 B.R. 687 (Bankr. C.D. Cal. 2003).

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To Infinity and Beyond: Exploring the Reach of the Automatic Stay

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The automatic stay is a vital and flexible protection for both debtors in bankruptcy and creditors who wish to share in the assets of the estate. “Only through a comprehensive administration of the debtor’s property, wherever located and by whomever controlled, can the court shield the property from creditors’ unauthorized grasp; prevent harassment of debtors; and ultimately ensure equal distribution among creditors.”¹ Courts have often probed the limits of the automatic stay, and some recent cases remind bankruptcy practitioners of the vast power of this important bankruptcy provision.

Hands Off the Debtor’s “Arguable Property”



Deborah B. Langehennig

In 2005, the Fifth Circuit considered the issue of whether the automatic stay protects property to which a debtor has only an *arguable* claim of right. In *Brown v. Chesnut* (*In re Chesnut*), a creditor foreclosed on real property in which the debtor claimed a community-ownership interest.² The property was characterized in the real estate records as the separate property of the debtor’s spouse, and the creditor, relying on the property records, proceeded with the foreclosure. The creditor was rebuffed by the bankruptcy court, which stated that “whether the Property is part of Debtor’s estate is a question of fact which must be adjudicated by a court.”³ The bankruptcy court—without deciding whether the subject property was, in fact, property of the estate—held that the automatic stay had been violated and that sanctions were appropriate.

¹ *Burgess v. Sikes* (*In re Burgess*), 438 F.3d 493, 509 (5th Cir. 2006).

² 422 F.3d 298 (5th Cir. 2005).

³ *Chesnut v. Brown* (*In re Chesnut*), 300 B.R. 880, 887 (Bankr. N.D. Tex. 2003).

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On appeal, the Fifth Circuit Court of Appeals held that the automatic stay applies to all property *arguably* owned by a debtor, even if it is later determined that the debtor did *not* own the property. After coining the phrase “arguable property,” the court analyzed case law and the policy and structure of the Bankruptcy Code, and opined that courts should presume protection of property to which a debtor has only an arguable claim of right.⁴ “If a creditor wishes to seize property...he [or she] cannot do so first and thereby force the debtor to vindicate his [or her] rights after the seizure.

determination of property rights after the debtor has invoked the jurisdiction of the Bankruptcy Court and with it the protection of the automatic stay. It is for the Bankruptcy Court, not the secured creditor, to determine whether the debtor has a sufficient interest in property to implicate the automatic stay, *even if the debtor’s claimed interest in property may turn out to be groundless.*”⁷



Stephen Manz

Two unreported cases from bankruptcy courts in the Third Circuit have also agreed with the reasoning of *Chesnut*. In *Bohm v. Howard* (*In re Howard*), a creditor believed that she was entitled to continue receiving distribution payments from the debtor relating to certain mineral rights.⁸ Despite the fact that the trustee advised the credi-

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Instead, he [or she] must first seek relief from the bankruptcy court.”⁵

While *Chesnut* is clearly an important decision in Fifth Circuit jurisprudence, its effect has also been felt nationally. In *In re Levenstein*, a New York bankruptcy court considered whether the automatic stay applied to a state foreclosure action in which the subject property is titled solely in the name of a non-debtor spouse.⁶ Despite the fact that the debtor’s name did not appear on the title to the subject property and his motion to intervene in the foreclosure action had already been denied, he asserted a claimed interest in the subject property on his schedules. The creditor proceeded with the foreclosure action, and the court considered whether that constituted a violation of the automatic stay. Noting that there was not a published opinion on this issue in the Second Circuit, the bankruptcy court cited to *Chesnut* and held that “[w]here the debtor claims an interest in property, the secured creditor may not make its own, unilateral

tor of its opinion that the payments were property of the estate, the creditor continued to “appropriate...such assets for her own benefit.”⁹ The court held that “[a]llowing the Defendant to excuse her behavior on this ‘good-faith’ defense would run contrary to the principles espoused in the Bankruptcy Court,” and then proceeded to include a block quotation from *Chesnut* relating what the Fifth Circuit had “astutely observed” regarding arguable property.¹⁰ The *Howard* court then reminded creditors that it can be expensive to be wrong, even if allegedly in good faith, and sanctioned the creditor for legal costs and punitive damages. In *In re Global Outreach*, the bankruptcy court considered whether a possessory interest paired with several other rights, such as a right to excess proceeds from a property’s disposition, was enough for the property to constitute property of the estate and thus be protected by the automatic stay.¹¹ While not directly on point, the debtor relied on *Chesnut* in its papers,

⁷ *Id.* at 47 (emphasis supplied).

⁸ 2010 Bankr. LEXIS 5109 (Bankr. W.D. Pa. May 17, 2010).

⁹ *Id.* at *7-8.

¹⁰ *Id.* at *10.

¹¹ 2009 Bankr. LEXIS 1602 at *18 (Bankr. D. N.J. June 8, 2009).

and the court considered the principle that “arguable property” should be presumed to be property of the estate “instructive.”¹²

While the holdings of *Levenstein*, *Howard* and *Global Outreach* did not go as far as *Chesnut* in that the property in *Chesnut* was found to not be property of the estate by the district court, the message from these cases rings clear: If a debtor has an arguable claim to property, even if a court ultimately finds that the property was never actually property of the estate, creditors must wait for a judicial determination before exercising their rights.

Application of Stay to Post-Confirmation Chapter 13 Estate

The automatic stay has been used as a sword rather than shield in the case of an agreement that the debtor freely negotiated with his soon-to-be former spouse.¹³ Without the assistance or knowledge of his bankruptcy counsel, David Clouse entered into a postnuptial agreement with his spouse after obtaining confirmation of his chapter 13 plan. His bankruptcy attorney included a provision in the plan that extended the effect of the automatic stay “[e]xcept and unless set forth in this Plan, confirmation of this Chapter 13 Plan shall not affect, alter, modify or terminate the stay provided in 11 U.S.C. [§ 362(a)].”¹⁴ The plan did not address the vesting of property at confirmation, so presumably § 1327 applied to revest property in the debtor at the time of confirmation.

When Clouse’s attorney learned of the postnuptial agreement, he filed a motion to determine that the agreement was void and in violation of the automatic stay. The court carefully reviewed each distributive provision of the agreement to determine its relation to property of the estate and the corresponding effect of the automatic stay. In light of the broad sweep of §§ 541 and 1306 in incorporating post-petition earnings and after-acquired property, the court found that several of the distributive provisions did attempt to direct or transfer property belonging to the bankruptcy estate and therefore violate the stay.

Clouse’s spouse argued that the debtor had waived the automatic stay by voluntarily participating in the negotiation and execution of the agreement, but the court disagreed for several reasons. First, a debtor acting without advice of counsel may be unaware of his or her rights and therefore cannot voluntarily and knowingly waive those protections. Second, since the chap-

ter 13 trustee in the case was not informed of the agreement and the purported waiver of the stay, a waiver could not be effective. The provisions of the automatic stay, in addition to protecting the debtor, serve to protect property of the estate under the trustee’s supervision. Third, on review of the language of § 362, the court found no provision that authorizes a debtor to waive the stay without notice to creditors and parties in interest. Because the court found no waiver of the automatic stay and also found that much of the property to be distributed under the agreement remained property of the estate, the court found the agreement to be void.

Two interesting ideas emerge from this decision. If property of the estate reverts in the debtor at the time of confirmation, is it appropriate to include a provision in the plan that extends the effect of the automatic stay throughout the life of the plan? Generally, debtors will elect to have property remain vested in the estate in order to continue the protection of the stay. This type of provision appears to be a win-win for a debtor. Property reverts in the debtor free from the supervision and control of the bankruptcy trustee and bankruptcy court. The debtor then enjoys both full ownership and subsequent appreciation of the property, while at the same time protecting it in the long term from the reach of creditors. A second bonus for the debtor is the ability to back out of a voluntary agreement when hindsight (or a perceptive attorney) indicates that the agreement should be avoided by invoking the protection of the continued stay.

Affirmative Duties Created by the Automatic Stay

In situations where a creditor has already technically violated the automatic stay by taking action without knowledge of a bankruptcy filing, they may be required to restore the *status quo* and avoid willful violation of the automatic stay by, for example, returning repossessed collateral¹⁵ or seeking to vacate a state court contempt order.¹⁶ One case recently held that creditors also have affirmative duties to correct the actions of third parties, even when the creditor informs the third party of the filing prior to it taking actions in violation of the automatic stay.¹⁷

In *Sternberg*, the debtor’s former spouse (Parker), through counsel

(Sternberg), asked a state court to hold the debtor in contempt for nonpayment of spousal support. The debtor subsequently filed for bankruptcy but did not notify the state court of the filing until three days later at an evidentiary hearing in the state court proceeding (the contempt hearing), at which time both parties discussed the impact of the automatic stay on the contempt hearing. Nevertheless, the state court decided to proceed with the hearing. Certain aspects of the state court proceeding were, after all, not prevented from continuing post-petition due to the exceptions in § 362(b)(2)(A)-(B) for “the commencement or continuation of a civil action...for the establishment or modification of an order for domestic support obligations” and “the collection of a domestic-support obligation from property that is not property of the estate.” To the surprise of both parties, two months later, the state court issued an order (the “contempt order”) holding the debtor in contempt, granting judgment for Parker and ordering the debtor to either pay in the next two weeks or be jailed.

The debtor filed a motion in a state appellate court to vacate the contempt order and asked Sternberg to assist, which Sternberg refused to do and instead filed a responsive brief. The bankruptcy court eventually vacated the contempt order and ruled that while the state court order violated the automatic stay, there was no separate violation of the stay by Sternberg or Parker. On appeal, the district court held that both Sternberg and Parker violated the automatic stay by failing to remedy the violation of the stay created by the state court order. The case eventually went up to the Ninth Circuit Court of Appeals, with Sternberg as the only remaining defendant.

The court of appeals focused on the fact that the automatic stay sometimes imposes affirmative duties on parties. In support of this, the court relied on *Eskanos & Alder PC v. Leetien*,¹⁸ in which a creditor filed a collection action against the debtor post-petition and, despite being informed of the bankruptcy filing immediately thereafter, failed to dismiss the action for 23 days. The court noted that “[o]n appeal, we explained that the plain language of § 362(a)(1) unambiguously imposed an ‘affirmative duty’ on the firm to discontinue the action once it gained knowledge of the

¹² *Id.* at *21-22.

¹³ *In re Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010).

¹⁴ *Id.* at 693.

¹⁵ See *Commercial Credit Corp. v. Reed*, 154 B.R. 471 (E.D. Tex. 1993).

¹⁶ See *Mitchell Constr. Co. Inc. v. Smith (In re Smith)*, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995).

¹⁷ See *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2009).

¹⁸ 309 F.3d 1210 (9th Cir. 2002).

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bankruptcy.”¹⁹ The court then concluded that Sternberg violated the automatic stay, clearly identifying where Sternberg went wrong:

We do not fault Sternberg for anything he did at the [contempt hearing], because the news of [the debtor’s] bankruptcy filing came as a surprise to him. The state court’s [contempt order] also surprised him, and Sternberg cannot be held responsible for the order. Within a reasonable time after that, however, the law required Sternberg to take corrective action. He did not, and he affirmatively opposed [the debtor’s] effort to obtain relief from the state appellate court.²⁰

While the court appears to have unequivocally stated that Sternberg’s fail-

ure to take corrective action with respect to the contempt order was sufficient to constitute a willful violation of the automatic stay, the court also took a softer stance by focusing more heavily on Sternberg’s actual defense of the contempt order. While there were valid portions of the contempt order for Sternberg to defend, the court expressed that Sternberg should have “at least” informed the state court of the conflicts between the contempt order and automatic stay. This distinction could be very important to creditors in determining what actions are required in different situations. At least one court has agreed with the more aggressive interpretation of *Sternberg*, stating that “[o]nce a creditor commences legal proceedings, it cannot disown all responsibility for actions taken by other parties in furtherance of the action. To hold otherwise would place a large hole in the reach afforded by

§ 362(a), which was intended by Congress to offer broad protections to the debtor and the bankruptcy estate.”²¹

Creditors Beware

The key takeaway from these recent cases is that courts are willing to construe § 362 very liberally to protect property of the estate. A good-faith argument that certain property is not actually property of the estate, the fact that a debtor has agreed to part with certain property or the fact that some other party is taking actions that a creditor is merely declining to correct may not be sufficient to protect creditors from being found to have violated the automatic stay. When in doubt, creditors should always seek relief from the bankruptcy court before assuming that their actions will later be vindicated: the alternative could be costly. ■

¹⁹ *Sternberg*, 595 F.3d at 944.

²⁰ *Id.*

²¹ *Hardesty v. Chase (In re Hardesty)*, 442 B.R. 110, 115 (Bankr. N.D. Ohio 2010).

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Section 362(h) Does Not Deprive a Trustee of Standing to Avoid a Lien

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Many trustees are familiar with the general requirements of 11 U.S.C. § 521(a)(2)(A) and § 362(h). Under those sections of the Bankruptcy Code, an individual debtor is required to file a statement of intention with respect to secured property. If the statement is not filed, or if it is filed and the debtor does not act on his or her stated intent, then the automatic stay terminates as to the secured property and that property is no longer property of the estate. Trustees may not fully understand the potential impact those sections may have on their ability to avoid a lien on secured property.



Neil C. Gordon

A recent decision from the Bankruptcy Court in the Southern District of Ohio holds that the operation of these sections can divest a trustee of standing to avoid a lien. While the utility of this case is dubious, secured lenders have nevertheless seized upon it and successfully intimidated trustees into giving up their avoidance powers in those instances where the lender's lien is clearly avoidable, but the individual debtor has failed to comply with the mandates of § 362(h).

Statutory Scheme

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the law was clear. An individual debtor was required to file a statement of intention indicating whether the debtor intended to retain or surrender property securing debt.¹ The statement of intention had to have been filed before the earlier of 30 days after the petition date, or on or before the meeting of creditors. In addition, a debtor was required to follow through on his or her stated intent by performing under the statement of intention within 45 days of filing the statement of intention.² The law was also clear that § 521(a)(2)(A)

¹ See 11 U.S.C. § 521(a)(2)(A).

² See 11 U.S.C. § 521(a)(2)(B).

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and (B) did not alter a debtor or a trustee's rights in the property subject to the debtor's statement of intention.

While the above procedures have remained in effect post-BAPCPA, BAPCPA created a link between § 521(a)(2)(A) and (B) and the termination of the automatic stay. BAPCPA added revised §§ 521(a)(2)(C) and 362(h), which have altered those sections' effect on a debtor's rights in the subject property. Section 362(h) provides that if an individual debtor does not file a statement of intention or timely

creditors. However, if the trustee files a motion, pursuant to § 362(h)(2), within the above time periods, then the trustee can prevent the termination of the automatic stay and maintain the property as property of the estate.⁵

In re Baine

At least one court has seized upon these BAPCPA provisions and held that the lifting of the automatic stay and removal of property from the estate under § 362(h) terminates a trustee's ability to exercise his avoidance powers based on a creditor's failure to perfect its security interest.⁶ In *Baine*, the debtors entered into a loan repayment and security agreement with HSBC to refinance the purchase of a 2000 Ford F-150 truck. Although it had a security agreement, HSBC failed to properly perfect its security interest according to state law. The debtors defaulted on the note to HSBC and filed their chapter 7 case

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perform under the same, then the automatic stay terminates with respect to the subject property and the property is no longer property of the estate.³ Section 362(h)(2) provides a safe harbor whereby § 362(h)(1)(A) and (B) will not apply if the court determines, upon motion of the trustee, that the subject property is of consequential value or benefit to the estate, and orders adequate protection of the creditor's interest and the debtor to deliver the collateral to the trustee.⁴

This section means that if a debtor does not file a statement of intention before the earlier of 30 days after the petition date or on or before the meeting of creditors, then the automatic stay terminates and the property is no longer property of the estate. The automatic stay will also terminate and the property will cease being property of the estate if the debtor timely files his or her statement of intention, but nonetheless fails to perform under that statement within 30 days after the first date set for the meeting of

³ See 11 U.S.C. § 362(h)(1)(A)(B).

⁴ If a § 362(h) motion is filed by the trustee, but the court does not determine that the property is of consequential value or benefit to the estate, then the automatic stay terminates upon the conclusion of the hearing on the motion. See 11 U.S.C. § 362(h)(2).

soonafter. The debtors timely filed their statement of intention, which indicated that they intended to surrender the truck. Despite this, the debtors failed to surrender it, and HSBC thereafter repossessed the truck without seeking relief from stay. The trustee and the debtors then filed an adversary proceeding, asserting that HSBC violated the automatic stay and seeking to avoid HSBC's lien on the truck, pursuant to 11 U.S.C. § 544 and applicable law. The trustee never filed a § 362(h)(2) motion with the court.

The court ruled against the trustee on cross motions for summary judgment and held that the operation of § 362(h) rendered the trustee without authority to avoid HSBC's lien pursuant to § 544 and applicable law. In applying § 362(h) to that case, the court found that the debtors' failure to follow through on their statement of intention, coupled with the trustee's failure to file a § 362(h) motion, caused the automatic stay to terminate

⁵ If the § 362(h) motion is denied, although the automatic stay terminates the property does not cease being property of the estate. See 11 U.S.C. § 362(h)(2). In light of § 362(h)(1), this result makes no sense.

⁶ See *Noland v. HSBC Auto Finance Inc. (In re Baine)*, 393 B.R. 561 (Bankr. S.D. Ohio 2008).

and removed the truck from property of the estate. The court reasoned that the termination of the automatic stay allowed HSBC to pursue available state law remedies, including repossession of the truck, without violating the automatic stay. The court then held that “[b]ecause the statute renders the Vehicle no longer property of the estate, it has the same effect as if the trustee abandoned the property pursuant to 11 U.S.C. § 554.” Consequently, “[b]ecause the operation of § 362(h) is functionally equivalent to abandonment, it has the effect of divesting the estate of all its interests in the property.” The court then held that the divestiture of control upon abandonment includes the loss of a trustee’s right to avoid an unperfected lien pursuant to § 544.

Abandonment Cannot Occur through § 362(h)

There are several problems in the *Baine* court’s reasoning. First and foremost, the court based its holding primarily on the dubious assumption that § 362(h)(1)’s removal of property from the estate is tantamount to the trustee’s abandonment of property under § 554. The two are simply not the same, and it is illogical that similar results would flow from each. It is well settled that abandonment can only occur after the formalities of § 554 have been met.⁷ The specific abandonment provisions in § 554 must take priority over the more general provisions found in § 362(h).⁸

Abandonment is the formal relinquishment of property from the bankruptcy estate and requires notice and a hearing.⁹ The requirement for formal notice and a hearing is important for two reasons. First, these “formalities are important because abandonment is revocable only in very limited circumstances.”¹⁰ Second, the procedural requirement of notice and a hearing is important because it allows the court to consider the views of other parties in interest, including creditors of the debtor, prior to the abandonment of property of the estate. It provides a layer of oversight to ensure that property of the estate, which may be used to pay creditors, is properly used for the benefit of creditors. The court’s decision in *Baine* is fundamentally flawed because it provides for *de facto* abandonment of estate property through a mechanism other than § 554 and

without notice and a hearing. Equating § 362(h) with § 554 serves to “repudiate the express language of § 554.”¹¹ Moreover, the court’s decision robbed creditors and other parties in interest of the opportunity to review the trustee’s actions and ensure that property of the estate is properly utilized for their benefit.

A Trustee Has a Two-Year Statute of Limitations

The *Baine* decision is also problematic because it inappropriately circumvents the statute of limitations contained in § 546—effectively turning a two-year statute of limitations into a 30-day period in which a trustee has to exercise his or her avoidance powers. This result, the shortening of the § 546 statute of limitations, is extremely problematic and has been rejected by courts in other contexts.¹² For example, in *Levine*, the debtors fraudulently transferred non-exempt assets to various insurance companies to purchase annuities that were exempt under state law. The court permitted the trustee to set aside this transfer, notwithstanding the trustee’s failure to object to the debtor’s claimed exemptions within the 30 days mandated by Bankruptcy Rule 4003(b). The *Levine* court found that the trustee’s commencement of an avoidance action was subject to the two-year statute of limitations governing adversary proceedings found in § 546, not the 30-day requirement found in Bankruptcy Rule 4003(b). Addressing this same issue in *Duncan*, the Tenth Circuit noted that “were we to hold otherwise, the two-year limitations period of [§ 546] would effectively become a 30-day limitations period, thereby rendering the provision meaningless.”¹³ The court’s decision in *Baine* would have the same effect of shortening the statute of limitations contained in § 546, thereby rendering § 546 meaningless.

Trustees Can Avoid Transfers of Property That Are Not Property of the Estate

A trustee is not limited to exercising his or her avoidance powers only over property of the estate. Section 362(h) simply provides that if the requisites of that section are not satisfied, then the automatic stay terminates and the property is no longer property of the estate.¹⁴ It does not follow that simply because property is no longer

property of the estate that the trustee loses his or her avoidance powers as to that property. There is nothing in the Code that requires a trustee to seek avoidance of property of the estate. In fact, in the preference and fraudulent-transfer contexts, a trustee will almost never seek to avoid a transfer of property where that property is property of the estate. Additionally, the Code contemplates that the avoided transfers will become property of the estate. Section 541(a)(3) provides that property of the estate includes any interest in property the trustee recovers under § 550 (and by implication §§ 544, 547 and 548) of the Code. It is simply immaterial whether the property that is subject to an avoidance action is property of the estate.

Applying Baine Reasoning Would Produce Absurd Result

The *Baine* decision is also flawed because applying § 362(h) in a manner consistent with the court’s decision would produce an absurd result. The court’s holding in *Baine* is broad enough to encompass the situation where the debtor completely failed to file a statement of intention. In such a situation, the secured property would cease to be property of the estate 30 days after the petition date and the trustee would lose his or her ability to avoid a lien on that property. Without the filing of a statement of intention, a trustee may never be alerted to the necessity of filing a § 362(h) motion.¹⁵ Further, in such a situation, the trustee may have no knowledge of the property or the potential avoidance action, but would nonetheless be deemed to have abandoned the subject property 30 days after the petition date. In many cases, the abandonment would occur prior to the meeting of creditors required under 11 U.S.C. § 341(a)¹⁶ and certainly before the trustee has had an opportunity to investigate assets. The practical effect of the *Baine* court’s interpretation of § 362(h) would be to strip the trustee’s ability to administer a secured asset if the debtor fails to file a statement of intention. This result would be completely absurd and at odds with the

⁷ See *In re Catalano*, 279 F.3d 682, 687 (9th Cir. 2002) (“[P]roperty is not considered abandoned from the estate unless the procedures specified in § 554 are satisfied.”).

⁸ See *In re Cervantes*, 219 F.2d 955, 961 (9th Cir. 2000) (statutes should not be construed in manner that robs specific provisions of independent effect).

⁹ See 11 U.S.C. §§ 554(a) and (b); *In re Catalano*, 279 F.3d at 685.

¹⁰ *In re Catalano*, 279 F.3d at 685.

¹¹ *In re Catalano*, 279 F.3d at 686.

¹² See, e.g., *In re Duncan*, 329 F.3d 1195 (10th Cir. 2003); *In re Levine*, 134 F.3d 1046 (11th Cir. 1998).

¹³ *Duncan*, 329 B.R. at 1203.

¹⁴ See 11 U.S.C. § 362(h).

¹⁵ *Baine* involved a situation where the debtors filed a statement of intention, but failed to follow through on that intention. The court noted that a trustee could avoid the harsh result of its decision by filing a § 362(h) motion. It appears that the court viewed this as somewhat of a waiver by the trustee. This notion of “waiver” is dubious in the situation where the trustee is not even aware of the existence of the subject property.

¹⁶ Under Fed. R. Bankr. P. 2003(a), the 341 meeting is to be held no fewer than 21 and no more than 40 days after the order for relief.

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reality of how trustees administer bankruptcy estates. Section 362(h) should not be applied in this manner.¹⁷

Conclusion

Section 362(h) simply cannot deprive a trustee of standing to avoid a lien on property. The *Baine* decision is fundamentally flawed because it equates

the operation of § 362(h) to § 554. The court's analysis of these two Code sections is incorrect because the specific provisions of § 554 are the only means by which a trustee can abandon property of the estate. Abandonment simply cannot happen through the operation of § 362(h). On a more practical level, in many instances the *Baine* court's holding would strip a trustee of the ability to administer a secured asset 30 days after a case is filed, without any notice to credi-

tors or a hearing. This result prejudices creditors and other parties in interest, conflicts with specific Bankruptcy Code provisions, and produces a scenario that surely was not intended by the drafters. Moreover, it would inappropriately turn a trustee's two-year statute of limitations contained in § 546 into a 30-day statute of limitations. With all these problems, § 362(h) simply cannot deprive a trustee of standing to avoid a lien on property. ■

¹⁷ See, e.g., *In re Silverman*, 616 F.3d 1001, 1006 (9th Cir. 2010) (statutes should not be interpreted in manner that would produce absurd result); *In re Jones*, 591 F.3d 308, 313 (4th Cir. 2010); *In re Lehman*, 223 B.R. 32 (Bankr. N.D. Ga. 1998) (same).

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Section 362(d)(4): *Technical* Corrections Act Creates *Substantive* Change

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When Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act on April 20, 2005, it added 11 U.S.C. § 362(d)(4). This subsection of the Bankruptcy Code read that a court must grant stay relief with respect to an act against real property “if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors.” The use of “and” as a conjunction rather than “or” led some courts to believe that the Legislature intentionally chose the word “and,” requiring all three types of conduct. 3 *Collier on Bankruptcy* ¶ 362.05[19][a] (16th ed. 2011).

On December 22, 2010, Public Law 111-327, referred to as the Bankruptcy Technical Corrections Act of 2010 (“BTCA”) became law (upon signing by President Obama) without a specified effective date. In the BTCA, Congress changed the conjunction in § 362(d)(4) from “and” to “or,” so that the pertinent part of this subsection now reads “to delay, hinder, or defraud creditors.” While this change passed as a technical correction to the Code, it will have a major effect on how courts apply this subsection.

Prior to this change, some courts required creditors to prove all three types of conduct described in § 362(d)(4) in order to grant relief from the automatic stay, imposing on creditors “a more substantial burden of proof.” 3 *Collier on Bankruptcy* ¶ 362.05[19][a]. These courts commonly denied relief under this subsection because the creditor failed to show the third type of conduct, i.e., that the debtor had an actual intent to defraud the creditor. *Id.* In fact, some courts required actual intent to defraud based on the following traditional elements of fraud: “ i) false representation of a material fact; ii) knowledge of or belief in its falsity by the person

making it; iii) belief in its truth by the person to whom it is made; iv) intent that it should be acted upon; and v) detrimental reliance upon it by the person claiming to have been deceived.” See, e.g., *In re Poissant*, 405 B.R. 267, 274 (Bankr. N.D. Ohio 2009).

The new wording of § 362(d)(4) effectively lowers the creditor’s burden of proof. The creditor is no longer required to prove a scheme to defraud if the creditor can prove a scheme to either delay or hinder. This new wording now matches the use of the phrase “intent to hinder, delay, or defraud” as it appears in § 548(a)(1) and § 727(a)(2). 3 *Collier on Bankruptcy* ¶ 362.05[19][a]. As a result, courts may now look at case law under these two subsections when deciding whether to grant stay relief under § 362(d)(4). *Id.*

Unfortunately, when the Legislature passed the BTCA, it failed to specify when to apply the change to § 362(d)(4). This change appears to be substantive because it reduces the elements requiring proof by the creditor — to the debtor’s detriment. Therefore, an argument can be made that the change applies only to cases filed after the effective date of the BTCA, December 22, 2010. See *Bennett v. N.J.*, 470 U.S. 632, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985) (statutes affecting substantive rights are presumed to have prospective application only).

The court in *In re J.R. Hale Contracting Co., Inc.*, 2011 WL 3799244, 55 B.C.D. 110 (Bankr. D. N.M. 2011), looked at the issue of whether the BTCA should be applied retroactively in the context of a different Bankruptcy Code subsection (§ 724(b)(2)) and concluded it should not. First, the court disregarded an after-the-fact statement by a Congressional sponsor of the BTCA (made five years later) that he meant for the BTCA to correct technical errors and not enact a substantive change. 2011 WL 3799244 *5. Then the court quoted *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988), for the proposition that “congressional enactments and administrative rules will not be construed to have retroactive

effect unless their language requires this result.” 2011 WL 3799244 *6. The *J.R. Hale* court found nothing in the BTCA requiring retroactivity and went on to point out that although Congress acknowledged an error, that acknowledgement is different from “a command to apply the statute retroactively.” *Id.*

In cases filed after the effective date of the BTCA, a creditor’s burden is clear – just one of the three types of conduct under new § 362(d)(4) need be proved. However, in a case predating the effective date of the BTCA, there is an argument to be made by both sides of a contested matter under § 362(d)(4). Of course, the *J.R. Hale* decision is not binding on bankruptcy courts in the Middle District of Florida. Therefore, a creditor who wants to take advantage of the reduced showing required by new § 362(d)(4) should argue the remedial title of the BTCA and urge the bankruptcy court to apply the statute retroactively. And a debtor in a case predating the effective date should do just the opposite, urging the court to apply the loosened standard prospectively only.